IN THE MATTER OF THE ARBITRATION between COMMUNICATIONS WORKERS OF AMERICA -and- BELLSOUTH TELECOMMUNICATIONS, INC. 

The stipulated issue is:

Whether the Company violated the collective bargaining agreement relating to vacation treatment for part-time employees being reclassified to full time?

A hearing was held on April 4, 1997 in Birmingham, Alabama, at which time representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.
More specifically, this matter involves fifteen computer attendants who on August 27, 1995 were reclassified from regular part-time status to regular full-time status.

Vacation entitlement is measured beginning on January 1st of a given year. From January 1, 1995 to August 27, 1995 it is undisputed that the grievants properly accrued vacation pay and entitlement computed on their part-time employment of 15 hours of work per week. (The full-time work week is 37.5 hours).

After August 27, 1995, in accordance with a Company Agreement Interpretation and practice, the Company made no change in the treatment of the grievants for vacations, continuing for the balance of the year the accrual of vacation entitlements on a part-time basis.

The Union contends that when the grievants became full-time employees they were entitled to the calculation of vacation benefits on the basis of a full 37.5 hours of work each week. And that if that was done, the grievants would have enjoyed, for whatever vacation time remained to them increased vacation entitlements, based on the full-time calculations.

The Union relies entirely on certain contract provisions which it asserts lead to a conclusion that the grievance should be granted.
First, inversely, the Union points out that there is no provision in the contract which allows the Company to deny full-time vacation benefits to employees re-classified full-time.

Next, it cites Article 5, Section 5.06, which, in substance, quantities the amount of vacation pay and entitlement based on seniority, without other limitations. From that the Union argues that when the grievants achieved full-time seniority, they were entitled to full-time vacation pay and entitlements.

The Union cites Article 2, Section 2.01, and particularly Paragraphs B. 2, 3 and 4, thereof. It asserts that because part-time employees shall receive

"The rate of pay and amount of increase. . .prorated by relating his/her hours of work to the normal work week."

and that

"A part-time employee shall receive progression increases at the same intervals as full-time employees."

the parties recognized contractually that pay increases for part-timers became effective "at the same intervals as a full-time employee." And that the same should apply to increased vacation benefits when a part-time employee becomes full-time. In other words,
because there is no hiatus between the date of a pay increase and its effectiveness, there should be no hiatus in the application of full-time vacation benefits after an employee becomes full-time. Indeed, the Union asserts that vacation pay is a form of wages, and should be treated similarly.

B-4 provides for a review of part-time employees on April 1 and October 1 of each year (for pay adjustments). The Union contends that for the Company not to grant vacation benefit adjustments on and after August 27th for those prior part-timers who became full-time on that date is violative of the principle of adjusting benefits to coincide with negotiated improvements and those contractual review dates.

The Union cites Article 1, Section 1.25, Paragraph C which provides in pertinent part:

Part-time employees and full-time employees. . . who are subsequently reclassified to part-time will accrue seniority on a pro-rated basis as such proration shall be determined by the number of hours worked per week as a percent of 37.5 hours. . ."
From that the Union argues that if seniority is "prorated" upon reclassification, then vacation benefits should similarly be prorated based on full-time status, on and after an employee changes from part-time to full-time.

The Union's theory is similar with its citation of the contractual language for holiday pay. It cites Article 4, Section 4.03 which in substance provides that:

"The holiday allowance paid shall be prorated based on the relationship of the individual part-time employee's 'part-time equivalent work week' to the normal work week of a comparable full-time employee. . . ."

From this, the Union submits that if holiday allowances are prorated, the same should be true for vacation benefits. And that if a part-timers' holiday pay is prorated without any calendar cut-off dates, it is contractually logical, if not mandated that full-time vacation benefits become effective for the percentage of the vacation year remaining on and after a part-timer becomes full-time.
In short, the Union asserts that because pay benefits, seniority benefits and holiday benefits, among others, are acquired by employees on the date they achieve the requisite seniority or when contractually effective, without any calendar hiatus, the same should obtain to vacation benefits. And that therefore, when the grievants achieved full-time status and seniority, the full-time vacation benefits should attach prospectively without any delays for any or all of the employee’s remaining vacation time.

The Company asserts that none of the foregoing contract provisions relate to or cover the instant circumstance - namely the reclassification of part-timers to full-time.

It points out that there is no express contract provision or language that addresses this fact situation, and that it was not raised by either side in contract negotiations. The Company concludes therefore that there was no “meeting of the minds” and that it remains, therefore, a managerial right to be dealt with by the Company unilaterally, provided the arrangements the Company promulgates are fair and reasonable.

The Company contends that its arrangement under these circumstances is logical, fair, and reasonable as well as supported by uncontested past practice.
More specifically, the Company has interpreted its contract obligations regarding vacation benefits for part-timers reclassified to full-time on essentially an equitable basis. If the affected employee was reclassified on a before July 1st (i.e. before the expiration of 6 months of the vacation year) he was accorded vacation benefits of whatever remained of his vacation time on a full-time employee basis. But if the reclassification took place after July 1st, (i.e. within the last 6 months of the vacation year) the affected employee would continue to receive vacation benefits on a part-time basis.

The Company views the July 1st cutoff date as fair and reasonable, especially in the absence of any contract language providing otherwise. It argues that it is manifestly fair to accord full-time vacation benefits to employees who have worked at least ½ of the vacation year as full-timers, and to deny it to those who (like the grievants in this case) remained part-timers for more than ½ of the vacation year.

The Company argues that what the Union seeks would lead to inequities and unfair results. It points out that if a part-timer is reclassified full-time in December, and had not yet taken any vacation time, his full vacation entitlement, generated by the single month he was in full-time status would be at the full-time rate. And that would be an unfair "windfall." Similarly, the Company claims that
under the Union's theory, if, in the reverse, full-timers are reclassified to part-time, their vacation entitlements should be cut appropriately. Not only has the Company not done so and does not plan to do so, but explains that that would be unfair to the employee. So, concludes the Company, the fair, equitable and more easily administered procedure was to adopt and implement the "one-half" year formula, with the July 1st cut-off date, for part-timers becoming full-time, and to leave the reverse unaffected.

Finally, the Company relies on past practice. It cited examples of some situations where it applied the "half-year" formula without objection from the affected employee(s) or the Union. This past practice, the Company asserts, is evidence of the reasonableness of its exercise of managerial rights in this regard and the fairness of the formula applied, and that the Arbitrator should not legislate a different arrangement. A change, concludes the Company is for collective bargaining not arbitration.
The stipulated issue is:
Did the Company properly terminated the grievant, TANYA LITTLE under Article VII, Section 5(d) of the collective bargaining agreement? If not, what shall the remedy be?

A hearing was held on August 28, 1992 at which time the grievant and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing briefs.

Article VII, Section 5(d) reads:

Seniority for purposes of this Article shall be deemed to date from the date of original hiring by the Company of each employee and shall be considered to have been interpreted only by reason of:


(d) Absence for five (5) consecutive days without notice or giving adequate reason unless there is a satisfactory reason for not giving such notice.
bound to it, the Arbitrator shares no responsibility for its grammatical construction.

As I read it, it is obviously subject to different interpretations, respectively favorable to the grievant and to the Company. As the burden is on the Company to prove cause for the termination, the interpretation favorable to the grievant cannot be ignored.

The circumstances for loss of seniority due to an absence of five (5) or more consecutive days, may be construed in the alternative. The alternatives are produced by the word "or" in the sentence reading:

Absence for five (5) consecutive days without notice or giving an adequate reason unless there is a satisfactory notice for not giving notice (Emphasis added).

Reasonably and logically, that can mean that Section 5(d) is triggered only if notice is not given. And in that case the employee must give an adequate reason for the absence or for not giving notice. But, if notice is given, that is all that is necessary to prevent the loss of seniority.

The Company would have the Arbitrator read the sentence as requiring an adequate reason for the absence whether or not notice is given. Based on that interpretation the Company has presented an elaborate and otherwise persuasive case that the grievant's reasons for her absence are not adequate.

But that position by the Company, despite its factual merit, is not the sole reasonable interpretation of the section.

Again, a logical reading of the section is that seniority is lost if the absence is without notice and without satisfactory reason.
for not giving such notice, or, again, where notice is not given, the absence is without adequate reason. Indeed, the last part of the section:

"...unless there is a satisfactory reason for not giving such notice"

makes it even more confusing. It remains unclear whether the phrases "adequate reason," and "satisfactory reason" found in two locations in the section relate to a "reason" for the absence or a "reason" for the failure to give notice.

With that ambiguity, unclarified by any negotiation history or past practice in this record, I cannot find that the grievant violated that contractual section. Under the foregoing interpretation, she met the threshold condition. She gave notice of her absence. She called in sick on May 30th and 31st, and I accepted the testimony that she or someone on her behalf called in and notified the Company on June 3, 4, 5, 6, and 7 or substantially over that period. On June 8, known to the Company, she was admitted to the Hartford Hospital after taking a drug overdose. Of course, if notice is based on a falsified condition or a condition otherwise lacking in bonafides, discipline would be appropriate not under Section 5(d), but under Section 5(b) (discharge for just cause). Those allegations and that section of the contract are not before me in this case.

Accordingly, though the Company apparently had certain grounds to discipline or discharge the grievant, its selection of Article VII, Section 5(d) was not among them.
The Undersigned, duly designated as the Arbitrator and having been duly sworn and having duly heard the proofs and allegations of the above named parties; makes the following Award:

The Company did not properly terminate the grievant, TANYA LITTLE, under Article VII, Section 5(d) of the collective bargaining agreement.

She shall be reinstated. However, because it is questionable that she was or would have been medically or psychologically capable of working during the period of her discharge, her reinstatement shall be without back pay.

Eric J. Schmertz, Arbitrator

DATED: October 23, 1992

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

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
It is undisputed that the grievant has had a history of alcohol and drug abuse and a record of absenteeism resulting therefrom. Also, she has been privately treated for underlying or attendant psychiatric problems and by referral by the Company to its Employee Assistance Program.

Based on the record, it is apparent to me that the Company had grounds to discharge the grievant for chronic absenteeism; for admitted alcohol and drug use and psychiatric problems which interfered with her ability to meet her job responsibilities on a regular basis; and for her refusal or inability to pursue or continue in the Employee Assistance Program. But at those times and in those instances, the Company, magnanimously withheld discharge and gave her another chance at rehabilitation and continued employment.

I understand and appreciate why the Company finally deemed her absence for a period of nine (9) consecutive days, May 30 through June 7, 1991, during which she admits she drank heavily, used drugs, was deeply depressed and contemplated suicide, as a final and intolerable example of her irredeemability.

However, bound as I am to the stipulated issue and to the contract as negotiated by the parties, I must note that this is not a discharge case for misconduct; not a discharge for general absenteeism; or for alcohol or drug use; or even for failure to comply with the Employee Assistance Program. The Company did not terminate the grievant on any of those grounds. Rather it terminated her only or solely under the specific provisions and conditions of Article VII, Section 5(d).

That Section is not artfully worded. It is not clear or free of ambiguity. The parties negotiated it and presumably worded it. Though
In the Matter of the Arbitration
between
LOCAL 702 I.A.T.S.E.
-and-
DU ART FILM LABORATORIES, INC.

The stipulated issue is:
Does the Company have the right to operate color negative developing machines #60, 61 and 62 on a continuous basis with a crew of no more than seven operators?

A hearing was held on July 21, 1992 at which time representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The stipulated issue notwithstanding, the question arbitrated dealt with the present operation of the machines with a crew of seven operators. My Award will respond to that and not to the as yet unjoined issue of the operation of the machines with less than seven operators. On that, which is not now or yet before me, the rights of the parties are expressly reserved.
The Union bases its case on two points. The first is the contract provision appearing in the Note under Negative Developing Department of Schedule A. That Note reads:

Note: Color Negative Developing

3 Man Crew: One Strand
5 Man Crew: Two Strands

The Union argues that as that Note requires three operators for one machine and five operators for two machines, it follows logically and compellingly that eight operators are contractually required for three machines operating side-by-side. Put another way, the addition of a single, third machine, requires the same manning as one machine -- three operators.

The second is the assertion that without an eighth operator the incumbent seven operators cannot be and are not relieved adequately for needed breaks, meal periods and for personal requirements.

The parties are reminded that the Arbitrator is bound to the terms of the contract. His authority is confined to deciding whether the use of seven operators to work machines #60, 61 and 62, operating continuously side-by-side, is violative of the contract. It is not within the Arbitrator's authority to base his decision on what he thinks would be the most convenient or even beneficial arrangement for the operators.

On that ground, I cannot accept the Union's contractual argument. The Note is silent on the question of the manning of three machines operating side-by-side. It is confined to the manning of a single machine and to the manning of two machines. The parties negotiated nothing further within the meaning of the Note, and therefore I can find no basis to extend its meaning beyond its express terms.
The Union's case of an alleged inadequacy of relief opportunities with only seven operators, has not met the requisite standard of proof required of the grieving party. The Union's witnesses were not operators from the machines involved and, indeed, were not employees on the shift on which these machines run. It is true that one, at least, is a Union steward who legitimately reported the complaints made to him by the affected operators. But they were unable to testify of their own knowledge of any circumstance where an operator was not or could not be relieved, when such relief was needed or requested. The Arbitrator recognizes and would uphold the right of the operators to reasonable breaks and relief opportunities in a continuous operation despite the fact that the contract does not specifically provide for such breaks. But the record before me does not adequately show that the incumbent operators have not been able to gain needed relief breaks. The Union's case on this point is limited to bare allegations, and that is not enough to sustain the grievance.

Under the circumstances set forth in Section 17, the Arbitrator has the authority to fix a manning level when the parties are in dispute. Here, the Company has given evidence of the history of the machines in question; their evolution from ECN(1) to ECN(2) and the changes in their operations. I make no new determinations in this proceeding under the authority of Section 17 because I am not persuaded that there has been enough of a showing of the kind of significant changes required by that Section to warrant consideration of an arbitral change in the present seven operator manning. Indeed, it is unclear to me how or whether the current operators are affected by the fact that the machines are now shorter and run faster, with greater productivity. Without making a determination, my inclination is to think that the work, responsibilities
and care that confront the highly skilled negative developers, handling original negative film, are about the same as before.

The reference to an earlier decision by me in a case between the Union and Technicolor involving the use of a third operator "primarily for relief" when a "particular machine" ran continuously, has not been shown to be applicable to or based on facts similar to the instant case, and therefore is not precedential.

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

The Company has the right to operate color negative developing machines #60, 61 and 62 on a continuous basis, as it has been doing, with a crew of seven operators.

Eric J. Schmertz
Permanent Arbitrator

DATED: August 4, 1992

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

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
In the Matter of the Arbitration between Local Union 1972, International Brotherhood of Electrical Workers AFL-CIO -and- Eaton Corporation Bethlehem Assembly Plant

The stipulated issue is:
Did the Company violated Article XII of the collective bargaining agreement when it revised the employee contribution amount for non-generic drugs in the mail order prescription drug plan? If so, what shall be the remedy?

A hearing was held in Bethlehem, Pennsylvania on August 18, 1992 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 and the Company filed a post-hearing brief.

More particularly, this case involves the application and interpretation of Section 12.1 of Article XII, and specifically the reference therein to "Mail Order Prescription Drugs." That Section reads:

12.1 The Hourly Healthcare Option Plan, Medical Utilization Review, Mail Order Prescription Drugs,
Though the Mail Order Drug Plan first found its way into the contract in 1990, it was unilateral promulgated by the Company as an employee benefit on October 1, 1987. The Company's written announcement to its employees dated October 1, 1987 reads in pertinent part:

Subject: Mail Order Prescription Drug Program

Dear Employee:

We are pleased to announce that as part of your Eaton Corporation Medical Benefits Plan we have included a Mail Order Prescription Drug Program for you and your eligible dependents.

This Program which is effective October 1, 1987, provide you with a less costly and more convenient way to obtain maintenance medications. You can realize substantial savings; you only pay $3.00 for each prescription and you may order up to a 90-day supply. You do not have to satisfy any other deductible. Plus you can save time since your prescriptions will be delivered directly to your door. (Emphasis added).

Viewing this as an additional benefit for its members, the Union raised no objection to this unilateral action by the Company.

The instant dispute arose when, on January 6, 1992, the Company unilaterally announced an increase in the co-payment (i.e. employee contribution) for Brand Name Drugs (non-generic) to $10.00 from the prior contribution of $3.00.
Its letter of January 6, 1992 to its employees/retirees read:

Dear Eaton Employee/Retiree:

The co-payment for each prescription ordered under the Eaton Mail Order Prescription Drug Program has been $3.00 for a 90-day supply since 1986. The average cost per prescription when the program was instituted was expected to be about $30.00. The overall cost per prescription is now approximately $64.00 with the average cost for "brand name" drugs $77.00 and generic $16.00.

In light of this substantial increase in cost we will implement a two tier co-payment; one for brand name drugs and the other for generic drugs effective January 1, 1992 as follows:

Brand Name Drugs: $10.00 per prescription
Generic Drugs: $3.00 per prescription

You will still be able to order a 90-day supply.

The Union's position is that the Company may not make a unilateral change in the contract; that Section 12.1 has made the Mail Order Prescription Drugs Program a bi-laterally agreed to benefit and condition of employment; that the provision that the program:

"shall be in effect as provided therein and shall detail the rights and obligations of the parties,"

incorporates by reference the Company's memo of October 1, 1987 in which the employee cost for all Mail Order Drugs, generic and non-generic, was
$3.00. And that absent mutual agreement, that contractual arrangement must continue to obtain and the Company's unilateral effort to increase the employee contribution must be nullified.

The Company's assertions are basically two fold. It argues that the Arbitrator should not construe the reference to the Mail Order Drug Program in Section 12.1 as a condition of employment or as a bilaterally binding agreement. It points out that though the 1990 settlement agreement on the current contract make specific reference to the Mail Order Drug Program, there was no bargaining on it, nor even discussion of it at the bargaining sessions, and only ministerially referred to when included in the settlement agreement. That historical assertion is not denied by the Union.

Additionally, the Company contends that the Mail Order Drug Program is really part of the Company's Healthcare Plan and subject to the Company's reserved right, as set forth in the settlement memorandum, to change the amounts of employee contributions. This position is based on the argument that prescription drugs were and still are available to employees through the Hourly Healthcare Options Plan; that the availability of Mail Order Prescription Drugs offered by the Company effective October 1, 1987 was an optional benefit in addition to the pre-existing availability of drugs through the basis Healthcare Plan; and therefore the Company's right to unilaterally change the employee's co-payment should be construed as applicable to the Mail Order Drug Program as well as the Healthcare Plan.

In my judgement there are several frailties to the Company's case. First, Section 12.1 expressly separates the Mail Order Prescription
Drug Program from the Hourly Healthcare Option Plan. As a matter of traditional contract interpretation, both stand alone and on equal footing as separate entities. If the Mail Order Drug Program was intended or deemed to be only an optional part of the Hourly Healthcare Plan, Section 12.1, or some other contract provision or memorandum should have made that clear. Absent that, I find more compelling and must conclude that the Mail Order Program, which came into effect after the basic Healthcare Plan, and which significantly changed the way employees could get and pay for prescription drugs, is not just a part of the Healthcare plan even if drugs were and can still be obtained through the Healthcare plan as well. In short, the evidence that the Mail Order Plan is a new and different benefit is more convincing than the argument that it is adjunct to the basic Healthcare Plan.

With that finding, and for at least two reasons, the Company's reserved right to change the amount of the employee's contribution is not applicable to the Mail Order Drug Program. First, that reserved right is positioned in the 1990 Settlement Agreement not after Section 12.1 but before Section 12.1 at the end of the specific schedule of employee contributions to the Hourly Healthcare Plan. Ordinary and traditional contract interpretation points to only one logical conclusion. It is that the reserved right clause at the end of the Section before 12.1 applies to
the enumerated employee contributions above it, and sets forth the procedure as well as the right to make changes. Therefore the "contributions" referred to in the clauses:

"Any changes in contributions will be announced a minimum of 30 days prior to the effective date of the change"

are the specific employee contribution to the Family Standard Healthcare Plan and to the Single and Family Optical Coverage Plan.

Secondly, assuming arguendo that the right to change the employee contribution applied to the Mail Order Drug Program, the Company's notice of the changed contribution did not comply with the foregoing clause. It's notice to employees that Brand Name Drugs would require a $10.00 co-payment was dated January 6, 1992 and made effective January 1, 1992. The required 30-days notice was not given. This also leads me to believe that the Company did not think or did not intend that the foregoing reservation clause was applicable to the Mail Order Drug Plan, when that clause was negotiated.

Finally, the Company's contention that the Mail Order Prescription Drug Plan should not be construed as a collectively bargained and bilaterally binding benefit, is not persuasive as a matter of law.

The moment it became a part of the 1990 contract either by mutual agreement, no matter how casual, or by ministerial action, it acquired, as a matter of basic contract law, all the characteristics and enforceability of every other part of the collective agreement.

I find no basis, either as an exception to the parol evidence rule or by any theory of contract interpretation, to look behind an
unconditional and unambiguous contract provision to see how it got into
the contract and to consider if its meaning or effectiveness is equivocal,
limited or different from any other contract provision. That there may
have been no bargaining discussions or bargaining "give and take" leading
to the inclusion of the Mail Order Plan in the contract, is immaterial.
The settlement memorandum of April 5, 1990 is specifically titled "Final
Company Proposal." That Proposal, which was accepted and ratified by the
Union, included, as apparently written by the Company, the exact wording
of the present Section 12.1 of the contract. That made Section 12.1, and
the Mail Order Prescription Drug Program a part of the bilaterally
negotiated and agreed to contract, with binding effect on both parties to
the contract. Indeed, the final words of Section 12.1, manifestly
applicable to the Mail Order Prescription Drug Program:

"and shall detail the rights and obligations of the
parties (Emphasis added)"
is a clear recognition that the inclusion of the Mail Order Program in the
contract created rights and obligation for both parties. The Company's
claim that the Mail Order Plan should be viewed as not collectively
bargained cannot stand the application of the clear meaning of that latter
language.

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

The Company violated Article XII of the collective
bargaining agreement when it revised the employee
contribution amount for non-generic drugs in the Mail
Order Prescription Drug Plan.
Until and unless there is mutual agreement otherwise, the employee contribution for non-generic drugs shall be restored to $3.00 per prescription. Employees who have paid $10.00 per prescription shall be reimbursed by the Company for the difference.

Eric J. Schmertz, Arbitrator

DATED: October 5, 1992
STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss:

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

IUE, Radio & Machine Workers Local 901

and

General Electric Company

OPINION and AWARD

Case No. 51 300 0174 92B

The stipulated issue is:

Did The Company violate Article XI of the 1988-1991 GE-IUE National Agreement or Local Supplement in May 1991 when Ken Saylor, William Malin and Gary Alig were denied displacement to the Code 1755 C-45 Tester-Transformer Developmental position? If so, what shall be the remedy?

A hearing was held on July 15, 1992 in Fort Wayne, Indiana at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and subsequently each side filed a post-hearing brief.

The relevant contractual provisions of Article XI and the Local Supplement read:

Article XI Reduction or Increase in Forces

Whenever there is a reduction in the working force or employees are laid off from their regular jobs, total length of continuous service, applied on a plant, department, or other basis as negotiated locally, shall be the major factor determining the employees to be laid off or transferred (exclusive of upgrading or transfers to higher rated jobs). However, ability will be given consideration.

Supplemental Agreement

TRAINING PERIODS TO QUALIFY

1. Employees with less than one year of service may displace shorter service employees on like or the same kind of work in the same department where
fully qualified or where training time will not exceed ten working days.

2. Employees with over one year of continuous service may displace employees who have less continuous service, providing they can qualify with incidental training (15 working days).

3. Employees with over four years of continuous service may displace employees who have less continuous service, providing they can qualify with 20 working days training.

4. Employees with over five years of continuous service may be given additional training in order to qualify.

Messrs. Saylor, Malin and Alig hereinafter referred to as the grievants, hold Power Supply Electronic Laboratory Technician positions in job Code 1758. The Company refused to permit them to displace less senior employees in Code 1755 positions "because of their lack of transformer experience and the extensive training which would be required for them to learn the transformer design job."

Based on the record before me, I am satisfied that the issue is narrowed to whether the grievants could perform the design aspects of the 1755 job with training that did not exceed the periods of time specified in the Supplemental Agreement.

I so conclude from my colloquy at the hearing with Mr. Leroy J. Jackemeyer, the Company's Senior QC Engineer of the Advanced Motor Division, as follows:

MR. ARBITRATOR: Let me understanding something. Are you saying that the thing that at least in your mind, the thing that signifiricantly distinguishes 1755 from 1758 at the present time and at the time that the grievants attempted to bump is the design engineering technician function?

MR. JACKEMEYER: That's correct.
MR. ARBITRATOR: If you removed that function, if that was not part of 1755, what would your position be with regard to the relative difficulty, complexity or interchangeability of the two jobs?

MR. JACKEMEYER: It would be much less but there would still be some training required. I think as stated earlier by one of the people—one of the witnesses, probably six to eight weeks.

Also, this conclusion is the logical consequence of the fact that prior to 1986, the grievants were in the same 1755 job code of the Tester-Transformer Development positions. But, when design functions became part of the bargaining unit job, they were not given that function. Rather, they continued their power supply work under a new code - Code 1758, and the design work became part of Code 1755.

But for the design function of Code 1755 and assuming the grievants had the requisite seniority as required by the Supplemental Agreement, I would have sustained this grievance. Though the transformer and power supply work of the two Codes are demonstrably different, I conclude that the grievants had enough skill and experience from their Code 1758 work to adjust to and adequately learn the requirements of the other components of the 1755 job substantially within the training time limits of the Supplemental Agreement. I think the Company's estimate of six to eight weeks for the grievants to be able to perform those duties is not beyond the substantive range of 20 working days of training specified in the Supplemental.

Not so, however, for the design component. The Union's position on this point is essentially twofold. First is that the design duties could be performed by the grievants with short
periods of training. The second is that the design work should not be part of the 1755 job and that therefore the grievants should not be disqualified from exercising their seniority bumping rights because of the claim that they cannot perform or learn those duties.

The weight of the evidence and a well settled arbitral rule, negates the first position. The Arbitrator's knowledge of the technical aspects of the 1755 and 1758 jobs, and particularly the design functions of the former, is limited to the record in this case. It is recognized by a substantial majority of arbitrators, including this arbitrator, that in disputes over "seniority and ability," the employer's judgment about an employee's ability to perform or learn a job should be accorded a presumption of validity unless shown to be arbitrary, capricious or demonstrably unreasonable. (See How Arbitration Works, Fourth Edition, Elkouri and Elkouri, pages 613-614).

Here, I accept the Company's testimony by its Senior Product Engineer and its Senior QC Engineer that six to nine months would be needed for the grievants to become substantially proficient. There is nothing in this record which would indicate that those witnesses personally, or their estimates of required training time, were arbitrary, capricious or unreasonable. That quantity of training time materially exceeds the contractually agreed to limits of training time in displacement cases as specified in the Supplement. And there is no contention in this case that the aforesaid provisions of the Supplemental Agreement are not applicable or binding. The Company is not required to grant additional training beyond 20 working days. It "may" do so at its discretion.
The Union's second contention is misplaced in this case. It is a collateral attack on the job duties of Code 1755. I am not persuaded that a case challenging the Company's denial of a displacement bump may include a challenge to the job duties of the job into which the grievant seeks to bump. Rather, confined to the stipulated issue, my authority, I believe, is limited to whether the grievants, admittedly with greater seniority than the incumbents, possess the ability to perform the 1755 job duties with no more training than allowed under the Supplemental Agreement. I do not see my authority as extending to finding or ordering a change in or an elimination of one of the present duties of the 1755 job - namely the design function. As I see it, that is a matter for a different case if grievable, or for collective bargaining, but not within the instant stipulated issue.

Moreover, without prejudice to the Union's position in another proceeding, it must be noted that the design function became part of the Code 1755 job in 1985, when a Don Rogers, who did the design work as an exempt employee was reclassified to an hourly job and continued that work as part of the bargaining unit. The Union did not object to that inclusion at that time. Nor did the Union object to the design function as part of Code 1755 over the last three years during which that design work was performed as part of the 1755 job by incumbent employees Kuzemka and Horn.

Finally, that those two latter named employees were permitted to take the design positions though both required extensive training to be able to perform therein, is not relevant
to this case. They did not bump into those jobs. Hence the dis-
placement provision and the training time limits of the National
Agreement and the Supplemental Agreement did not apply. At
the time, the positions were open, and presumably were filled by
bid, not bump. The Company's position on this is not refuted.
Whoever was assigned to the job had to be trained and trained
extensively. It was not, as here, a situation where an employee
who would require extensive training sought to bump an incumbent
who was already qualified or substantially qualified.

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

The Company did not violate Article XI
of the 1988-1991 GE-IUE National Agree-
ment or Local Supplement in May 1991 when
Ken Saylor, William Malin and Gary Alig
were denied displacement to the Code 1755
C-45 Tester-Transformer Development
Positions.

DATED: October 26, 1992
STATE OF New York
COUNTY OF New York

I, Eric J. Schmertz do hereby affirm upon my Oath as
Arbitrator that I am the individual described in and who
executed this instrument, which is my AWARD.
In the Matter of the Arbitration
between
Office and Professional Employees International Union, Local 153
and
International Ladies' Garment Workers' Union

OPINION AND AWARD

The issue is:
What shall be the disposition of Local 153's grievance on behalf of CAROLINE JOHNSON?

A hearing was held on March 4, 1992 at which time Ms. Johnson, hereinafter referred to as the "grievant" and representatives of Local 153 and the I.L.G.W.U., hereinafter referred to respectively as the "Union" and the "Employer" appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's oath was waived.

The grievant was suspended for four weeks because of unsatisfactory attendance, particularly a record of excessive tardiness.

The Union does not dispute the unsatisfactory and extensive nature of that record. In this case, the Union only disputes the magnitude of the penalty, asserting that a four-week suspension is too severe. It points out that the grievant is acknowledged by the Employer to be a very good worker who was promoted and received a merit increase over the period of time of her latenesses. The Union asks the Arbitrator to reduce the penalty to a more moderate level.
I conclude that I do not have the contractual authority to do what the Union asks.

Article IV Section 4.2 of the contract reads:

4.2 If, upon joint investigation by the Union and the Employer, or by decision of an Arbitrator, it shall be found that an employee has been unjustly discharged or suspended, such employee shall be reinstated to the former position held without any loss of seniority or rank, shall suffer no reduction of salary and shall be compensated by the Employer for all time lost, computed at the regular rate of wages received by said employee prior to the date of discharge or suspension.

To my mind, that language means that only if a suspension is found to be "unjust," may the penalty imposed be reversed, and in that case, the penalty is set aside and expunged totally. That is what is referred to as an "either/or" disciplinary clause. Therefore, if a suspension is not "unjust," the extent of the suspension cannot be changed or modified downward, as the Union seeks in this case, unless, of course, the magnitude of the suspension is manifestly disproportionate to the offense committed or unduly harsh.

Here, it cannot be concluded that a suspension was "unjust." The grievant's poor attendance record is conceded. Universally, that justifies a disciplinary penalty. She had been previously warned that her
attendance record was unacceptable and told that unless improved, she would be subject to greater discipline. So, the requirements of "progressive discipline" were complied with by the Employer.

Nor am I able to conclude that a four-week suspension was too harsh or out of proportion to the offense. Though one may argue that a lesser period of suspension would have been adequate, it does not follow that a suspension of four weeks is so lengthy as to be an improperly harsh penalty or wrongly responsive to the grievant's inability or unwillingness to come to work on time.

Her explanation that she had transportation problems is just that -- an explanation; but it is not an excuse. Other employees with the same or more difficult travelling schedules, manage to arrive on time. The grievant could have and should have done so too, even if it meant leaving for work earlier. And it is well-settled that a poor attendance record is cause for discipline, even if the reasons for it are beyond the employee's fault or control.

That she was promoted and granted a merit increase do not immunize her from discipline for her attendance record. It is undisputed that when promoted and when she was given the merit increase -- both for her acknowledged good work -- she was expressly warned about her latenesses. Those warnings, accompanying the promotion and merit increase, preserved the Employer's right to take the disciplinary action taken in this case.
The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD.

The Union's grievance on behalf of CAROLINE JOHNSON is denied.

Eric J. Schmertz
Impartial Chairman

DATED: March 6, 1992

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

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Whether the IAM Lodge 480 or the SMWIA, Local Union #5 shall perform the reworking of casting flaws and voids in parts at the Martin-Marietta Energy Systems Inc., Oak Ridge Y-12 Plant, Oak Ridge, Tennessee?

A hearing was held on June 16, 1992 in Oak Ridge, Tennessee at which time representatives of the above-named Unions appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

Both sides were given the opportunity to file a post-hearing brief by July 5, 1992. The SMWIA, Local Union #5 did so.

As the caption of this case and the stipulated issue indicate, this is a jurisdictional dispute between the above-named Unions, submitted to arbitration in accordance with the Jurisdictional Policy of the Metal Trades Department, AFL-CIO. The Undersigned Arbitrator was selected in accordance with this policy.
The particular work in dispute is performed on a part that is highly classified. Therefore the part itself was not disclosed, identified or in anyway revealed to the Arbitrator at the hearing or otherwise. Because of this secrecy, both parties and the Arbitrator recognize that facts and evidence that might otherwise have been presented and which might have helped in the decision making, could not be offered into evidence. Accordingly, all that is before the Arbitrator is the narrow question posed in the stipulated issue and only evidence that could properly be adduced, considering the classified nature of the part involved.

The part in question has been developed and made in two stages. At first, for about five years, it was a prototype. Though members of both Unions worked generally on certain aspects of the prototype, it is uncontested that the IAM Lodge 480 members (hereinafter referred to as the "machinists") exclusively "reworked the casting flaws and voids."

Essentially, on this historical practice and exclusive assignment rests the machinist's claim for the work in this proceeding.

After completion of the "prototype," the part was made (and is being made) for "production." The instant "production" part is much larger than was the prototype. Consequently, the record indicates, the "casting flaws and voids" are larger. With the shift from prototype to "production" and with the increase in the size of the part and a corresponding increase in the size of its casting flaws and voids the Martin-Marietta management assigned the "reworking of the flaws and voids" to the members of the SMWIA, Local Union #5, (hereinafter referred to as the "sheet metal workers.")
Because of a change in the operational methods for reworking the flaws and voids between the smaller prototype and the considerably larger "production" part; because of OSHA regulations applicable to those operational methods and because to do otherwise would be an intrusion by the Arbitrator on a managerial prerogative, I conclude that the disputed work should continue to be performed by the sheet metal workers.

Based on the record before me, I find that during its prototype phase, the flaws and voids were reworked by the machinists by using hand tools, primarily files, drills and hand grinders. At the same time, however, large scale, heavy or sophisticated grinding generally, was done by and within the jurisdiction of the sheet metal workers. That grinding work was done in a special grinding room, open only to the sheet metal workers. That room is equipped with exhaust systems to remove dust produced from grinding, and only there can grinding be done in present compliance with the requirements of OSHA.

Significant to this case is that the operational methods to rework the flaws and voids in the larger production model of the part involves primarily grinding of a magnitude and quantity different from what was done on the prototype and of a type that has to be done in the grinding room. In short, the method of reworking the flaws and voids and preparing them for the welder, changed significantly, from work that had been done by machinists to work more historically and traditionally done by the sheet metal workers. With that shift in methods, tools and location, the transfer of this work from the machinists to the sheet metal workers was neither illogical or unreasonable.

This is not to say that the machinists could not perform the type of grinding presently used to rework the flaws and voids in the production part. Clearly, based on their skills, experience and
abilities, they can. Indeed, it was stipulated in the record that both crafts possess the ability and qualifications to do the current work.

But, to assign the work to the machinists would require not only that the machinists take on grinding work of a scope and nature primarily and previously performed by the sheet metal workers, but because of OSHA standards, would require the introduction and presence of machinists in the grinding room, where they have not worked, or the creation by the Company of another grinding area for the machinists which complies with OSHA rules. Either would constitute, in my view, an arbitral intrusion on the well-recognized management prerogative to determine the methods and means of production -- a step I feel I should take only if the Company's assignment was arbitrary or clearly wrong. Neither is the case here.

For the foregoing reasons, 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 SMWIA, Local Union #5 shall perform the reworking of casting flaws and voids in parts at the Martin-Marietta Energy Systems, Inc., Oak Ridge Y-12 Plant, Oak Ridge, Tennessee.

Eric J. Schmertz, Arbitrator

DATED: July 14, 1992

STATE OF NEW YORK )
COUNTY OF NEW YORK )

ss:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Whether the Company acted in violation of the contract by providing policies for sale by the Marketing Representatives despite the fact that there was no agreement with the Union concerning the compensation to be paid the Marketing Representative for the sale of such policies? If so, what shall be the remedy?

A hearing was held on December 16, 1991 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 was waived. The issue was submitted to the Undersigned as sole arbitrator. The Arbitrator's oath was waived. A stenographer record of the hearing was taken, and the parties filed post hearing briefs.
In dispute is the interpretation and application of Article VII, Management Rights, and particularly Paragraph 6 thereof. Paragraph 6 sets forth certain managerial rights as follows:

"The unqualified right within its discretion to alter or amend underwriting practices, rules and regulations, including the right to determine the types and classes of policies to be sold...

However, Paragraph 6 goes on to set forth an exception, as follows:

"...except that the Marketing Representative's compensation applicable to policies sold by the Marketing Representatives shall be arrived at by mutual agreement of the Company and the Union."

In this case, the Company and the Union have not yet agreed on the compensation to be paid Marketing Representatives for the sale of a long-term-care insurance policy known as Protect Care, classed in terms of risk as a Substandard II policy.¹

Nonetheless, the Company has provided this policy for sale to the public, and by doing so, has made it one of the "products" which the Marketing Representatives may sell.²

The Union's position is that the foregoing exception to various management rights bars the Company from making a policy available for sale

¹The parties have agreed on an interim rate of compensation, subject to this arbitration. It is undisputed that the Union does not accept this rate as adequate, but has agreed to its implementation pending this arbitration so that the Marketing Representatives can receive some compensation in the interim.

²The Marketing Representatives are not required to sell this or any other Company product. But their commission income and "productivity" depend on their cumulative sales of Company insurance policies generally.
until and unless the rate of compensation for the Marketing Represe-
tatives selling that policy has been mutually agreed to. As that has not
yet been done, the Union asks the arbitrator to enjoin the sale of the
policy in question, and to grant certain requested compensation to
Marketing Representatives who have sold it.

The Company contends that it may provide the policy for sale,
even if and while there is no final agreement with the Union on
compensation for the Marketing Representatives, so long as the Company
pays those Representatives retroactively for their sales when the
compensation rate is ultimately established. This procedure, the Company
argues is consistent with past practice and a proper balance between its
managerial and exclusive right to "determine the types and classes of
policies to be sold," and conditions of employment, such as compensation,
which are mandatory subject of collective bargaining.

Put another way, the questions in dispute are:

At what point shall the Marketing Representatives be fully
compensated for the sale of a new type of policy? From the outset of
availability of that policy for sale? Or may they be made whole
retroactively after an agreed upon rate of compensation is reached?

The former, of course, precludes sales until compensation is
agreed to. The latter permits sales while negotiations for the rate of
compensation are still going on and pending their completion.

The disputed contract section does not provide the answer. In
that sense it is ambiguous because it is subject, logically and
reasonably, to either interpretation. It is a fair interpretation of
Paragraph 6 to deem mutual agreement on a rate of compensation for the sale of a policy as necessary before the policy can be offered for sale. Especially so when pay is a critical part of the employment relationship; when its mutual agreement is so manifestly expressed in the contract; and when it is such a specific restriction on the enumerated management rights. Contrary-wise it is an equally fair interpretation of Paragraph 6 to deem it simply as an express listing in the management rights clause of a subject that is not a managerial prerogative. The purpose being to distinguish compensation, as a mandatorily bargainable condition of employment, from an enumeration of management rights. But, with that purpose contractually clarified and achieved, it should not be extended interpretively to constitute a condition precedent to the Company's managerial right to make policies available for sale.

Ambiguities in collective bargaining agreements are resolved by arbitrators by resort to past practice and negotiation history. A consistent practice known to or accepted by both parties, may be construed as a bilateral clarification of the ambiguity, and evidence of what the parties intended or were willing to accept as the application and interpretation of the otherwise ambiguous contract provision. A review of bargaining history related to the contract language or the subject matter of the substantive disagreement can be equally enlightening.

Here there is both a negotiation history and a past practice which bear scrutiny.

The Union asserts that twice in contract negotiations, in 1981 and 1984 the Company sought but failed to obtain from the Union a contract
provision which would allow it to provide policies for sale even if the parties had not reached mutual agreement on the compensation to be paid the Marketing Representatives.

On the other hand, the Company points to "past practice." It shows that twice, in 1979-80 and 1988 under the same contract language, it provided for sale new types of policies or made significant changes in policies for sale without having first reached agreement with the Union on the rate of compensation for the Marketing Representatives. In those respective instances, the Marketing Representatives sold a new flexible premium annuity, a revised premium notice ordinary life and flexible life insurance policies, and when the compensation rates were mutually agreed to, they were paid and made whole retroactively.

As between these two divergent positions, the latter, namely the practice of 1979-80 and 1988, is more probative and persuasive as evidence of the way the parties interpreted, and applied Paragraph 6. Considering the apparent rarity of a failure to agree on compensation at the time new policies were available for sale, and the absence in this record of any other such prior situations, I conclude that the two instances in 1979-80 and 1988, factually similar to the instant case, meet the definition of a past practice for interpretive purposes.

The Union's evidence on the contract negotiations of 1981 and 1984 is sparse at best. A single Union witness testified about it based on his "best recollection." No documentation in support was introduced. No written contract demands; no minutes of negotiation sessions; and no correspondence dealing with the alleged Company proposal and the Union's rejection of it, were produced in this record.
Unlike the "negotiation history," the sale of the policies in 1979-80 and 1988 before compensation was agreed to was based on more probative evidence. It was known to the Union. In 1979-80, the Union made no objection and filed no grievance. In 1988, it sent a letter of protest, but did not formally grieve or pursue the matter to arbitration. Indeed, in its report to the Presidents of its Local Unions with Company membership, the Union's position was equivocal. That part of the report of July 21, 1988 dealing with sale of the policies before compensation was agreed to, stated inter alia:

"...it is the Union's position that agents should not sell new products. However, we do recognize that in some instances when 'needs selling' is followed, circumstances may arise that will necessitate the selling of the new product line. However, if such a situation is necessary and the product is sold, it should be clearly understood that it is the Union's firm position that no commission can be paid. We encourage all agents in your attempts to serve and satisfy your client's needs, to do this through the sale of those products which remain available to you.

Also, in both instances, the Union and the Company subsequently negotiated a compensation rate and the Union and its membership accepted that rate as it was paid retroactively.

I conclude that those two instances, as the only ones in which the issue was previously confronted, pragmatically represented an agreed
to balance between the Company's managerial right to market its products and the Union's right to engage in negotiations over and obtain adequate compensation for the sale of those products, within the meaning of Paragraph 6 of Article VII of the contract.

Recognizing, as both sides do in this case, that compensation rates are mandatory subjects of collective bargaining, it should be recognized also that it is not uncommon in labor relations and under collective bargaining agreements for employees to work at bargaining unit duties while negotiations for the wage rates or for changes in the wage rates for those duties are ongoing. In those circumstances, the later agreed to wages or changes are applied retroactively. This is true, for example, in fixing rates for new jobs, changed jobs, and for incentive and piece worked jobs under and during a collective bargaining agreement, and wage increases in successor collective bargaining agreements, when the expired contract "status quo" is maintained or extended.

So, as long as there is retroactivity in this case, the instant circumstances are not unprecedented.

The Union rightly poses the question -- what would happen to a Marketing Representative's compensation for sales of new policies while the rate is not yet fixed, if the parties can never agree in the rate? At the hearing, I ruled that that was not presently before me, and that it is correct. Though it does not become a justiciable issue until and unless negotiations to determine the rate fail, I find that it is currently relevant in a particular respect as indicated below and in the Award. I do not agree with the Company that upon that failure it could unilaterally implement its last offer to the Union. That may apply in a typical
bargaining setting for a new contract or for a term or condition of employment not covered by an effective collective bargaining agreement. Here, however, the effective contract calls for mutual agreement on the rate of compensation. If such agreement is not reached, it becomes, in my view, a dispute under the contract. As such, it is then a matter for arbitration under the contract. As the arbitrator is authorized to resolve contract disputes, he would be, therefore, empowered to determine the compensation rate. To permit the Company to impose a rate unilaterally would be contrary to the contractually requirement that it be "arrived at by mutual agreement." An arbitral decision fixing the rate if direct negotiations fail, is certainly more consistent with what the contract contemplates than unilateral implementation of the Company's last rate offer.

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

The Company did not violate the contract by providing policies for sale by the Marketing Representatives despite the fact that there was no agreement with the Union covering compensation to be paid the Marketing Representatives for the sale of such policies. It is not a contract violation provided that when the compensation is mutually agreed to, the Marketing Representatives are paid that compensation retroactively for all prior sales. So that the Marketing Representatives are fully compensated there shall be added to the retroactive payment, interest at the statutory rate.
In the event that the parties do not agree on the compensation, that issue should be deemed a dispute under the collective bargaining agreement, and shall be resolved by arbitration, with the arbitrator authorized to fix the rate of compensation.

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Eric J. Schmertz  
Arbitrator  

DATED: March 4, 1992  
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 Union claims that the Company violated Article 33, Fourth Paragraph of the contract when it ordered JOHN BRADFORD to return to duty on January 30, 1992 after he underwent a Company ordered blood test at New Rochelle Hospital.

A hearing was held on June 8, 1992 at which time Mr. Bradford, 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.

While on duty, returning to the office after discharging school children, the grievant was involved in an accident with the bus he was operating. A Company supervisor took the grievant to the New Rochelle Hospital for a blood test to determine whether he was "under the influence of alcohol or...used marijuana or other controlled substances during or in close proximity to working hours...". The action by the Company was under Article 33 of the contract, the pertinent parts of which read:

In the event of drunkenness, use of marijuana or other controlled substances, improper fare handling, an altercation or insubordination, the Employer may take immediate action by suspending the employee and arrange for a hearing within twenty-four hours.
All employees suspected of being under the influence of alcohol and/or using marijuana or other controlled substances shall be required to submit to appropriate medical tests which shall be administered at the Employer's expense. These tests shall be administered at a recognized hospital. In the event the employee refuses to submit to such medical examination after having been duly requested to do so, such employee shall be discharged forthwith. If it is determined through appropriate medical tests that the employee was under the influence of alcohol during working hours or that said employee used marijuana or other controlled substances during or in close proximity to his or her working hours, such employee shall be subject to immediate discharge. The standard regular tests to be agreed upon by the Employer and the Union administered by the designated hospital and/or laboratory in accordance with its usual procedures to determine the use of alcohol, marijuana and other controlled substances shall be acknowledged by the Employer and the Union to be conclusive.

If said employee is found to not have been under the influence of alcohol or to have used marijuana or other controlled substances during or in close proximity to working hours, the Employer agrees to pay him all monies he would have earned on regular assignment had he not been suspended and no record of this examination shall be entered in his employment record.

After the blood test, the Company's supervisor drove the grievant back to the Company office where he was given another bus and dispatched for the afternoon portion of his run for that day. The grievant was paid for the full day.

The Union contends that upon being taken for a blood test, the grievant should have been placed in suspended status and not return to active employment until the results of the blood tests were made known and proved negative.

The Union argues that as a matter of public policy and under the provisions of the foregoing contract language is the requirement that an employee tested for alcohol or controlled substance use may not be returned to work until the results of the tests are officially known. To test him and to return him to work before the test results are determined
is, in the Union's view, an abuse of the Company's contractual right to require a blood test only for probable cause and prejudicial to the public safety.

The Union asserts that the Company must be deterred from requiring a blood test as a tactic of harassment under circumstances like the instant case where, because the employee would not lose compensation for the day, the Company could order tests arbitrarily and with impunity. To deter the Company from doing so the Union seeks an Award by the Arbitrator directing the Company to pay the grievant his wages from the time the blood test was taken to the date its results were known, on top of the pay he received for that period from active employment. And because in the instant case the Company is unable to fix the latter date the Union seeks the pay penalty until the date of this Award.

The Arbitrator is bound to the terms of the contract. I do not read the contract to require the suspension of the employee that the Union says is warranted by the public policy and contemplated by Article 33, managerial good judgment notwithstanding.

The second paragraph of Article 33 states that the Employer "may" suspend an employee "in the event of drunkenness, use of marijuana or other controlled substances..." I do not interpret that permissive language to mean that it must suspend such an employee.

A requirement of a suspension, as interpreted by the Union, must be more explicit and unconditional. Indeed, the third Paragraph of Article 33 makes clear that the parties knew how to mandate the penalty of discharge in the case of the use of alcohol or a controlled substance under the stated circumstances. By using the mandatory word "shall," the Company is required to discharge an employee "forthwith" who "refuses to submit to (a) medical examination...when suspected of being under the
influence of alcohol and/or a controlled substance" and if the medical tests show that the employee was "under the influence of alcohol during working hours and...used marijuana or other controlled substance during or in close proximity to his or her working hours." If, like discharge, a suspension was to be contractually mandated and intended in cases where a medical test is administered and until the results of that test are known, the contract could have and should have so provided at this point. It does not.

The fourth Paragraph of Article 33 upon which the Union specifically relies, provides for reimbursement to an employee who is found not to have been under the influence of alcohol or a controlled substance of "monies he would have earned had he not been suspended." But that is premised on having been suspended. It does not require that he be suspended. Rather it makes him whole for monies lost if he is suspended.

Here the grievant was not suspended and lost no pay. Ultimately the results of his blood and urine tests were negative for alcohol and drugs. Though it is unclear why the Company continued him on duty before the blood test results were known, and the Company did so at its own peril, I cannot find under the contract that the Company had an unconditional duty to suspend him, public policy notwithstanding. Therefore, the public policy questions raised by the Union, albeit matters of importance, are for a different forum. However, abuses by the Company of its contractual right to require medical tests under circumstances stated in the contract will not be allowed by the Impartial Chairman, and may be readily redressed through the grievance and arbitration provisions of the contract. I do not find the single instant circumstance to be an abuse.
The Undersigned, Impartial Chairman under the collective bargaining agreement between the above-named parties, and having duly heard the proof and allegations of said parties, makes the following Award:

The Company did not violate Article 33 fourth paragraph of the contract when it ordered John Branford to return to duty on January 30, 1992 after his blood test the same day.

Eric J. Schmertz
Impartial Chairman

DATED: June 17, 1992
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 issue is set forth by the United States District Court, Southern District in the Order of Judge Richard Owen dated March 16, 1990 as follows:

1. Ordered that the action is remanded to Arbitrator, Eric J. Schmertz to clarify whether the arbitration award of Arbitrator [Theodore W.] Kheel required that the...employees be paid in the event that the Company did not recover from the Board of Education."

Hearings were held on October 30, 31 and November 1, 1991 at which time representatives of the above-named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; a stenographic record was taken; and the parties filed post-hearing briefs.
Earlier, in remanding the matter to the District Court, the United States Court of Appeals for the Second Circuit said that the award "fail(ed) to make the Arbitrator's intent clear." The Court stated:

"The award provides no clear instruction as to what to do if the Company's claim was not satisfied. When an arbitration award provides no clear instruction as to how a court asked to enforce the award should proceed, the Court should remand to the arbitrator for guidance. See Olympia & York Florida Equity Corp. v. Gould, 776F.2d 42 (2d Cir. 1985); Americas Ins. Company v. Seagull Compania Naviera, S.A., 775F.2d 64, 67 (2d Cir. 1985) ("a court should not attempt to enforce an award that is ambiguous or indefinite") (emphasis added).

Based on the remand of the Circuit Court to the District Court, the latter directs me to "clarify" Mr. Kheel's award. It does not ask for an interpretation of the award.

"Clarification" and "interpretation" are not synonymous. "Clarification" requires deciding what Mr. Kheel intended his award to mean.

"Interpretation" requires deciding what, independently, I deem the award means.

Based on the dictionary definition and dictionary example, the person who made the ambiguous statement is the one to clarify it.¹

¹The Random House Dictionary of the English Language:

Clarification: To make clear, intelligible, to free from ambiguity.
That is distinguished from the dictionary definition and dictionary examples of "interpretation." "To interpret" allows for a different forum or someone other than the person responsible for the ambiguity to give it an unambiguous meaning.²

In my over thirty years as an arbitrator, it has been my unvaried experience that the clarification of an ambiguous award, like its modification or correction, is for the original arbitrator.

Hence, in this case I conclude that my authority under the Court's Order and remand to "clarify," is confined to finding out what Mr. Kheel intended. My authority does not extend to my interpretation of his award on its face or to interpret it based on the beliefs and testimony of others as to what they think it was supposed to mean, or should mean, or even, specifically, to resolving the conflicting testimony on whether or not there had been some agreement on what Mr. Kheel was to award.

1(...continued)
Example: After her Professor clarified his statement, she understood what he had meant." (Emphasis added)

2The Random House Dictionary of the English Language:

Interpretation: The act of interpreting; an understanding or conception of another's words; an explanation of the meaning of another's artistic or creative work.

Examples: "The actor interpreted Lear as a weak, raging psychopath."

"His interpretation of the poem is rather ambiguous."

"To interpret the hidden meaning of a parable."

"To interpret a reply as favorable." (Emphasis added)
Such testimony and evidence, no matter how credible, do not tell me what Mr. Kheel intended.

Mr. Kheel is the only one possessing the mental processes to definitively state what he meant. If his award is to be "clarified," the best, indeed the only one who can provide the clarifying answers is Mr. Kheel himself. He cannot do it now as the arbitrator because, as the Circuit Court ruled, he is no longer the impartial chairman, and because his authority as arbitrator was not reinstated for that purpose. But he is not mentally or physically disabled, nor judicially enjoined from offering probative testimony on what he intended when he was the arbitrator.

At the arbitration hearing and under Oath, on direct and cross-examination, Mr. Kheel repeatedly and unequivocally stated that he meant, and that therefore his award intended, that the employees are to be paid despite the fact that the Company did not recover from the Board of Education.³

³Pertinent Colouquy

On direct examination:

Q. (By Mr. Groarke)

Now, was it your intent that the men be paid even if the Board of Education did not -- even if the Company did not receive money from the Board of Education in their lawsuit?

A. (By Mr. Kheel)

It was my interpretation of the collective bargaining contract that the Company's obligation was unconditional. (Tr. pg. 31)

... 

Q. And was your interpretation that the collective bargaining agreement was commingled with the commercial contract between the Company and the Board of Education?

(continued...)
A. ...Nothing in the collective bargaining contract made it dependent upon the Board of Education contract and visa versa. What the reality was is that the Company was obligated, in my opinion, and I so awarded to pay the employees under the collective bargaining contract, but did not immediately...I decided to give the Company time to collect from the Board of Education before it had to pay out the money, a rather substantial sum. It was not my intention to make the award conditional.

Q. When you say "conditional" you mean conditional upon the Company's success in its lawsuit against the Board of Education?

A. That is correct. (Tr. pg 31, 32.)

On cross-examination:

Q. (By Mr. Rosenthal)

What happened between the time you sent out the draft award and the time you wrote the last paragraph?

A. (By Mr. Kheel)

I don't recall specifically, but I do know that you were complaining about the draft award because you were unhappy about having to pay the money out in advance. And you kept telling me that you were certain you were going to collect, that you had a very strong case; and that you were entitled to it; and that you felt you were going to win. And I decided as an accommodation to provide in my award that it be stayed so that you, the Company, wouldn't have to pay the money until you get a decision.

Now, I didn't know at that time, and it wouldn't have made any difference, that you had filed the claim with the wrong agent of the Board of Education. It would have been ridiculous for me to make an award conditional on how competent you were in pressing your claim against the Board of Education. That would have been the height of stupidity. I made an (continued...)
That constitutes the requisite clarification and I make it my Award.

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

Based on Mr. Kheel's testimony under Oath as to the meaning and intent of his award, I find that his award is clarified to mean that the employees are to be paid in the event that the Company did not recover from the Board of Education.

Eric J. Schmertz
Impartial Chairman

DATED: March 11, 1992

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.

3(...)continued
unconditional award, but I stayed it to give you time to do your thing and to collect...(Tr. pg. 73, 75.)
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

NEW YORK BUS TOURS, INC., PAROCHIAL
BUS SYSTEMS, INC., d/b/a NEW YORK
BUS SERVICE

Plaintiff,

v.

THEODORE W. KHEEL,

Defendant,

SONNY HALL, as President of the
TRANSPORT WORKERS UNION OF AMERICA,
LOCAL 100,

Intervenor-Defendant

Appears

Bondy & Schloss
Attorneys for Plaintiff
6 East 43rd Street
New York, New York 10017
Of Counsel: Joseph S. Rosenthal
Jacqueline I. Meyer

Colleran, O'Hara & Mills
Attorney for Intervenor-Defendant
1225 Franklin Avenue
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Garden City, New York 11530
Of Counsel: Edward J. Groarke

OPINION AND ORDER
85 Civ. 4724 (RO)
OPINION AND ORDER

Owen, District Judge:

Over twelve years ago, on October 18, 1979, arbitrator Theodore W. Kheel issued an Opinion and Award to resolve whether bus drivers employed by New York Bus Tours, Inc. were entitled to compensation for a period of three months during which they were out of work due to a wild-cat strike that led the bus company to close down operations. His opinion, in major part, read as follows:

The evidence demonstrates that the Company and Union as well as the 83 employees here claiming to be paid were ready, willing and able to provide bus service throughout the duration of the wild-cat strike but were prevented because of an event over which neither the Company, the Union nor the employees had any control, namely the efforts of persons involved in the strike to prevent the Company's buses from operating. The employees reported for work and were paid initially. Together with the Company, they attempted to provide service. The Company's officials consulted the Board and the Police and concluded, on the basis of the advice and information they received, that it would not be possible to operate the buses. The employees and their Union continued throughout the duration of the strike to indicate their availability to work but the circumstances growing out of the strike prevented the Company from resuming service.

In my opinion, all of the conditions entitling the Company to compensation under the provision of its contract with the Board of Education set forth above are here present. The Company and its employees were ready, willing and able to provide service and attempted to provide service but were prevented from providing service by an event over which neither the Company, the Union, nor the employees had any control. The circumstances were directly comparable to an emergency closing of the school by the Board of Education due to weather or other conditions. Since the practice of the parties pursuant to that provision is clear and established by the record and the conditions under which the Company becomes entitled to compensation are present, I must and do hereby hold that the employees are entitled to be paid for the time they lost during the wild-cat strike.

Since my decision is based on the practice established by the parties pursuant to the Board's obligation to the Company, I hereby stay enforcement of my award pending satisfaction of the Board's obligation to the Company. I have been assured by the Company that it will proceed promptly to enforce its claim against the Board, that it has filed notice of its claim with the Board.
and that it is commencing suit against the Board. Nevertheless, I am retaining jurisdiction to make certain that all measures are taken to assure prompt enforcement.


Thereafter, in its first appearance before me, following the intervention of the Transport Workers Union of America, Local 100 and the removal to Federal Court, the Company argued that the language in arbitrator Kheel's Opinion staying the decision constituted a determination that the award was contingent upon the Company's success in its suit against the Board of Education, and that since the Company had been unsuccessful, it owed nothing to the employees. I did not read Kheel's Opinion to say this at all, concluding that the statement, "I must and do hereby hold that the employees are entitled to be paid for the time they lost during the wild-cat strike", was in no way an expression that the employees' compensation was contingent upon the Company's recovery from the Board, and the decision to "... stay enforcement of my award pending satisfaction of the Board's obligation to the Company", was merely a statement of the parties' practice that payment of the compensation could await resolution of the Company's action against the Board at which time, it was assumed, it, the Company, would come into funds to pay the employees. See New York Bus Tours, Inc. v. Theodore W. Kheel and Sonny Hall, 85 Civ. 4724 (RJ), at 4 (S.D.N.Y. December 1, 1985) (Amended Opinion, March 25, 1986 at 4-5) (New York Bus III). Kheel's Opinion certainly did not suggest that the employees' right
to back pay was at the mercy of a mortal procedural gaffe by the Company's attorneys. Accordingly, I remanded the case for further arbitration to determine the amount of back wages. Because by this time Kheel's powers as arbitrator had expired pursuant to stipulations of the parties, I directed that the arbitration as to the amount of compensation due the employees should proceed before the newly designated Impartial Arbitrator.

In accordance with that direction, the new arbitrator, Eric Schmertz, conducted a hearing and issued an Opinion and Award dated December 14, 1987 awarding the employees back pay, plus interest, in the amount of $375,956. I granted the Union's motion to confirm and enforce this award and ordered the Company to pay the Union on behalf of the employees. New York Bus Tours, Inc. v. Theodore W. Kheel and Sonny Hall, 85 Civ. 4724 (RO) (S.D.N.Y. April 18, 1988)(New York Bus IV). The Company appealed and the Court of Appeals reversed. It reasoned that, "[i]n light of the facts that Kheel felt the employees were entitled to be paid and that he stayed enforcement to allow the Company to seek payment by the Board, it is not at all clear what Kheel intended in the event the Company was not paid by the Board", New York Bus Tours v. Theodore W. Kheel and Sonny Hall, 864 F.2d 9, 12 (2d Cir. 1988)(New York Bus V), and, accordingly, vacated and remanded with instructions to remand to "the arbitrator" to clarify whether the award required that the employees be paid regardless of the success of the Company's success in its action against the Board. Id, at 12-13.

On receipt of the Court of Appeals' mandate to remand to "the arbitrator", over the Company's objection, I remanded the action to Kheel, the arbitrator who authored the award, in accordance with what I understood arbitration practice to be when an award requires clarification, see discussion p. 5, infra, and directed that he answer the following certified question: "Was it your intent in the October 18, 1979 Opinion and Award to
require the Company to pay the affected employees' wages and benefits in the event the Company was not compensated for the period of the wildcat strike (February 20 through May 10, 1979) by the New York City Board of Education?" New York Bus Tours, Inc. v. Theodore W. Kheel and Sonny Hall, 85 Civ. 4724 (RO) (S.D.N.Y. January 27, 1989)(New York Bus VI). Kheel submitted a Clarification and answered the certified question stating, "It was my intent in the October 17, 1979 Opinion and Award to require the Company to pay the affected employees' wages and benefits in the event the Company was not compensated for the period of the wildcat strike (February 20 through May 10, 1979) by the New York City Board of Education." Thereupon, I granted the Union's motion to confirm and enforce the Opinion and Award of arbitrator Schmertz, and entered a judgment ordering the Company to pay the Union now $400,378 on behalf of the employees. New York Bus Tours, Inc. v. Theodore W. Kheel and Sonny Hall, 85 Civ. 4724 (RO) (S.D.N.Y. March 8, 1989)(New York Bus VII).

The Company appealed again. The Court of Appeals again reversed, ruling that I had erred in interpreting its instructions to remand to "the arbitrator" for clarification, by remanding the matter to arbitrator Kheel rather than arbitrator Schmertz, as Kheel no longer had jurisdiction to decide any matter in this action. The Court of Appeals remanded a second time with instructions to remand the matter to arbitrator Schmertz stating:

We therefore vacate the judgment of the district court enforcing the award, and remand with instructions that the matter be remanded to Arbitrator Eric J. Schmertz to clarify whether the arbitration award required that the employees be paid in the event that the Company did not recover from the Board. There is no basis for this court to suggest to Schmertz how he should proceed to clarify the award.

Accordingly, I remanded to arbitrator Schmertz to clarify whether the arbitration award of arbitrator Kheel required that the employees be paid. *New York Bus Tours v. Theodore W. Kheel and Sonny Hall*, 85 Civ. 4724 (RO) (S.D.N.Y. March 16, 1990) (*New York Bus IX*). Pursuant to this, Schmertz held hearings over three days, October 30, 31, and November 1, 1991, at which the Company and the Union presented evidence, including the testimony of Kheel who, not unexpectedly, I am sure, stated that it was his intent that the employees be paid unconditionally even if the Company was not paid by the Board.

Thereafter, on March 11, 1992, Schmertz issued an Opinion and Award stating:

> Based on Mr. Kheel’s testimony under Oath as to the meaning and intent of his award, I find that his award is clarified to mean that the employees are to be paid in the event that the Company did not recover from the Board of Education.

*Opinion and Award, Impartial Chairman, Eric J. Schmertz* at 6 (March 11, 1992) (*New York Bus X*). Schmertz expressly rejected the Company’s demand that he independently of Kheel’s input determine what Kheel’s 1979 Award meant, stating:

> In my over thirty-years as an arbitrator, it has been my unvaried experience that the clarification of an ambiguous award, like its modification or correction, is for the original arbitrator. Hence, in this case I conclude that my authority under the Court’s Order and remand to ‘clarify,’ is confined to finding out what Mr. Kheel intended. My authority does not extend to my interpretation of his award on its face or to interpret it based on the beliefs and testimony of others as to what they think it was supposed to mean, or should mean, or even, specifically, to resolving the conflicting testimony on whether or not there had been some agreement on what Mr. Kheel was to award.

> Mr. Kheel is the only one possessing the mental processes to definitively state what he meant. If his award is to be ‘clarified,’ the best, indeed the only one who can provide the clarifying answers is Mr. Kheel himself.

*New York Bus X* at 3-4.

The Company now moves to vacate this most recent award rendered by Schmertz
asserting that he acted in "manifest disregard of the law" when he permitted Kheel to testify as to his intent and arguing that the "clarification" by Schmertz should not have been based upon such testimony of Kheel because the Court of Appeals had previously held that Kheel did not have jurisdiction to clarify the issue himself. In this regard I agree with arbitrator Schmertz that although Kheel no longer has jurisdiction to decide any matters in this action as an arbitrator, there was no bar to his testifying as a fact witness, under oath and subject to cross-examination, and any testimony that he so provided, if credited, could be used by the current arbitrator in carrying out his duty to clarify Kheel's original award. See New York Bus X at 4 ("Kheel] cannot do it now as the arbitrator because, as the Circuit court ruled, he is no longer the impartial chairman, and because his authority as arbitrator was not reinstated for that purpose. But he is not mentally or physically disabled, nor judicially enjoined from offering probative testimony on what he intended when he was the arbitrator.") Schmertz approached his obligations on the remand exactly as he should have and as he was specifically directed to do by the Court of Appeals, see p. 4 supra. In specific language the Court directed him to clarify Kheel's award, not decide de novo, and expressly refrained from suggesting how he should proceed to so clarify. Thus, the purpose of the remand being to determine what Kheel meant in his original Opinion, clearly the best way -- and indeed the only way -- was to get this information directly from the horse's mouth. See Iron Workers Local No. 272 v. Bowen, 624 F.2d 1255, 1264 (5th Cir. 1980).

The present position of the Company would force this case into a Victorian garden maze which has no exit. However, the exit from the garden maze is in view. Schmertz did clarify any ambiguity that existed; the departure from the maze should proceed expeditiously and the employees who have waited over ten years to recover should finally be paid.
Accordingly, the Union's cross-motion to confirm and enforce the Opinion and Award of Eric J. Schmertz dated March 11, 1992 clarifying the Opinion and Award of Theodore W. Kheel dated October 18, 1979 is granted. The motion of New York Bus Tours, Inc. for an order vacating the award is denied.

Submit order and judgment accordingly.

Dated: June 15, 1992
New York, New York

United States District Judge
The stipulated issue is:

Was there just cause for the termination of Clarence Hill?
If not what shall be the remedy?

A hearing was held on November 3, 1992 at which time Mr. Hill, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing memoranda.

The grievant was discharged for a cumulative disciplinary record of warnings and suspensions for "accidents" and "reckless driving" and other rule violations, culminating in allegations of "reckless driving" and a "failure to report an accident" on October 1, 1992.

Relevant is the grievant's most recent prior suspension of fourteen days for
“failure to report an accident.” That suspension, which began as a discharge, is based on an Agreement between the Company and the Union and accepted by the grievant. It reads:

AGREEMENT

AGREEMENT, made this 18th day of June, 1992 by and among PAROCHIAL BUS SYSTEM, INC. and NEW YORK BUS TOURS, INC. (hereinafter “New York Bus”), TRANSPORT WORKERS UNION OF AMERICA, LOCAL 100, AFL-CIO (hereinafter “Union”) and CLARENCE C. HILL.

WHEREAS, the Union commenced an arbitration proceeding claiming that New York Bus did not have just cause to discharge CLARENCE C. HILL; and

WHEREAS, the parties have settled the grievance giving rise to said arbitration proceeding;

NOW, THEREFORE, the parties hereto agree as follows:
1. The termination of Clarence C. Hill effective June 5, 1992 shall be reduced to a suspension without pay for fourteen (14) days.

2. Mr. Hill shall be reinstated to his former position of employment effective June 20, 1992.

3. Should Mr. Hill in the future fail to fully comply with the outstanding rules and regulations of New York Bus relating to the reporting of accidents, the Company shall have the right to terminate his employment forthwith.

Prior to that suspension and Agreement, and over his period of employment from latter 1983 until his discharge in October 1992, the grievant’s disciplinary record also includes a seven day disciplinary suspension in August/September 1991 for violation of the no-strike clause of the contract, a three day suspension because of an accident in March 1991 and numerous warnings and notices for chargeable accidents and driving offenses.

Accordingly, up to the charged incidents of October 1, 1992, the Company had imposed discipline on the grievant progressively for offenses generally violative of his
required duties as a bus driver, and more particularly, relevant to the October 1st allegations. Hence, though the October 1st incident if proved, may not be grounds for discharge standing alone, they are, against the backdrop of his entire record, including the final paragraph of the Agreement of June 18, 1992, offenses which would properly trigger his discharge as the final penalty of the progressive discipline sequence.

The record adequately supports the Company’s case. The grievant is charged with reckless driving on 116th Street. More specifically, he is charged with driving at an excessive speed, causing serious injury to one passenger and causing other passengers to be thrown upward from their seats when his bus hit and passed through a depression or “sink” in the road. The evidence on this incident is clear, based on the testimony by two passengers who were on the bus. That one passenger was injured and had to be taken from the location to a hospital by ambulance, is not disputed.

The grievant’s explanation that he was not speeding and did not know of and did not see the depression in the road, is unacceptable. The evidence shows that this was not his first use of 116th Street and that the road condition was the same previously as on October 1st. More important is the obvious fact that to cause most if not all the passengers to be thrown upward from their seats (as testified to by the passengers) and the serious injury to one passenger, the bus had to be traveling at a speed well in excess of a rate reasonable or prescribed for a City street. I accept as accurate and relevant the additional testimony of a passenger that previously the grievant was speeding on the FDR Drive and turned at high speed off the Drive and on to 116th Street.

Because of his prior disciplinary record of many warnings and admonitions about his driving, the grievant had a duty and was on notice, to exercise care. That he drove so fast on 116th Street as to cause passenger dislocation and one passenger’s serious injury, is a manifest disregard of what is reasonably expected of any driver of a
bus carrying public passengers, and also for the grievant a manifest disregard of
warnings and discipline he previously received.

Also, in a not insubstantial way, he was not forthright about the accident he had
on October 1st. The evidence on that incident and circumstance is also supportive of the
Company's charge.

I am satisfied that upon pulling into a bus stop at Castle Hill, the grievant struck
and his bus became entangled with an abandoned car. I credit as accurate the testimony
of a passenger that the grievant had trouble moving the bus out of the bus stop; that he
got out of the bus several times and went to the outside rear of the bus, apparently to
see what was interfering with the exiting of the bus from that stop. I do not accept the
grievant's testimony that he got out of the bus only once, observed the rear side of the
bus from the front of the bus, and was not aware of having hit the abandoned car.
Indisputably, the rear side of the bus was damaged. In view of what I deem as the
credible testimony of the passenger and because it would be the logical thing for the
grievant to do, I conclude not only that he hit the car, but went to the rear of the bus
more than once, saw and knew of the damaged caused to the bus.

The grievant's "failure to report (that) accident" took the form of his conduct
upon returning to the garage. He did not, as he should have, immediately disclose the
damage and reveal its cause. In what I must construe was an effort to confuse if not an
attempt to avoid any responsibility or liability, he asked supervision if "there was a
report of any damage to the bus." The testimony of the Assistant Superintendent of
Maintenance on this point is essentially conceded by the grievant. As I have concluded
that the grievant knew he had hit the abandoned car and saw the damage caused to the
bus, I see no logical or acceptable reason why he would ask if there was "any report of
damage to the bus" except to divert responsibility from himself. Also, he concedes that
in response to the Superintendent's question of whether he had an accident because the damage was “new”, he replied “I'm not sure, there was an abandoned car at the Castle Hill area.” Again, as I have concluded that he knew he had caused the damage, that answer was not fully forthcoming but rather designed it seems to me, as another attempt to avoid the blame. That the grievant showed the damage to the Superintendent is immaterial because even at that point he did not acknowledge his responsibility. He thereafter filled out an accident report accurately stating that his bus hit the car, But that does not cure these earlier efforts at obfuscation. It is undisputed that the Company rules require that a driver report an accident immediately upon his return to the garage. Under these findings and circumstances I am compelled to hold that though he was under an express duty from the Agreement of June 18, 1992 “to fully comply with the rules and regulations of New York Bus relating to the reporting of accidents,” he failed to comply with those rules with the requisite promptness and truthfulness.

Accordingly, the incidents of October 1, 1992 have been proved to my satisfaction. Considering the grievant’s prior record, and especially the Agreement of June 18, 1992 under which he was given a final chance to comply with Company rules regarding accidents, the October 1st events constitute legitimate grounds to trigger the grievant’s discharge as the final penalty in a properly imposed progressive discipline sequence.

The Undersigned, Impartial Chairman under the collective bargaining agreement between the parties, and having duly heard the proofs and allegations of said parties, makes the following AWARD;
There was just cause for the termination of Clarence Hill.

ERIC J. SCHMERTZ
Impartial Chairman

DATED: November 25, 1992
STATE OF New York:
COUNTY OF New York:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The stipulated issue is:
Was there just cause for the discharge of Ronald Arnold? If not, what shall be the remedy?

A hearing was held on November 12, 1992 at which time Mr. Arnold, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The grievant, a bus driver, was discharged for his overall disciplinary record culminating in charges of driving violations on October 8, 1992.

The issue is not whether the charges of October 8, 1992, if proved, constitute in and of themselves grounds for dismissal. They do not. Rather, it is whether those charges, against the back-drop of the grievant's entire disciplinary record, properly constitute the triggering events for the imposition of discharge as the ultimate penalty in a progressive discipline sequence.

The grievant's prior disciplinary record is replete with various violations. He has been placed on notice and warned for poor attendance,
chargeable accidents, reckless driving, and passenger complaints about his driving. On more than one occasion, he was suspended and/or placed on final warning for various offenses. Most relevant are his appearances as the grievant in three prior disciplinary cases before this Impartial Chairman.

In August of 1983, the Employer discharged him for poor attendance. I reduced that discharge to a disciplinary suspension because, as the then new Impartial Chairman I decided to use that case to establish a precedent for that and other subsequent, similar matters. I used that case to serve notice on the parties that except for disciplinary offenses justifying summary dismissal, I would require the Employer to follow the well-settled disciplinary procedure of progressive discipline. And for that reason I gave him a final opportunity to achieve and maintain a satisfactory attendance record.

In May of 1989, I reversed the grievant's suspension for reckless driving. That charge was based on letters of complaints from pedestrians but none of the pedestrians testified at the arbitration. In my opinion, I stated:

"This is not to say that the complaining letters regarding the grievant's recklessness toward the pedestrians are untrue, but rather that the letters alone do not constitute the type of evidence required to meet the requisite standard of "clear and convincing" evidence.

The foregoing two decisions established two arbitral rules. First, that progressive discipline must be followed in non-summary dismissible cases, and second, that complaining witnesses should testify in person and be subject to cross-examination.
In November 1991, I upheld the grievant's five-day suspension for erratic and negligent driving. In that case I accepted as credible the in person testimony of the Employer's Superintendent of Transportation who observed the grievant's wrongful driving at impermissible high speed. Also I upheld the suspension because it succeeded other disciplinary notices and warnings for prior violations of the same type.

In the foregoing opinion I stated:
In view of his prior disciplinary record which includes a number of accidents and warnings for driving errors and one suspension in 1982 for wrongful driving, I do not find it unreasonable for the Employer to have concluded that with the instant incident, his negligent driving continued. Therefore, I do not find that a disciplinary suspension of five days was either harsh or unreasonable.

Obviously, the November 1991 decision was based not only on a finding of fact that the grievant drove improperly, but because there was in person testimony by the witness who observed that driving. And also based on the fact that the suspension was the appropriate next step in the progressive discipline sequence.

Both latter requirements have been met in the instant case. The grievant is charged with impolite and belligerent conduct to a passenger; reckless driving on Fifth Avenue; speeding in taking a turn through an intersection with a pedestrian crossing; failure to stop at a prescribed bus stop; and instead of stopping at that bus stop, continuing down the road at an excessive speed.

The charge of rude conduct to a passenger has not been proved. The testimony discloses that the passenger and the grievant engaged in a
conversation regarding when the reduced senior citizen fare was applicable. The passenger believed that at 4:40 P.M. she was entitled to board and ride the bus at the reduced senior citizen fare. The grievant properly told her that the fare at that hour was the full fare of $3.75. Though there was a continuing exchange between them, I do not find, based on the testimony, that the grievant's attitude or demeanor rose to the level of rudeness or belligerence.

However, based on the in person testimony of the passenger as well as the in person testimony of a Company supervisor, I am persuaded that the other charges against the grievant are factual as the Employer asserts. And that as a continuation of the grievant's record of wrongful driving qualify as a proper "trigger" for his dismissal on his entire disciplinary record.

The passenger testified that travelling down Fifth Avenue, the grievant drove at approximately 40 miles an hour; changed lanes abruptly several times; blew his horn "at everyone" and braked abruptly and repeatedly. She concluded that never before had a bus on which she was a passenger been driven that fast and so maneuvered on Fifth Avenue, and that the experience was "stressful" with "too much anxiety." I find no reason why the passenger would falsify her testimony or misrepresent the nature of the trip on Fifth Avenue.

Later that day, seated in a bus which followed the grievant's bus, Supervisor, Alvin Oteri testified that he saw the grievant approach the intersection of Einstein Loop and Co-Op City Boulevard. He testified that the grievant's bus engine was "revving" and that the turn was made at an excessive speed. He stated that the prescribed speed should have been no more than five miles an hour, particularly because the turn involved passing through a pedestrian cross-walk. He judged the grievant
made the turn at 25 miles an hour with the bus engine still "revving" at a high rpm. He went on to testify that instead of moving to the right and stopping at the bus stop on that corner, the grievant not only did not stop but did not slow down and continued down that road still at an excessive speed.

I accept as accurate Mr. Oteri's testimony just as I accepted in the earlier decision the testimony of the Company's Supervision of Transportation. Again, there is nothing in the record upon which one could or should conclude that Mr. Oteri falsified his testimony or did not observe what he said he saw. Indeed the grievant's testimony on this point is equivocal. First he testified that he did stop at the bus stop for "a second," and then for "2-3 seconds," but could not state whether he opened the bus door as required. He then attempted to justify his action by asserting that there were no passengers on the bus to be discharged and there were no passengers standing at the bus stop to get on the bus.

It has not been shown that a driver may be excused from stopping at a bus stop just because he thinks there are no passengers leaving the bus or planning to enter the bus.

Though I conclude from the disputed testimony that Oteri testified accurately when he stated that the grievant did not stop at all at the bus stop, there is no acceptable evidence to refute his testimony that the grievant made a turn into the intersection and across a pedestrian cross-walk at an excessive speed and continued at an excessive speed as he travelled from the bus stop.

As I have observed many times before, this Employer has a "fiduciary" duty to the riding public it transports. Just as a manufacturing enterprise applies "quality control" procedures before its products are made available to the public, so, too, may this Employer take
every reasonable step to insure the safety of its buses and the safe operation of those buses by its drivers. Indeed, it has a duty to do so. Quality control is preventative. It not only permits the manufacturer to minimize his liabilities for dangerous products, but also protects those who use the product. Similarly, I find that this Employer may follow and take preventive measures to insure not only the safety of its equipment but safe driving by its drivers. Bluntly, I do not find nor would I require this Employer to wait until there is a major accident before it takes steps to remove from its employ a driver whose record shows a propensity for accidents, driving violations, and other infractions of operating rules and procedures. The situation with the grievant has reached the point where because of his extensive record of driving violations; because he has been put in notice by warnings and suspensions for these particular violations, and because, as the instant case indicates, his propensity to commit operating violations has continued, I have no choice but to uphold the discharge.

As part of the record, the Union has submitted certain letters of commendations which the Company gave to the grievant. The grievant is to be commended for the actions and services which prompted these letters. However, two date back to 1982 and one to 1985. The last, in March of 1988 concerns a circumstance not related to driving. The first three pre-dated many of the grievant's violations, including particularly, my decision of November 25, 1991. Unfortunately, neither in specificity nor in sufficient quantity do those four letters of commendation provide any basis for a different conclusion about the grievant's record nor can they, at this point, serve in mitigation. In sum, when juxtaposed with the grievant's overall disciplinary record and his continued violations of
driving regulations, those letters show that out of the jaws of potential victory he has snatched defeat.

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

The discharge of Ronald Arnold was for just cause.

Impartial Chairman

DATED: December 23, 1992

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 dispute involves the application of the following provision of Article XXII, GENERAL of the collective bargaining agreement:

The Company shall provide parking facilities for employees' cars on job site.

and the grievance of David McHale relating thereto.

A hearing was held on October 27, 1992 at which time Mr. McHale, 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.

At the outset of the hearing the parties stipulated the issue as follows:

Was there just cause for the discipline of David McHale? If not what shall be the remedy?

However, the parties disagree over the scope of that issue. The Company asserts it is limited to the propriety of the two day suspension it imposed on the grievant. The Union agrees that that question is in dispute, but also claims that the issue and grievance include the
"withdrawal of parking privileges" from the grievant and the reprimand letter placed by the Company in his file for claiming he paid for parking "under harassment."

Consequently the scope of the issue is for the Arbitrator to determine.

Company employees are given a plastic "key" card which has two uses. It activates the gate of the parking garage in the Company's building. Thus it is used by employees to gain access to the garage with their cars in implementation of the foregoing contract provision granting them free parking. The card is also used as a "key" to open and enter doors into the Company's building.

The grievant suffers from epilepsy. He does not and never has had a driver's license, and does not own a car. It is the Company's contention that he is therefore not eligible for the parking benefit. And that his plastic "key" card may not be used by anyone else or any car to enter or park in the garage even to transport the grievant to work or to pick him up to take him home at the end of the work day.

For many years, the grievant, his mother and father have followed the following procedure. The grievant may come to work or go home with his father. In that event there is no problem because his father is also an employee of the Company, has his own "key" card and is entitled to park his car in the garage. But because the grievant and his father at times work different hours, he cannot travel both ways with his father at all times. Many times therefore the grievant is brought to work or taken home by his mother. In that case, the grievant's "key" card is used to enable his mother and her car to enter the garage. Though she is not a Company employee, the days she brings the grievant to work, or takes him home, she parks her car in the garage for the entire or a portion of the day while she is at her office at the Internal Revenue Service in White Plains.
When the grievant comes to work with his father but doesn't go home with him, his mother enters the garage later in the day, parks her car, and later picks up her son at the end of his shift and takes him home.

It is this varied use of the grievant’s key card by this mother when her car is parked in the garage, that the Company objects to, claiming that that is not in compliance with the contractual benefit of according free parking 'for an employee’s car.' But rather, argues the Company, it amounts to free parking for the grievant’s mother. The Company also claims that the grievant’s mother has used his card to gain free parking in the garage for herself at times when she neither brings him to work nor takes him home.

The dispute arose when the Company invalidated the grievant’s card for parking. When his card did not activate access to the garage, the grievant and his father complained to Michael Giordano, the Company’s Assistant Building Manager. The content of the discussions between Giordano and the McHales is sharply contradictory. The Company asserts that the grievant was told that his card was not any longer to be used for parking under any circumstances because the car(s) involved were not his and he had no drivers license.

On one or two days immediately thereafter, the grievant’s card was again used, and access to the garage was gained. However, on two days subsequently, the card would not work at the garage, and the grievant (driven by his father, but using the grievant’s card) paid the $9 daily parking fee required of the public. He protested this payment by signing the parking ticket as “paid under harrassment.”

The Company deemed the grievant’s use and efforts to use his card after the meeting with Giordano as a willful disregard of instructions and hence insubordination. For that the Company imposed the two day suspension.
harassment" the Company placed a reprimand letter in his file. And, the Company electronically and permanently invalidated the grievant's "key" card for use in the garage, prompting the Union's objection to that action in this case.

As there is no disagreement that the two day suspension has been placed in issue in this case, that disciplinary action can be dealt with without resolving the dispute over the scope of the grievance.

I find the evidence of the discussions between Giordano and the McHales to be unclear, offsetting and hence inconclusive. Giordano asserts that he told the McHales that the grievant's key card was not to be used for the garage. The testimony by and in behalf of the grievant is that Giordano said that the grievant's card could be used "if the grievant was in the car" and that he also said, in the face of the complaint initiated by the McHales, that "there should be no problem in the future" with the use of the grievant's card. There were no independent witnesses or participants to the conversations. With the burden on the Company to prove its case clearly and convincingly, I am not persuaded that it has met that standard regarding what Giordano in fact said. Surprisingly, on such an important matter, and in view of a contrary practice for many years the Company did not follow up what it claims were verbal instructions by a written memorandum to the grievant, his father, or the Union. Failing to do so, the testimony of what was said remains inconclusive one way or the other, and fails to meet the Company's evidentiary burden.

Moreover, that the grievant and his father used and then attempted to use the grievant's card on days following their talks with Giordano, suggests to me that either they were not told that the card couldn't be used when the grievant was being transported to or from work, or that that instruction was not communicated by Giordano clearly and unequivocally. Both McHales had good work records and I am not persuaded that they would have purposefully defied orders, thereby risking discipline. Instead, and because the senior
McHale is a Union Steward, I think that they would have grieved, rather than engage in “self-help.”

Accordingly, the two day suspension for “insubordination” or defying orders, was unjustified, and must be reversed.

Deciding the scope of the grievance is not made easy by the fact that the contract does not require a written grievance, nor does it contain a formal grievance procedure. Article XVI Grievance Procedure simply permits a grievance “concerning the interpretation, application or performance of this Agreement” to go directly to arbitration. Absent formal written grievances and grievance steps, the opportunity to define and identify the details of the grievance is not readily available. Here, the Union through its attorney, filed for arbitration with the American Arbitration Association a dispute identified as “The suspension of David McHale at the 44 South Broadway location.” That identification was thereafter tracked and repeated by the Association in its correspondence with the parties.

On the other hand however, both McHale’s wrote letters to the Union’s business agent and business manager. Both letters opened with the statement “I am filing this grievance...” (emphasis added). Cumulatively, these letters protested not only the grievant’s suspension but also the letter of reprimand and the invalidation of the grievant’s key card for parking. In the absence of a defining grievance procedure, I am not prepared to hold that the “short hand” notation of the dispute in the letter to the Arbitration Association limits the grievance just to that reference. Determinative to my mind is the Union’s unrefuted testimony that the McHale letters were sent to the Company’s labor relations representatives and that the content of those letters were discussed in telephone conversations between a Union representative and those Company representatives. In short, I am satisfied that the Union put the Company on adequate notice that three complaints were encompassed within the grievance.

Again, in the absence of a contractual prescription as to how grievances are to be
written and filed, I find that the grievant's reference to "harassment" when he paid the $9 parking fee was nothing more than an inartful method of grieving that payment and preserving his right to seek redress. I see it as comparable to signing "under protest" or "without prejudice." As a method of grieving, the grievant and his father had the right to so complain, albeit crudely. Therefore, the reprimand letter placed in the grievant's file for doing so, was inappropriate and unjust, and shall be expunged.

Obviously, there can be no quarrel with the Company's refusal to allow the grievant's mother to use the garage to park while she is at her White Plains office when she neither brings the grievant to work nor takes him home. That is a manifest misuse of the grievant's key card, not for any benefit to the grievant, but as an exclusive, and improper benefit for the mother. The Company may take steps to prevent that abuse.

The bare contract language is not determinative. Though no evidence was adduced on the negotiation history of the parking language, I am not prepared to conclude that the intent of that language was to limit parking only to cars owned by employees, and driven by an employee. For example, an employee may certainly use his card if he is driving a leased or rented car. Also, as an extreme example, I believe that the benefit of parking is available to an employee who is chauffeured to and from work, and where the chauffeured car is parked in the garage during the in-between hours, provided the chauffer is engaged exclusively and solely for the employee's benefit. In those examples, the use of the card to enter the garage to park the vehicle in the garage would be reasonable implementations of the parking benefit, as exclusive to and for the employee. That I conclude is the intent and purpose of the contractual parking benefit. In other words, it is for the employee, and for the employee exclusively. When the grievant's card is used by him and his mother, to gain access to and park in the garage, either when taking him to work or taking him home, the benefit is not exclusive to
and for the grievant. There is a second and not inconsequential benefit, and that is for his mother, in the form of free parking while she is at work elsewhere in White Plains. I am not persuaded that the contract parking benefit was intended to extend to that situation. Nor in the absence of other contrary evidence should the arbitrator extend its coverage and meaning that far.

This is not to say that the arbitrator does not think that there are magnanimous and humanitarian reasons to accommodate the grievant and his disability by allowing the practice. Indeed, I think there are. But my jurisdiction is not to fashion a humanitarian solution. That is for the Company to consider and judge. My authority is to interpret and apply the contract. And I see no contractual basis to sanction the use of the grievant’s parking card to accord his mother free parking for a full or partial day even when that is in conjunction with transporting her son.

Nor is there evidence that the grievant’s mother drives to White Plains and uses her White Plains office only as an accommodation to her son. It is true that the mother works at two IRS offices, one in Rockland County and the other in White Plains. She has not testified nor has the Union asserted that she could do all her work in Rockland County. I conclude that her job requires her to work at both locations. That being so, when she goes to White Plains, it is not just to transport or pick up the grievant but also to work, mandatorily, at her White Plains office. So, on those days, to park in the Company’s garage would be a benefit to her, not authorized by the collective agreement.

Accordingly, the Company may prohibit the use of the grievant’s key pass for and under that circumstance.

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:

(1) The grievance covers the grievant’s two day suspension; the letter of
reprimand for protesting the payment of the parking fee “under harrassment” and the cancellation of parking privileges.

(2) The two day suspension of David McHale is reversed. It shall be expunged from his record and he shall be made whole for the time lost.

(3) The letter of reprimand in the grievant’s file for claiming he paid the $9 parking fee “under harrassment” shall be expunged from his file.

(4) The grievant’s plastic “key” card may not be used by his mother to park her car or the car she is driving in the Company garage, even if she is driving the grievant to work and/or taking him home.

DATED: NOVEMBER, 16 1992
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
The issue is the Union's grievance charging the Company with violation of Article XIV of the contract by its requirement that employees provide receipts for meals costing in excess of $4.00 when said employees are "authorized to work away from their permanent reporting place to other geographic areas."

There is no dispute that the grievance involves employee(s) who were authorized to work away from their permanent reporting places within the meaning of Article XIV.

The narrow issue is whether payment of the "meal allowance" under Section 8 of Article XIV may be conditioned by the Company on the production of meal receipts.

A hearing was held on December 13, 1991 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 and the parties filed post-hearing briefs.
In its entirety, Article XIV reads:

ARTICLE XIV

TRAVEL TIME, CONDITIONS AND EXPENSES

Section 1

Employees authorized to work away from their permanent reporting place to other geographic areas will receive in addition to their base pay the following conditions and expenses:

Section 2

Transportation to and from these locations will usually be made by common carrier or company vehicles, with costs to be paid or reimbursed by the Company, however, if the employee is required to use his personal vehicle he will be paid the standard mileage reimbursement rate specified in Article XV, Section 1.

Section 3

The Company will make all living arrangements for employees on board and lodging assignments and those arrangements must be of proper standard. An employee will be deemed to be on board and lodging assignment when said assignment to a job site is outside a sixty (60) road mile radius from both the employee's permanent reporting point and the employee's home. If an employee elects to return to his home using his own vehicle, he will receive thirty-five dollars ($35.00) in lieu of any board, lodging, mileage, and/or other per diem compensation.

Section 4

Should these temporary assignments last for more than five (5) calendar days, such employees will be able to make phone calls not to exceed fifteen dollars ($15.00) per week at Company's expense; provided Company facilities will not be available after normal business hours for usage.

Section 5

Should such assignment within the Continental United States last four (4) weeks or longer, then such employees shall be allowed one (1) trip home at Company's expense, on the second or third weekend of such assignment and an additional trip home every third weekend thereafter with transportation costs to be paid by the Company.
Section 6

The Company will not schedule airline travel which is more than eight (8) hours in any one day. Pay for time spent traveling will be at straight time. Where delay or emergency occurs, pay will not exceed eight (8) hours. When an employee requests to use his personal vehicle, and permission is granted, average airline travel time will be used for purposes of pay under this Article.

Section 7

If the employee elects to go to his permanent location on either a holiday or weekend, the employee will be allowed expenses up to that designated as his standard per diem; or alternatively, no more than the actual cost to maintain the employee during this time away from the permanent location.

Section 8

Meal allowance will be as follows:

<table>
<thead>
<tr>
<th>Meal</th>
<th>Allowance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breakfast</td>
<td>$ 7.00 per day</td>
</tr>
<tr>
<td>Lunch</td>
<td>$ 8.00 per day</td>
</tr>
<tr>
<td>Dinner</td>
<td>$15.00 per day</td>
</tr>
</tbody>
</table>

Reasonable allowances will be maintained during less than full day assignments. The above will not apply if the Company provides/pays for meals as a part of the assignment.

Section 9

It is not the intention of the Company to permanently reduce the existing bargaining unit by transferring employees in and out of this geographical area; provided, however, the Company retains the right to assign and transfer employees into and out of this geographical area.

Permanent transfers shall first be on a voluntary basis by each job classification (where such volunteers are qualified). When a qualified volunteer cannot be found, the Company shall have the right to require the lowest seniority employee in the job classification (who is qualified) to take such transfer. Temporary transfers can be up to six months duration. Temporary transfers shall first be on a voluntary basis by each job classification (where such volunteers are qualified). When a qualified volunteer cannot be found the Company shall have the right to require the lowest seniority employee in the job classification (who is qualified) to take such transfer. The Company may assign any employee in a job classification on a temporary basis.
Section 10

An employee on a board and lodging assignment of five (5) calendar days or more will be allowed fifteen dollars ($15.00) per week for laundry allowance.

Section 11

Receipts must be provided to receive reimbursement for all expenses over four dollars ($4.00). Travel by common carrier is to be at coach or, if available, special discount/excursion fares.

The Union contends that the contractual payments for meals of $7.00 per day for breakfast; $8.00 per day for lunch; and $15.00 per day for dinner are as the Section states, an "allowance" and not an "expense." And as such, is not subject to the Section 11 requirement that "receipts must be provided to receive reimbursement for all expenses over four dollars ($4.00)" (emphasis added). This contract interpretation is supported, the Union claims by a past practice under which the meal allowance was regularly paid without the employees providing meal receipts, and that this practice obtained for many years until 1990 when the Company issued a memorandum setting forth the receipt requirement (which generated the instant grievance(s)).

The Company contends that the contract language is clear; that each monetary benefit of Article XIV and any Section thereof constitutes an "expense" within the meaning of Article XIV and Section 11. And that that includes the "meal allowance" of Section 8.

It argues that with the contract language clear, any practice to the contrary is not controlling and that even if any such practice existed, it was properly ended by the Company's 1990 system-wide memorandum enforcing the contract prospectively. Alternatively, the Company asserts that there has been no discernable or probative past
practice. It claims that the practice with regard to receipts for the meal allowance for meals in excess of $4.00 differ from one Company location to another. Some locations or departments required receipts, others did not. And that therefore, contrary to the Union's claim, there has been no consistent practice supportive of the Union's contract interpretation.

Additionally, the Company asserts that at bargaining, the Union complained of the uneven and inconsistent practice regarding receipts for the meal allowance; demanding that the Company act consistently. In response, the Company told the Union it would enforce its contract right to require receipts, and thereafter, issued its memorandum in implementation.

Finally, the Company also claims that at bargaining, the Union demanded that Section 11 be dropped from the contract, but failed to obtain that result. The Company interprets that to mean that, though, the bargaining notes introduced into evidence at the arbitration do not reflect specific discussion about the meal allowance or the requirement for receipts, the Union recognized the continued applicability of Section 11 to all the monetary benefits under Article XIV, including the meal allowance.

I conclude that I do not have to resolve the conflicting testimony over past practice or the differing views and interpretations of the bargaining history, because I do not find the relevant contract Sections to be ambiguous.

Rather, I find them clear and therefore enforceable as written, irrespective of past practice or bargaining history.
Obviously, Section 1 is introductory and applicable to all the Sections, 2 through 10 that follow. It expressly provides that in addition to their base pay, employees "will receive...the following conditions and expenses" (emphasis added). The word "following" must apply to the Sections that follow, namely Sections 2 through 10.

I am also persuaded by logic and traditional contract construction that the word "expenses" in the phrase "following...expenses" applies to all the enumerated monetary benefits employees who "work away" receive in addition to their base pay and that the language "following...conditions" applies to all of the other operational aspects of the "working away" assignment referred to in any of the succeeding Sections.

Section 1 makes no exception to or exclusions in its reference to "expenses." The Union acknowledges that the Company has the right to require receipts for expenditures in excess of $4.00 for all the monetary benefits in all the Sections except Section 8. Significantly to my mind, the Union concedes that receipts may be required for the "laundry allowance" set forth in Section 10. As I have found the contract language clear and unambiguous, the Union's distinction, based on past practice, between the laundry allowance and the meal allowance, is immaterial. The fact is that under the clear language of Section 1 referring to the "following expenses," the laundry allowance was treated by both sides as an "expense" and receipts were and may be required for reimbursement. That Section 1 intended to include all the monetary benefits as "expenses," including the meal allowance as well as the laundry allowance, is further supported by the final Section -- Section 11. That Section
is conclusory. It refers back to all the preceding Sections. Just as all the monetary benefits of the succeeding Sections are encompassed in the introductory Section 1, Section 11 summarizes and encompasses all the Sections that precede it, 2 through 10. And it sets forth requirements that attach to each of them. These requirements are two-fold. First it too provides no exception to or distinction from "expenses," and therefore like Section 1, makes itself applicable to the meal allowance as an expense. And, secondly on an encompassing basis, it limits reimbursement of the monetary benefits or expenses of all the preceding Sections to circumstances where a receipt is provided for costs in excess of $4.00.

Finally, the semantic distinction which the Union makes and relies on between "expenses" and an "allowance" is simply not supported by dictionary definition. The Random House Dictionary of the English Language defines "allowance" as "a sum of money allotted or granted for a particular purpose, as for expenses" (emphasis added). Clearly, the meal allowance fits precisely within that definition as an expense.

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

The Company did not violate Article XIV of the contract by its requirement that employees provide receipts for meals
costing in excess of $4.00 while said employees are "authorized to work away from their permanent reporting place to other geographic areas."

Eric J. Schmertz, Arbitrator

DATED: March 30, 1992

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

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

The grievance of Albert Pollack is not arbitrable.

Eric J. Schmertz, Arbitrator

DATED: May 1, 1992

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

between

Local 153, Office and Professional Employees International Union

-and-

Wesleyan University

In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and University, the Undersigned was selected as the Arbitrator to hear and decide the following stipulated issue:

Is the grievance of ROGER RAYMOND arbitrable?
If so, did the University violate Article IX of the collective bargaining agreement when it failed to award ROGER RAYMOND the job vacancy of working foreman-grounds? If so, what shall be the remedy?

A hearing was held at the University on March 31, 1992 at which time Mr. Raymond and representatives of the Union and University 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.

During the course of the hearing, the Union and Mr. Raymond withdrew the grievance with prejudice.

The University agrees that no action will be taken against Mr. Raymond as a result of his application for the job vacancy, or because of his filing of a grievance, or because of his testimony at the arbitration.
The foregoing two paragraphs and the arrangements referred to therein are hereby officially recorded in this Case Disposition.

Eric J. Schmertz, Arbitrator

DATED: April 1, 1992

STATE OF NEW YORK )
COUNTY OF NEW YORK )

ss.

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

between

Local 153, Office and Professional Employees International Union

-and-

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The foregoing two paragraphs and the arrangements referred to therein are hereby officially recorded in this Case Disposition.

Eric J. Schmertz, Arbitrator

DATED: April 1, 1992

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.