includes a markup for uncompensated care, a surcharge to make up the difference between the DRG rate and the lower rate hospitals are reimbursed for treating Medicare patients, and an extra fee to recoup money lost through discounts to other plans.

Those DRG add-ons "force the Benefit Plans to incur costs for the benefit of others" if the plans provide benefits to pay the full DRG rate, the court said. "ERISA itself forbids benefit plans from paying benefits for anyone other than a plan beneficiary."

The New Jersey regulations allow for appeals by individuals whose DRG costs exceed the actual cost of their hospital care by more than $250, but only if their third-party insurer reimburses the hospital according to DRG rates.

"Again, only if the Benefit Plans choose to ignore the dictates of ERISA and pay DRG rates can the beneficiaries avail themselves of an appeal," the court said. "This lack of parity with other hospital payors arises because of a Benefit Plan's administration and it is this relationship that undergirds the argument in favor of pre-emption."

The court's ruling lends new urgency to calls for changing the way New Jersey delivers and finances health care. "We're hoping to force the issue, so the hospitals will decide they have to come up with some other funding mechanism to pay for uncompensated care in New Jersey," state AFL-CIO President Charles Marciante told BNA in an April interview about the case.

The state's much-maligned system of funding uncompensated care through a surcharge on paying patients' hospital bills has been renewed each time it has expired, despite pleas from business, labor, hospitals, and health insurers for enactment of a broad-based funding mechanism. Organized labor has pushed hard for a 1 percent payroll tax, but employer groups refuse to consider such a measure in the absence of a complete overhaul of the health care system.

The uncompensated care markup law is due to expire June 30, but lawmakers May 7 approved legislation extending it indefinitely. Florio has until June 22 to act on the bill. An administration source said the governor may conditionally veto the measure, telling lawmakers he will agree to a temporary extension, but only if certain reforms are enacted. Among the changes Florio has proposed are requirements that all commercial carriers in New Jersey sell health insurance to anyone who requests it, at rates established without regard to the applicant's age, sex, health status, occupation, or geographic location.

EMERGENCY BOARDS RAIL PROPOSALS

Reports issued May 28 by three presidential emergency boards appointed to recommend resolution of contract disputes involving more than 20,000 railroad workers in many respects follow the contract package applied to railroad workers last year on the recommendation of a separate presidential panel.

The 1991 rail settlement, which covered more than 100,000 workers on major freight carriers, initially formed the basis of new contract agreements between three rail unions and the carriers, and its terms were ultimately imposed on another eight unions after a one-day strike and the ruling of a second panel. The second panel was created under strike-ending legislation adopted by Congress on the day of the walkout in April last year.

The three new reports cover contract disputes involving 7,800 workers on the freight carriers represented by the International Association of Machinists, 5,200 members of the
Brotherhood of Maintenance of Way Employees on Conrail, and 7,500 workers on Amtrak represented by six different unions.

None of the current agreements were subject to last year’s recommendations, although negotiations in both instances date back to 1988. The IAM broke out of the major freight settlement process last year when the other 11 unions involved agreed to a special procedure for sending the outstanding issues to the presidential emergency board.

If settlements are not reached, unions in the current disputes will be free to strike at the end of a 25-day cooling-off period at 12:01 a.m. June 24. Managements would be free to impose new contract terms at the same time.

Reports Receive Mixed Reception

Carrier representatives generally welcomed the reliance of the current boards on last year’s settlement, while unions assessed the reports less favorably. In a statement issued by Amtrak, however, that carrier said the board’s failure to recommend “many of the work rule changes” it proposed will make that board’s recommendation “financially difficult to implement.”

The recommendations in the Amtrak dispute varied more than the others from last year’s rail settlements. Much of the Amtrak report, including the recommended wage package, was modeled on contract agreements already reached between Amtrak and unions representing about 63 percent of its union-represented workers. Those agreements have included richer wage packages than last year’s freight settlement in exchange for work rule relief.

Amtrak said the recommendations, however, “should provide a basis for further negotiation.”

Jedd Dodd, chief negotiator for the BMWE in the Conrail and Amtrak disputes, said the recommendations of the panels “do not provide a basis for settlement.” The recommendations, he said, would reduce members’ standard of living and impose “intolerable working conditions.”

He said the union would strike if no acceptable agreement can be negotiated with management, and he urged Congress “to stay out of our dispute and permit the free exercise of collective bargaining to end this dispute.”

Edwin Harper, president of the Association of American Railroads, said that although the reports represent “no great victory,” they “offer suggestions for compromise that will allow the nation’s fragile economic recovery to be spared the debilitating effects of a nationwide rail strike.”

In releasing the reports late May 28, White House Press Secretary Marlin Fitzwater said the president hopes “these reports can form the basis for an equitable resolution of these rail-labor disputes through negotiation among the parties.”

Wage Recommendations

The Amtrak emergency board recommended that settlements with Amtrak unions provide an immediate $2,000 lump-sum payment and a 5 percent wage increase on ratification, followed by increases of 4 percent on Oct. 1, 1992; 2 percent on Jan. 1, 1993; 3 percent on Oct. 1, 1993; 4 percent on Oct. 1, 1994; and 2 percent on July 1, 1995. In addition, it calls for a cost-of-living formula to begin paying increases each six months as of July 1, 1995, while negotiations for new contracts are underway.

The board called for the Amtrak agreements, like those in the other disputes, to reopen for amendment in January 1995.

The boards’ wage recommendations in the Conrail and Machinists’ disputes, meanwhile, followed last year’s rail pattern, and called for an immediate $2,000 lump-sum increase; a 3 percent lump-sum increase retroactive to July 1, 1991; additional 3 percent lump-sum in-
the unions had argued that larger wage increases were justified, the boards said it would be "inappropriate to treat" the disputes as if they "existed in a vacuum." Endorsing the unions' wage proposals, the Conrail and Machinists boards said, "would be profoundly destabilizing to the present wage structure of the railroad industry."

The three boards recommended that health and welfare issues be resolved on the same lines as last year's rail settlement, including provisions for employee cost-sharing beginning in 1993.

Some Changes In Work Rules Recommended

The Amtrak board endorsed a number of work rule changes proposed by the carrier, while recommending that others be withdrawn from the bargaining table. It found that a management proposal for a "composite mechanic" position was premature and should be withdrawn, but said proposals seeking reductions in advance notice of change in work-force size were "needed to allow the carrier to more quickly to stabilize its forces in the event of job abolishments or displacements."

It recommended that the position of passenger fireman on Amtrak be changed to assistant passenger engineer with an additional $2.28 per hour payment, but said Amtrak's proposal to increase from four hours to five hours the running time required before such an employee must be on board should be dropped.

The Amtrak board endorsed a lower hourly rate for new yard service engineers set at 90 percent of the regular rate for the first two years of service. A proposal from the Brotherhood of Locomotive Engineers calling for a $250 monthly allowance for engineers who maintain certification, it said, should be withdrawn.

Among other recommendations, the board agreed with the BLE that meal allowances on Amtrak should be increased from the current $4.15 for employees away from home, and recommended a $5 allowance immediately, with a $1 increase in 1994. The union is seeking a $10 meal allowance.

Both the Amtrak and Conrail boards recommended approval of carrier proposals to eliminate geographic restrictions on the use of traveling work gangs represented by the BMWE. The use of high-technology equipment by these workers justifies removing the restrictions, the boards said. The BMWE argued that the removal of geographic boundaries would place an undue burden on employees who would have to travel over extended distances.

The Conrail board also recommended that the Monday-Friday work week be replaced with a schedule that guarantees employees either Saturday or Sunday off. It also agreed that management should be allowed to schedule starting times over a broader period than the current 6 a.m. to 8 a.m. starting period.

It rejected the carrier's argument that BMWE gangs should not be paid for travel time from camp units to work sites, but said 15 minutes of travel time each way could be unpaid.

The three emergency board were chaired by Benjamin Aaron. Also serving on all three boards were David Twomey and Eric Schmertz. Arnold Zack and Preston Jay Moore both served on the Conrail and Amtrak boards. All the panel members are labor-management arbitrators.

Copies of the three emergency board reports are available for a fee from BNA Plus; the toll-free nationwide telephone number is 1-800-452-7773; or (202) 452-4323 in the Washington area.
The PORT AUTHORITY seeks the discharge of RUSSELL BALLANTYNE for testing positive for use of marijuana.

BALLANTYNE, hereinafter referred to as the "grievant" is a Structural Maintenance Mechanic which he and the Authority agree is a safety sensitive job. He entered the Authority's Employee Assistance Program after he was found by Authority police in possession of marijuana cigarettes. Over almost two years in the Assistance Program he was regularly and at times randomly tested for drug use. Except for the beginning of almost two years of surveillance, and except for the test that is the subject of this case, his drug tests were negative. With about two months remaining in the two year program, on April 21, 1992, he was tested. The report of that test, made known on April 24, 1992, was positive for marijuana.

At the time he requested but was denied a new urine test. But the Authority agreed to retest the same urine sample. The result of the retest of the same urine specimen was also positive. Those tests are the subjects of this proceeding.

The grievant denies the use of marijuana found in his urine from the April 21st test and the retest of that specimen. He asserts that he
was exposed to "passive inhalation" of marijuana for several hours at a party he attended in a small, closed basement area, where there were about fifty guests, three quarters of whom smoked marijuana continuously. In support of this defense, he submitted into evidence, without Authority objection, except the observation that they were hearsay, sworn statements from two guests at the party affirming the extensive use of marijuana at the party, the heavy concentration of marijuana smoke, and the close and crowded conditions.

Apparently, if the grievant had admitted the allegations, he would have been referred back to the Employee Assistance Program and given another chance to complete it successfully while retaining his employment with the Authority.

But because he denies the charges he was advised by his attorney not to continue in the program as that would be construed as an admission of the charge. Instead, though he continued to meet with medical representatives of the Authority and was and is willing to continue to be tested, he has not participated further in the formal counseling aspects of the Program.

I agree with the medical testimony of the Authority that bare, external exposure to or passive inhalation of marijuana smoke would not produce the positive results found in the grievant's system as a result of the April 21st test, unless the exposure was intense; heavily concentrated over an extended period of time, and from a small, closed and unventilated location.
The problem with that position by the Authority is two fold. First, the grievant's testimony and the "hearsay" affidavits of three guests at the party assert the factual existence of just those conditions. And, more significantly, the Authority's physician acknowledged the possibility of the low positive level of the grievant's test if the exposure and passive inhalation were of the nature and magnitude claimed by the grievant and supported by the affidavits. Dr. Segal's only reservation to that acknowledgement was that under those intense circumstances, the grievant would have became "high." And, because in this case there is no evidence of that effect on the grievant, his story of exposure and passive inhalation cannot be believed.

Both sides have submitted scholarly and medical citations relating to the effects of passive exposure and passive inhalation of marijuana. I deem these citations to be offsetting and hence inconclusive either way. The material introduced by the Authority support its skepticism and rejection of the grievant's explanation. Contrariwise the articles introduced by the grievant support the plausibility of his defense.

Instead, what I deem probative is the grievant's unrefuted testimony about the overwhelming presence of marijuana smoke at the party he attended, and Dr. Segal's acknowledgement that, except for the absence of the grievant experiencing a "high," the low but positive level of marijuana found in his urine could have been produced from the conditions claimed to be present at the party, namely a marijuana smoke filled and closed small area, with continuous exposure over several hours.
With that acknowledgement and with the offsetting nature of the authoritative medical writings submitted I am not satisfied that the Authority has met its "just cause" burden for the grievant's discharge. And I am not satisfied that that burden, which an employer must meet to sustain or effectuate a discharge, has been met even in the absence of evidence that the grievant also experienced a "high." To sustain the request for discharge on the single reservation that the grievant did not experience a "high" would, to meet the burden of proving "just cause," require more evidence showing that that condition was an unvaried and absolute condition of passive exposure and inhalation that produced positive test results. Or, in other words, evidence, that unless a "high" is experienced by everyone so exposed, there was not enough exposure to produce a positive test result.

Such evidence, raising that single condition to that absolute level, has not been shown with the requisite conclusiveness in this case to meet the Authority's burden of proving just cause by evidence that is clear and convincing.

The Authority has some understandable suspicions, and frankly so do I. It suggests the grievant missed or cancelled counseling session because he was smoking marijuana and did not want to be tested at those times. It suggests that he entered the Employment Assistance Program originally, and repaired to it and sought one of its counselors after the positive result of the April 21st test, only as a cover for his marijuana use and as a protection against disciplinary action. That may be so, but, so far as this record is concerned, it is speculative and a suspicion. Speculations and suspicions are not the quality of hard evidence required by the just cause standard of proof.
Accordingly, I shall deny the Authority's request for the grievant's discharge. He is entitled to continue in the Authority's employ and he shall be reinstated. However, I do not find that he is entitled to back pay. In his testimony he stated that not only did he not smoke or use marijuana during the relevant surveillance period of the Assistance Program, but knew he should avoid locations and circumstances where marijuana was used by others. He even testified that he was concerned about going to rock concerts because marijuana was smoked there. And though he testified that the Assistance Program counselors told him that he could attend those concerts, he relies on this sensitiveness to marijuana exposure to support his assertion that he did not use it just prior to the April 21st test.

That being his position, I can find no justification for his attendance at, or especially his continued presence at a party at which marijuana was extensive smoked and where marijuana smoke permeated the area for several hours. That he remained at that party under these conditions is manifestly inconsistent with his acknowledged understanding that he should not (and would not) expose himself to these conditions. Indeed, I accept the Authority's assertion that part of the Assistance Program included the admonition to avoid these circumstance. That he did not quickly leave the party when the intense presence of marijuana had become apparent was inconsistent with what he knew or should have known was expressly or impliedly proscribed by the Assistance Program. Clearly, that his counselors let him attend an open-air rock concert, was not a license to remain in a small, close, marijuana smoked filled room (in a basement) for several hours. I am satisfied that the grievant knew or should have known the distinction, but did not conduct himself either accordingly or appropriately.
I consider that an offense that does not justify his discharge, but which does justify a disciplinary suspension for the period of time that he has been suspended from work and for which he has not been paid.

The Undersigned duly designated as the Hearing Officer, and having duly heard the proofs and allegations of the grievant and the Authority, makes the following AWARD:

The Authority's request that RUSSELL BALLANTYNE be discharged is denied. Just cause has not been proved for that penalty. However, though BALLANTYNE shall be restored to active employment, it shall be without back pay. The period of time between his present suspension and his reinstatement to active employment shall be deemed a disciplinary suspension, for which I have found there is just cause.

Eric J. Schmertz, Hearing Officer

DATED: September 25, 1992

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.
October 23, 1992

Laurie J. Fornabai, Esq.
Port Authority of NY & NJ
Law Department
One World Trade Center
New York, New York 10048

Timothy M. Donohue, Esq.
Arseneault, Donohue, Sorrentino
& Fassett
560 Main Street
Chatham, New Jersey 07928

Re: Ballantyne/Port Authority Arbitration

Dear Ms. Fornabai and Mr. Donohue:

This is in reply to your respective letters of October 8 and October 15, 1992.

Whether Mr. Ballantyne is obligated to continue in the EAP depends on what his status was at the time that he was suspended.

If at that time, he still had a period of time to go to complete his EAP commitment, he remains obligated to do so now. However, if at the time of his suspension he had completed his EAP commitment, he is not obligated to continue in the program under my Award.

This clarification does not limit the Authority's right to require further EAP commitments from Mr. Ballantyne if there are further violations of the Authority's drug policy.

Very truly yours,

Eric J. Schmertz

EJS/ps
In accordance with Exhibits L and M (Major Disciplinary Proceedings - Impartial Hearing Officer) of the collective bargaining agreement between the Port Authority and the Maintenance Division of the Building and Construction Trades Council of Greater New York, and Port Authority Instruction 20-1.10, the Undersigned was selected as the Impartial Hearing Officer to hear and decide disciplinary charges against William P. Kernochan.

A hearing was held on May 6, 1992 at which time representatives of the Port Authority appeared, as did a representative of the above-named Union. Mr. Kernochan did not appear, though he received due notice of the hearing and had told his Union representative that he intended to appear. On the Port Authority's motion, the hearing proceeded in his absence.

The Port Authority seeks Mr. Kernochan's dismissal. The record amply establishes the Authority's right to do so.

Mr. Kernochan's job as a Trades Helper requires that he possess a valid drivers license. It is undisputed that Mr. Kernochan's license has been suspended for what appears to be an extended period of time prospectively, if not indefinitely.
He has at least 24 points on his suspended license. On that ground alone he is presently unqualified to perform his job and there is not reasonable prospect that he will be able to perform it any time in the future. The suspension of his license, due to operating violations on his part, make him the architect of his own disqualification.

Additionally, he has an extensive prior disciplinary record for this and other offenses, for which he was disciplined on a progressive disciplinary basis.

For the foregoing reasons, the Port Authority has just cause to discharge Mr. Kernochan from its employ.

The Undersigned, duly designated as the Impartial Hearing Officer makes the following decision:

The Port Authority has grounds to discharge William P. Kernochan. Its request for a ruling permitting it to do so is granted.

DATED: May 9, 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 Port Authority seeks the discharge of Racquel Galeano for excessive absenteeism and for Absence Without Leave.

A hearing was held on July 30, 1992 at which time representatives of the Port Authority and Local 1400 Transport Workers Union of America appeared. Ms. Galeano failed to appear.

I am satisfied that Ms. Galeano received due and legal notice of the hearing. The Port Authority introduced evidence of notices of the Intent to Discharge and the Charges and Specifications, together with notices of the hearing date, time and location, sent to Ms. Galeano by registered mail to her address as recorded in the Port Authority's records, and evidence of return receipt cards signed by members of Ms. Galeano's family. Moreover, the Port Authority introduced evidence showing that Ms. Galeano personally requested an adjournment of the hearing originally scheduled for an earlier date; evidence that the Port Authority granted her request and rescheduled the hearing for July 30, 1992 and sent her due notice thereof.

The Port Authority introduced evidence of Ms. Galeano's absentee records during 1990, 1991 and 1992 and a report of Formal Counselling given to her in June 1991 in which she was warned of the consequences of a failure to improve her attendance record.
Additionally, the Port Authority cites Section VI of the MOA expressly incorporated in the collective bargaining agreement with Local 1400 TWUA, (Ms. Galeano's bargaining agent), providing for a waiver of the right to a disciplinary hearing in the event of failure to appear at said hearing after due notice. On this latter ground alone, the Port Authority argues that Ms. Galeano should be forthwith terminated.

In the absence of Ms. Galeano, her Union representatives who were present to represent and defend her, were unable to and therefore did not contest the foregoing evidence introduced by the Port Authority.

 Accordingly, on all the grounds advanced by the Port Authority, and especially the fact that Ms. Galeano has been AWOL from February 21 to the present date, I deem that Ms. Galeano has abandoned her job with the Port Authority, and the Port Authority has just cause to formally discharge her from its employ.

**AWARD**

The Port Authority's request that Racquel Galeano be discharged, is granted.

Eric J. Schmertz
Impartial Hearing Officer

DATED: August 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 Port Authority seeks the discharge of Racquel Galeano for excessive absenteeism and for Absence Without Leave.

A hearing was held on July 30, 1992 at which time representatives of the Port Authority and Local 1400 Transport Workers Union of America appeared. Ms. Galeano failed to appear.

I am satisfied that Ms. Galeano received due and legal notice of the hearing. The Port Authority introduced evidence of notices of the Intent to Discharge and the Charges and Specifications, together with notices of the hearing date, time and location, sent to Ms. Galeano by registered mail to her address as recorded in the Port Authority's records, and evidence of return receipt cards signed by members of Ms. Galeano's family. Moreover, the Port Authority introduced evidence showing that Ms. Galeano personally requested an adjournment of the hearing originally scheduled for an earlier date; evidence that the Port Authority granted her request and rescheduled the hearing for July 30, 1992 and sent her due notice thereof.

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Additionally, the Port Authority cites Section VI of the MOA expressly incorporated in the collective bargaining agreement with Local 1400 TWUA, (Ms. Galeano's bargaining agent), providing for a waiver of the right to a disciplinary hearing in the event of failure to appear at said hearing after due notice. On this latter ground alone, the Port Authority argues that Ms. Galeano should be forthwith terminated.

In the absence of Ms. Galeano, her Union representatives who were present to represent and defend her, were unable to and therefore did not contest the foregoing evidence introduced by the Port Authority.

Accordingly, on all the grounds advanced by the Port Authority, and especially the fact that Ms. Galeano has been AWOL from February 21 to the present date, I deem that Ms. Galeano has abandoned her job with the Port Authority, and the Port Authority has just cause to formally discharge her from its employ.

**AWARD**

The Port Authority's request that Racquel Galeano be discharged, is granted.

Signature

Eric J. Schmertz
Impartial Hearing Officer

DATED: August 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 Port Authority seeks the discharge of Richard Flippen for substantial violation of the General Rules and Regulations for all Port Authority Employees as set forth in the Charges and Specifications dated June 5 and June 9, 1992 and introduced into evidence as Authority Exhibit #1.

A hearing was held on October 9, 1992 at which time Mr. Flippen, hereinafter referred to as "Flippen" and representatives of the Port Authority, hereinafter referred to as the "Authority" and the Building and Construction Trades Council, hereinafter referred to as the "Union," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Flippen admits the charges and specifications with an explanation. He explains that he committed the acts charged because of a drug habit which had become increasingly expensive.

The Hearing Officer's role and jurisdiction is to decide whether the offenses were committed by the employee charged and if so, whether that offense(s) constitutes cause for discharge. In the instant case, the answer to both parts of that question is in the affirmative.
The Charges and Specifications against Flippen and which he admits are essentially charges of theft. If there is anything well settled it is that theft of the admitted magnitude in this case is cause for discharge irrespective of the employee's prior record. And, if as here the employer decides to request that penalty the Hearing Officer has no right to substitute a different judgment for the exercise of that right.

Mitigation of the penalty may be awarded by the Hearing Officer only if the charges are not fully proved or admitted and if the penalty of discharge is not appropriate for the offences. That is not the situation here. Under the circumstances where as here the charges have been admitted and where they constitute recognized grounds for discharge, mitigation of that penalty is for the Authority to consider, not for the Hearing Officer to order.

Flippen and his Union on his behalf made eloquent pleas for compassion and for another chance for him. It appears that he may have overcome his drug abuse habit and has rehabilitated himself enough to be free of the circumstances which he claims caused his misconduct. He is an employee of almost 30 years services with a virtually unblemished record. I am most sympathetic to his personal struggle to straighten out his life, and it is fervently hoped that he will succeed. However, no matter how understanding of his problem I may be, the fact remains that he committed a summary dismissal offense for which
the Authority has the right, which its chooses to invoke, to discharge him. I find that I have no choice but to sustain the Authority's right to do so.

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

The Port Authority's request that Richard Flippen be discharge is granted.

Eric J. Schmertz
Hearing Officer

DATED: October 12, 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 disciplinary proceeding, the Authority seeks the dismissal of MARVIN LABERTH ("LABERTH") for his alleged violations of a Waiver Agreement dated July 18, 1991 relating to his participation in the Authority's Employee Assistance Program. The arbitration case involves a grievance by the Union protesting the Authority's refusal or failure to restore LABERTH to duty and a contention that his employment status resulting from the discipline charges constitutes an improper "suspension" under the Collective Bargaining Agreement.

There are unique legalities and facts about this case that are critically different from others arising from the Authority's Employee Assistance Program and which are determinative in deciding both the discipline and arbitration issues.

The relevant Waiver which LABERTH signed and which the Union obtained on his behalf from the Authority was, in one significant respect, different from the traditional Waiver. Certain language customarily used
previously was changed. The usual language applicable in prior cases, and for example in a similar discipline case involving ANTHONY JAMES ("JAMES") read in Paragraph E:

Prior to (employee's name) return to duty as a (job classification)...he shall undergo a urine test and will be returned to duty upon negative results and if determined to be fit for duty by the Office of Medical Services.

Under that language, as in JAMES' case, an employee was not necessarily restored to work if he tested negative for drug use but needed the additional certification of the Authority's Medical Department that he was "fit for duty." In other words, an employee could be properly and effectively barred from return to duty by a Medical Department finding that he was "unfit for duty" even if his drug test was negative.

The first draft of the relevant Waiver in the LABERTH matter followed that traditional form. Paragraph E of the unsigned draft read:

Prior to LABERTH's return to duty as a Building and Grounds Attendant at Newark Airport, he shall undergo a urine test and will be returned to duty upon negative results and if determined to be fit for duty by the Office of Medical Services.

However, explicitly at the request of the Union, the language was changed for LABERTH in the final Waiver which he, the Union and the Authority ultimately executed. The pivotal language of Paragraph E of his Waiver read:

Prior to LABERTH's return to duty as a Building and Grounds Attendant at Newark Airport, he shall undergo
a urine test and will be reinstated to duty upon negative results.

Specifically, and as a result of direct negotiations between representatives of the Union and the Authority, the last part of the traditional Paragraph E, namely the provision "and if determined to be fit for duty by the Office of Medical Services," was deleted. The record shows that it was deleted expressly in the LABERTH case because the Union told the Authority that it did not want LABERTH confronted with what happened to JAMES. Apparently, JAMES tested negative for drugs but was denied restoration to duty because the Medical Department found him unfit, nonetheless.

This Arbitrator did not change Paragraph E of the Waiver in the instant case, nor did he participated in any of the negotiations leading to that change. The parties did it themselves, directly, unambiguously and specifically for the LABERTH situation. The participating representatives of the parties are knowledgeable and sophisticated. The conclusion is inescapable. They intended to permit LABERTH to return to work upon and following a negative drug test. It could have been but was not conditioned on his cooperation or compliance with other aspects of the program at the time he tested negative. It was not conditioned on a series of negative tests or negative results for any specific period of time. Rather, it was written in the singular. Unambiguously, it provides for restoration to duty on the occurrence of a single event, a negative test, the balance of his record and/or compliance with the Employee Assistance Program up to that point notwithstanding.

Put another way, at the point that his drug test was negative, and in the absence of any disciplinary action for other alleged violations of the Waiver up to that point (such as absenteeism from the program
sessions or other examples of lack of cooperation) the single event of a negative test required his restoration to duty. Therefore, the Authority's reliance on other alleged violations before the negative test and for which no disciplinary charges were filed or pursued, would be misplaced.

It is undisputed that LABERTH underwent a urine test on July 18, 1991 and that the test was reported negative on or about July 22, 1991. I conclude that he should have been restored to duty at that point. Subsequent events and allegations of failure to comply with Employee Assistance Program requirements are per force irrelevant to whether or not he should have been returned to work on the earlier date.

In that connection, had he been restored to duty in accordance with that specially worded Waiver, the subsequent events which triggered the disciplinary case, specifically the Medical Department's directive that he attend an in-patient drug rehabilitation program prior to being found fit for duty and before he could return to work, would not have taken place. Logically, therefore, the disciplinary action arising from that latter event is mooted, making it unnecessary to deal with the Union's grievance charging an unjust "suspension."

Remaining is the matter of remedy. Frankly, I agree with the Authority that LABERTH has not shown that he is free of a cocaine habit. Considering his entire medical history, I am not persuaded that had he been restored to duty he would have worked from that point to now drug free. Indeed, considering his medical record and his several compliance failures during an earlier Waiver period, (i.e. absenteeism from and cancellation of program and treatment sessions) the presumption is otherwise, at least in my mind. Therefore, I consider it unfair to the Authority, if not unjust, and probably an unjustified enrichment to
LABERTH to order his reinstatement with back pay. I choose not to totally ignore his overall record or the events following July 22, 1992. The appropriate remedy in my judgement, on both legal and equitable grounds under the particular circumstances of this case, is that he be reinstated but without back pay.

The Undersigned, duly designated as the Hearing Officer of the disciplinary charges and the Arbitrator under the arbitration provisions of the Collective Bargaining Agreement, and having duly heard the proofs and allegations of the above-named parties makes the following Decision and AWARD:

MARVIN LABERTH shall be restored to duty as a Building and Grounds Attendant at Newark Airport but without back pay.

Eric J. Schmertz, Arbitrator

DATED: January 29, 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

Air Line Pilots Association and Trans World Airlines

AWARD

Case No. TWA 056-90

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

The Company did not violate Section 6(B) and related sections of the Agreement when it terminated the Student Captain Training Program of William H. Fountain and assigned him to permanent Flight Engineer status.

STATE OF New York
COUNTY OF New York
September 1992

Eric J. Schmertz
Neutral Referee

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

STATE OF
COUNTY OF
September 1992

M. M. Fliniau
Concurring

I, M. M. Fliniau do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
STATE OF                     B. K. Miller
COUNTY OF                     Concurring
September 1992

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

STATE OF                     D. H. Brown, Jr.
COUNTY OF                     Dissenting
September 1992

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

STATE OF                     J. R. Dell Isola
COUNTY OF                     Dissenting
September 1992

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

between

Air Line Pilots Association

and

Trans World Airlines

OPINION

of NEUTRAL REFEREE

Case No. TWA 056-90

The stipulated issue is:

Whether or not the Company violated Section 6(B) and related sections of the Agreement when it failed to afford William H. Fountain a fair and adequate opportunity to complete his Student Captain Training Program and assigned him to permanent Flight Engineer status?

Hearings were held in St. Louis, Missouri on March 26 and 27, 1992, at which time Mr. Fountain hereinafter referred to as the "grievant" and representatives of the above-named Company and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

Captains D. H. Brown, Jr. and J. R. Dell Isola served as the Union members of the Board of Arbitration. Captains M. M. Fliniau and B. K. Miller, served as the Company members of the Board. The Undersigned was selected and served as the Neutral Referee.

The Oath of the Arbitrators was waived; a stenographic record of the hearing was taken; the Union and the Company filed post-hearing briefs; and the Board of Arbitration met in executive session on August 26, 1992.
Section 6(B) of the Agreement reads in pertinent part:

When a pilot fails initial upgrading to qualify as Captain or First Officer, the pilot will be assigned to the Flight Engineer status at his/her permanent domicile and shall not thereafter be eligible to exercise a bid to a higher status nor shall the pilot be eligible for the prerogatives of Section 6(D)(6) and (7) below. Further such pilot shall not be eligible to serve in the international relief officer position. Pilots assigned hereunder may exercise their rights under Section 21.

Also relevant and relied on by the Union are certain Sections of the Company's Line Standards Guide, specifically subparagraphs a. and b, which read:

a. The following requirements will govern the line qualification of captains on TWA aircraft in addition to the requirements outlined in the Airman qualifications section of the Flight Operations Policy Manual:

(1) Satisfactory completion of seventy (70) hours programmed line operating experience with a line check airman. If performance during line flying is above standard, the line check airman, with the concurrence of the General Manager - Flying, may recommend a semifinal line check after 35 hours.

b. Normally this program should be sufficient to establish the potential of the student captain for promotion to captain status. However, at the discretion of the General Manager - Flying, an additionally reasonable amount of line operating experience, normally not to exceed thirty (30) hours, may be prescribed. Upon satisfactory completion of this additional line time, a satisfactory semi-final and/or final line check must be completed.

The Company removed the grievant from the DC-9 Captain Training Program after forty-eight hours and forty minutes for what the Company characterizes as a "dangerous lack of situational awareness." Pursuant to Section 6(B), he was disqualified from
any further attempt to qualify as a Captain, and assigned permanently to Flight Engineer status.

As the stipulated issue indicates, the Union asserts that the Company erred by failing to accord the grievant at least 70 hours in the program. It claims that but for a final unsatisfactory rating by Captain Schaefer (the grievant’s last instructor), relating to a landing attempt in St. Louis on October 24, 1991, the grievant was progressing adequately. It asserts that his ratings by his instructors were at least minimally satisfactory to continue him in the program; it disputes the alleged errors of October 24th and that, like other student pilots "similarly situated" the grievant would have qualified had he been allowed to remain in the Program the "prescribed" 70 hours. Or, alternatively, he would have qualified if accorded the additional 30 hours contemplated by Section b. of the Guide.

Additionally, the Union points to certain steps within the Program, as set forth in the Guide, with which it claims the Company failed to comply, such as not sending the grievant "back to the simulator" after he made errors on Flight 669, and not giving him the "opportunity to have an evaluation ride," as examples of unfairness and procedural defects which should nullify the termination of the Program and the grievant’s disqualification.

In support of its contention that the grievant was showing adequate competence and progress, the Union cites the fact that he "has FAA type ratings on the B-757, B-747 and DC-9" and has worked
as "First Officer on the B-707, B-727 and B-767" with more than 6000 hours in that capacity.

The Union discounts any benefit the grievant may have obtained from an earlier DC-9 Student Pilot Training Program, which he undertook unsuccessfully, some fourteen months earlier. It claims that the fourteen intervening months were in fact prejudicial to the grievant's abilities as a pilot, because, assigned during that period as a Flight Engineer, his piloting skills eroded. And, as that earlier disqualification was set aside, the intervening months as a Flight Engineer, with attendant loss of piloting experience and skills, should have been a reason to give him more time to qualify.

The Company argues that the 70 hour training period is not a minimum guarantee. It claims, as in this case, that if a student fails to demonstrate requisite progress, ability or skill, it may terminate the Program earlier. It denies any disparate treatment of the grievant, asserting that he was demonstrably worse than others cited, and in the the Company's judgment had committed so many mistakes during the FAN, First and Second Line phases of the program, that its judgment that he would not qualify even if accorded more time in the Program was fair and reasonable.

1. His disqualification from that Program was overturned by an earlier System Board of Adjustment on procedural grounds. Pursuant to the Award of that Board, and undisputed in this case, the Company accorded the grievant the instant Training Program as a class of one, and "from the beginning."
The mistakes the grievant made, as testified to by his instructors, and on which the Company bases its case in this proceeding, are set forth both in the stenographic record and on pages 13, 14 and 15 of the Company's brief, and need not be recited here. From the record and testimony, I am not persuaded that the Company's decision to remove the grievant from the Program was based solely on the October 24th "missed landing approach at St. Louis." That may well have triggered the decision, but all of the reported errors and mistakes, which the Company cumulatively deem to show "a dangerous lack of situational awareness," were considered by the Company and were integral factors in its decision.

Aside from the St. Louis landing on October 24th, and the allegation of "flying into a thunderstorm," the facts surrounding the other cited mistakes are not seriously disputed. However, an arbitral evaluation of all of the circumstances of the alleged mistakes, is controlled by a well settled rule that is followed by a majority of arbitrators including this arbitrator. That rule is that in cases where an employee's ability and skill to perform a particular job is in question, the employer's assessment will be accorded a presumption of accuracy and validity, unless that assessment is shown to be arbitrary, capricious, discriminatory or even unreasonable. This rule, in my view, is especially applicable where, as here, the matter of safety is paramount.

Within the foregoing rule, the Company's decision cannot be found to have been improper. The Company intended to give
the grievant a full, second change to qualify. The three phases, FAM, First and Second Line were accorded him. His instructors were acceptable to him. One was the same who worked with him during his first effort, and was of his choosing the second time.

There is no claim or evidence of any illwill between the grievant and his instructors. On the contrary, the record shows that the instructors tried diligently to get him qualified and one even offered to work with him during off hours. Therefore I must find that the testimony of those instructors, including Captain Schaeffer's report of the St. Louis landing on October 24th, the testimony regarding flying into a storm, and all the other specific incidents, was truthful, accurate and objective. With that conclusion it follows that the Company's determination that the grievant "dangerously lacked situational awareness" was factually rooted and reasonable.

Therefore, unless the Company was contractually barred from shortening the grievant's Training Program by less than 70 hours, or if the grievant was treated in a disparate manner, the termination of the Program after 48 hours was proper. Nor is the earlier termination nullified by an omission of one more simulator experience or an evaluation ride. Considering the grievant's numerous mistakes and, cumulatively, his unsatisfactory rating, it has not been shown that those two experiences would have made any difference, even assuming arguendo, they were a mandatory part of the Program.

The evidence does not support a conclusion of disparate
treatment. Though the Union cites other pilots who were of questionable qualifications along the way in the Program, and who ultimately qualified after 70 or 100 hours, there has been no specific showing that they had as many difficulties as the grievant or had shown as little progress as he at relatively the same point. In short, the Company's case that the grievant was demonstrably worse than others, has not been rebutted, and that conclusion also has not been shown to be arbitrary, capricious or unreasonable.

I reject the Union's claim that he should have been given extra time or consideration because of the 14 intervening months as a Flight Engineer. At most, that neutralized, not diluted his earlier experience in the Program. I do not think it set him back, especially since the instant Training Program was "from the beginning."

That the grievant possesses certain FAA credentials and has had First Officer experience on other types of aircraft does not establish his qualifications as a DC-9 pilot. It is the Company's standards and qualifications to pilot a DC-9 that obtain and are relevant in this case, not what may be required or accepted by the FAA. And it is the ability to fly a DC-9, not another type of aircraft that is the critical question in this case.

The final question, namely whether the Company has the contractual right to terminate the Training Program before 70 hours, has been answered and settled by a prior System Board Award. In ALPA Case No. NY-84-79/Drake, the System Board, headed
by Neutral Referee Preston Moore, stated that the Program "pro-
vided no automatic right to 100 specific hours of training" and
that "The Company had the right during any step of the training
to terminate the training." To my mind, implicit of course, is
that the Company's right to terminate the instant Program before
70 hours must be based on cause and justified. With that implicit
condition, I am in full agreement with the holding in Drake.

Here, for the reasons aforementioned, the Company had cause
and justification for terminating the grievant's Training Program
short of 70 hours.

September 24, 1992  

ERIC J. SCHMERTZ  
Neural Referee
In the matter of the Arbitration between
AIR LINE PILOTS ASSOCIATION
and
TRANS WORLD AIRLINES

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

1. The Company has not proved by the clear and convincing standard of evidence required, that it had just and sufficient cause for disciplining Captain Louis A. Klemp, Jr. with a 30-day suspension.

2. That 30-day suspension is set aside.

3. For his lack of truthfulness at the hearing regarding a statement he made at the investigation, the grievant shall not be made whole for the time lost. Instead, the 30-day suspension is reduced to a 10-day suspension. He shall be made whole for the difference.
Eric J. Schmertz, Neutral Referee

DATED: July 28, 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.

John R. Dell Isola
Concurring in #1 and #2
Dissenting from #3

DATED: July 28, 1992
STATE OF NEW YORK ) ss: 
COUNTY OF NEW YORK )

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

Donald H. Brown, Jr.
Concurring in #1 and #2
Dissenting from #3

DATED: July 28, 1992
STATE OF NEW YORK ) ss: 
COUNTY OF NEW YORK )

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

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

William F. McKinney
Dissenting from #1 and #2
Concurring in #3
DATED: July 28, 1992

STATE OF NEW YORK
COUNTY OF NEW YORK

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

Darrell T. Webb
Dissenting from #1 and #2
Concurring in #3
DATED: July 28, 1992
The stipulated issue is:
Whether or not the Company had just and sufficient cause for disciplining Captain Louis A. Klemp, Jr. for the reasons assigned in Captain R.A. Pitts' letter of September 11, 1990, and if not, what shall be the remedy?

A hearing was held on February 5, 1992 at which time Captain Klemp, hereinafter referred to as the grievant and representatives of the above-named Company and Union appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Undersigned served as the Neutral Referee on the Board of Arbitration. Captains William F. McKinney and Darrell T. Webb served as the Company Board members. Captains John R. Dell Isola and Donald H. Brown, Jr. served as the Union Board members.

The Oath of the Arbitrators was waived. A stenographic record of the hearing was taken; the parties filed post-hearing briefs; and the Board of Arbitration conferred in executive session on June 26, 1992.
Captain Pitts' letter of September 11, 1990, addressed to the grievant, reads as follows:

Dear Captain Klemp:

The investigation referred to in my letter to you dated August 10, 1990, has been completed. The subject of that investigation was your absence from duty during the period 12 July 1990 through 3 August 1990.

At a meeting on 23 August 1990, we discussed your being on sick leave and absent from duty during the subject period.

You stated that you had the flu on July 10 and subsequently lower back pain on July 26; and you went on to say that you had not bothered to go to a doctor for treatment or a diagnosis of your problems.

The Company does not want its pilots flying while they are ill, but by the same token, TWA has every right to expect full-time service from its employees. Your activities during the subject period were well-publicized and did not lend themselves to the support of your status as a full-time employee at TWA. Your attempts to secure Personal Time Off for that period are documented; and that having failed, you subsequently called off schedule ill.

In summary, I find your behavior in this matter to be unacceptable. You have not provided the Company any documentation of your illness; and, worse yet, you have manipulated to deprive TWA of your full-time services. Your record indicates you have been formally counseled on two previous occasions concerning your attendance with the most recent resulting in the letter of reprimand by Captain Fallucco on February 7, 1989.

In consideration of the above, it is my intention to remove you from the active payroll (AWD) for a period of thirty (30) days. This action will be in accordance with the time limits specified in Section 21 of the Working Agreement.

As that letter indicates, and based on the Company's claim in the arbitration, the Company charges the grievant with an abuse of sick leave benefits by falsely claiming he was ill and by improperly taking
sick leave and receiving sick pay when he was actually campaigning for the Republican nomination for Governor of the State of Kansas. He faked his illness, asserts the Company, after his request for time off for that political purpose was denied by the Company and after his efforts, with the Company's assistance, to swap vacation time with other pilots, failed.

This case is replete with suspicious circumstances and circumstantial evidence which point in support of the Company's position. However, the question is whether those suspicious circumstances and the circumstantial evidence add up probatively to the clear and convincing evidentiary standard required in a disciplinary case.

First, is the coincidence of the grievant's failed efforts to be excused from work for a period of time for the acknowledged political objective and his subsequent claimed illness (flu and back pain) for virtually the same period of time.

Next is his admission that twice, while allegedly ill from flu or with severe back pains, he attended two political rallies in the furtherance of his candidacy. One was reported in the press and the other he acknowledged voluntarily.

Next is his admission that over the approximately 21-day period, with first the flu and then back pains, he did not see a physician and therefore could not supply medical substantiation of the claimed illness and disability when asked by the Company to do so upon his return to work.

Next is his statement that despite not seeking medical attention, he nonetheless took prescription pain killers which he said
disqualified him from flying in any event, and that that medication consisted of seven pills left over from an earlier back episode when he did see a doctor.

Next is the Company's claim that during the investigation by Captain Pitts of the circumstances of the absence upon the grievant's return to work, the grievant made an admission against interest by stating that he had decided that "he could not serve the people of Kansas and still fly." The Company interprets that to mean that the grievant was determined to take the time off to campaign, and as that was his overriding priority, falsely claimed illness in order to achieve that objective.

The issue is not simply whether the grievant's testimony is directly believable, but rather whether, on the totality of the evidence, the Company has met its burden of showing that he is not to be believed, by contrary evidence that meets the clear and convincing standard.

Though I, too, may harbor the same suspicions as does the Company, I cannot conclude that the requisite level of proof elevating those suspicions to probative conclusiveness, has been met.

I conclude that it is not enough to prove the charge by the bare fact that the grievant's claimed illness coincided with the period of time he had previously requested off. The record requires more evidence to find as a matter of fact that the coincidence of illness with the time he sought as personal leave, is unbelievable. That it is improbable is a fair conclusion. That it is unbelievable cannot be so concluded in the absence of further independent evidence to the contrary.

Also, evidence and his acknowledgement of participation in two political rallies at a time that he claimed he was ill with the flu or
suffering from back pains is also not enough in my view to prove the falseness of his sick leave claim. Realistically, political zealousness and ambition may be enough to permit limited campaigning in the form of appearances at two political events even if suffering from the flu or back pains. And that is what he claims. Standing alone, the claim of illness and two appearances at political rallies are not so mutually exclusive as to determinatively conclude that the latter establishes the falsity of the former.

Nor is the grievant's failure to obtain medical treatment or see a physician enough to prove the charge against him. The Company acknowledges that employees are not required to see a physician or obtain medical substantiation of illness that keeps them out of work. Here, during his absence and claimed illness, he was not directed to see a doctor, not told to obtain medical substantiation to be submitted during his absence or when he returned to work. Indeed, he and other pilots have been off work with claimed illnesses in the past without being required to see a physician or submit medical proof of the illness or disability.

Again, while unlikely that he would take prescription medication without a physician's contemporary approval, it is certainly not out of the question. Retention of pills from a prior back episode is quite possible and the use of them during a subsequent episode, without seeing the doctor, though unwise, is not unusual or even uncommon. Despite lingering suspicions, I cannot conclude, based on the hard evidence, that his testimony in that regard was false.

In fact, much of what the Company relies on, namely the grievant's explanations, cut both ways. Certainly he knew, after his
request for time off was rejected, that if he took the time anyway with a false excuse of illness and disability, that claim would be closely scrutinized by the Company. And unless he could dispel the Company's skepticism, he would be in danger of discipline. That being so, it seems to me, he would have taken steps to prepare and present a better defense, albeit a false one, if in fact, his claim of illness and disability was untrue. Why, for example, one may logically ask, would he have put himself in an obviously precarious position for what he must have known and the record discloses, was at best a long shot political campaign. His candidacy did not have organizational support. He was not recognized as a major contender, and ultimately withdrew from the race before the primary. In short, the circumstances are more questionable and illusive than conclusive. As each of the foregoing circumstances flow from the single claim -- namely that he was ill and disabled, their cumulative effect is no more determinative than each separately.

I am troubled by the grievant's denial that he said to Captain Pitts that he "couldn't serve the people of Kansas and still fly." I see no reason why Captain Pitts would not have remembered that statement and no reason why Captain Pitts would fabricate it. But, more importantly, the statement is not so lacking in ambiguity as to be the admission against interest attributed to it by the Company. It is subject to two interpretations. The first is an admission that he had decided to take off from flying to campaign and to do so under any circumstances. The conclusion from that is that his claim of illness and disability was false. The other interpretation is that it applied to his original application for time off. Meaning, that he asked for the time off because he recognized he could not campaign for the Governorship and fly at the same time. The record before me is not clear enough to decide what the
statement referred to and to what point in the history of this event it obtained. As such it retains an inconclusive ambiguity. However, whatever it meant, I must conclude that the grievant was not truthful in denying making the remark. For that, some penalty is justified, and shall be assessed in the Award.

It is understandable if the Company asks, how, under the foregoing circumstantial evidence and suspicious coincidences is it to prove its case if the record is presently deemed inadequate? Under the suspicious circumstances of this case, the Company should have conducted its own independent investigation right from the beginning of and certainly during the pendency of the grievant's absence. In my judgment, the Company would have been justified in visiting him at his home to assess his condition. It would have been justified, in my judgment, to send a physician to examine him at the beginning of and during the absence. It would have been justified, in my opinion, if the Company maintained a surveillance of the grievant and his activities during his absence. It would have been justified, in my opinion, if it had told him from the moment that he reported that he was ill and disabled that he was to obtain a medical statement substantiating that claim; to send it to the Company forthwith or present it upon his return to work, particularly in view of his prior record of absenteeism. Considering the suspicious coincidences and circumstances of this case, all of these steps, and others of a similar type, would not only have been proper but would have represented the kind of independent inquiry into the bonafides of the grievant's claimed illness which could transform suspiciousness to a convincing, negative, conclusion. In sum, this is not to say that I find that the grievant was ill and/or suffering from back pains. Indeed, I am frank to say that I have personal doubts. But doubts, suspicions and
speculation are not enough to meet the requisite standard of proof. Regardless of the Arbitrator's intuitive view, it is to the clear and convincing standard of proof to which he is bound in discharging his arbitrable duties in disciplinary cases.

Eric J. Schmertz
Neutral Referee
In the Matter of the Arbitration
between
Office and Professional Employees
International Union, Local 153

and

United Federation of Teachers
Local 2, American Federation of
Teachers, AFL-CIO

The stipulated issue is:
Did United Federation of Teachers, Local 2 violate Article VI, Section 1 of the Collective Bargaining Agreement when it paid members of Local 153 the equivalent of double time for Veteran's Day, November 10, 1989? If so, what shall be the remedy?

A hearing was held on January 24, 1992 at which time representatives of Local 153, hereinafter referred to as the "Union," and United Federation of Teachers, Local 2, hereinafter referred to as the "Employer," appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The Union's case has obvious equitable appeal.

Under identical circumstances, the Employer administered the identical contract language in two separate contracts, differently. The pertinent contract language reads:

...all work performed on any of the above-enumerated Holidays or work performed on Sundays shall be compensated for by twice the regular rate of pay.
...if a Holiday falls on a day when the office must remain open, the employee may, at his/her discretion opt for a compensatory day or receive an additional day's pay.

Veteran's Day is one of the enumerated Holidays.

For Veteran's Day, 1989, when the office remained open, employees under the Union contract who worked that day were paid double time under the foregoing contract language.

For the same day, Veteran's Day, 1989, under identical language in the Employer's contract with the Printers Union, the Employer paid members of the Printers bargaining unit who worked, triple time.

However, despite the obvious disparate treatment between the Union members and employees under the Printers' contract, the determinative question is whether the Union's case can be sounded in contract violation.

It must be noted that the stipulated issue deals only with an alleged violation of the Union's contract. Moreover, it well-settled that where the contract language is dispositive of the issue in dispute, equitable considerations do not come in to play. Also, under both the stipulated issue and the arbitration provisions of the contract, the Arbitrator's authority is limited to determining whether there has been a contract violation. Section 2 of the Grievance Machinery and Arbitration provisions of the Union's contract defines a grievance as a "dispute...relating to any matter of wages, hours and working conditions, or any dispute between the parties involving interpretation or application of any provision of this agreement." (Emphasis added)
The Union asserts that by paying the Printers triple time, the Employer changed what the Employer and the Union previously understood to be the meaning of the foregoing contract language, thereby entitling those members of the Union who worked on Veteran's Day, triple time also.

The problem with that theory is that though a different application of one contract covering employees of a different bargaining unit may be unsettling to good labor relations and a prima facie inequality, it cannot be deemed a variation or new interpretation of the Union's contract unless the treatment of employees under that contract was changed. The Employer's treatment of employees in the Union's bargaining unit remained consistent and the same as they had been treated since that full language was originally negotiated in their contract. In the only other instance in which an enumerated Holiday fell on a day that the office was open, Lincoln's birthday in 1983, the employees under the Union's contract were paid only double time. And, the Union concedes that at that time and until the instant difference between it and the Printers' contract arose, it agreed with the Employer's interpretation and application of the contract language. It specifically accepted the last sentence thereof;

"If a Holiday falls on a day when the office must remain opened, the employee may at his/her discretion opt for a compensatory day or receive an additional day's pay,"

as intended to limit the total amount of pay to double time. Indeed, the Union states that had the Printers not been paid triple time, the instance grievance would not have been filed.
That the Employer paid the Printers triple time under identical circumstances was an action not under the Union's contract and therefore not a variation thereof. Rather, it was a separate, albeit different, application of a different collective bargaining agreement, covering a different bargaining unit, namely its contract with the Printers.

One might ask, why not apply the well-settled rule that employees similarly situated must be dealt with similarly, and that to give a benefit to some and not to others similarly situated is discriminatory and must be reversed. The rule is inapposite here. The members of the Union's bargaining unit are not similarly situated to others. The "similarly situated" rule is confined to those within the same bargaining unit. Hence, as to employees covered by other contracts, a larger grant of a benefit than that accorded Union members, as unfair as that may appear, applies to a group of employees differently situated, because they are covered by a different contract. And, therefore, not legally of the same class.

But frankly, I am not comfortable with the Employers explanation of the distinctions. It states that the Union knew, by negotiations and prior notice, following an earlier arbitration, that Article VI, Section 1 limited pay under the facts of this case to double time. But that because the Printers' contract is its first agreement with the Employer, and because the Printers did not have the same bargaining history or notice of the purpose and intent of the same contract language as did the Union, the Employer acknowledged to the Printers that the bare language was ambiguous, subject to an interpretation supporting triple-time pay, and therefore gave the affected Printers triple time.
I believe that the Printer's Union knew or should have known that this particular contract language was identical with and adopted from the Union's contract. Therefore, I believe it knew or should have known constructively at least, of the meaning and application the Employer and Union put on it.

That being so, and because of the unsettling impact on good labor relations, created by employees in two different bargaining units, working side-by-side, but treated differently under the same facts and contract language, I choose to make a recommendation. I recommend that without prejudice or precedent, the Employer grant an additional day's pay to Union members who worked on Veteran's Day, 1989, thereby according them parity with the Printers who worked that day. This recommendation is for the Employer to accept or reject in its discretion, and therefore, the Award is in no way changed or modified.

I believe that the recommendation also makes sense because it is my understanding that the new contracts negotiated by the Employer with both Unions have clarified this matter and that such a Holiday pay discrepancy will not happen again. And that henceforth, there shall be consistency in the interpretation and application of the Holiday provisions of both collective bargaining agreements.
The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above-named parties makes the following AWARD:

Local 2 did not violate Article VI, Section 1 of the Collective Bargaining Agreement when it paid members of Local 153 the equivalent of double time for Veteran's Day, November 10, 1989.

Eric J. Schmertz

DATED: February 7, 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.