In the Matter of the Arbitration between
UNITED INDUSTRIAL WORKERS OF NORTH AMERICA WELFARE PLAN -and- BABYLAND NURSERY, INC.

The above-named parties selected the Undersigned as the Arbitrator to decide a dispute between them regarding Babyland’s indebtedness to the United Industrial Workers of North America Welfare Plan ("Plan").

The parties have reached a settlement of the dispute which at their mutual request I make as my Award, as follows:

This arbitration concerns delinquent contributions payable by Babyland Nursery, Inc., ("Company") to the United Industrial Workers of North America Welfare Plan ("Plan"). The Company is party to a collective bargaining agreement ("CBA") with the United Industrial, Service, Transportation, Professional and Government Workers of North America. Pursuant to that CBA the Company became a party and subscriber to the Trust Agreement establishing the Plan listed above. The Company has agreed to remit monthly contributions to the Plan on behalf of
its employees, to provide for health and welfare benefits. During the period from July 1, 1994 through June 30, 1995 the monthly contribution rate was $333.50 per employee. Each employee agreed to contribute $15.00 per month towards this amount.

In order to avoid the necessity of litigation procedures, the CBA and trust agreement permit the arbitration of any question concerning the payment of monies to the Plan. The CBA further provides that the Plan is authorized to directly pursue all matters related to payments to the Plans, and grants authority to the Plan to determine whether to pursue such matters in New Jersey or Maryland. In this instance, the Plan has elected to pursue the delinquency in the state of New Jersey. For the purposes of this proceeding, the Company and the Plan have stipulated that all preliminary steps to submitting the matter to arbitration have been completed.

The Company and the Plan are in agreement that other than a payment of $4,830.00, which represents the employees' co-payment, the Company has not remitted contributions owed to the Plan for the months of March, April, May
and June 1995. Based upon the number of bargaining unit employees during those months, the Company and the Plan have stipulated that the Company owes $102,557.00 to the Plan for this period. The Company and the Plan have agreed that the Company will pay the contributions owed in accordance with the following schedule:

Payment One - $40,000.00 to be received by the Plan on September 15, 1995;
Payment Two - $32,000.00 to be received by the Plan on October 15, 1995;
Payment Three - $30,557.00 to be received by the Plan on November 15, 1995.

The collective bargaining agreement provides that in an arbitration proceeding concerning payment to the Plans, the arbitrator shall have the authority to award the unpaid contributions, interest thereon, and liquidated damages in an amount equal to the greater of interest on the unpaid contributions or liquidated damages of twenty per cent (20%) of the amount owed. Provided
that the Company makes the payments as indicated above, the parties have agreed that interest and liquidated damages are not payable. However in the event that the Company defaults in its obligations to repay, the Plan is entitled to interest and liquidated damages on the entire delinquent amount. The parties have stipulated that the Company is in default if payments one and two are twenty (20) days late, or if payment three is one (1) day late. Interest shall be computed at the rate of eight per cent (8%) per annum. Interest shall accrue from the last day of the month in which a particular contribution payment was first due until payment in full is made.

The parties agree that the Plan may seek enforcement of this arbitration award within six months of the date of delivery of this award. In the event of a default, the Plan will seek enforcement of the full amount of the award, including interest and liquidated damages. The parties also agree that Babyland will remain current in its contributions to the Plan.
AWARD

The Company is indebted to the Plan for delinquent contributions in the amount of $102,557.00, to be repaid in accordance with the schedule outlined above. In the event that the Company defaults on its repayment schedule, the Plan is entitled to the full amount of contributions owed, plus interest and liquidated damages as calculated above, as well as attorneys fees and costs of enforcement.

Eric J. Schmertz, Arbitrator

DATED: August 29, 1995

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

Local 369, Utility Workers of
America, AFL-CIO

and

Boston Edison Company

AWARD

P&M GRIEVANCES

NOS. 4786 & 4990

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

(1) The Company violated the collective bargaining agreement by the suspension with final warning of Shepherd Adams in November 1993. The suspension is reversed and Adams shall be made whole for the time lost. The final warning shall be expunged from his record.

(2) The termination (and suspension) of Adams in September 1994 violated the collective bargaining agreement. Adams shall be reinstated, but without back pay. A final warning shall attach to the reinstatement.

DATED: September 28, 1995
STATE OF New York )
COUNTY OF New York )ss.:

Eric J. Schmertz
Chairman

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
John F. Holland, Jr.
Concurring in #1
Concurring in #2
Dissenting from #2

DATED:
STATE OF
COUNTY OF

I, John F. Holland, 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.

Lisa K. Amber
Dissenting from #1
Concurring in #2
Dissenting from #2

DATED:
STATE OF
COUNTY OF

I, Lisa K. Amber 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 369, Utility Workers Union of America, AFL-CIO and
Boston Edison Company

OPINION AND AWARD

P & M 4766 and 4990

In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and Company, the Undersigned was selected as the Chairman of a tri-partite Board of Arbitration to hear and decide the following stipulated issue:

Did the Company violate the collective bargaining agreement by the suspension with final warning of Shepherd Adams in November 1993 or by the suspension and termination of Shepherd Adams in September 1994? If so what shall be the remedy?

In shorter form the issue under the contract is whether there was just cause for the aforesaid suspension and discharge.

Ms. Lisa K. Amber and Mr. John F. Holland, Jr. served respectively as the Company and Union arbitrators on the Board of Arbitration.

Hearings were held on March 10, April 3, and May 18, 1995. Mr. Adams, hereinafter referred to as the "grievant" and representatives of the Union and Company appeared and
were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived. A stenographic record was taken. The parties filed post-hearing briefs, and the Board met in executive session on April 30, 1995.

**Suspension and Final Warning in November 1993**

The grievant was a "Troubleshooter."

Prior to the November 1993 suspension and final warning the grievant was suspended for an admitted negligent work practice (improperly cutting a live cable). On November 2, virtually his first day back at work following that suspension, the grievant was assigned a job to "remove a jumper" at a private residence. He was given the assignment by Supervisor John O’Neill at about 8 AM that day. The Company asserts that O’Neill told the grievant that it was "a pre-arranged appointment" with the resident of that location; that she was a school teacher and had to leave home at 9 AM; and that he "was to get right over there" or "get there no later than 9 AM" so that he could get in. Other Company personnel were also assigned, and there was also a police presence.

By his own acknowledgement the grievant arrived at the
work location, at about 9:20 AM. The Company suggests that it was as late as 9:45. Either way the school teacher had left, the grievant could not get into the premises, the assigned crew was disbanded (as was the police) and the job had to be rescheduled for another time.

The Company charges the grievant with a willful failure to carry out the explicit directive to get to the job by or before 9 AM. And that against the backdrop of his prior disciplinary record (which is extensive and which contains prior suspensions, including the suspension of only a few days earlier) the instant suspension and final warning were warranted and for just cause.

The grievant and the Union on his behalf deny that he was told to be at the location by 9 AM; that rather he understood the job to be a routine assignment and that in accordance with a regular practice followed by the troubleshooters and not objected to by the Company, he went for coffee after stocking his truck and leaving the Company’s

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1The Company concedes that normally when time is not of the essence, troubleshooters do and may stop for coffee before reporting for their morning assignments.
yard, and hence arrived at the work location at 9:20 AM.

As with all disciplinary actions the Company has the burden to show just cause by evidence that is clear and convincing. I do not think that the differing testimony about what instructions O’Neill gave the grievant requires a determination of credibility. I think it quite possible, and the essential facts so indicate, that the instructions given, and what the grievant heard and understood added up, as a totality, to a mis-communication.

The instructions given the grievant were oral. He was given a written note which was limited to the address. That note did not instruct the grievant when he was to arrive nor did it refer to the asserted “pre-arranged” appointment.

O’Neill’s testimony on the point varies. First he stated that he told the grievant “to get over there right away,” without a specific time instruction. Later in his testimony he stated that he told the grievant to be there by 9 AM and why. The Company’s brief recites the former - namely that he told the grievant to “go right over.”
In the absence of written instructions I am neither clear nor certain what O’Neill said and how precise he was about when the grievant was to arrive. And I cannot impute precise knowledge to the grievant under those circumstances. Indeed, considering the allowed practice of getting coffee after loading the truck, and the ambiguousness of the limited instruction to “go right over,” I cannot conclude that an arrival at 9:20 [2] was unreasonable or in non-compliance.

The Company’s position is supported by Supervisor Peter Kane, who testified that he was in the control room that morning and heard O’Neill tell the grievant to “be there by 9 AM, because the teacher had to leave by then.” But Kane’s subsequent activities are not consistent with this testimony or that instruction.

Because of the grievant’s mistake in cutting a live cable which gave rise to an earlier unchallenged suspension (and apparently because of the grievant’s less than exemplary work record) Kane was assigned to accompany and observe the

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2The Company’s belief that the grievant did not arrive until 9:45 is not proved. It is based on a Supervisor’s efforts to locate him at a coffee shop beginning shortly after 9 AM and thereafter seeing him on the job at 9:45 AM. But there is no evidence that in the interim, between 9:20 and 9:45 the grievant was not at the work location. And therefore whether the grievant could or should have heard the radio calls, is immaterial.
grievant and his work the entire day of November 2, 1993. Indeed, he acknowledges that he was in the control room that morning so that he could begin observing the grievant and "to be sure the grievant understood the assignment."

Yet Kane, who was instructed to observe all the grievant's work activities that day, did not himself arrive at the job location until 9:05 AM. It is stipulated in the record that the work the grievant was to do would take about 10 minutes to complete. If the grievant had arrived shortly before or at 9 AM as the Company says he was instructed to do, he might well have completed the job by 9:05 when Kane arrived, and Kane though assigned to do so, would not have been able to observe the grievant's work practices on that day's first assignment.

There may be a number of reasons why Kane arrived at 9:05, and he may have intended to arrive earlier. But no evidence in explanation was offered. Under this circumstance, considering the standard of proof required of the Company, I must conclude that Kane himself was either not clear when the job was to begin or uncertain that the time of arrival to begin the job was of the essence or so critical.

I find therefore that what Kane said he heard O’Neill tell the grievant has not been proved to be what the
grievant heard or should have heard.

Nor, under those conflicting and inconsistent circumstances can the instructions asserted by the Company be reasonably imputed to the grievant with sufficient conclusiveness.

Also, following the grievant’s suspension and final warning, an unusual event occurred. O’Neill and Kane called and spoke to the grievant by phone and in substance expressed regret or sympathy about what happened. The Union characterizes it as an “apology.” The Company says it was an expression of “sorrow” because the grievant was “liked,” but that in no way was it a concession that the grievant was not culpable or the penalty not proper.

Whatever the purpose or intent of the call, it was friendly and sympathetic to the grievant’s predicament. I deem such a call by a supervisor, who is essentially responsible for the discipline, to be extraordinary, and a further indication of the ambiguousness of the events leading to that discipline. In my view it is not unreasonable to interprete the call, and the “sorrow” expressed as an indication that O’Neill and Kane did not believe that the grievant was entirely at fault and that the penalty imposed on him was, though not reversed by them,
unwarranted. In short, and again, this event, uncommon in my experience after a supervisor has triggered a disciplinary penalty, supports the reasonable possibility that what was said by O’Neill to the grievant at 8 AM in the control room and what the grievant heard or understood was a miscommunication.

In sum, the entire set of circumstances remain too unclear, ambiguous and indeterminate to meet the requisite disciplinary standard of “clear and convincing.”

With the foregoing it is unnecessary for me to assess the Union’s argument that following a virtual immediate return from a suspension for cutting a live cable the grievant would not have been so foolish as to risk further discipline by ignoring an explicit work order. However I would observe that standing alone this is not enough of a defense. I have seen too many foolish and irrational acts to allow sole reliance on what is logical.

However for the other foregoing reasons I shall reverse the suspension and final warning, direct that they be expunged from the grievant’s record and direct that he be made whole.
Suspension and Discharge

in September 1994

It is clear and undisputed that but for the above referred-to final warning, the charges against the grievant arising from his assignment on September 17 and 18, 1994 to locate a fault, would not have been grounds for his discharge. The question of the propriety of the discharge is no longer at issue therefore, in view of my reversal of the prior final warning. The same is true for the "suspension" preliminary to and then subsumed in the discharge.

The issue at this point is whether the charge against the grievant of "poor work performance" has been proved by clear and convincing evidence, and if so what penalty short of discharge, should be imposed.

In performing his assignment to troubleshoot a fault, the grievant is charged with (1) an erroneous tentative location of the fault, (2) a failure to follow prescribed procedures by not using the "Thumper" a second time to test the system after "breaking down" a particular manhole, (3) by telling the dispatcher that he "was certain" the fault was between manholes 21169 and 21168 and by so reporting
that finding unconditionally in his daily Trouble and Operation Report, with his written statement thereon to “Replace 1 Section of 50015K P & 2 Cable” between those manholes and (4) by leaving the job without permission of supervision and without “proving” the fault he reported by a final use of the Thumper.

I find that the grievant make mistakes, but so did the dispatcher and supervision.

After “breaking down” manhole 21169 the grievant did not return to the station to activate the Thumper as procedures require and as he said he planned to do in his call to his dispatcher. In that call which began at 12:37 AM the grievant said

"Broke down MH21169...go(ing back to the station...to prove that I still have it...and turn I’m coming back to MH21168...”

The grievant’s words are prospective. He says he “is going back.” Therefore I reject the Union’s assertion that the grievant had returned to the station and used the Thumper earlier after breaking down MH21169. Rather I accept as accurate the Company’s evidence that if the grievant returned to the station after telling the dispatcher he planned to do so, he could not have been able to enter the station or activate the Thumper because the station operator had left well before that time.
I find therefore that despite his assertion otherwise, the
grievant did not use the Thumper after breaking down manhole
21169 and that he "cut corners" by not even attempting to do
so,

Next, though I find nothing wrong his original tentative
fault location between manholes 21168 and 21169 (and the
Company concedes that at that point a tentative finding was
not an error of procedure), I do find that he erred by
telling the dispatcher that he was "sure" of the fault
location.

In his call to the dispatcher, the grievant said at 0205
AM on September 18

"...its definitely in the section..."

The dispatcher asked:

"so you are sure about that"

The grievant replied:

"sure"

Also serious are the unconditional statements on his
Trouble and Operations Report about the location of the fault
and the repair work to be done. He failed to note anywhere
on his Report that he had left the work before "proving" the
fault with a final use of the Thumper, nor did he indicate
that his tentative fault location was still to be proved.
I do not find him liable for not making a final use of the Thumper, because by then the Thumper operator had left; the Thumper was disconnected and troubleshooters are not permitted to attach or re-attach the Thumper cables.

However, as a troubleshooter, highly skilled and highly paid, and who is considered the “eyes and ears” of the Company in finding faults and making repairs, he had a duty to make clear not just to the bargaining unit dispatcher but also to supervision by special report or at least on his official Trouble and Operations Report of the unproved status of the fault he believed he found. He also had a duty to report that he left the job without proving it and why.

As it turned out, the Company relied on the Report and replaced the cable between manholes 21169 and 21168. And when the system was thereafter activated a fault occurred in a different nearby manhole, causing a fire, smoke, and an outage and required fire department response.

On the assumption that the fault the grievant was seeking was at this latter location and not between manholes 21168 and 21169, the subsequent cable failure is attributable to the grievant’s Report and to supervision’s lack of knowledge that the “tentative” fault between 21168 and 21169 had not been proved by the grievant before he left the job.
Also, though the grievant had worked some 18 hours straight on the job in inclement weather and was unquestionably fatigued, he left the job improperly. The proper procedure is not merely to tell the bargaining unit dispatcher that he is leaving, but to notify and obtain permission of managerial supervision to do so and to request a replacement. Wrongly, he rejected a replacement for himself and a replacement for the Thumper operator. In his talk with the dispatcher and in reply to the dispatcher’s question

"so do you want an operator at 329? ...
do you still want him"

The grievant replied:

“No...No I don’t want him now.”

By not doing so for either, supervision did not know that the Thumper was no longer usable or that the fault could not be proved. Supervision was not given the chance or option of getting another Thumper operator or the chance to assign another Trouble-shooter to replace the grievant. And to see to it that the replacement used the Thumper as the final step to prove the fault.

On the other hand I am satisfied that by practice, Troubleshooters rely on the dispatcher to convey essential information to managerial supervision. Here, apparently, the grievant expected the dispatcher to tell supervision that
despite the grievant’s “certainty” over where he believed the fault was located, it was not proved. Also apparently, the dispatcher who was inexperienced in that job, did not do so. I think that the dispatcher, who is the communications link between the troubleshooter and the Company, should have done so, and therefore erred to the Company’s disadvantage and the grievant’s prejudice. However this expection of what the dispatcher should have done, did not relieve the grievant from the duties and responsibilities previously enumerated.

Also, I find that management acted imprudently. I see no reason why, where safety and service are at stake, it relied solely on the grievant’s Report, assuming therefrom that the fault location had been proved. It seems to me that in such a sensitive matter the transcript or tape of the conversation between a Troubleshooter and a dispatcher should be reviewed to be certain that what was reported on the Work Report is accurate and complete. Had management reviewed that transcript (and what other better reason is there for taping those conversations) it would have known the fault had not been proved and steps could have been taken to prove it,
or as the Company alleges in this case, disprove it. So, I attribute some blame to management.

Finally, that a fault was found in a different manhole when the system was activated after the grievant’s work, meant to the Company that the grievant erred in his tentative findings. That may be so, but again applying the requisite evidentiary standard, that has not been established. Company witnesses on cross-examination acknowledge the “possibility” of two faults, the one that eventually occurred and the one the grievant believed was between manholes 21168 and 21169. Any doubt about the possibility would have been dispelled, and the Company’s charge against the grievant further supported, if the replaced cable between manholes 21168 and 21169 had been inspected and had not shown a fault or defect. But the Company discarded that cable when it was replaced and apparently it was not inspected. No evidence of its condition was offered. So the possibility of two faults, which I cannot find unreasonable, if not probable, remains. Yet such speculation would be unnecessary if the grievant made clear what he had done and not done and especially what he had not proved.

Based on all the foregoing the grievant cannot be found
blameless. His reinstatement is mandated. But considering the errors he made, the consequences of those errors, his prior disciplinary record which includes several reprimands and suspensions for work-related violations, the fact that he received unemployment insurance, and if he was not employed elsewhere, his failure to offer evidence of efforts at mitigation, his reinstatement shall be without back pay. The lack of back pay shall be deemed a suspension. Also, as another disciplinary suspension in his accumulated disciplinary record a final warning shall attach to that suspension and reinstatement.

Eric J. Schmertz
Chairman

DATED: September 28, 1995
IN THE MATTER OF THE ARBITRATION

between

UNITED STEELWORKERS OF AMERICA,
LOCAL NO. 12003

and

BOSTON GAS COMPANY

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

The Company did not violate the collective bargaining agreement when it changed its method of payment of wages from payment in hand to mail delivery.

ERIC J. SCHMERTZ, CHAIRMAN

DATED: January 6, 1995

STATE OF NEW YORK )

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, ERIC J. SCHMERTZ do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
In accordance with Article XII of the Collective Bargaining Agreement dated May 21, 1993 between United Steelworkers of America, Local 12003, hereinafter referred to as the "Union," and Boston Gas Company, hereinafter referred to as the "Company," the Undersigned was selected as the Chairman of a tripartite Board of Arbitration to hear and decide, together with the Union and Company designees to said board, the following stipulated issue:

Did the Company violate the collective bargaining agreement when it changed its method of payment of wages from payment in hand to mail delivery? And, if so, what shall be the remedy?

Messrs. Edward J. Maloney and Mark E. Smith served respectively as the Union and Company members of the Board of Arbitration.

A hearing was held on October 4, 1994 in Braintree, Massachusetts at which time representatives of the Union and Company appeared and were afforded the full opportunity to offer evidence and argument and to examine and cross examine witnesses. The Oath of the arbitrators was waived; a stenographic record of the hearing was taken; and the parties filed post hearing briefs.

The Board of Arbitration met in executive session on December 28, 1994.
From at least 1970 and until June of 1993 the Company paid its employees, represented by the Union, by hand delivering their checks to them personally on Thursday of each week.

In June of 1993 following the end of a lengthy lockout, the Company informed the Union and implemented the instant disputed policy of mailing employees their pay checks on Wednesday of each week.¹

It is the Union's position that the payment of wages in person from 1970 to 1993 became a past practice which ripened into an implied bilateral provision of the contract. And that as such it can be changed only by bilateral collective bargaining, not by the Company's unilateral action. Additionally, the Union asserts that the Company's unilateral change in the method of paying wages seriously inconvenienced the affected employees. For example, employees could not, as previously, cash their pay checks on Thursdays at the credit union or at banks, and that because some employees did not receive their pay checks through the mail until Friday or Saturday following the Wednesday mailing or in some cases not until Monday of the following week, they not only did not have the same access to cash as before, but did not have as much opportunity to notify the Company of errors in or omissions from those checks in time for corrections in the next week's check.

The Company's position simply is that the methodology of making payments of wages is a management prerogative, and that the Company retained the unilateral right to make a change in that methodology so long as it was consistent with the law. (There is no dispute in this case over the legality of the payment of wages by check through the mail).

¹During the lockout monies owed to any of the employees were paid by check through the mail, as the bargaining unit employees were prohibited from entering on the Company property during that period of time.
The Company also points out that the collective bargaining agreement contains no provision dealing with the procedural methods of paying wages and that the change from in person payment is nothing more than a change in a "method of operation," which does not acquire the status of an implied contract provision or a condition of employment.

Moreover, the Company offered testimony designed to show that this change improved the efficiency of the work force and productivity; and that the impact on the employees was at most de minimus, and not different from before the change.

I agree with the Union that the payment of wages by in person delivery of checks for at least 23 years meets the test of an employment related past practice. There is no dispute over the extensive length of that procedure. As the payment of wages for services performed is directly related to the employment relationship, I am satisfied that the method of making that payment is also employment related. The procedure over those 23 years was unvaried. The Company’s citations of what it characterizes as "variations" are not variations at all. They are factually different. The examples given of circumstances where pay checks were mailed to employees pertained in each instance to employees who were not actively at work during the relevant pay period, but rather on vacation, ill, disabled, or on leave of absence. So, those examples involved employees not similarly situated to the grievants in this case.

In short, the examples cited by the Company are not relevant variations of the procedure of paying wages in person and do not negate or vitiate the long standing in-person payment procedure for employees at work.

Accordingly, the methodology of paying employees actively at work for the period 1970 to 1993 meets the test of a consistent, unvaried, and employment related past practice.
The stipulated issue accords the Board of Arbitration limited authority — namely the power to determine whether the change in the method of paying wages violated the collective bargaining agreement. If the contract prohibits what the Company did, it is neither an excuse nor relevant if the change has improved the Company's efficiency and productivity. Conversely, if there is no contractual bar to the Company's action, that employees may be more inconvenienced by experiencing some delay in converting their checks to cash or in notifying the Company of errors, is also irrelevant.

Narrowed to the question of whether the contract has or has not been violated, it is undisputed that the contract contains no specific provision regarding the methodology of paying wages. It is also stipulated that the question or issue of the method of payment was not discussed or even raised in contract negotiations. The only provision in the contract which has relevance to the instant dispute, (and which will be more fully discussed later in this Opinion), is Article XIII Section 3 which reads:

Article XIII

Section 3. Changes -- It is the intention of the Company to make no substantial changes in working conditions which are in effect and are not covered by this Agreement. If any such changes are to be made, prompt and reasonable notice will be given to the Local Union President or his designee and the matter discussed at a meeting of the Joint Committee (Article XII, Section 1) prior to the Company's making the change unless unusual circumstances make such notice or discussion impractical.

The record shows that the parties did negotiate on a Company proposal that the pay period be changed from weekly to bi-weekly and that there be a change in the timing of the payment of the Union checkoff. The Union rejected those proposals and the Company withdrew them.
The Company contends that Article XIII Section 3 is inapplicable because the Company's action was not a change "in working condition" but only an "operational change." Similarly, it is the Union's position that Article XIII Section 3 is inapplicable because, matured to an implied condition of the contract, the past practice is not, therefore, a "working condition...not covered by this agreement" (emphasis added), but rather, contractually implied, a working condition covered by the agreement.3

My analysis is different. Though the payment methodology between 1970 and 1993 meets the test of a past practice, I do not conclude that it created a new, independent, implied contractual provision. Rather I am satisfied that subsumed within Article XIII Section 3 are employment-related past practices that are not otherwise explicitly covered by the contract. Article XIII Section 3 deals with "working conditions which are in effect and are not covered by this agreement." (emphasis added) A past practice that is employment related is, to my mind, a "working condition which (is) in effect and not covered by this Agreement." In my judgement, Article XIII Section 3 was designed and intended to protect and perpetuate as working conditions employment-related past practices where the contract is otherwise silent on those condition. Manifestly the payment of wages weekly by in hand delivery on the job, as an employment-related past practice, is a working condition which was in effect though not specifically covered by the Agreement.

But for Article XIII, Section 3, I would have found that the past practice of in person payment had become an implied contractual provision, independent of other contract provisions. But Article XIII Section 3 produces a different result. It not only expressly incorporates

3Alternatively the Union argues that if Article XIII Section 3 is applicable, the Company failed to comply with the notice requirements thereof, making its unilateral action a nullity.
past practices into the contract as working conditions, but sets forth the circumstances under which the Company may make changes in those working conditions. So, the question is not whether the unilateral change by the Company of the employment related past practice violated an implied condition of the contract, but rather whether that unilateral change violated Article XIII Section 3 of the contract.

Based on the record before me I conclude that the change the Company made did not violate Article XIII Section 3. A full reading of that provision of the contract clearly shows that the Company is barred from making substantial changes in working conditions (or employment related past practices). And that if it makes such a change, meaning, of course, a substantial change, it must follow the notice and discussion procedures required by that section of the contract. Conversely, Article XIII Section 3 would allow the Company to make unilateral changes in working conditions or employment related past practices that are not "substantial." And if not substantial, the procedural requirements of notice and discussion do not come into play.

Obviously, therefore, the final question is whether the change which the Company made in this case by mailing the checks to the employees on Wednesday of each week rather than delivering them to them at work on Thursdays, constituted a "substantial change" within the meaning of Article XIII Section 3. The evidence before me does not persuade me that the change was "substantial."

The testimony on the numbers of employees who had problems with their checks showed no significant increase after the change in the methodology. About as many found errors in their checks after the change as before the change. And the same was true with regard to how many and how often employees received another person's check along with their own.
I do see one particular effect that could be a disadvantage to an affected employee. And that is that with mail delivery those employees who before cashed their checks on Thursdays at the credit union or at banks on their way home, can no longer do so. They receive their checks, at the earliest, on Thursday at home, and unless they can cash them that evening, must wait until Friday to do so.

But the record does not provide definitive information on what percentage of the employees previously cashed their checks on Thursdays, so I am unable to assess the magnitude of that variation. Therefore, I cannot reach a judgement that it is a "substantial" effect.

The same is the case regarding the Union’s assertion that some employees do not get their checks until Friday or Saturday or even not until Monday of the following week. In the absence of some reasonably precise numbers or percentages of employees so affected, and with the logical and realistic probability that it is small, I cannot make a definitive conclusion that any such impact is "substantial."

Also, with regard to this latter group, there is insufficient evidence to conclude that if errors in their checks are found by employees in that small group, they did not or would not have time to notify the Company of those errors by noon the following Monday, to insure correction in the next week's pay check. At most, in the absence of more exact numbers, and considering the small probability of this particular impediment arising and the probable few employees affected, I must judge the impact or potential impact to be de minimus.

Finally, let me observe that I do not think that any of the problems arising from the change are chronic. I think there may have been "bugs" in the process in its early stages. But inexorably, as the process becomes smoother, as the mailing of checks becomes more proficient, and as
voluntary direct deposit (which apparently is increasing and which gives the employees immediate cash at this banks from the deposited checks) becomes more popular, the complained of dislocations should decrease if not be eliminated. Additionally, it is suggested that the Company review its consideration of mailing the checks, a day earlier, on Tuesdays.

Eric J. Schmertz, Chairman

DATED: January 6, 1995
In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and Employer, the Undersigned was appointed as the Arbitrator to hear and decide a dispute relating to Mr. Richard Consiglio.

A hearing was held on July 29, 1995 at which time Mr. Consiglio, hereinafter referred to as the "grievant" and representatives of 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, a stenographic record of the hearing was taken, and the parties filed post-hearing briefs.

Absent the agreement of the parties on a stipulated issue, I deem the issue, based on the record before me, to be:

Was there just cause for the Employer's refusal to permit the grievant to return to active employment?

If not, what shall be the remedy?

More specifically, the dispute centers on the Employer's denial of the grievant's request to return to work on or about January 26, 1995,
following the grievant’s recovery from disability, because of and pending the outcome of criminal charges against him as set forth in an indictment by a Rockland County grand jury (IND. NO. 94-314).

The indictment charges the grievant with the crimes of Reckless Endangerment in the Second Degree, Menacing in the Second Degree, Criminal Possession of a Weapon in the Fourth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree.

In further refinement of the issue, I deem the Employer’s action to constitute a suspension of the grievant until the charges in the indictment are determined, dismissed or withdrawn.¹

The circumstances of the event, as presented by both sides are essentially the same. On Thanksgiving Day, 1994, at a party, the grievant abused cocaine and alcohol. Angry with him for doing so, his wife left the party and went home. The grievant stayed the night, and travelled home by taxi cab the next day. Upon arriving home, the grievant’s wife angrily left the house, and apparently summoned the police. The grievant tried to "sleep off" the effects of the drug and alcohol, but was awakened by the police knocking on his door and requesting permission to enter. The grievant denied their entry without a search warrant.

Upset by what he concluded was his wife’s report to the police, the grievant loaded and fired his shot gun into the lock of his wife’s jewelry box, removed her jewels and flushed them down the toilet. He then discharged the shot gun a second time, into the television set or into the ceiling. The police, again attempted to enter this house, but the

¹As of this date and based on the probative record before me, the indictment obtains and, no trial has taken place. The Union asserts, but has offered no documentary proof or testimony thereof, that a motion to dismiss the charge related to "possession of a controlled substance" has been granted, and a motion to dismiss the entire indictment has been made.
grievant told them that he would commit suicide if they did, and, according to his testimony, assumed a "suicide position" with the shot gun under his chin.

Later, after sleeping in his car, and after the police broke windows in the house and had the gas and electrical services turned off, the grievant surrendered, was arrested and jailed.

Obviously, it is not my role to "try" the criminal charges or to determine if the indictment squares with the facts and evidence. That is for the Criminal Court. What is before me is whether, based on the information the Employer obtained from the indictment and from its own subsequent investigation, and from the evidence adduced at the hearing, it had proper grounds to place the grievant in suspended status, until the Criminal Court acted.

I consider the facts surrounding the grievant's earlier disability, immaterial to this case. He claims he was injured from an assault by a policeman who stopped his car to check on whether he was driving intoxicated. The Employer asserts that its information is that the grievant assaulted the policeman. As there is no probative evidence in this record in support of either contention, that event has no evidentiary value in the instant proceeding. Moreover, though charges for that incident may be pending or contemplated, I conclude that the disability and its causes were not a reason for the grievant's subsequent suspension.

Some differences between the charges in the indictment and the events which resulted in the indictment were adduced at the hearing.
There may be some question of whether the grievant "threatened the police with a shot gun" or "held the police at bay with a shot gun" or "endangered other persons." Nonetheless, his admitted actions were extremely dangerous to himself and at least potentially dangerous to the police. He admits he was still under the influence of drugs and alcohol, and manifestly, his mental and emotional stability was seriously compromised.

The arbitral question is whether this "off duty" conduct, the criminal charges arising therefrom, and the facts as developed at the hearing are sufficiently related or germane to the grievant's employment setting to foreclose his return to active work.

The arbitral rules on such set of circumstances are adequately settled. If the off-duty misconduct has a discernable negative impact on the employee's job, or on his employer's reputation, or presents a reasonable potential for a detrimental effect on the employer's business or the conduct of its business, or if the nature of the offense is contrary to or inconsistent with the duties and responsibilities of the employee's job, the employer has the managerial right to refuse or defer employment or re-employment. This is not to say that with the presence of the foregoing impact, a criminal indictment standing alone without a finding of guilt, would make a discharge of an accused employee proper.

2 The grievant was alone in his house, and the shot gun was discharged within the house.

3 The Union argues that the events are unrelated and irrelevant to the grievant's job because he was on disability and not working at the time, and they occurred off the Employer's property and not in the course of or in connection with his employment.
In my judgement, such summary and final action by an employer when an employee is only accused, is violative of "due process" and violative of the fundamental presumption of "innocence until proven guilty." So, I would not have sustained a discharge of the grievant.

But he is not discharged. He is suspended, pending the outcome of the charges. 4

I find that the facts of the events leading to the charges, though arguably somewhat less serious than the charges themselves, are sufficiently serious and significantly related to the grievant's employment status, to support and affirm the propriety of the suspension.

I find it reasonable to conclude that if the grievant had been permitted to return to work it would have been discernably disruptive to the Employer's business and services. The grievant is a Technician. He worked with some 300 other employees of that classification and supervision. That some five employees, bargaining unit and supervisory, expressed concern about the effect of his return to work while the criminal charges were pending, is evidence to me of some realistic unrest among the grievant's fellow technicians and within that department. I am not prepared to accept the Union's argument that five complaints or expressions of concern are de minimis. I cannot reject as unreasonable, the Employer's conclusion that they represented a more widespread feeling within the department and among others who would work with the grievant.

4 Though not within my authority under the issue as presented, it is my view that consistent with the "due process" that the Employer says it accorded the grievant, an acquittal verdict, or a dismissal or withdrawal of the charges, would entitle the grievant to reinstatement and to be made whole.
Moreover, I do not find it unreasonable -- and certainly not arbitrary or capricious -- for the Employer to be concerned about the safety of other employees and the safety to commercial and public visitors to the grievant’s work area. On that question, and especially in the absence of any medical or expert testimony on the grievant’s present mental and emotional state, I am not prepared to substitute my judgement for that of the Employer, when safety is the Employer’s responsibility.

This is not to say that I conclude that others would be in danger from the grievant, but rather that the Employer’s judgement that unsafe conditions could result from the grievant’s return at this time or when he sought to return, is not so implausible, unrealistic or unreasonable as to be rejected. In short, there is no evidence showing me that the grievant’s conduct was an isolated incident and not likely to reoccur.

I have considered the Union’s view that the safety argument is speculative and unrealistic in view of the security procedures and personnel maintained by the Employer. The fact is, however, that the possibility of an unsafe condition is connected to and arises from the grievant’s dangerous behavior and not from some imagined source. That being so, I cannot treat the concern as unfoundedly speculative, nor am I prepared to find, absent agreement of the Employer, that existing security forces and procedures would be adequately protective.

So, a nexus has been shown between the grievant’s off-duty misconduct, and its impact on the efficient and orderly operation of the Employer’s business if he was returned to work.
I do not find that the Employer violated any contractual procedures in ordering the suspension. It was not a discharge, so the notice requirements of Section 5.10(a) of the contract is not applicable. And, considering the probable imminence of rulings by the Court or a trial, the grievant’s status has not yet reached the point of a “constructive discharge.” Additionally, considering the expedited nature of the grievance, and the verbal, but mutual agreement for it to go directly to arbitration, I see no violation in this case of any “practice” of serving prior notice in cases of suspensions.

Nor do I see discriminatory or disparate treatment of the grievant when compared to actions regarding other employees who suffer from drug or alcohol addiction. Those employees with drug or alcohol problems who were and are accorded a chance at rehabilitation through treatment rather than discipline, did not commit offenses that resulted in criminal charges. I accept as correct the assertion that the grievant’s conduct was related directly to his abuse of cocaine and alcohol. But the consequences of that abuse, namely the criminal charges, distinguishes the grievant from those other employees, and justifies different action.

Finally, there is not enough in the record of any practice of treating other (or another) employees who committed a serious criminal offense less harshly than the grievant. Two cases were cited. In one, the employee’s suspension while under criminal indictment apparently was not challenged, and following his acquittal he was reinstated. The facts in the other, the Cooper case, were not defined, as the Arbitrator wrote no Opinion. For those reasons, neither are probatively precedential for the instant matter.
The Undersigned, duly designated as the Arbitrator, and having
duly heard the proofs and allegations of the above-named parties, makes
the following AWARD:

Pending the outcome of the criminal
indictment against Richard Consiglio, and
without prejudice to the rights of the
parties and Mr. Consiglio after
determination or disposition of the charges
of the indictment, the Employer’s
suspension of Mr. Consiglio, was for just
cause and is upheld.

Eric J. Schmertz, Arbitrator

DATED: October 24, 1995
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.
American Arbitration Association,
Administrator

In the Matter of the Arbitration

between

IBEW Local 1400

and

Citizens Gas & Coke Utility

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The stipulated issue is:

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

A hearing was held in Indianapolis, Indiana on December 1, 1994 at which time Mr. Hoaglin 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 Arbitrators Oath was waived; a stenographic record of the hearing was taken and the parties filed post-hearing briefs.

The essential facts are not in dispute. The Company received several anonymous reports of the use of illegal drugs by its employees and found drug use paraphernalia on its premises. Also, drugs were found in the systems of two employees who died in work related accidents.

So prompted, the Company hired an undercover agent to investigate drug use among the employees.

On August 11, 1993, during working hours and following a series of earlier discussions between the agent and the grievant in which the
grievant denied drug use, the grievant agreed to and arranged to sell to the undercover agent 1/4 of an ounce of marijuana. Further details of the sale were to be confirmed in a subsequent telephone conversation between them which was to take place or took place off Company premises and outside of working hours. The sale, itself, was to be consummated thereafter in accordance with those arrangements, again off premises and outside of working hours.

The grievant was discharged on October 21, 1993 for violation of Company work rules, specifically for "making a deal on Company premises to sell marijuana."

Though the enumerated work rules do not explicitly refer to this charge, the Company refers to and relies on its "general rule" which states:

"The Utility reserves the right to take disciplinary action as may be justified for any proper cause."

The Company asserts that the grievant's engagement on Company property in arranging a drug sale constituted "proper cause" for his discharge.

The allegation of an agreement to sell marijuana to the undercover agent is not denied by the grievant or the Union.

However, in defense, the Union contends that the grievant was "entrapped"; that he violated no specific work rule; that if there was a sale of the marijuana it was off Company property and on the grievant's own time and hence not actionable by the Company; that the grievant had
not used drugs and was not impaired by drug use as proscribed by the Company's drug and alcohol policy; that the grievant was not accorded "progressive discipline"; and that the police authorities chose not to take criminal action against him.

I agree with the Union that the undercover agent persisted in discussing drugs with the grievant several times before August 11, 1993 and that but for his persistence it is improbable that the grievant would have participated in the transaction. Specifically, it is undisputed that in those prior discussions between them the grievant repeatedly denied using drugs and acknowledged that to do so would jeopardize his job. Had the agent terminated his efforts at that point I think it unlikely that the subsequent arrangement for the sale and transfer of the marijuana would have been made.

But I do not see this as entrapment. The undercover agent's testimony, which I deem creditable, shows that at some point, namely on or by August 11th, the grievant had become a willing and uncoerced participant in the sale agreement. That he was not receptive earlier does not mean that he was tricked, misled, coerced or otherwise involuntarily led to the August 11th transaction. At that later point, and based on the record before me, I conclude that the grievant became a voluntary participant and a willing partner in what he believed was a bonafide transaction. Indeed, there is probative evidence indicating that he initiated the specifics of the sale.

That he may have exhibited poor judgement is not an element of entrapment, even assuming that entrapment, which technically is a legal
defense to a criminal charge, is a cognisable defense in a non-criminal arbitration. Also as a non-criminal proceeding, the arbitration of the charge against the grievant is not affected by the decision of the police not to charge him with a crime.

That the Company work rules do not specifically prohibit "drug dealing" is immaterial. Clearly an employer may take steps to uncover, eliminate and prevent drug use and drug dealings among its employees on its premises and during working hours. Setting aside one's personal views about the use of undercover agents in carrying out those objectives, it is well-settled that an employer may do so as part of his managerial authority. Hence there was nothing violative of the contract or the Company/Union relationship here by the Company's use of that procedure.

Though the Company has certain enumerated work rules, it nonetheless retained its managerial authority to discipline and discharge employees for "proper cause." "Proper Cause," as the general rule of the work rules indicates, need not be limited to enumerated offenses. A "general rule" of this type is quite common in industrial relations as part of promulgated work rules and is designed to and enforceable as a retention of an employers right to discipline and/or discharge for offenses not otherwise enumerated, provided, of course, that those offenses meet the test of just or proper cause. With that right expressly reserved, the contract reference to discussions with the Union on changes in the work rules, is inapplicable. There was neither an "addition" or an "amendment."

Therefore in this regard the issue is not whether the charge against the grievant had to be among the enumerated offenses, but rather whether standing alone, it constitutes "cause" for discharge within the meaning of the "general rule."
Also, if the charge against the grievant meets the test of proper cause for summary dismissal, the application of "progressive discipline is unnecessary. As the parties well know, "progressive discipline" is relevant for offenses which standing alone are not serious enough to justify immediate discharge. But "progressive discipline" is not a condition precedent to immediate discharge for a summary discharge offense.

Here, therefore, the question is not whether "progressive discipline" was or should have been administered, but rather whether the grievant committed a summary dismissal offense.

That the grievant did not use drugs and was not "impaired" are also immaterial. He is not charged with those offenses. The charge against him is different. It is "making a drug deal" and it is that charge alone that must stand the test of just or proper cause.

Accordingly, the remaining and determinative issue is whether the charge against the grievant constitutes "proper cause" for his summary discharge.

I must conclude that it does. He willingly and voluntarily on Company premises and during working hours, arranged to sell a quantity of marijuana. That equates with "dealing in drugs." That the actual sale and transfer was to take place or took place later, off hours and outside of the Company's premises, does not make it any less a transaction on Company premises and during working hours. In short, the prohibited transaction began, was negotiated and agreed to on Company premises and during working hours. Only its physical implementation was to be or was off hours and off Company premises.
The beginnings, negotiations and agreement on Company premises to sell a quantity of prohibited drugs is something that the Company has the managerial authority to prohibit and prevent. The safety and welfare of its employees and the integrity of its products and reputation are as much in jeopardy by the selling of drugs by its employees as the use of drugs by employees. And finally, as with drug use and impairment due to drugs while on Company property and/or during working hours, transactions or agreements to sell drugs engaged in at similar times, are dismissible offenses. That in this case the transaction was engaged in or structured by the use of covert procedures unknown to the grievant, as debatable as that may be in terms of social niceties, does not relieve the grievant of his intention to commit that offense or his role in it.

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

There was just cause for the discharge of CHRISTOPHER HOAGLIN.

Eric J. Schmertz, Arbitrator

DATED: February 17, 1995
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 the discharge of ROBERT KAUKARAS in violation of 
Article XIII of the collective bargaining agreement? 
If so, what shall the remedy be?

Coyne Electrical Contractors, Inc., hereinafter referred to as the "Company" has not met its burden of establishing just cause for Mr. Kaakaras' discharge by the requisite clear and convincing standard. The allegations of Kaakaras' misconduct and his denials and explanations are offsetting and hence indeterminative either way. Also, the Company failed to employ or follow the well-settled principle of "progressive discipline" in that at no time did it confront, warn, discipline or otherwise put Kaakaras on notice that his job was in jeopardy because of the charges against him advanced in this arbitration.

Accordingly, Kaakaras' discharge is reversed and shall be expunged from his record.

However, other facts established at the hearing preclude his reinstatement at this time to active employment or an Award of back pay.
The Company has shown that it has lost significant work contracts, thereby substantially reducing the available work for its employees and resulting in substantial employee layoffs. Indeed, the number of employees in Kaukaras' classification have been reduced from about 30 to about 3 or 4.

As a consequence it is unclear, and not established as part of the record, whether Kaukaras, with relatively short term seniority, would be able to claim active employment at this time and, it is equally unclear, and not established, when or whether if at all, he could have made that claim during the period of his discharge.

Under these circumstances Kaurakas' proper present status shall be that of a Company employee laid off under Article XIII, effective on or about the date he was discharged. If there be a short period of time between the date of his discharge and when work for him would no longer have been available, any pay for that period is offset by his interim employment at a Local 3 job at Bloomingdales.

If and when work which he can perform becomes available he shall be considered for recall and for employment by the Company under the contract and industry recall procedures and practices.

Eric J. Schmertz, Arbitrator

DATED: June 7, 1995

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:
Did the Company violate Section 1, Article 4 of the 1991/1994 GE-IUE National Agreement? If so, what shall the remedy be?
Regardless of the determination of the above, was the letter of reprimand and discharge of SPENCER PRIDE for just cause?

A hearing was held on February 15, 1995 in Cleveland, Ohio, at which time Mr. Pride hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator’s Oath was waived; a stenographic record of the hearing was taken; and the parties filed post-hearing briefs.

The Company charges the grievant with insubordination. It claims that on February 17, 1994 he refused to perform a work order to cut certain tubing; that that refusal led to the issuance of a letter of
reprimand to the grievant for insubordination. (He had received a prior letter of reprimand with a suspension in 1986 for "misoperation...causing extensive damage...endangering (him)self and others.") And that in accordance with Company policy and rules, a second reprimand carries the penalty of discharge.

The Union and the grievant deny that the grievant refused to perform the assignment. They assert that as a Union steward, the grievant questioned the propriety of the assignment (claiming it was outside of his job classification) and that he intended to do the job "under protest" following receipt of heat treatment for an injured shoulder, but found upon completing that treatment that the job had been done by another employee.

Based on the record before me, I find that the Company had just and reasonable grounds to conclude that the grievant actually or constructively, but willfully, refused to comply with the work order, justifying the letter of reprimand. In this proceeding the Union does not challenge the Company's general policy of imposing the penalty of discharge upon a second reprimand. (Reprimands are issued for "serious offenses"). It only challenges the propriety of the at issue reprimand.

My findings of fact are as follows:

1. Upon instructions from manager of shop operations Mark Castelletti, another employee (Willis Mitchell) was instructed to cut certain tubing and was further instructed to get the grievant to help him do so. (It is undisputed that two employees are needed to do the particular job).

2. When Mitchell informed the grievant, the grievant sought a meeting with Castelletti.
At that meeting, followed by a second meeting that immediately followed and attended by the Union's Chief Steward, the grievant argued first, that the work assignment was not part of his job classification; second that he "would do it" (or "would not do it unless") he was paid the higher job rate of a fabricator; third, that to perform the work would be prejudicial to his productivity record.

3. When the foregoing three arguments did not persuade Castelletti to withdraw the work assignment (Castelletti disputed the merits of each argument), the grievant then stated that he had to get a heat treatment for his shoulder, and left the meeting, to do so.

4. Throughout the two meetings Castelletti repeatedly told the grievant to perform the job as assigned and to grieve if he thought the assignment was improper.

5. Shortly after the grievant left the second meeting to get a heat treatment at the medical department, Castelletti saw him at his work station, approached him, and told him he was being given a final chance to carry out the job assignment, and that if he did not, he'd "be written up."

6. Thereafter the grievant went for a heat treatment for his shoulder. During that period, Castelletti assigned the tube cutting work to another employee (Ben Smith), who did the work with Mitchell.
7. The grievant completed the heat treatment at about 2:40 P.M. The end of his shift was at 3:00 P.m. (It is undisputed that the tube cutting assignment would have taken from 20 minutes to 1/2 hour, and that employees are entitled to a clean-up period before clocking out).

I need not decide whether the grievant overtly refused to perform the job as assigned. A "refusal" need not be so precisely defined or confined. A "refusal" can take the form of an unduly protracted objection to the assignment; an unreasonable delay in performing the assignment; non-urgent or non-compelling activities before getting to the assignment, or intervening circumstances that delay or exhaust the time available to perform the job. Where these events or circumstances are deemed to be resorted to or utilized in opposition to or to frustrate a legitimate work order, a conclusion that the work order is being "refused" is logical. These latter circumstances are present in this case.

Based on the foregoing facts and the entire record including the grievant's testimony, I am constrained to conclude that because he believed that the work assignment was not in his classification and because he had previously orally grieved a similar assignment, he intended not to perform it unless he was paid a higher rate. And that when that demand and his argument regarding "productivity" were unavailing, he decided to claim the need for medical treatment for his shoulder as an ultimate factor to avoid compliance. The record is clear that more than once he was warned that if he did not comply he'd be "written up" (i.e. disciplined).
While there is no dispute that the grievant had been receiving heat treatment for his shoulder and that he did get treated on February 17th, there is no evidence that he was scheduled to do so at that particular time or evidence that having worked throughout the day up to that point, the medical treatment was, coincidentally, compelling or necessary at that moment. I do not question the bonafide of the heat treatment, but rather the need to have it done at that time. Rather, because he never mentioned either his shoulder paining him or the need for heat treatment until his other claims were expressed and denied, I must conclude that the heat treatment procedure was utilized by him for the purpose of and as a final effort to avoid doing the work ordered.

Indeed, his timing supports this conclusion. He certainly should have known, following the final discussion with Castelletti at his work place when Castelletti gave him "a final chance" to comply, that if he went for heat treatment instead, Castelletti would get someone else to do the work. Additionally conclusive is the fact that the grievant's timing was such that when he completed the heat treatment there was not and would not have been enough time to do the job anyway. At the risk of harshness, I must conclude, considering the grievant's earlier resistance to do the assignment, that he knew that to take the heat treatment at the time he did would effectively make subsequent performance of the job impossible.

None of the grievant's claims or complaints about the job assignment, even assuming their bonafides, fall within the well-settled exceptions to the basic rule "to comply and then grieve."
Nor, in my view, did the grievant's role as a steward give him immunity. Indeed to the contrary. As a steward of some 10 years, he knew and concedes he knew of the rule "comply and then grieve." As a steward he had a special duty to follow that rule, especially, as here, where the work assignment was given to him in his capacity as an employee. He had the right to question the propriety of the order and the right to have a meeting on it with Castelletti and with the Chief Steward. But when told directly to do the job and grieve, he should have complied without further delay, leaving redress of his objections to the grievance procedure. To seek additional pay (even if ultimately warranted) and to decide to delay getting to the work until after the heat treatment, was to improperly substitute his judgement for that of management for what was to be done and when and how it was to be done. At that point he went beyond his authority as a steward. The Company's disciplinary action was not therefore because the grievant was a Union steward. Hence, I find no violation of Section 1, Article 4 of this contract.

As there is not challenge herein to the Company's procedure of imposing the penalty of discharge for insubordination or for a second reprimand, and in view of my finding that the grievant's second letter of reprimand was for the offense of insubordination, the grievant's discharge is sustained.
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 Section 1, Article 4 of the 1991/1994 GE-IUE National Agreement.
The letter of reprimand and the discharge of SPENCER PRIDE was for just cause.

Eric J. Schmertz
Arbitrator

DATED: May 17, 1995
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:

Whether the discharge of VIRGINIA CANDIS was for just cause? If not, what shall be the remedy?

A hearing was held on March 29, 1995 at which time Ms. Candis, 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, and the parties filed post-hearing briefs.

The critical questions posed in this case are whether the grievant falsified the medical and physical condition of her right arm by claiming that intense and chronic pain in that arm virtually immobilized its use on her job; whether she misled the physicians who examined and treated her; and whether she claimed and received Workers Compensation and accepted medical treatment at considerable expense to the Company, fraudulently.
I need not recite herein the extensive history of the grievant's problems with her right arm beginning with a claimed work injury in July 1989, through some 100 visits to the Company clinic, examinations, diagnoses, and treatments by Doctors Mull, Sherman, Lamb and evaluations and therapy at the Lewis Gale Pain Center over approximately four years from 1989 to the grievant's discharge in October 21, 1993. The record and the briefs of the parties document that history fully, along with the periods of time that the grievant did not work because of the claimed disability and the period of time she worked only part-time.

Suffice it to say that throughout she complained of and was diagnosed with "excruciating" pain; inability to move the arm in any normal way; (e.g. "can't lift a pencil or button clothes") intense pain on being touched; the need to carry the arm "as if it was in a sling," with the hand more like a "claw." She was medically diagnosed as suffering from "reflex sympathetic dystrophy," with "50% impairment."

With virtually no improvement (except some minor progress at the Pain Clinic) over this extended period of time, and apparently because of the grievant's expressed desire to retire on disability, the Company, suspicious of the bonafides of her claimed condition, secretly video taped her off the job. These tapes showed circumstances vastly different from her claimed disability generally, vastly different specifically from her claimed inability to perform her job (as an operator who placed PROMS, weighing one ounce each and measuring an inch square, in a small box) and "inconsistent" with the complaints and symptoms she continued to report to the doctors and the Company's medical department. The video taping took place on June 6, July 6 and 7, September 17, 18, 20, 21, 22, 23 and 24, 1993. There is no evidence that the tapes are not authentic or that they were edited or otherwise selective.
The tapes showed the grievant using her right arm, apparently unimpaired, doing such things as moving and dismantling furniture, carrying groceries and other packages, opening and closing doors, loading the rear of an automobile, swinging a pocketbook over her right shoulder, lifting cartons of soft drinks, folding an umbrella, shaking out laundry and hanging wash on a clothes line. The physicians who had examined, diagnosed and treated her over the four year period, testified at the hearing, that upon seeing the tapes, they concluded that her ability to do these things off the job was "totally inconsistent" with her reports and complaints to them, inconsistent with their diagnosis of her condition (at least by the time the video was taken), and that they concluded that the grievant "misled them." They answered "no" to the arbitrator's question of whether there could be a difference between the demands of and tensions on the job, as distinguished from her off the job activities, that would account for the marked difference in the use of her right arm.

The Union argues that video tapes alone, without further medical examinations of the grievant, are not sufficient to nullify the several years of medical diagnosis and treatment made and accorded by the doctors. And that the later testimony of the doctors that they were "misled" should not be accepted by the arbitrator as sufficiently probative to support an abrupt and "late switch" in the diagnosis, especially when the grievant was not again examined and the new opinions regarding her condition (or noncondition) were based on the video-tapes alone.

Though it does not affect the outcome of this case (because other evidence in the record is adequately supportive of my decision) I want to, at this point, reverse an evidentiary ruling I made at the hearing. I admitted into evidence a video tape of the grievant working at her job in the plant. (Company Exhibit 24). I did so before the cross-
examination of the Company nurse. In her cross-examination, however, she acknowledged that that tape was made for "ergonomic" purposes.

On March 15, 1991, the Union and the Company agreed in writing (and signed by William C. Martin, the Company’s Safety Specialist) that tapes taken for "ergonomic" evaluations "will not be used to discipline employees." Here, obviously Company Exhibit 24 was introduced into evidence to show the grievant’s severely restricted use of her right arm while on the job and to be compared with the off-the-job tapes showing normal use of that arm. As such, its purpose in this arbitration is to support the Company’s conclusion that the grievant falsified her condition and to support the Company’s action discharging her. Clearly, thus, it has been introduced "to discipline" the grievant. That is a violation of the March 15, 1991 agreement. That technically, it was made by the medical department and not the Safety Department, I consider immaterial. Its use here to support a disciplinary penalty is a breach of the spirit and intent of the March 15, 1991 agreement. Therefore, I exclude it.

However, this ruling notwithstanding, there is other substantial evidence in the record that discloses how the grievant did her job with her claimed disability and the virtual uselessness of her arm when doing so. Therefore, the comparisons between her claimed inability to use the arm normally on the job and her flexible use of the arm off the job can be compared by this other probative evidence.

I do not agree with the Union that the testimony by the doctors at the hearing changing their diagnosis of the grievant’s condition should not be accorded credit in view of their long-term diagnosis and treatment of the grievant otherwise.

They gave their medical opinions on the grievant’s condition based on the tapes, and compared medically what they saw she was capable
of during off the job with her complaints and symptoms on the job when she was examined. I cannot conclude that their conclusions based on that comparison, in the absence of rebuttal medical testimony, were not rooted in medical expertise.

It is well known that pain is a subjective symptom. Doctors make a diagnosis of pain and related symptoms based largely on what the patient reports. Objective evaluations, based on x-rays, and other scientific techniques do not usually disclose pain.

That being so, I reach the following conclusions. I find no reason to disbelieve that the grievant’s condition originated with an accident. I see no reason to disbelieve that for some time she suffered extensive pain and was effectively disabled (including possibly up to 50%). I have no quarrel with the operation performed on her arm and the diagnosis which prompted it. Nor do I have any reason to believe that the grievant did not at some point and for some period suffer from "reflex sympathetic dystrophy."

In short, for some undefined period of time, I conclude, in the absence of evidence to the contrary, that her claim of pain and disability and her entitlement to workers compensation and medical treatment were legitimate.

But at some point, I conclude, her condition if not totally cured, improved substantially. That occurred some time before and probably well before the video taping of her off the job activities. Just when cannot be determined from this record.

I reach this conclusion not only on the video tapes of her off-the-job activities, but also on a well-settled rule of evidence. Though the Company has the burden in this case of proving cause for the grievant’s discharge, the burden of proof shifts to the grievant when and
after the Company has made out a prima facie case. The Company did so with the video tapes of the grievant’s off the job activities, together with the new diagnoses of the doctors based on their observations of the tapes. Shown prima facie, is that regardless of the possible bonafides of the grievant’s original accident and resultant condition for a period of time, there came a point when the grievant was rehabilitated, at least to the extent that she should have been able to do her job normally. At that point, the burden of proof shifted to the grievant to show, medically psychologically, or otherwise that there were differences between her job and her off the job activities which would explain or rebut what the tapes showed and the prima facie conclusions drawn therefrom. The grievant and the Union on her behalf did not assume or meet this shift in the burden. So the tapes and the later medical evaluations by the doctors stand unrefuted, with the Company’s burden of proof met.

At some point, the grievant knew that her condition had improved substantially, and that her off the job apparently unrestricted use of her arm could have been applied to her job duties as well. At that point, she had the duty not only to no longer claim the disability but to commence performing her job duties with the normal use of her arm. To the extent and for the period she did not do so, (and I conclude it was for a significant period) she falsified her condition to the Company, continued to take benefits and seek accommodations to which she was no longer entitled. That falsification constitutes a substantial and willful violation of an express company rule against "falsification of records" and I cannot find that under the circumstances and absent mitigating factors, the penalty of discharge was either unjustified or too harsh.

I recognize the theoretical possibility that for psychological reasons alone, the grievant may not have been able to use her arm on the
job but could use it off the job. But no evidence in support of that possibility was adduced in rebuttal to the Company’s case. If such a speculative possibility is deemed to be a mitigating factor, warranting the grievant’s reinstatement on condition she perform her job regularly and without any show or claim of disability, that is for the Company to consider and is not within the scope of the evidence in this arbitration.

However, the grievant’s own testimony suggests otherwise. At the hearing she stated that her arm had improved considerably and that she was now able to work normally. That acknowledgement comes too late. To me it means that much earlier her arm had improved, but that she failed to tell the Company, continuing rather to falsely perpetuate the misrepresentation until faced with discharge and this proceeding. Also, that she thinks she is now capable of working without restrictions belies any suggestion that the job presents "psychological" problems to her that are not present when she is off the job.

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 discharge of Virginia Candis was for just cause.

Eric J. Schmertz, Arbitrator

DATED: May 30, 1995

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.
AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION

between

INTERNATIONAL UNION OF ELECTRONIC,
ELECTRICAL, SALARIED, MACHINE AND
FURNITURE WORKERS, AFL-CIO
IUE LOCAL 1160

and

GENERAL ELECTRIC COMPANY

The stipulated issue is:
Did the Company violate Article XI of the 1991-1994
GE-IUE National Agreement or the Local Layoff and
Recall Supplement on November 3, 1992, when DALE
WITZMAN was recalled from layoff to the Inspect and
Test "A" Classification rather than KEN DZWONKOWSKI?
If so, what shall be the remedy?

A hearing was held in Eveleth, Minnesota on December 14, 1994 at
which time Mr. Dzwonkowski, hereinafter referred to as the "grievant" and
representatives of the above-named Union and Company appeared. All
concerned were afforded full opportunity to offer evidence and argument
and to examine and cross-examine witnesses. The Arbitrator's Oath was
waived; a stenographic record of the hearing was taken, and the parties
filed post-hearing briefs.

In my judgement the facts and circumstances of this case warrant
the application of the legal principle of "reformation" (i.e. to conform
the technical circumstances to the substantive facts) and calls for a
decision that is both equitable and contractual.
Article XI reads:

1. 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 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.

Similarly, in all cases of rehiring after layoff, total length of continuous service applied on a plant, department, or other basis as negotiated locally, shall be the major factor covering such rehiring if the employee is able to do the available work in a satisfactory manner after a minimum amount of training. (JTX 1)

The Layoff and Recall Supplement reads:

2. RECALL FROM PERMANENT LAYOFF PROCEDURE

(A) Total length of continuous service as defined in Section 1(a) shall be the major factor governing rehiring, if the employee is able to do the available work in a satisfactory manner after a minimum amount of training not to exceed one (1) week. Every effort will be made to place laid off or downgraded employees on their former jobs. No new employees will be hired in a job classification until all laid off qualified employees have had an opportunity to return to work.

(B) Downgraded employees will be returned to their former job classification and rates whenever sufficient work in their classifications becomes available on the basis of their total length of continuous service and continued ability.
Prior to November 2, 1992 both the grievant and Dale Witzman were on layoff. It is undisputed that both had served actively in the classification, Inspect and Test "A" and were qualified to perform the duties of that classification. The grievant enjoyed greater seniority.

The Company's recall of Witzman, the junior of the two, to the Inspect and Test "A" classification prompted the instant grievance.

If Witzman's recall to that classification involved also the assignment to him of the duties of that classification, the Company's action would clearly violate the recall provisions of the contract. The grievant, as the senior of the two was "able to do the available work in a satisfactory manner..."and therefore was entitled to recall preference.

But there is more to the relevant facts. Witzman, though classified as Inspect and Test "A" was not assigned to the duties of that classification, but rather to work within the classification Electric Mechanic, Group A (also referred to as Electromechanic).

More specifically, Witzman was recalled and assigned to perform "wheel motor work."

The Company asserts that no Electromechanics were on layoff at the time; that Witzman had been a "GE Electromechanic and had extensive experience on the types of wheel motors involved"; that the grievant was not so-experienced or qualified; that it would have taken him not the contractual "one week" to learn the job, but rather "three months"; and that Witzman was accorded the title Inspect and Test "A" upon recall because, as a small and informal shop, it was the practice to "carry" a
recalled employee "on the books" in his former classification. And that to "declassify" Witzman to the lower rated Electromechanic job would result in a reduction in pay contrary to the Company's agreement with him when he was offered the recall.

Simply, it is the Company's position that the "available work" within the meaning of the Recall Supplement was wheel motor repair within the Electromechanic classification and that Witzman was qualified to do it and the grievant was not. Hence, concludes the Company, the Witzman recall in preference to a recall of the grievant was contractually proper.

The Union asserts that the definition of "available work" is the job classification to which an employee on layoff is recalled -- here, the job of Inspect and Test "A." And that having so identified and focused the recall notice on that classification, the Company is so bound. It concludes therefore that the grievant, qualified in that classification and with greater seniority, should have been recalled. My interpretation of the Union's argument is that if the Company erred with regard to the actual work to which the recall employee would be assigned, it made that error at its peril and cannot deny the recall as mandated by the contract to the classification the Company selected.

Alternatively, the Union contends that by skills he already possessed from the higher rated job of Inspect and Test "A," and from courses he has taken, the grievant is able to perform the wheel motor work involved, and certainly after a week's training.

Based on the record before me, I cannot disagree with the Company's position that the grievant is not now qualified to perform the wheel motor repair. Nor can I conclude that he would be capable of doing so with training of one week. I accept the Company's judgement and testimony on that point. Therefore, though the grievant is highly skilled
and talented as an Inspect and Test "A" and though he is to be commended on his educational initiatives, I am not persuaded that he is yet able to step into the work of wheel motor repair and do it satisfactory as contractually prescribed.

Nonetheless, the Company committed certain procedural and contractual errors which cannot stand with impunity, and the effects of which compel an equitable remedy.

There is no serious dispute that the work the Company wanted and needed to have performed when it initiated the recall was wheel motor repair. There is no evidence that it intended to assign the recalled employee to work in the Inspect and Test "A" classification and then shift, later, to wheel motor repair. But, though it acted in good faith in that regard, it nonetheless purposefully noticed the recall for the wrong classification.

Also, by retaining Witzman in the higher job classification of Inspect and Test "A," though it was intended all along that he be assigned to specialized duties in the lower rated job of Electromechanic, was not only contractually erroneous, albeit beneficial to Witzman, but perpetuated mis-information to the grievant and the Union.

The foregoing prompts this blunt analysis. Willfully or inadvertently, the Company's procedural error misled the Union and the grievant. At the time of the recall, and probably until the first grievance meeting was held, the Union and the grievant had legitimate grounds to believe that the Company violated the recall provisions of the contract.

Under the facts of this case, where it is clear that the work for which the recall was intended was wheel motor repair (and within a different classification than the job of the recall notice) I am not
prepared to unrealistically conclude that the "available work" within the contractual meaning was work in the Inspect and Test "A" classification. So the Union's claim in that regard is rejected. But, on equitable grounds I do conclude that for a period of time, again, namely from the recall of Witzman until the Union knew what the "available work" was in fact, the Union and the grievant had reason to believe that the "available work" was work for which the grievant was qualified and to which he was entitled based on his seniority. Under that circumstance, I conclude that the Company must bear some financial responsibility for its contractual "error," for the misleading effect it had on the Union and the grievant, and for its disregard of what would appear to be the grievant's rights under the contract.

Also because it is part and parcel of the same recall "transaction" and because of its misleading nature, I conclude that it is within my authority to conform the facts of the Witzman recall to the spirit if not the requirements of the contract.

Specifically, so that the recall and other relevant provisions of the contract are upheld and enforced, Witzman's status should be conformed to the classification in which he is actually working, at the rate of pay of that classification.
Based on the foregoing particular facts and circumstances of this case, the Undersigned, duly designated as the Arbitrator, and having duly heard the proof and allegation of the above-named parties, makes the following AWARD:

The recall of Dale Witzman is upheld.

However, for the contractual errors committed by the Company in noticing and implementing that recall, the Company is directed to pay Ken Dzwonkowski an amount of money equivalent to what he would have earned at straight time as an Inspect and Test "A" for the period from the recall of Witzman to when the Company notified the Union that Witzman’s recall was to perform wheel motor repair (in the classification Electromechanic) but no later than the date of the first step of the grievance procedure of the instant grievance.

Prospectfully, Witzman shall be reclassified as an Electromechanic and paid at the rate of that classification, unless the Union and the Company agree otherwise on his classification and rate of pay.

DATED: March 20, 1995

STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Impartial Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
PERMANENT ARBITRATOR, FILM LABORATORIES INDUSTRY

In the Matter of the Arbitration
between
Local 702 Motion Picture Laboratory Film Technicians
and
Guffanti Film Laboratories, Inc.

OPINION AND AWARD

The stipulated issues are:

1) Did the Employer violate Article 1, Subsections a, b and f, Article 7 and Schedule A of the Collective Bargaining Agreement by laying off Robert Moran from his position as a Projectionist on or about March 31, 1995? If so, what shall be the remedy?

2) Did the Employer violate the same contract sections and also Article 16 of the contract by assigning the projectionist work to Supervisors? If so, what shall be the remedy?

A hearing was held on September 12, 1995 at which time Mr. Moran, 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 stipulated issues are interrelated and can be dealt with together.
The contract sections cited by the Union in its grievance and in the stipulated issues notwithstanding, the facts in this case are controlled by the first paragraph of Section 7 and Section 7(a) of the contract. It reads:

When work is insufficient to provide a full week’s employment for all employees of a department layoffs may be effected in any one of the following methods:

The available work shall be rotated in the first instance amongst the qualified employees within the particular classification affected, and then, if necessary, among the qualified employees within the particular classification affected, and then, if necessary, among the qualified employees in the department at the wage rates of work performed so as to afford at least three days work per week for the employees affected. Thereafter, should such work distribution result in less than three days work per distribution result in less than three days work per work for such employees of said department, or should such work provide not more than three days work per week for a period of six successive weeks, layoffs in such department may, at the option of the Employer, be effected as hereinafter provided, under subdivisions (1) (2), (3), (4) and (5) of (c) hereof.

The unrefuted evidence adduced by the Company is that the projectionist work performed by the grievant had fallen to three hours a day. Absent evidence to the contrary I conclude that means that the total amount of projectionist work in the laboratory was three hours a day. As the grievant was the only employee in the
department and the only employee "particular(ly) classified" as a "Projectionist," there were no other employees within the meaning of Section 7(a) amongst whom the work could be "rotated." Moreover, rotation of three hours of work a day "amongst qualified employees" would not produce at least "three days work per week for such employees," even if others, outside of the department were included.

In short, Section 7 allows for layoffs when there is a diminution of work below a "full week's employment," and sets forth the procedures to be followed, the notice to be given and certain payments to be made.

There is no dispute that the grievant was laid off because of the sharp reduction in his work as a Projectionist, and that he was offered, but refused to accept the two weeks wages required by Section 7(c).

It is well settled that a specific, relevant section of a contract takes precedent over other general provisions. Accordingly, as is traditional under collective bargaining agreements, an explicit provision for layoffs because of a diminution of available work preempts the general Shop Agreement (Article 1) or the Classification of Work and Rates (Schedule A). Neither of the foregoing provisions (or subsections thereof), restrict the Employer's right
under Section 7, to effectuate lay-offs for lack of work. With that foregoing interpretation of Section 7, there is no basis to find any Section 7 violation.

The Union complains further that the grievant’s remaining projectionist work was assigned to non-bargaining unit Supervisors and other bargaining unit employees not of the Projectionist classification. The record shows that the remaining three hours a day of projectionist work was parcelled out to a bargaining unit Timer and a Mechanic and possibly, at nights, to a Supervisor.

I cannot find this arrangement as it involved a Timer to be a violation of the contract, not only because the grievant’s layoff was permitted by Article 7, but also because the record shows that the projectionist work and the use of the projector has not been exclusively that of the bargaining unit Projectionist.

The well settled rule prohibiting the assignment of bargaining unit work to non-bargaining unit personnel or to bargaining unit employees of other classifications requires a showing that the work has been exclusively performed by a particular classification, here the Projectionist.

That requisite exclusivity has not been shown. Indeed, on a regular basis, on the night shift, for example, the same work
performed by the grievant, was performed by Supervisor Jack Harrell. Also, during the grievant's employment, the use of a projector to check quality, color, etc., was regularly done by Timers. Though the quality control exercised by the Projectionist and the Timers were different in detail there is a sufficient similarity in the use of the projector (normal and high speed projection) and the purposes of that use (quality control) to negate any claim of exclusivity by the projectionist.

So, in the absence of a showing of exclusivity, I find no contractual fault to the assignment of some of the remaining hours of the grievant's work to the Timer.

Nor is this inconsistent with my Decision in Local 702, I.A.T.S.E. -and- TVC and Precision Laboratories. (September 17, 1991). The Union's reliance on that Decision is misplaced. It is significantly distinguishable from the instant case. In TVC I reversed the layoff of James Garrett, a Raw Stock Splicer, who was laid off because of a "diminution of work in that classification." There, unlike the instant case, I "(did) not find any diminution of work which would justify the grievant's layoff." I found that his work, in full quantity, was being performed by other employees.

Here, the Employer has shown a substantial diminution in the grievants' work. That is a material difference from the record
Also, in TVC, the employer offered no evidence to show that the Raw Stock Splicer did not have "exclusivity" over the work in question. In the instant case however, the Employer did show that projectionist work or the use of the projector for quality control was not the function of the Projectionist, exclusively.

In short, those two major differences between TVC and the instant case, make TVC inapposite to the present issues.

However, the assignment of the work to a Mechanic and to a Supervisor, cannot be sanctioned under the contract or the foregoing arbitral rule.

The record does not show that operating a projector for purposes of quality control has been regularly assigned to the Mechanic. He relates to the projector for mechanical purposes. He "stands by it while it runs," apparently to repair it if necessary, but there is insufficient evidence that he operates it or operates it for a quality control purpose.

The assignment of Projectionist bargaining unit duties no matter how small in quantity, to a Supervisor is violative of
Section 16(a) of the contract. That Section, which is explicit and unambiguous, takes precedence over any practice to the contrary. It reads:

"Supervisory employees who are not classified as Working Foremen or Sub-Foremen shall not engage in production or perform the work of another employee except insofar as such work may be incidental to their duties."

Night shift projectionist work performed by a Supervisor, is not "incidental" to his supervisory duties. And a subsequent assignment of those duties, after the grievant's layoff, is also not incidental to his supervisory function.

Expressly and impliedly the Employer argues that the distribution of the grievant's remaining work to the Mechanic and to a Supervisor, (and in theory to other classifications other than Timers), is authorized by a Memorandum of Agreement dated December 27, 1985 between the Employer and the Union. The Employer asserts that in exchange for wage increases, contributions to benefit funds, a promise of no layoffs and other benefits, the Union accorded the Employer "flexibility in making work assignments." And that this "flexibility" was more precisely defined in a December 20th, 1985 letter signed by Paul Guffanti, Jr. of the Employer and C. W. Vitello, the then business agent of the Union. That letter stated:
"Our Lab's present need for flexibility is limited to the Developing Department. However, because of technicological changes or changes in the nature of our business, it may be necessary in the future to make changes in other areas in order to remain competitive. None of these changes will diminish the job security guarantees in the Memorandum of Agreement."

The Employer explains that the foregoing agreement was entered into because of the extreme competitiveness of the industry, and that without it then and now, the Employer, faced with sharp reductions in laboratory work, would be unable to remain in business. It appeals to the Arbitrator to apply this agreement to the facts in the instant case and uphold the distribution of the projectionist duties to other classifications and to supervision, in recognition of the Employer's desperate efforts to "hang on" to his business.

The only question within the Arbitrator's limited jurisdiction to interpret and apply the contract, is whether the aforesaid Memorandum is applicable to this case. Matters of economic survival, not controlled by the contract, are for discussion and negotiations between the parties, and not within the authority of the Arbitrator, no matter how sympathetic he may be personally to the Employers economic adversity. In short, if what the Employer has done is violative of the contract, I must
reverse it, regardless of its economic consequences. And if consistent with the contract, it will be sustained.

For two reasons I do not find this Memorandum of Agreement to be applicable. First, it was part of a contract renewed in 1985, and was consideration for wage and benefit improvements then. There is no evidence that it was continued as part of subsequent contracts or as part of subsequent contract extensions. In short, it was a term and condition of the contract negotiated in 1985; it was companion to the other conditions of employment negotiated and in effect then; and, absent evidence to the contrary, expired with the expiration of that contract. I take arbitral notice of the fact that in one form or another, contracts subsequent to the one negotiated in 1985 were agreed to by the parties. So, unless this specific Memorandum was extended as part of those subsequent agreements, it has expired.

Secondly, by its specific terms, it guarantees no layoffs. It states:

"In order to enhance the job security of all present employees, the Employer agrees that during the term of this Agreement there shall be no reductions in force. Except for attrition, there shall be no layoffs of such employees...(emphasis added)"

Here, the grievant was laid off.
If the Memorandum is still in effect, the grievant could be viewed as a "present employee" within the meaning of the guarantee. His layoff therefore would have been precluded and should be voided. If "present employee" applied only to those employed in 1985 when that contract was negotiated, its non-application now to the grievant adds further to a conclusion that it was intended for the term of the 1985 contract. And that the present inapplicability of the job security guarantee, a major consideration is evidence of the expiration of the entire Memorandum.

For those reasons, I find the 1985 Memorandum is no longer in effect, and hence not a defense to the Company's actions.

The conclusions derived from all the foregoing are apparent. The Employer had the contractual right to lay off the grievant because the quantity of the available projectionist work fell below the minimum of Section 7. Based on the absence of exclusivity the Employer had the right to assign the small quantity of remaining work to Timer(s) who had previously performed work on the projector for quality control. But the Employer did not have the contractual right to assign the work to a Mechanic(s) or to a non-bargaining unit Supervisor.

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, make the following AWARD:
Provided the amount of available projectionist work in the Laboratory fell to three hours a day, the Employer did not violate the collective bargaining agreement by laying-off Robert Moran.

The Employer did violate the collective bargaining agreement by assigning any of the remaining three hours a day of projectionist work to Supervisor(s) and to a Mechanic(s).

The Employer is directed to cease and desist from assigning that projectionist work to Supervisor(s) and/or Mechanic(s).

DATE: September 22, 1995
STATE OF New York)
COUNTY OF New York) ss:

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

Eric J. Schmertz
Permanent Arbitrator
In the Matter of the Arbitration between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 455

and

HOLYOKE WATER POWER COMPANY

The stipulated issue is:
Did the Company have proper cause to terminate the employment of JAMES PHELAN on or about June 7, 1994?
If not, what shall be the remedy?

A hearing was held in Holyoke, Massachusetts on November 29, 1994 at which time Mr. Phelan, 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 and the parties filed post hearing briefs.

The grievant was discharged pursuant to the Company's Fitness for Duty Policy (NUP90) for testing positive a second time for use of cocaine.

The Union challenges the policy generally as unreasonable, and, specifically, contends its application to the grievant was unreasonable and therefore his discharge should be nullified.
The pertinent parts of the Fitness for Duty Policy read:

1. **Policy**

The Company recognizes that employees who are impaired by any cause -- mental or emotional; fatigue and stress, but particularly by on-site or off-site use or abuse of controlled substances or alcohol that may adversely affect their ability to perform their duties -- may create an increased risk to their own safety, the safety of other employees, and the safety of the public. Further, the Company acknowledges that its ability to safely and efficiently carry out its responsibilities while maintaining the public's confidence can be seriously jeopardized by employees whose safe performance is impaired by any cause. Accordingly, the Company is committed to:

- Ensuring that the work environment is safe, productive, and healthy;
- Ensuring that employees perform their work assignments in a reliable, trustworthy manner and are not under the influence of alcohol, illegal drugs, prescriptions or "over the counter" drugs, or are not impaired by mental or emotional problems, fatigue, or stress;
- Providing reasonable measures for early detection of individuals who are not fit to perform their duties; and
- Maintaining an alcohol and drug free workplace that is free from the effects of such substances.

**Employee Assistance Program**

9. The Company recognizes that alcohol and/or drug abuse may require treatment and rehabilitation. Employees who have an alcohol or drug abuse problem should be referred to the Company's Employee Assistance Program.

10. Employees who have an alcohol or drug abuse problem and who ask for help should be referred to the Company's Employee Assistance Program, immediately. A request for assistance, or participation in the Employee Assistance Program, may not be used by an employee as a means of avoiding disciplinary action when a violation of the Fitness of Duty policy is indicated.

11. Employees who have tested positive for alcohol or drugs for the first time will be referred to the Company's Employee Assistance Program.
Management Actions and Sanctions

21. Violation of any provision or requirement of this policy may constitute a "for-cause" situation and may result in disciplinary action up to and including discharge.

25. Employees who have been removed from activities because of fitness for duty impairment may be returned only after the Company physician determines their fitness for duty.

26. Lacking any other evidence, a positive test result will be presumed to be an indication of off-site drug or alcohol use and may result in referral to the Employee Assistance Program, other appropriate resources, removal from assignments consistent with regulatory requirements and Company policy, and disciplinary action as appropriate.

   a. Removal from one's assignment for a first positive test will be for a minimum of 14 days. Employees will be placed on paid medical leave contingent upon (1) compliance with the course of action recommended by the Employee Assistance Program and medical staff and (2) sufficient paid sick time is available to cover the period of absence.

   b. Should circumstances warrant, employees removed from their jobs may be subject to disciplinary action. Such action could be applied at the same time as medical leave and therefore affect one's pay status while on such leave.

   c. Any subsequent positive test will result in discharge.

The parties stipulated that on April 21, 1994 the Company had "reasonable suspicion to have the grievant drug/alcohol tested" and that on that date he "reported to work unfit for duty under the influence of alcohol and drugs." A test of the grievant's urine was positive for cocaine.

Before the test results were known, the grievant entered an inpatient detoxification program (Spectrum) and remained in that program the required five to seven days until May 4, 1994. Apparently he pursued that treatment properly. Thereafter, upon registering with the Company's
Employee Assistance Program, and upon direction from Spectrum and the EAP he was told to enter an out-patient rehabilitation program at Holyoke Hospital. The grievant did so but not before May 16th.

On May 9th, the grievant met with the Company's Medical Review Officer, and was told his positive test was "a first positive" under the Fitness for Duty Policy and "that a second positive would place his job in jeopardy." At that time he was placed on paid medical leave of absence.

The grievant attended the Holyoke Hospital program from the evening of May 16th through May 25th. He tested positive for cocaine use on May 18th and 20th, and beginning with May 23rd, began to miss scheduled sessions. It is undisputed that during this period of rehabilitation treatment, the grievant continued to use cocaine, including an admission of use on May 24th. At about this latter time the grievant was expelled from the Holyoke Hospital program for his failure to follow the prescribed schedule of treatment.

With that expulsion, the Company discontinued his paid status.

On May 31st the grievant was called into the Company's Medical Office for a "return to work" examination and evaluation. He told the Medical Officer that he had used cocaine on May 24th. The Medical Officer responded that if the grievant was tested that day, he would test positive, as cocaine probably would still be in his system from May 24th. The Medical Officer gave the grievant the option of being tested then, or to wait to be tested until June 2nd. The grievant elected the latter.

The test of the grievant's urine on June 2nd was again positive for the use of cocaine. He was then discharged pursuant to Section 26(c) of the Fitness for Duty Policy, which provides:

"Any subsequent positive test will result in discharge."
The Union claims that the Fitness for Duty Policy should be nullified as unreasonable because it was unilaterally promulgated by the Company and not negotiated with or agreed to by the Union.

Whether the Company had the duty to bargain with the Union on the Fitness for Duty Policy, and whether, if so, that duty was met, is not within the jurisdiction of the Arbitrator. That is a legal issue under the National Labor Relations Act, and within the exclusive jurisdiction of the National Labor Relations Board.

The Arbitrator’s authority, as I see it, is to determine if the Policy meets the test of an enforceable work rule under the collective bargaining agreement, and I shall limit my analysis to that, regardless of whether the Company installed the policy unilaterally as a work rule or as a condition of employment following an impasse in negotiations.

A managerially legislated work rule is proper and enforceable if it is employment related, adequately noticed and publicized, uniformly enforced and if reasonable. Here there is no real dispute over its legitimate relation to the employment setting in protecting the safety, morale, productivity and discipline of the work force, nor is there any question that the policy (NUP90) was well-publicized to the employees. Also, its uniform enforcement is not questioned in this proceeding. What is challenged by the Union is its reasonableness.

To judge its reasonableness, generally, a more detailed look at its provisions and practices is warranted.

Clearly, the Policy is both rehabilitative and disciplinary. It does not mandate discharge (or even discipline) for the first positive test for drug use. Though Section 26(b) reserves to the Company the right to take disciplinary action "at the same time as the medical leave," Section 26(a), immediately preceding, makes clear that discipline will not
be taken during the paid medical leave, so long as the affected employee is in "compliance with the course of action recommended by the Employee Assistance Program and medical staff." So, the emphasis, at least initially, is on rehabilitation, with discipline and discharges coming into play if the employee fails to comply with the treatment regime, and (under Section 26(c)) if he again tests positive.

Against a backdrop of the well-accepted prerogative of management, generally, to discipline and discharge for a first positive test for drug use, I must view as liberal and enlightened an employer policy, which as here, establishes an Employee Assistance Program to assist in rehabilitation and which gives an employee a "second chance" before facing dismissal.

Moreover, the Company's policy is additionally beneficial to the employee by continuing his pay during the treatment period and according the use of sick time for that purpose.

Nor do I find the "minimum of 14 days" removal from active employment to be unfair. The record shows that paid leaves extended well beyond that period, so long as the affected employee was pursuing treatment satisfactorily.

Under these general provisions, application and practice, I find no basis to find the Policy per se, to be unreasonable.

The narrower and more precise question in this case, is whether the application of the Policy to the grievant was unreasonable.

The Union contends that it was unreasonable for the Company not to let the grievant complete his program of rehabilitation before testing him on June 2nd. The Union contends that it was unreasonable and in violation of the Policy to test the grievant before he actually returned to work. The Union contends it was unreasonable not to give the grievant
"an ultimatum" that he "return to work by a date certain, fit for duty, or suffer termination." The Union contends it was unreasonable for the Company to determine that the June 2nd positive test was due to continued use of cocaine by the grievant after May 24th. And the Union contends it was unreasonable not to put the grievant, for the full period of his prescribed treatment, in what is acknowledged as the most effective methodology of therapy, namely in an in-patient facility.

In considering these contentions, I must again make reference to the arbitrator’s limited authority. My authority does not extend to determinations of what I personally view would have been the most humanitarian, benevolent or even effective way of handling the grievant’s serious and unfortunate drug addiction. Rather, my authority is confined to determining whether the Company’s actions and the application of its Policy were unreasonable. I do not decide if or whether the Company could have been more supportive, indulgent, or magnanimous in dealing with the grievant’s problem or whether optimally, there may have been a better method of treating him.

The Company did not terminate the grievant’s rehabilitation program. He did so himself, by continuing to abuse cocaine throughout, and by his lack of diligence at Holyoke Hospital leading to his expulsion. I find nothing in the Policy or in the contract which requires the Company to extend the grievant’s period of treatment after the grievant himself defaulted on the opportunity of rehabilitation; nor was the Company’s refusal to do so unreasonable. Any other ruling would sanction repeated failures and lack of diligence in rehabilitation, with apparent impunity.
I do not read the Policy to require the Company to permit an employee to return to work before testing him a second time. Indeed Section 25 of the Policy expressly states that:

"An employee...may be returned (to duty) only after the Company physician determines (their) fitness for duty."

Manifestly, to my mind, an employee removed from duty because of drug abuse cannot be deemed fit for duty thereafter unless tested to show he is free of drug use. So a subsequent test is an inherent requirement for determination of fitness and at the threshold of a return to work. That the Company did not allow the grievant to return to work before testing him again, was not unreasonable.

Similarly, I find nothing in the Policy that required the Company to give the grievant an "ultimatum" to return to work by a specific date, drug free. Such an ultimatum is implicit in the express requirement of the policy. The meaning of Section 26 (a,b, and c) is clear. Employees given the chance to undertake treatment are on notice that they must comply with the terms of that treatment; that disciplinary action may be imposed during the period of treatment; and that any subsequent positive test will result in discharge. In short, the entire period of treatment and the requirements of compliance are, unmistakably, "ultimata" themselves. So, I cannot find it unreasonable that the company did not give the grievant a further, explicit ultimatum, before another test was given, and before discipline, expressly reserved as a right of action in Section 26 (b), was imposed.

As to the test of June 2nd, I find it immaterial whether the positive result was merely a residue of the grievant's admitted use of cocaine on May 24th or evidence of his continued use between May 24th and
June 2nd. The Union asserts that because the test result whether taken on May 31st or June 2nd was "pre-ordained" to be positive, to administer it on either day, was unreasonable. That view begs the real question. The real question is whether the Company had the right to call the grievant in for a test some forty-two days after he first tested positive. I cannot find it unreasonable for the Company to have done so. Section 26 (a) speaks of a medical leave of absence for a "minimum of 14 days." The grievant's leave was three times that length, and throughout it he continued to abuse cocaine and during it he was expelled from a rehabilitation program. The Policy clearly contemplates a subsequent urine test sometime after 14 days. Considering the grievant's poor record during his leave of absence I cannot judge it to be unreasonable for the company to call the grievant in for testing and to test him anytime after the 14 days, and certainly not after 42 days.

The critical fact is that on June 2nd he again tested positive in violation of the Policy that "any subsequent positive test will result in discharge" (emphasis added). The Policy is unequivocal. It refers to any subsequent test, and mandates the penalty of discharge. So, whether the June 2nd positive result was due to use of cocaine on May 24th and/or thereafter, is immaterial. It still is a subsequent positive test. Additionally, with the right of the Company to order such a test forty-two days after the first test, it is equally immaterial that the results were "pre-destined" to be positive. The Company had given the grievant an ample and reasonable opportunity to rehabilitate himself over a forty-two day period. Considering his lack of diligence and responsibility in undertaking that opportunity, the Company had the right on May 31st, or June 2nd to bring it to an end and to administer a subsequent test, even if the results of that subsequent test were a foregone conclusion.
Finally, I, and apparently the experts agree, that in-patient care throughout a period of rehabilitation is the best method of treatment. The Union seems to argue that the Company had a duty to provide the best treatment to the grievant, and not having done so, the disciplinary penalty should be nullified. Neither the Policy nor the contract requires that of the Company. The medical treatment afforded the grievant was the best available under his and the Company’s medical insurance. There is no evidence that it was a poor program. Indeed, it appears to have been customary and adequately respected. Assuming arguendo that a total in-patient program is the best therapy, it is mere speculation at best, to think that the grievant would have responded any better to it than to what was available and afforded to him.

It is my hope that the grievant’s claimed successful treatment after his discharge will be permanently effective and that he has finally achieved rehabilitation. The Arbitrator has no authority to restore him to duty because he now may be well. It was his condition at the time of his discharge that is determinative. But if he has now overcome his addiction, it is hoped he can gain employment elsewhere and pursue a useful and healthy life.
The Undersigned, duly designated as the Arbitrator in the above matter, and having duly heard the proof and allegations of the above-named parties, makes the following Award:

The Company had proper cause to terminate the employment of James Phelan on or about June 7, 1994.

Eric J. Schmertz
Arbitrator

DATED: January 16, 1995
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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration between

OPEIU, Local 153, AFL-CIO

and

Long Island University

The stipulated issue is:

Was there just cause for the termination of Calvin Ratteray? If not, what shall be the remedy?

Hearings were held on March 7 and June 1, 1995 at which time Mr. Ratteray, hereinafter referred to as the "grievant" and representatives of the above-named 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.

The grievant was discharged for his "involvement and conduct in an altercation on the University’s property on December 21, 1993." More specifically he is charged with "stalking" and then in the course of an argument, "slapping" the face of a female pharmacy student.

Prior to his dismissal on December 23, 1993 the grievant was a laboratory technician-specialist at the University’s College of Pharmacy. As such, he was a salaried employee of the University,
and had been so employed for over 24 years.

It is the University’s position that regardless of the relationship between the grievant and the female student (Marcel Forsythe) and irrespective of the circumstances, for a University employee to strike a student is intolerable and manifestly grounds for discharge, regardless of the length of his employment or unblemished prior record.

The grievant, and the Union on his behalf deny the charge. They assert that the grievant and Forsythe had a romantic and intimate relationship; that the confrontation in a University building on December 21, 1993 was merely a verbal exchange; that there were no witnesses; and that Forsythe falsified the alleged assault to University security and its Director of Personnel.

Let me be blunt and come right to the point. I do not think that either the grievant or Forsythe testified truthfully. I reject the grievant’s denial of the assault. His claim that Forsythe’s glasses flew off her face because she shook her head vigorously during their verbal encounter, is simply not probable or plausible. Rather, I conclude the glasses flew off when the grievant struck her. Her spontaneous statement, to those who heard her cryout, to Security shortly after the incident, and the report she made to Personnel and the nurse and the independent testimony of her reddened cheek, all support this conclusion.
On the other hand, I do not believe her when she denied that she and the grievant had a romantic and intimate relationship. Her admission that she "slept over" at the grievant's house "once or twice;" the photographs introduced into evidence showing them together (apparently happily and playfully) at a restaurant and at leisure,; and her admission that she "confided" in him, persuade me of that relationship.

What happened here, I believe, is that the romantic relationship went sour; that she decided to end it; that he resisted and spent a night in the hallways of a dormitory where she was located studying for an exam with some other student, trying to find her; and when they did meet, after he was unable to find her or unable to persuade her to come out of her study sessions, they had a quarrel and he slapped her face. There is no evidence of any prior acts of violence by the grievant nor is there evidence of a propensity for violence. I believe this was a single incident.

Nonetheless I agree with the University that absent mitigating circumstances, an employee who strikes a student commits an indefensible offense that warrants dismissal.

Here, however I find two particular circumstances in the nature of mitigation which cause me to impose a severe disciplinary penalty on the grievant, but short of discharge.

Those circumstances, unwittingly of course, but none the less
consequential, afix some responsibility on the University for the critical event.

The first is the University's failure to remove the grievant from the University dormitory the night and morning of December 20th and 21st. The record before me shows that persons not housed in the dormitory or not there for educational purposes, are not permitted to remain in the building after midnight. The grievant entered the dormitory at 10:15 PM and did not leave until after 2:30 AM. As he logged in his presence was known to the security personnel on duty. During those more than four hours the grievant looked for Forsythe, openly telephoned the rooms of students where he believed she was studying, and even asked students of her whereabouts. The anger from the apparent rupture of their relationship and her obvious avoidance of him (she acknowledged she knew he was in the dormitory looking for her), and the frustration at being unable to find her must have mounted, leading to the outburst later the same day. Had Security maintained surveillance over his activities that night and removed him after midnight, and had his unorthodox conduct (as a University employee) been reported as it occurred, the uninterrupted emotional factors leading to the assault may have been defused.

Also, as there is nothing in the record about any University rule or policy regarding romantic or intimate relationships between
University employees and students I can only presume that there was no rule or policy on that subject. That being so, the University knew or should have known that adult relationships could and indeed would develop between employees and students. The absence of any restrictive rule or policy means that the University tolerated such relationships. Toleration carries with it knowledge or constructive knowledge that those relationships could turn sour, could lead to quarrels, and could involve, in extreme but not unprecedented instances, possible violence.

This is not to say that the University should have promulgated a rule prohibiting romantic or intimate relationships between employees and students. (Though I personally favor such a rule and legislated one at the Hofstra Law School), but rather that not having done so, the University cannot be fully absolved from some responsibility for the consequences of a broken relationship, including, as here, an act of violence.

In short, adopting the tort theory of "contributory negligence," I affix some constructive blame on the University for the unfortunate events of this case. Its employees should have been more rigidly instructed and supervised for obvious protective reasons.

This does not excuse the grievant. Regardless of his relationship with Forsythe there was absolutely no justification,
socially or legally, for him to slap her. His misconduct warrants a severe penalty. Only because of the University's omissions in this matter will I reduce his discharge to a disciplinary suspension. The grievant has been out of the University's employ for about 18 months. I shall extend that period of time to a total of 24 months. Accordingly, the grievant shall be reinstated on December 23, 1995 without any back pay. The period of time from his discharge on December 23, 1993 to his reinstatement on December 23, 1995 shall be deemed a disciplinary suspension.

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

The discharge of Calvin Ratteray is reduced to a disciplinary suspension. He shall be reinstated without back pay on December 23, 1995.

DATED: JULY 10, 1995
STATE OF New York )
COUNTY OF New York )ss:

Eric J. Schmertz
Arbitrator

1Forsythe's rights in other forums, such as a possible court action for assault, are not within my jurisdiction and are not determined by this decision.
The stipulated issue is:

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

A hearing was held on August 22, 1995 at which time Mr. Costa, 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.

Prior to his discharge the grievant was a driver, delivering on behalf of the Company boxed and bundled magazines to various retail dealers.

The charges against him, for which he was discharged, are "theft" and "falsification of Company documents."

More specifically he is charged with falsifying the reason for the return of boxes of magazines to the Company, and, attendant thereto, with the pilferage of significant numbers of certain magazines from those boxes and their conversion to his own use. The Company alleges and concludes that the magazines he removed from the boxes he used for
personal transactions to the retail dealers or otherwise, and that that constituted "theft." His return of those boxes, claiming that the dealers refused or failed to accept them because of an inability to pay, was a "falsification."

Additionally, as to "bundles" of magazine or "loose titles," the Company asserts that shortages found after return from his delivery run were also pilfered by him and converted to his own improper use.

The case against the grievant is circumstantial. He was not seen removing magazines from the inventory on his truck, nor is there any direct evidence of any improper transactions with dealers or others. None of the outlets who were to receive the boxes of magazines which the grievant returned to the Company with the report of "refused, nonpayment" testified or offered any evidence.

I agree with the Union that because the charge, in significant part at least ("theft") parallels a crime, the standard of proof required of the Company should be rigidly adhered to. But, I conclude that that requisite arbitral standard of proof has been met.

One can legitimately debate whether the grievant's culpability has been shown under the criminal standard of "beyond a reasonable doubt." But it is not the criminal standard that is applicable in discipline cases, including cases of discharge for offenses that parallel crimes. The evidentiary standard, as both sides recognize, is proof that is "clear and convincing."

Though the evidence against the grievant is circumstantial, I am satisfied that even a rigid application of the "clear and convincing" standard to the facts and proofs, establishes this grievant's culpability for the offenses charged.
Critical to the case against the grievant is the evidence regarding two boxes of magazines, destined respectively for the outlets Highway Cigar and News Galaxy.

Suspicious about the grievant’s practices after receiving a "tip" on an earlier day that a driver was selling or distributing magazines from his truck on the street, and after determining, based on time and location, that it was the grievant, the Company ordered that his inventory of magazines be checked on March 8, 1995 upon completion of his route, to compare the quantity he started with and the quantity delivered, with the quantity that remained.

It is the unrefuted testimony of the Company that from the two boxes destined for Highway Cigar and News Galaxy but returned to the Company by the grievant because of "no payment," there was an unaccounted for shortage of a significant number of popular magazines; that the straps on the boxes were loose; that the boxes were partially crushed (with an attendant loosening of the straps); that the side panels of the boxes were or appeared to have been sliced (making, based on simulation, the removal of magazines from that opening possible); and that to compensate for the magazines removed, the boxes were stuffed with newspapers and a camel cigarette catalog.

Also unrefuted is the Company testimony that the boxes are filled by conveyor belt by other employees; that for the particular delivery scheduled for March 8th, the boxes were packed and secured with plastic straps on March 6th. And placed on the grievant’s truck on March 7th, following which the truck was locked and remained locked (with the key in the possession only of the foreman) until the grievant was ready to begin his delivery run on March 8th.
Finally, again unrefuted, the Company’s Operations Manager testified that following the inventory showing the shortages in the boxes returned by the grievant, he visited the two dealers involved — Highway Cigar and News Galaxy, and saw on their magazine racks a quantity of the very titles that the grievant returned and which the grievant claimed those dealers rejected.

From these observations, the Company concluded that the titles displayed by those two outlets were the magazines missing from the boxes the grievant returned; that the grievant must have engaged in a private transaction to supply those dealers with the magazines he "stole"; and that the return of the boxes because the dealers would not or could not pay for them, was a manifest falsification.

As I see it, there are only three principal and reviewable possibilities to account for the missing magazines.

First is the possibility that the Company witnesses are falsifying what they did and learned when they checked the grievant’s inventory. That, of course, would contribute a "frame-up" of an immense magnitude. I reject this possibility. There is no evidence that the Company or any of its officials had reason to falsify their testimony or capriciously planned to falsely charge the grievant with or implicate him in a "theft." Indeed, the Company had prior problems with the grievant in connection with unexplained shortages, and had warned him. Those warnings were not protested or grieved as unfounded or false.

The second possibility is that the boxes were filled improperly or "short" by the personnel at the conveyor location, a day before they were put on the grievant’s truck. And that the newspaper and catalog filler were added to the boxes then to cover-up the removal of the magazines. Or that the magazines were removed from the boxes, and paper
and catalog filler substituted sometime between the time that the boxes were loaded in the grievant’s truck and the day he went on his delivery route.

I reject these possibilities as illogical and unrealistic. If other personnel were pilfering magazines when the boxes were filled, or en route to the truck, or after being loaded on the truck, shortages would have been found in boxes that were delivered to dealers. Those dealers, upon opening their boxes would have found shortages from what they ordered and would have found newspaper and catalog fillers. And they certainly would have complained to the Company and demanded credit or reimbursement for what they did not receive. There is no evidence of any such other shortages. For the shortages to be limited to and identified only with the boxes the grievant returned would have required careful coordination between the grievant and those other employees. The boxes would have had to be selectively chosen and the grievant would have had to know which boxes he was to return as rejected by the dealers. And the same would be required if the boxes were tampered with en route to or while locked in the grievant’s truck. I am not persuaded of the feasibility or realistic possibility of either scenario. Moreover, any such set of circumstances necessarily involving the willful participation of the grievant. It would make him an active part of a theft and falsification and obviously could not be a defense to the instant charges.

What remains are the allegations advanced by the Company in this case. The circumstances add up logically and realistically to the grievant’s culpability. The evidence shows that the boxes appeared to have been opened. The sides were slit or apparently slit. The crushed corners made it easy to slide the straps off or aside. Significantly, the newspapers in the boxes were dated not March 6th when the boxes were
filled and not March 7th when placed in the grievant’s truck, but rather March 8th, the day of the scheduled delivery, the day the boxes were returned and the day the magazine shortages were found. There is no evidence that newspapers dated March 8th could have been available earlier than the early morning of March 8th.

I conclude, therefore, that the newspapers were put in the boxes on March 8th and that only the grievant could have done so.

That the titles missing from the boxes, in the approximate quantity missing (at least as to the one outlet where a quantity approximation was made by the Operations Manager) were on display at outlets the grievant claims refused delivery, adds evidence to the facts and circumstances that can only be explained logically and reasonably by the grievant’s culpability. Because it is otherwise purely speculative, I accept as accurate the Company testimony that no other unauthorized distributors could have delivered that quantity to those outlets on March 8th, and that the quantity precluded "swapping" or borrowing from other outlets.

Also, because I accept as truthful the testimony of the Company’s Operations Manager and the then Driver Check-in Foreman, I do not find the Company’s case prejudiced by its inability to produce at the hearing the particular newspapers found in the boxes or to produce testimony by Highway Cigar or Galaxy. Indeed, under my findings and the circumstances, the fruitlessness of any effort to do the latter is obvious.

With the foregoing it is unnecessary for me to deal substantively with the shortages in the "bundles" handled by the grievant or in his "A Station" inventory. Procedurally, however, I find no precedential import to the undisputed fact that for shortages in that or
those products, drivers have not been disciplined, but rather only required to pay for the shortages. Here, the major charge against the grievant is not shortages in his A Station inventory or in loose or bundled magazines, but rather pilferage in significant quantities from boxes and conversion to an improper use and falsification of documents. There is no past practice or precedent limiting the Company's disciplinary action for those offenses to simply payment by the driver for the shortages.

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

The discharge of ANTHONY COSTA was for just cause.

Eric J. Schmertz, Arbitrator

DATED: September 1, 1995

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

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