In the Matter of the Arbitration Between

THE MANAGEMENT TRUSTEES OF THE
NYSA-ILA PENSION TRUST FUND,

  - and -

THE UNION TRUSTEES OF THE
NYSA-ILA PENSION TRUST FUND.

Arbitrator:   Eric J. Schmertz

Appearances:  Lambos & Junge ................................. for Management Trustees
              (by C. Peter Lambos and
               Donato Caruso)

              Stillman & Friedman, P.C. ......................... for Union Trustees
              (by Julian W. Friedman and
               Samantha J. Leventhal)

              BakerBotts, L.L.P................................. for Anthony Scotto
              (by Bertram Perkel)

Pension Claim
(Anthony Scotto)
INTRODUCTION

The New York Shipping Association, Inc. (NYSA) – International

Longshoremen’s Association (ILA) Pension Trust Fund (PTF) is a multiemployer, labor-management trust fund administered by three management trustees and three union trustees. The PTF was established pursuant to an Agreement and Declaration of Trust and Plan (Plan) and the collective bargaining agreements existing by and between NYSA¹ and ILA.

PTF administers an employee pension plan that provides retirement benefits to industry employees and their beneficiaries. Eligible PTF participants include longshoremen, union representatives, waterfront workers, dispatchers, employees of PTF, other NYSA-ILA trust funds and medical centers.

The dispute submitted for arbitration concerns the number of years of credited service Anthony Scotto should receive for purposes of fixing the amount of his pension benefits. Scotto left union office in late 1980 and he has not worked in the industry since 1981. His efforts to secure a pension based on at least 25 years of credited service² date back to early 1984 when he inquired about his years of service. Management and Union co-counsel of PTF and the Executive Secretary to PTF informed him that he had only 18 years of credited service from 1963 through 1980 and none from 1953 to 1962. PTF’s Board of Trustees met on Scotto’s appeal in December 1984 and they referred the issue

¹ NYSA is the multiemployer bargaining agent for the employers of longshore workers in the Port of New York and New Jersey (NY-NJ Port).

² It is at this level that his pension increases due to the application of a “vested rights formula.”
to co-counsel for review. Management co-counsel issued a written opinion in January 1985 that Scotto had no credited service from 1953 through 1962 primarily because his employers during that time period had not made contributions to PTF on his behalf.

In early 1999, after he turned 65 years of age, Scotto applied for pension benefits claiming uninterrupted service from 1953 through 1980. On April 1, 1999, PTF’s Executive Director informed Scotto that a pension in the amount of $280.69 per month had been approved, effective June 1, 1999, based upon 18 years of credited service for the period from 1963 through 1980. No service credit was given for the years 1953 through 1962. Scotto appealed that determination to PTF’s Trustees who deadlocked at a meeting on April 7, 1999. The Management Trustees voted to deny the appeal and affirm a benefit determination based on 18 years of credited service. The Union Trustees voted to grant the appeal and award a pension of $700.00 per month based on at least 25 years of credited service from 1953 through 1980.

This arbitration was instituted to resolve the deadlock pursuant to provisions of federal law and Article IX, §1 of the PTF plan.

A hearing was held on March 10, 2000 in New York City at which the Trustees and Scotto were represented by counsel. The arbitrator’s oath was waived. Counsel for the parties stipulated many facts, including Scotto’s work history, and they were permitted a full opportunity to examine witnesses. There were no objections to the

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3 The Labor Management Relations Act (LMRA or Taft-Hartley Act) §302(C)(5)(B), 29 U.S.C.A. §186(C)(5)(B) provides that a deadlock in the administration of an employee benefit fund must be resolved by “an impartial umpire.”
conduct of the hearing. A stenographic record was taken and the parties filed post-hearing briefs and reply.

**BACKGROUND FACTS**

Scotto was credited with 18 years of service for work during 1963 through 1980. Those years are not in dispute. Only those from 1953 through 1962 are disputed. The parties' stipulated Scotto's employment history during the years in dispute as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Employment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1953</td>
<td>402 hours as waterfront employee</td>
</tr>
<tr>
<td>1954</td>
<td>1,358 hours as officer and employee of Locals 1814 and 327-1 and 67 hours on waterfront</td>
</tr>
<tr>
<td>1955</td>
<td>1,178 hours as Local 1814 officer and employee and 1,064 hours as employee of Welfare Fund</td>
</tr>
<tr>
<td>1956</td>
<td>1,579 hours as Welfare Fund employee</td>
</tr>
<tr>
<td>1957</td>
<td>1,447 hours as Welfare Fund employee and 1,106 hours as employee of Brooklyn Clinic</td>
</tr>
<tr>
<td>1958</td>
<td>1,538 hours as employee of Brooklyn Clinic</td>
</tr>
<tr>
<td>1959</td>
<td>1,714 hours as employee of Brooklyn Clinic</td>
</tr>
<tr>
<td>1960</td>
<td>1,644 hours as employee of Brooklyn Clinic and 92 hours as officer and employee of Local 1814</td>
</tr>
<tr>
<td>1961</td>
<td>1,616 hours as Local 1814 officer and employee and 1,616 hours as employee of Brooklyn Clinic</td>
</tr>
<tr>
<td>1962</td>
<td>1,589 hours as Local 1814 officer and employee and 1,589 hours as employee of Brooklyn Clinic</td>
</tr>
</tbody>
</table>
Scotto's employers, whether Local 1814, Local 327-1, the Brooklyn Clinic or the Welfare Fund did not report any of his earnings to PTF nor did they make pension contributions on his behalf to the PTF for the years in issue. His union employer offered in 1983 and 1999 to make contributions on his behalf for all years of his union employment, but the offers were rejected by the Plan Trustees.

For certain of the years in which Scotto was an officer/employee of Local 1814, he did not accept compensation for services rendered to Local 1814 and its membership because the union was in economic distress and could not pay. The years for which Scotto was not paid by Local 1814 is somewhat unclear. The documents in evidence and the Trustees' memoranda refer to different dates.

As best as can be determined, the years for which Scotto was not paid for union work were 1956 through and including 1959. He was also unpaid by Local 1814 in 1960, except for $270 he received. It is not necessary, however, to identify the years of service for which Scotto did not accept compensation for union work with any great precision. No matter the number or the arrangement of those years, for reasons discussed hereafter, Scotto's waiver of compensation is immaterial to his pension eligibility.

The large number of documents the parties admitted into the record by agreement relate to the following:

1. Scotto's employment history, including hours and earnings.
2. Scotto's 1984 inquiry regarding service credit.

Local 327-1 later merged into Local 1814.
4. Receipt by certain Brooklyn Clinic employees of PTF service credit for time worked at the medical center.

5. A September 30, 1978 deadline under the PTF Plan for retroactive pension contributions on behalf of union representatives.

6. Receipt by the PTF of retroactive pension contributions on behalf of union employees.

7. Service credit being extended to employees notwithstanding the absence of pension contributions or the presence of service breaks.

8. Service credit awarded to Pier Superintendents.

THE BROOKLYN CLINIC

The Brooklyn Clinic is one of the medical centers that are owned and operated by the NYSA-ILA Medical and Clinical Services Fund (Clinic Fund). The Clinic Fund is a jointly administered, multiemployer, labor-management trust fund existing under law, Declaration of Trust and Plan, and collective bargaining agreements. The Clinic Fund administers an employee welfare benefit plan that provides medical, dental and other healthcare benefits on an out-patient, ambulatory basis to eligible plan participants and their dependents. Scotto worked for the Brooklyn Clinic from 1957 through 1962. In 1960, the Clinic Fund created a pension plan for employees of the Brooklyn Clinic and other medical centers known as the NYSA-ILA Medical and Clinical Services Fund Retirement Trust (Retirement Trust). Scotto was, like other Clinic employees, a required participant in the Retirement Trust. Scotto’s employer contributed ten percent of his straight-time salary to the Retirement Trust from 1960 until he left his employment with
the Brooklyn Clinic in 1962. At that time, Scotto withdrew the Retirement Trust contributions. He did so on advice of Peter Lambos, counsel for the PTF Management Trustees, who told him that he had to withdraw the monies credited on his behalf in the Retirement Trust because he was no longer employed by the Brooklyn Clinic. The accuracy of that information is not questioned by any party.

In 1966, persons then in the employ of the Brooklyn Clinic and the other NYSA-ILA medical centers were afforded the right to roll the funds that had been credited to them under the Retirement Trust into the PTF Plan. Those employees then received PTF service credit for all of the years they worked at the medical centers, including the years when they were covered by the Retirement Trust, and earlier years when they were not covered by that pension plan. That option was not extended to Scotto.

THE WELFARE FUND

The NYSA-ILA Welfare Fund (Welfare Fund), like the Clinic Fund, is a jointly administered, multiemployer, labor-management trust fund established under law, Declaration of Trust and Plan, and collective bargaining agreements. The Welfare Fund administers an employee welfare benefit plan that provides hospital and medical benefits on both a self-insured and insured basis to eligible plan participants and their dependents.

Scotto was employed by the Welfare Fund from 1955 through 1957 as a Claims Representative and Investigator. The Welfare Fund was his sole employer in 1956. In 1955, he was also employed by Local 1814 and in 1957 he also worked for the Brooklyn Clinic. Although Scotto worked more than 1,000 hours for the Welfare Fund during each of those three years, no hours were reported nor were any contributions made to PTF by
the Welfare Fund. In 1958, after Scotto had left his employment with the Welfare Fund, employees of the Welfare Fund first became eligible to participate in the PTF.

**CONTENTIONS OF THE PARTIES**

**UNION TRUSTEES**

Scotto should be credited with 28 years of service for uninterrupted work in the industry from 1953 to 1980. Nothing under law or the PTF Plan prohibits Scotto from receiving credit for service from 1953 through 1962. Denial of service credit for work in the industry from 1953 to 1962 on any of the shifting and internally contradictory rationales offered by the Management Trustees since 1984 would be incorrect, unfair and discriminatory. The failure or inability of certain employers to make pension contributions on Scotto’s behalf is irrelevant to his eligibility for service credit. Moreover, union offers to make pension contributions on Scotto’s behalf retroactively were made in 1983 and 1999 but refused by the Plan Trustees. Those contributions could have and should have been accepted by the Plan notwithstanding a purported September 30, 1978 deadline for acceptance of contributions, just as they had been accepted for other employees. Scotto would be treated in an arbitrary and capricious manner as compared to other PTF participants and beneficiaries if he were denied credit for service between 1953 and 1962.

The Management Trustees are barred from advancing any claims or arguments in arbitration that were not actually submitted to and considered by the PTF Trustees at their meeting of April 7, 1999. The bar extends to the LMRA §302 argument that is meritless in any event.
MANAGEMENT TRUSTEES

The PTF's plan document controls an individual's eligibility for pension benefits. Under the clear provisions of the PTF Plan, Scotto's employment before 1963 is not and cannot be credited service. Scotto suffered a service break\(^5\) from 1954 through 1962, which forfeited all years of service that occurred prior to and during the service break. No hours were reported and no contributions were paid to PTF for service before 1963. Both are conditions to services being credited. Retroactive pension contributions may not be accepted under the Plan and federal law. Work for the union without compensation is not credited service. Work done as other than a full-time employee is not credited service. PTF's treatment of other plan participants is not relevant because Scotto is not similarly situated to the other participants. To credit Scotto with service before 1963 would breach the Trustees' fiduciary obligations.

ANTHONY SCOTTO

Service credit should be given for work in the industry from 1953 through 1962 without requirement for retroactive contributions. Arguments not presented to the PTF Trustees may not be considered by the arbitrator.

\(^5\) A break in service occurs whenever an employee works fewer than 400 hours a year in covered employment for more than two years before September 30, 1978 and fewer than 501 hours a year for more than two years on and after October 1, 1978.
Summarized below are the grounds set forth in the Management Trustees’ brief in support of their argument that none of Scotto’s employment prior to 1963 is credited for pension purposes.

**Union Employment**

1. Scotto did not receive a salary for the work and the offices he held with Local 1814 from 1956 through 1959. A union representative must receive a salary from the union if the employee is to have “employment in the industry” within the meaning of the PTF Plan.

2. No hours of work were reported and no pension contributions were made by any union employers on Scotto’s behalf for any pre-1963 union employment. Contributions are required by the PTF Plan. The unions’ failure to make contributions cannot be cured retroactively because the PTF Plan itself establishes a September 30, 1978 cut-off date for union contributions. Retroactive contributions for union employment would be illegal in any event under §302 of the Taft-Hartley Act.

**Welfare Fund/Brooklyn Clinic Employment**

1. Scotto’s employment with the Welfare Fund and the Brooklyn Clinic was not employment in the industry under the PTF Plan because he was employed by those employers when neither employer was covered by the PTF Plan. Amendments to the PTF Plan that enrolled Welfare Fund and Brooklyn Clinic employees into the PTF Plan were made after Scotto left his employment with the Welfare Fund and the Brooklyn Clinic. These amendments were not intended to be retroactive. That intent is manifest
from the contribution requirement, a condition that ipso facto precludes any credit for prior service with these employers.

2. No hours were reported and no contributions were made to the PTF Plan by either the Welfare Fund or the Brooklyn Clinic and retroactive contributions are not expressly authorized by the Plan and are barred by §302 of the Taft-Hartley Act.

3. For some of the time during the years in dispute, Scotto worked for both the Brooklyn Clinic and for ILA Local 1814. Therefore, he was not a full-time employee of the Brooklyn Clinic and, as such, he was not employed in the industry within the meaning of the PTF Plan.

4. Scotto was a participant in the Retirement Trust in 1960, 1961 and 1962 when he worked for the Brooklyn Clinic. His participation in the Retirement Trust was a disqualifying condition which made his employment other than within the industry.

Dock Employment

1. Scotto’s work on the waterfront in 1953 is employment in the industry, but the service break from 1954 through 1962 made his work in 1953 ineligible for service credit.

OPINION

The Arbitrator’s Role

PTF’s Management and Union Trustees agree that the arbitrator serves as the seventh, tie-breaking trustee in disputes arising under the Plan. Like any other Plan trustee, the arbitrator, as trustee, must act reasonably and solely in the interest of the Plan.
participants and beneficiaries to ensure that eligibility determinations are reached and applied fairly.

Although in agreement as to these general principles, the Management and Union Trustees have a disagreement about the scope of the arbitrator’s review.

The Management Trustees argue that the arbitrator’s review proceeds de novo upon an independent appraisal of the “evidence presented to the trustees.” From the Management Trustees’ view, the arbitrator is allowed and required to consider any eligibility issue or argument that can be supported by the facts in the record, even if that issue or argument was not actually discussed or voted upon by the Plan Trustees.

The Union Trustees argue that only the issues or arguments discussed and decided by the Plan Trustees are subject to the arbitrator’s review and decision.

I agree with the Union Trustees on the scope of review. Although the record forms the factual context in which the eligibility issues are to be decided, the review is limited to the issues and arguments actually discussed and voted upon by the Plan Trustees.

The arbitrator’s function is to break a “deadlock.” A deadlock can arise only over issues that have been actually addressed by the Plan Trustees. There cannot be a deadlock over issues and arguments that have not been debated and voted upon by the trustees, even if the factual record could be said to give rise, potentially, to other issues or arguments. There is simply no way of knowing how any of the Plan trustees may have voted on an issue or how they would have resolved an argument if that issue or argument has not actually been presented to them. These trustees reached a deadlock on certain
issues only and it is only those issues which can be submitted to the arbitrator for the tie-breaking vote. If I were to decide an issue that had not been considered by the Plan Trustees, I would not be acting as the seventh, tie-breaking trustee. Rather, I would become the sole trustee deciding questions never considered by the Plan Trustees. That is a role I have not been given under law or the Plan and it is not one I am allowed to assume. The issues that are and are not properly before me are discussed below.

I also believe that I am required to follow the traditional substantive and procedural rules that govern arbitration proceedings to the extent those rules are consistent with my status as the seventh trustee. This dispute may be a special type of arbitration in the sense that I function in a dual capacity as arbitrator/trustee, but it is an arbitration proceeding nonetheless and, consistent with my status as trustee/arbitrator, I have acted according to customary arbitration precepts.

Scotto's Credited Service

For the reasons set forth hereafter, Scotto must be credited with service from 1953 through 1962, except for 1956, and awarded a pension based on those years of service plus the years of credited service from 1963 through 1980, which are not in dispute.

Certain basic, but important facts are not in dispute. First, all of Scotto’s employment for the years in question was exclusively in the longshore industry. Indeed, Scotto has never worked outside that industry in his adult life. Second, Scotto worked for each and all of the years in issue more than the number of hours that are required under the PTF Plan to qualify an employee for service credit. Third, none of Scotto’s employment decisions were made with an intent to compromise his pension benefits. I
am persuaded that he was not aware and was not informed that leaving one job for another or holding two jobs simultaneously might affect his eligibility for service credit in PTF.

The Management Trustees denied Scotto service credit for the years 1953 through 1962 on the ground that he had a break in service from 1954 through 1962 which disqualified him from service credit for all of those years and for his work in 1953 on the waterfront which would have been credited to him but for the subsequent service break.

The only grounds clearly submitted for the Trustees’ debate and vote in April 1999 regarding service credit were the failure by Scotto’s employers to report his earnings or hours and to make pension contributions to PTF on his behalf. These grounds are common to both Scotto’s union employment and his employment with the Welfare Fund and the Brooklyn Clinic. There was also mention during the Trustees’ 1999 meeting of his participation in the Retirement Trust. None of these is a permissible or persuasive basis to deny Scotto service credit for the years 1953 to 1962, with the exception of 1956, which I need not reach.

The obligation under the PTF Plan to report earnings or hours for and on behalf of an employee rests exclusively with the employee’s employer. The failure or refusal by an employer to report hours worked or the earnings derived from that employment cannot serve to deprive an employee of service credit and derivative pension entitlements because the default is not in an obligation owed by the employee. Without obligation, there is no responsibility and no consequence.
Scotto’s employers’ failure to report earnings/hours is all the more appropriately rejected as a basis for a denial of service credit for Scotto because there is no dispute about the number of hours he worked or his earnings. The PTF Trustees know the number of hours Scotto worked and how much he made. They also know to a certainty that he worked more than enough hours every year from 1953 through 1962 to qualify for service credit for those years. A failure to report hours or earnings in these circumstances is inconsequential to the calculation of Scotto’s years of credited service.

The Management Trustees’ main argument, advanced consistently over many years, has been that Scotto’s employers during 1954 through 1962 did not make pension contributions on his behalf to PTF. But like the hours/earnings reporting obligation, the contribution obligation under the PTF Plan is a matter strictly between the Plan Trustees and the employee’s employer(s). As and to the extent contributions were not made to PTF on Scotto’s behalf by any of his employers, that noncontribution, for whatever the reasons it occurred, does not and cannot serve to cause a forfeiture or diminution of the pension rights Scotto would have had but for the absence of contributions. If contributions are owed, they are owed by Scotto’s employers and it is the Trustees’ right to attempt to collect them. Any alleged legal inability or failure to collect those contributions retroactively from any of Scotto’s employers, despite the offers of payment by the ILA locals, is immaterial to Scotto’s pension rights. Even assuming that the terms of the PTF Plan and/or federal law prohibit the receipt or collection of retroactive pension contributions from employers on behalf of any employee, the contribution requirement never shifts from the employers to the employee. The employee is not accountable for
and may not suffer because of an employer’s failure to carry out what is the employer’s
duty. Noncontribution cannot work a forfeiture or diminution of an employee’s pension
benefits that are earned by service, not contributions.

Although the analysis could stop here, it is appropriate to point out the
implications of a contrary conclusion. The Management Trustees’ argument that
noncontribution by an employer results in a loss or diminution of pension benefits for
employees is one that is not limited to Scotto. All employees in the industry would be
deprived of the pension benefits they had otherwise earned by their service if their
employers did not make contributions to the plan. Employees, however, would likely not
know that the contributions were not being made on their behalf. Even if they did know,
they are relatively powerless to compel their employers to make those contributions. I
do not read either the terms or the purposes of the PTF Plan to reflect an intent to harm
faultless employees for the derelictions of their employers. Nor can I reasonably
construe the Plan in a way that would require the Trustees to make endless “corrective’
amendments to the Plan.

The Management Trustees’ argument in this regard is unpersuasive for additional
reason. They concede that the failure by an employer to make pension contributions
would not ordinarily result in an employee being denied service credit under the PTF
Plan. They argue, however, that union employees and officers must be treated differently
and less beneficially than other employees by federal law. According to the Management
Trustees, §302 of the Taft-Hartley Act requires current contributions from union
employers and bars retroactive contributions under any and all circumstances. This argument is rejected for several reasons.

The Taft-Hartley Act §302 issue was not discussed or decided by the Plan Trustees in conjunction with Scotto's application for benefits. That claim, therefore, is not properly before me. Although an interpretation of Taft-Hartley Act §302 is not strictly within my jurisdiction, I will offer a few observations about that law in response to the Management Trustees' request that I do so.

The Taft-Hartley issue is simply not controlling. The contribution requirement is the employer's only and the enforcement of that obligation is a matter between the Trustees and the noncontributing employer. If contributions were not made, and if they cannot now be collected or received, either because of the Plan's terms or federal law, the employee's pension rights still cannot be affected.

There appears to me also to be a significant distinction between the Trustees' receipt of retroactive contributions from a union employer which has made the contributions on a voluntary basis, and the collection of those monies pursuant to legal action initiated by the Plan Trustees. The latter would again appear to fall outside the prohibitions of the federal law because the judiciary's intervention ensures that there is no illegality or questionable conduct.

As to the meaning of Taft-Hartley Act §302, retroactive contributions on Scotto's behalf, given the facts of this case, do not appear to fall within the range of evils Congress sought to address in this legislation. The law was intended to ensure that trust funds were not tampered with or used for illicit purposes. Congress was concerned with
corruption of collective bargaining through bribery of union officials by employers, with extortion by union officials, and with abuse of power due to unregulated control of welfare funds by union officials. There is no danger of that in Scotto’s case because he has been out of the industry and out of the union service since at least 1981. Federal law permits union officers and representatives to enjoy pension benefits on the same terms as other employees under exceptions and provisos to that statute. I do not interpret Taft-Hartley Act §302 to allow pension trustees to discriminate in the extension of benefits between one employee and another or one class and another so long as the purposes of the federal law are otherwise satisfied.

Furthermore, I do not view the federal law to itself ban all retroactive pension contributions by employers. That could not be the effect of the federal legislation for if it were, the Plan could not have fixed the September 30, 1978 deadline for the receipt of retroactive contributions from unions. Therefore, it is not the law that bans retroactive contributions in an absolute sense. Rather, the law may ban the retroactive contributions only because the Plan has done so by its terms. But in that regard, the record shows that the September 30, 1978 deadline for contributions has been waived and retroactive contributions have been accepted on behalf of union officers years after the deadline had passed.

The exhibits introduced into the record of this proceeding provide several examples of employees, including union employees, being credited with service by the Plan Trustees despite their employers’ failure to make pension contributions on their behalf. Counsel for the Plan Trustees agreed to redact personally identifying information
from these exhibits to protect privacy interests. Although there was not express agreement to do the same to all of the exhibits, there is no reason or need to identify any particular individual or entity in this opinion.

These documents establish clearly that the Trustees were crediting service for which no concurrent pension contributions were made as late as 1984 for work dating back over various years to as early as the 1950s. The September 30, 1978 cutoff for contributions by unions simply has not been strictly enforced because the Trustees recognize correctly that they need to comply “with the spirit of the Plan.” Employers, including union employees have been billed for thousands of dollars of contributions retroactively. Moreover, credit has not been conditioned on actual collection of these billed contributions. There is recognition by the Trustees in these same documents that the contributions may not be collectable even pursuant to legal judgment. There is, therefore, no basis for the Management Trustees’ claim that retroactive contributions are either not authorized by the Plan or cannot be accepted after September 30, 1978.

Although the Management Trustees argue that acceptance of these contributions was limited to a “shake out period” after the 1978 cutoff, that acceptance continued, by the Management Trustees’ admission, until the mid-1980s. That was a point in time coincident to the date Scotto first inquired about his years of service, yet he was not afforded the same treatment. After examining the records in evidence, it is apparent that the Trustees have acted to prevent perceived injustice, to correct mistakes, and to protect persons who “had no earnings attributed to employment outside the industry during that period.” Scotto’s circumstances are comparable to these other individuals or, at least, not
so dissimilar as to make the Trustees' willingness to accept retroactive contributions for others inapplicable to Scotto.

Those same principles account for the Trustees' decisions to grant pension benefits to employees despite actual or potential breaks in service such as was done for the Pier Superintendents. The Pier Superintendents who elected to participate in the PTF Plan were retroactively awarded five years of credit to avoid a service break, without required pension contributions, because they had service in the industry and their employers were under the mistaken belief that contributions were not required of them.

The Management Trustees argue that the treatment of the Pier Superintendents is not relevant because Scotto was never employed in that capacity. The Management Trustees' argument in this respect, however, misses the point. So far as the Plan is concerned, Scotto and the Pier Superintendents were "similarly situated." That Scotto was a union official and the Pier Superintendents were not is not a difference. Both had the same eligibility for pension credits. Both were covered by the same Plan and both enjoyed the same benefits.

There is significance to the treatment of the Pier Superintendents also because it reflects an intention on the part of the Plan's administrators and Trustees to preserve, protect and extend service credit for employees who have continuously worked in and for the industry, notwithstanding the capacity in which they were employed. The Trustees' actions reveal a conscious, concerted effort to guard against a forfeiture or diminution of pension benefits. The service credit extended to Pier Superintendents is particularly relevant because the problem was that they thought they had been covered, but learned
that contributions had not been made on their behalf. The actual or potential service break was avoided for them by an amendment to the Plan that gave them years of service credit retroactively, despite the absence of contributions. The Management Trustees' arguments against service credit for Scotto stand out in stark contrast when compared to the actions on behalf of these others. It is here that I apply the well-settled arbitral principle that employees who are similarly situated must be treated similarly.

It appears from the 1985 opinion letter that the Management Trustees long ago did not regard Scotto's participation in the Retirement Trust from 1960 to 1962 as a service break because there was no prohibition against participation in more than one pension plan at the relevant time and the subsequent prohibition was not retroactive. Having now raised that ground again, it is properly rejected for that reason and others.

Scotto's participation in the Retirement Trust was involuntary, as was his withdrawal of the monies in his account when he severed employment with the Brooklyn Clinic in 1962. In 1966, employees of the Brooklyn Clinic were allowed to enroll in the PTF Plan by transferring the amounts that had been credited to them in the Retirement Trust into the PTF Plan. Scotto, of course, did not have this option because he was required in 1962 to withdraw the monies that had been credited to him. Had he remained in the Clinic's employ until 1966, he also could have enrolled in PTF and received credit for all of his work for the Brooklyn Clinic. But he was denied the option that was afforded all others due to circumstances beyond his control. If he had a choice between leaving the contributions in the Retirement Trust or withdrawing them, and told that a voluntary withdrawal would compromise his pension benefits, it is implausible that he
would have withdrawn those monies. In 1966, he then could have rolled those monies into PTF and obtained full service credit, as did others. A forced withdrawal of contributions may not and should not work a forfeiture of pension benefits. Clinic employment was always intimately connected to the industry. The amendment to the PTF Plan in 1966 to give Clinic employees full service credit in PTF for all years of service merely formalized what was already de facto.

The Management Trustees argue, however, that the amendments to the Plan were not intended to extend Clinic employees service credit retroactively because the condition for that credit was the rollover of any contributions then in the Retirement Trust. This again, however, is nothing more than a variation on the “no contributions” argument I have previously rejected as a basis for a denial of service credit. The Plan amendments recognized that Clinic employment is service in the industry. Scotto rendered that service in the same circumstances as others who were credited retroactively with PTF service for their work in the Brooklyn Clinic and other medical centers. That Scotto was not in the active employ of the Clinic in 1966 is inconsequential. Credit under PTF for service with the Clinic prior to 1966 was extended to persons who were employed by the Clinic in 1966. Scotto’s employment ended earlier, but when rendered, his service was identical to that for which others received credit for the same years of employment. The date Scotto severed employment with the Clinic is, thus, a matter of circumstance, not substance. Scotto’s work with the Brooklyn Clinic must be recognized as credited service because to do otherwise would occasion the very injustice and unfairness the Plan is designed to
guard against. Scotto cannot be denied credit for the same service for which others were
given credit.

The other arguments made by the Management Trustees were not presented to or
considered by the Trustees when they deadlocked. Those arguments, therefore, are not
before me for vote or determination. Nonetheless, to dispel any doubt regarding Scotto’s
eligibility for service credit, I will address each of them briefly.

Scotto’s waiver of compensation for certain of the years he worked for the ILA
local because the union was in financial extremis and unable to pay does not mean that he
did not hold a salaried position. There was a salary tied to the position because his work
for the union before and after was paid. Scotto simply did not accept the compensation
derived from that fixed salary. In short, his job was salaried though he did not accept pay.
Moreover, his work was never regarded by his employer as “volunteer.” The work for
which Scotto did not accept pay was of the same character as the work for which he was
paid, not incidental tasks typical of unpaid volunteers. Nor have the Management
Trustees established that Scotto did not receive anything of economic value for his work.

The injustice of denying Scotto service credit on this basis is also obvious. In
effect, Scotto waived the salary he would have received to help the ILA Local and its
membership cope with the dire financial conditions prevailing within the union at the
time. No fair and reasonable reading of the “salary” provisions of the PTF Plan, which
must be interpreted in the best interests of the Plan’s participants and beneficiaries, can
result in Scotto being penalized for his actions in this regard.
The Management Trustees also claim that Scotto had a service break because when he worked for both the union and the Brooklyn Clinic, he was not a “full-time” employee of either. But holding two jobs is not at all inconsistent with at least one or each being full-time. “Full-time” for this purpose is marked by the number of hours of work needed annually and cumulatively to qualify for pension eligibility. Scotto worked for both the union and the Brooklyn Clinic well in excess of the hours needed to qualify for service credit. He was, therefore, a full-time employee of both and certainly, at the very least, the Brooklyn Clinic.

I believe that Gertrude Stein once observed that “a difference is a difference if it makes a difference.” Scotto’s employment circumstances, different as they may be in certain respects from other employees, make no difference in the calculation of his service credit. The Management Trustees have tried to cause Scotto to fall outside the literal terms of the PTF Plan and to differentiate his employment circumstances from others whose service has been credited when the express terms of the Plan then prevailing would have denied those employees that credit. In the final analysis, however, the Union Trustees have the far better of the argument on the facts, the law and the equities. To deny Scotto the service credit that others have received in comparable circumstances is arbitrary and discriminatory. I cannot give the Plan such an interpretation and need not when a reasonable reading of the Plan’s terms as written and as applied affords Scotto service credit for all of the years in dispute, except for 1956, when he was employed by the Welfare Fund only. I need not decide his eligibility for service credit for 1956. Even
if that year were not credited, that would not constitute a service break and would not affect the amount of his pension.

AWARD

Anthony Scotto is to be granted a pension in an amount based on 27 years of credited service from 1953 through 1980, excluding 1956.

Dated: July 17, 2000

Eric J. Schmertz
Arbitrator

State of New York )
)ss:
County of New York )

I hereby affirm pursuant to CPLR 7507 that I am the individual described herein and who executed this instrument which is my Award.

Dated: July 17, 2000

Eric J. Schmertz
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES A. CAPO, JOHN W. MILLARD,
JOSEPH CURTO, BRIAN DAGAN, and
ANTHONY PETRIZZO, in their capacities
as Management Trustees and Management
Alternate Trustees of NYSA-ILA
Pension Trust Fund,

Petitioners,

-v.-

JOHN BOWERS, ALBERT CERNADAS,
STEPHEN KNOTT, and FRANK SCOLLO, in
their capacities as Union Trustees
of the NYSA-ILA Pension Trust Fund,

Respondents,

To Vacate An Arbitration Award
Rendered Pursuant to 29 U.S.C. §
186(c)(5) To Resolve A Deadlock
Between Petitioners and Respondents
Concerning The Application For
Additional Pension Credits Filed By

ANTHONY M. SCOTTO,

Additional Respondent.

JOHN S. MARTIN, Jr., District Judge:

James A. Capo, John W. Millard, Joseph Curto, Brian Dugan,
and Anthony Petrizzo (collectively "Petitioners" or the
"Management Trustees"), the Management Trustees of the NYSA-ILA
Pension Trust Fund ("PTF"), seek summary judgment vacating an
arbitration award (the "Award") granting Additional Respondent
Anthony M. Scotto ("Mr. Scotto") pension service credit for
twenty-seven years of service even though no contributions were
paid by Mr. Scotto's employers for nine of those years. John Bowers, Albert Cernadas, Stephen Knott, and Frank Scollo (collectively "Respondents" or the "Union Trustees"), the Union Trustees of the PTF, cross-move for summary judgment affirming the Award. For the reasons set forth below, Petitioners' motion is granted and the Award is vacated.

BACKGROUND

The New York Shipping Association ("NYSA") is the multi-employer collective bargaining representative for employers of longshore workers in the Port of New York and New Jersey ("NY-NJ Port"). The International Longshoremen's Association, AFL-CIO ("ILA"), a labor organization within the meaning of the Labor Management Relations Act ("LMRA"), is the exclusive collective bargaining representative of all longshoremen and other waterfront workers employed by the members of NYSA and other employers in the NY-NJ port. PTF administers an employee pension benefit plan that provides retirement benefits to longshore workers covered by NYSA-ILA collective bargaining agreements as well as union officers and employees, including employees of NYSA-ILA medical centers.

Mr. Scotto worked in the longshoremen's industry from 1953 through 1980, holding various positions with union locals, an industry trust fund, an industry medical center, and as a longshoreman. In early 1999, Mr. Scotto applied for pension
benefits from PTF. In his application, Mr. Scotto claimed that he was entitled to a pension benefit based on uninterrupted service in the industry from 1953 through 1980. On April 1, 1999, PTF’s Executive Director informed Mr. Scotto that he was entitled to a pension benefit, effective June 1, 1999, based on 18 years of credited service for the period from 1963 through 1980. This determination was apparently based on the fact that no contributions had been made to the pension fund on Mr. Scotto’s behalf before 1963. Mr. Scotto appealed this decision to PTF’s Board of Trustees and the Trustees deadlocked on the issue. The Union Trustees believed that Mr. Scotto deserved a pension based on twenty-five years of credited service. The Management Trustees, however, believed that Mr. Scotto should be granted only eighteen years of credited service because no contributions were ever paid to PTF on behalf of Mr. Scotto for the years prior to 1963. In accordance with the provisions of LMRA Section 302(c) (5), codified at 29 U.S.C. § 186(c) (5), the Trustees’ deadlock was referred to an impartial arbitrator for resolution.

On July 17, 2000, Arbitrator Eric J. Schmertz (the "Arbitrator") issued the Award, resolving the deadlock in favor of the Union Trustees and directing the PTF Trustees to grant Mr. Scotto pension service credit for his years of service prior to 1963, even though no contributions were ever paid to the PTF during those years by his employers. The Management Trustees
believe that the Award would force them to violate the LMRA's prohibition against money payments by employers to unions and union officials. The Union Trustees believe the Award falls within the exceptions to this prohibition.

**DISCUSSION**

Petitioners argue that the Award violates the LMRA. Section 302(a) of the LMRA provides in relevant part:

> It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

1. to any representative of any of his employees who are employed in an industry affecting commerce; or

2. to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce.

29 U.S.C. § 186(a). However, there are nine exceptions to this prohibition, including the so-called "trust fund exception," or Section 302(c)(5), of the LMRA. The trust fund exception allows payments to pension trust funds provided that: "the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund." 29 U.S.C. § 186(c)(5).

The payments ordered by the Arbitrator do not fit within the trust fund exception because he awarded Scotto credit for periods
of employment during which his employer did not make contributions to the fund. The Second Circuit has held that "[o]nly employees and former employees of employers who are lawfully contributing to a union pension trust fund may qualify as beneficiaries of a Section 302 trust." Mollia v. Groggigan, 403 F.2d 110, 116 (2d Cir. 1968). Thus in In re Typo-Publishers Outside Tape Fund, 478 F.2d 374 (2d Cir. 1973), the Second Circuit found that trust fund payments to union members who were employed by non-contributing employers violated the LMRA based on the express language of the statute. See id. at 375.

Respondents argue that nonetheless the Award payments are not prohibited because Section 502(c)(2) of the LMRA provides a separate exception for payments "in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress." 29 U.S.C. § 186(c)(2). In Respondents' view, the Award is therefore exempt from the Section 302(a) prohibition against money payments regardless of whether it fits within the exception for pension trust funds.

The difficulty with Respondents' argument, however, is that it is inconsistent with the following statement of the Second Circuit in International Longshoremen's Association v. Seatrain Lines, Inc., 326 F.2d 916 (2d Cir. 1964):
whenever some other provision of Section 302(c) provides a more particularized exception, the transaction must satisfy the requirements of that other exception to be exempt. Thus, contributions to union welfare funds which have been made pursuant to an arbitration award, and might therefore be thought to fall within the exceptions of Section 302(c)(2), are to be scrutinized under the standards set out in Section 302(c)(5).

Id. at 320.

While this language would seem to preclude the enforcement of any arbitration award that would result in a payment not specifically authorized by the Act, subsequent cases suggest that this statement should not be followed blindly. Seatrain did not involve an arbitration award but rather a settlement agreement between an employer and a union. In that context, the Second Circuit was concerned that an employer and a union could get around the specific prohibitions of the LMRA by characterizing a potentially improper payment as a "compromise, adjustment, settlement, or release of any claim, complaint, grievance or dispute" under Section 302(c)(2). Thus the underlying policy concern articulated in Seatrain was that Section 302(c)(2) should not be used to nullify the prescriptive effect of the statute.

See id.

Cases subsequent to Seatrain have attempted to reconcile the apparent conflict between the Act's prohibition of certain payments and the provision that exempts payments made pursuant to a court decree or an arbitration award. The issue was most recently addressed in this district in the thorough opinion of
(S.D.N.Y. Aug. 18, 2000), in which she observed:

Whether to affirm the Arbitrator's award is a difficult question of law. The plain text of the LMRA suggests that Congress intended to create nine alternative exceptions to the prohibition of payments from employers to unions. Taken at face value, the September 13, 1990 Agreement appears to satisfy the "settlement or release of claim" exception in § 302(c)(2). However, this Court is bound by the ruling of the Second Circuit in Seatrain, which, in order to prevent even the appearance of impropriety, mandates that any payment made by an employer to a union in lieu of a dues check-off must satisfy the requirements of § 302(c)(4).

Id. at *3 (citations omitted).

In New York Telephone, Judge Jones refused to enforce an arbitrator's award that was based on a stipulated record because the arbitrator had not been asked to resolve the underlying question of whether the employer's hiring of temporary employees violated the collective bargaining agreement at issue. Rather, the arbitrator had only been asked to resolve the question of the legality of the employer's agreement to pay the union an amount equal to the dues it would have received had temporary employees not been used.

As Judge Jones recognized, other cases suggest that where the arbitrator has fully adjudicated a dispute between the employer and union and has made a monetary award to compensate the union for the damages it suffered as a result of a breach of the collective bargaining agreement, the fact that the payment
would otherwise be prohibited by the statute does not preclude enforcement of the arbitration award. See Washington Post v. Washington - Baltimore Newspaper Guild, Local 25, 787 F.2d 604 (D.C. Cir. 1986); United Steelworkers of Am. v. U.S. Gypsum Co., 492 F.2d 713 (5th Cir. 1974).

The above cases can be reconciled by examining the role of the arbitrator and the nature of the award. In Washington Post and United Steelworkers, the arbitrator found a violation of the collective bargaining agreement which caused actual damage to the union and ordered the employer to pay in damages a lump sum equal to the dues the union would have collected had the employer not violated the collective bargaining agreement. As the Court observed in Washington Post:

The rule we adopt in this case, although novel in the sense that we have not previously addressed the question, is straightforward and grounded in practical reality. The Post, as the arbitrator found, violated the terms of the collective bargaining agreement. The Guild suffered as a consequence of that breach. The arbitrator properly determined that the Post should compensate the Guild for that breach. We hold that this award was lawful under § 302 of the LMRA.

787 F.2d at 609.

In both Seabrain and New York Telephone there had been no finding that the employer had breached the collective bargaining agreement; there was simply a determination that the employer was obligated to make a payment which the court found to be in violation of the LMRA. Indeed, in New York Telephone Judge Jones recognized that "if the Arbitrator had decided whether the
Plaintiff's decision to hire temps violated the CBA and then made his award, *Seatrain* would not control." 2000 WL 1174944, at *4.

Here as in *Seatrain* and *New York Telephone* the payments at issue were not to compensate a party for a past injury arising from the breach of a contract. Rather, the arbitrator has ordered the fund to make, on an ongoing basis, payments that are prohibited under clear authority in this Circuit. As the Court recognized in *Washington Post*: "it is unquestionably the province of the courts to say what the law is. We need not defer to an award which contemplates a violation of law." 787 F.2d at 606.

Even if *Seatrain* were not controlling on the issues presented here, it is doubtful that the award of the arbitrator could be sustained because it was rendered in manifest disregard of the law. As explained in *Greenberg v. Bear, Sterns & Co.*, 220 F.3d 22 (2d Cir. 2000):

In order to vacate an award on these grounds, a reviewing court must find "both that [1] the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case."

Id. at 28 (quoting *Disessa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997)).

Here the Arbitrator considered his role to be one of a "tie-breaking trustee," as required by the PTF plan. (Friedman Aff. Ex. 1 at 13.) Therefore, the Arbitrator followed "the traditional substantive and procedural rules that govern
arbitration proceedings [only] to the extent those rules [were] consistent with [his] status as the seventh trustee." (Friedman Aff. Ex. 1 at 13.) Furthermore, he specifically chose not to review the Trustee dispute de novo because then he "would not be acting as the seventh, tie-breaking trustee." (Friedman Aff. Ex. 1 at 13.) Finally, the Arbitrator did not fully review the possibility of a violation of Section 302, believing that the issue was neither properly before him nor within his jurisdiction. (Friedman Aff. Ex. 1 at 17.) He based the Award on a theory that the "contribution requirement is the employer's only and the enforcement of that obligation is a matter between the Trustees and the noncontributing employer... the employee's pension rights... cannot be affected." (Friedman Aff. Ex. 1 at 17.) This conclusion is against the weight of authority in the Second Circuit which clearly conditions the legality of an employee's pension benefits under Section 302 on employer contributions. See Moglia, 403 F.2d at 116; Typo-Publishers, 478 F.2d at 375.

Thus the Arbitrator appears to have acted in "manifest disregard of the law" because (1) he choose to ignore the provisions of Section 302, and (2) the law in this Circuit that he ignored was well defined, explicit, and clearly applicable to the case.

Given the strong public policy considerations underlying the LMRA and the clear law in the Second Circuit that payments to
an employee whose employer has not contributed to the plan are illegal, this arbitration award cannot be enforced.

CONCLUSION

For the foregoing reasons, Petitioners' motion for summary judgment vacating the Arbitration Award is granted. Respondents' cross-motion for summary judgment is denied.

SO ORDERED.

Dated: New York, New York
March __, 2001

JOHN S. MARTIN, JR., U.S.D.J.

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For Additional Respondent:
Bertram Perkel
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New York, NY 10022
IN THE MATTER OF THE ARBITRATION

between

LOCAL 1205 I.B.T.

-and-

KLEET LUMBER CO. INC.

The stipulated issue is:
Whether the grievance of DEREK BUCK
is arbitrable?
If so, whether the discharge of DEREK
BUCK was for just cause? And if not,
what shall be the remedy?

A hearing was held in Melville, New York on December 27, 1999 at which time Mr. Buck, 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. Both sides filed a post-hearing brief.

The grievant was discharged on July 1, 1999 and the Union was so notified the same day. The Union filed for arbitration on July 12th. The Company contends that the grievance challenging the discharge is not arbitrable because the Union did
not comply with the five (5) day time limit of Article 18(b) of the contract. Said section reads in pertinent part:

"...The Union shall have the right to challenge any such discharge within the five (5) days thereof..."

The question to be determined is not when the issue was filed for arbitration nor whether more than five (5) days elapsed between the discharge and the submission of a grievance to arbitration. Rather it is when the Union challenged the discharge. The contract does not require that the "challenge" be in writing, nor that it be in the form of a submission to arbitration. A "challenge" can take the form of verbal protests or discussion, and that is what happened here, within the five (5) day limitation.

The evidence establishes that on July 1\textsuperscript{st}, a Union representative told the Company president that the Union disputed the grievant's discharge and asked the Company to reconsider. Another talk between Union and Company representatives took place right after the July 4\textsuperscript{th} weekend, at which time, because the Company would not reconsider the grievant's discharge, the Union official told the Company that it would take the matter to arbitration. And it did so on July 12\textsuperscript{th}.

I find that the Union's verbal dispute of the discharge on July 1\textsuperscript{st} and immediately following the July 4\textsuperscript{th} weekend constituted a "challenge" to the discharge within the
meaning of Article 18(b) and therefore in compliance with the five (5) day time limit. The grievance filed for arbitration on July 12th is therefore arbitrable.

On the merits, however, the Union is wrong in asserting in its brief that the Company's evidentiary burden is to prove the grievant's guilt of theft "beyond a reasonable doubt." That criminal standard of proof is not applicable in an arbitration, even where the charge parallels a crime. I do agree that in such cases arbitrators, including this one, hold employers to a high standard of proof because of the serious effect on an employee's reputation, job security and employability by a finding of culpability and by his discharge for such an offense. The standard of proof, usually applicable is evidence that is "clear and convincing." I have repeatedly interpreted that to mean that the evidence must be of such quality and probativeness as to persuade me that the employee committed the offense charged, and that the commission of that offense justified the ultimate industrial relations penalty of discharge.

In this case, I conclude that the Employer has met that burden of proof.

The grievant is charged with participating in a theft of cedar lumber from the Company's lumber yard. It is charged that he was asked by a fellow employee, W.R. Hassman, Jr., to
help him remove some cedar lumber from the yard, without paying for it; that Hassman offered the grievant $200 to do so; that the grievant agreed; that he placed the cedar on his truck (along with two legitimate deliveries) and then without complying with Company rules requiring a delivery ticket to match the load and a check or approval by the dispatcher, left the yard and delivered the cedar to a location where Hassman was privately constructing a deck on a residence.

Resolution of the issue turns on the credibility of three witnesses - the grievant, Hassman and the Company president, Howard Kleet. Upon consideration of the testimony of each, I find no reason why Messrs. Hassman and Kleet would testify falsely about, respectively, the plan and arrangements for the removal of the cedar, and what took place when the grievant was confronted with the charge of theft and discharged. Put another way, it is well-settled arbitral law and meets the clear and convincing test that if the facts of a dischargee's culpability are established by witnesses who have no reason to "bear false witness" and where there is no evidence of animus or a "frame-up", the denials of the employee and his different version of the events may be properly viewed as an untruthful effort to save his job and to avoid the consequences of discharge. This well-recognized view was enunciated by the late Harry Shulman, one of the leaders of the arbitration profession and long-time Umpire under the UAW-Ford Motor Company contract.
He wrote that “an accused employee has an incentive for denying the charge against him, in that he stands immediately to gain or lose in the case,” and that...“if there is no evidence of ill will towards the accused on the part of the accuser...the conclusion that the charge is true can hardly be deemed improper” (see page 322 How Arbitration Works: Elkouri and Elkouri).

Here Hassman, who admitted his role in the theft and who was permitted to resign in lieu of discharge, testified unhesitatingly that he and the grievant arranged the theft. There is no evidence to conclude he falsified that testimony. Hassman was discharged, but then allowed to resign. It cannot be said that the offer of resignation was conditional on his testimony against the grievant, because the grievant too was offered the chance to resign. I accept as truthful Hassman’s explanation of why he first said that he had shown the grievant a delivery ticket from an earlier delivery (which the grievant and the Union claim “tricked” the grievant into believing the order was legitimate), and then revealed that there was no delivery ticket at all. I accept his statement that the first untruth was an effort to protect the grievant from implication in the theft, but that when it was discovered he told the grievant that he “would not lie under oath in an arbitration.” So, I believe Hassman’s version of the transaction, namely that he asked the grievant to help him steal the lumber; that no proper delivery ticket supported the removal of the cedar; that the cedar was
loaded after the other, legitimate material was put on the grievant's truck and duly checked or authorized by the dispatcher; and that for the cedar the grievant willfully circumvented the Company's prescribed rules regarding deliveries from the yard.

Similarly I find no reason why Kleet would falsify his testimony regarding the meeting at which the grievant was confronted with the charge of theft. There is no doubt that the Company representatives at that meeting made clear to the grievant that they were investigating a theft of cedar; that they were looking into the grievant's participation in that theft and that the grievant faced discharge. I reject the argument that the grievant was only charged with or thought he was charged with a violation of Company rules regarding the removable of the lumber from the yard. Kleet testified that the grievant did not admit the delivery of the cedar until pressed several times with questions about it. He testified that upon admitting the delivery the grievant became "remorseful," said he knew he "did something wrong" and broke down and "cried." I am satisfied that those statements by the grievant and that event were admissions of his participation in the theft. Certainly he knew what he was charged with when he was told he was discharged, but that if he wished to resign instead, it would be acceptable to the Company. Significant to me is that at this point, nor indeed at any point in that meeting, did the grievant claim that he was innocent.
that he was "tricked" by Hassman or that he honestly believed that the cedar delivery was legitimate. Instead he said he wanted to think over the offer of resignation instead of discharge.

The foregoing version of that meeting, testified to by Kleet, I find credible and believable, the grievant’s denials and different version notwithstanding.

Theft is a summary dismissal offense. The grievant’s employment record of three years showing no prior discipline is not sufficiently lengthy or otherwise distinguished to consider it as a mitigating factor.

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

1. The grievance of DEREK BUCK is arbitrable.

2. The discharge of DEREK BUCK was for just cause and is sustained.

Eric J. Schmertz, Arbitrator

DATED: February 16, 2000

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

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

Did the Company violate Article V, Section 8 of the 1998-2002 LM IUE National Agreement in the assignment of overtime work on August 13, 1999 to JOHN ZELTINS and NEIL PARRENE in the code 13711, R-11, utility/worker classification on second shift under DAVID KOPMEYER? If so what shall the remedy be?

A hearing was held in Schenectady, New York, on August 8, 2000 at which time representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived; stenographic record of the hearing was taken and the parties filed post-hearing briefs.

Based on the record before me I find that I need not make a threshold determination on the merits. I so find because at two steps of the grievance procedure, the Company acknowledged
the meritorious nature of the Union’s grievance, disputing only the remedy sought.

In pertinent part, the Union’s grievance dated August 12, 1999 reads:

On Thursday, August 12, 1999, four utility workers stayed over to fulfill a request for floor preparation in the machine shop Q.A. area. The overtime was payed[sic] by the tenant’s overtime budget. On Friday, August 13, 19099, the utility workers were again short of manpower thus creating a situation which required some of the workers from Thursday’s overtime to be solicited to come in early. These workers were willing to come in early on Friday thereby putting them on double-time. The nightshift foreman refused to allow the utility workers to work. Instead, management went to the G.U.L. workers for overtime support. This policy was only supposed to be implemented when the utility worker’s list was exhausted.

The utility workers have been working understaffed for months. They have been covering the extra areas without complaint. This additional strain is felt by all of KAPL because of the insufficient time allowed to perform a good thorough cleaning. The unmanned positions should be filled without further delay. There should be a list of hirees, in the "pipe line" ready for hire as promised.

The utility workers should not be punished for trying to support the job even during overtime situations.

Restitution should be made to the two utility workers denied the opportunity to work the overtime. This overtime belongs to the utility workers and they should always have first refusal to do their work.
The Company's responses, dated respectively August 24, 1999 read, inter alia:

SUBJECT: RESPONSE TO GRIEVANCE DATED 8/18/99, Not Following Overtime List"

This grievance protests utilizing GUL's instead of Utility Workers for overtime on August 12, 1999 for coverage of open areas.

After reviewing the circumstances of this event, the Company agrees that the Utility Workers should have been asked prior to utilizing the GUL's. This has been discussed with the appropriate supervision. In the future, the Utility Workers will be offered the overtime first.

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It is the Company's position that supervisors are responsible for prudent management of overtime costs. However, in this particular situation, it would have been appropriate to offer the same options to all utility workers before offering the work outside the overtime group even though the two employees in question were offered and turned down the opportunity to work over four hours.

It is not the Company's practice to pay for time not worked.

It is clear to me that Manager Chmielewski and Labor Negotiator Krueger had authority on behalf of the Company to officially respond to the grievance and to bind the Company to these responses.
Equally clear is that those responses admitted, on behalf of the Company, that the Company had violated Article V, Section 8 of the National Agreement and that the Union’s grievance in behalf of grievant’s ZELTINS and PARRENE was substantively meritorious.

I am convinced that the only reason the grievance was not fully resolved in the grievance procedure and subsequently submitted to arbitration, was because the Company refused to make the grievant’s monetarily whole for the overtime they lost when not offered the overtime opportunity.

I am not persuaded that the Company’s arguments in the arbitration that overtime was apportioned equally as required by the contract or that the Company was not obligated to offer the overtime to the grievants when it meant double-time pay for them, were raised in the grievance procedure or should now be treated as substantive defenses to the Company’s admissions in its responses to the grievance.

Rather, I hold that the Company was and is bound to its acknowledgements made in the grievance procedure, leaving open for arbitral determination only the matter of remedy.

The Company’s position on remedy is:

"It is not the Company’s practice to pay for time not worked," and

"In the future the Utility Workers will be offered the overtime first."
The Company's position and "practice" notwithstanding, it is universally well-settled that employees who have lost an earning opportunity because of an employer's breach of contract are entitled to a monetary remedy equivalent to the earnings lost, irrespective of the fact that they did not work the time involved. Otherwise, contracts could be breached with impunity and enforcement of bilaterally bargained conditions of employment would be frustrated. This remedial action is applied and ordered by arbitrators traditionally and universally, and is applicable in this case as well. Also, I have that remedial power stemming from the stipulated issue, which explicitly vests the arbitrator with the power to fashion a remedy if a contract breach is found.

Lest the Employer think this decision is solely based on the technical Company's responses in the grievance procedure, I have two observations. The first is that in sound industrial relations that is precisely the role of the grievance procedure -- namely to set forth the positions of the parties, officially and contractually, and to resolve disputes where possible. And secondly, had I judged the merits of the grievance de novo, I would have reached the same decision. The contract does not provide an exception to the overtime procedure just because the overtime may result in double-time pay. Moreover, the decision to work overtime is a managerial prerogative, so the Company can schedule to avoid double-time to preclude the "manipulation" it
ascribes to the grievants. But, if, as here, the Company re-
contours the overtime by scheduling it as a “call-in” or “pre-
shift,” because it cannot get employees to accept the overtime
“after-shift,” the re-contoured schedule is a new and different
overtime assignment and the rules and procedures for its offer to
employees obtain anew. And, as here, employees who would
otherwise be eligible to be asked first, cannot be by passed in
favor of a differently classified group just because they had
worked an earlier and different overtime assignment. So, on the
merits, irrespective of the Company’s binding admissions or
acknowledgements in the grievance procedure, I would have found a
contract breach when the Company gave pre-shift overtime to
General Utility Laborers without offering it to the grievants in
the Utility Worker-Maintenance and Service Classification.

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

The Company violated Article V, Section 8 of
the 1998-2002 LM IUE National Agreement in
the assignment of overtime work on August 13,
1999 to JOHN ZELTINS and NEIL PARRENE in the
Code 13711 R-11 Utility/Workers
Classification on second shift under DAVID
KOPMEYER.
The grievants, JOHN ZELTINS and NEIL PARRENE shall be paid by the Company an amount of wages equal to what they would have earned by the assignment of overtime on August 13, 1999.

Eric J. Schmertz, Arbitrator

DATED: October 30, 2000

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

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

Was there just cause for the discharge on January 21, 2000 of EDWIN BATISTA? If not, what shall be the remedy?

A hearing was held on May 22, 2000 at the office of the Undersigned at which time Mr. Batista, hereinafter referred to as the “grievant” and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The parties agree that the Company may review, for evaluation and disciplinary purposes, an employee's work record over an 18-month period.

The Company asserts that such a review, applied to the grievant, shows an excessive unexcused absentee and lateness record, and an excessive sick leave record, culminating in an "insubordinate" refusal in his part on January 17, 2000 to comply
with the instructions of a supervisor. The Company argues that the absence, lateness and sick record and the act of insubordination, separately and jointly, against the backdrop of several "correction notices" (i.e. warnings), constitute just cause for his discharge.

Based on the record before me, I conclude that what prompted the 18-month review and triggered the grievant's discharge, were the events of January 14th through 17th. More specifically, the matters of the bonafides of the grievant's absence from his shift beginning the night of January 13th and continuing to the morning of January 14th, and the charge of insubordination arising out of the Company's investigation of that absence. Indeed, it is apparent to me that but for the grievant's absence on January 13th and 14th, and his alleged insubordination, the 18-month review would not have been done (at least not then) and he would not have been fired (at least not then). So, the issue of just cause turns on his absence of January 13th and 14th and the charge of insubordination. If the grievant was not at fault with regard to those events, his discharge, which would not have otherwise taken place at that time, cannot be sustained.

I do not find sufficient fault with his actions of January 13th through 17th to have triggered the review or to uphold the discharge.
First, with regard to the change of insubordination, the probative evidence is conflicting and inconclusive. The Company asserts that upon reporting to work on January 17th, following his absence of January 13th and 14th, the grievant was told by supervisor Ortiz that he could not punch in and that he was to await the arrival of Mr. James Bidetti so that the matter of his absence could be discussed and determined. Instead, claims the Company, the grievant willfully ignored the instruction, and went home.

The grievant's version of the event is critically different. He testified that Ortiz told him that he couldn't punch in, and that he couldn't work until he came in with the Union delegate. And, upon being pressed by the grievant to be allowed to work, Ortiz told him to "go home." The grievant's version of the event is substantially supported by the testimony of the Union shop steward, Flores, who was present.

Significant to my mind is the testimony of Ortiz. After telling the grievant that he couldn't punch in or work and to wait for Bidetti, the grievant replied "let me punch in or send me home." And to that, Ortiz said I can't let you punch in, do what you want to do" (emphasis added). Ortiz' testimony did not include an unequivocal order that the grievant wait for Bidetti, nor, when the grievant was leaving, a warning that to do so would be defiance of an order and insubordination. Moreover,
with Ortiz' refusal to permit the grievant to punch in, together with Flores' testimony, not denied by the Company, that Bidetti told Flores that the grievant was "suspended," and that Flores so told the grievant, I conclude that the grievant had reasonable grounds to believe that he was "off the clock" and "suspended." If that was his belief, which I conclude to be reasonably based, the grievant was under no requirement to wait on the Company premises for Bidetti's arrival. In short, the status of "suspension" and an order to remain for a meeting are mutually inconsistent.

In any event, I do not see the elements of insubordination. In sum, the grievant, I conclude, had reasonable grounds to believe that he could or should go home in the face of a prohibition on working, and/or he had a reasonable basis to believe that he had been suspended, and therefore relieved of any duty to remain on the premises. I see no order to him to remain, or a requisite warning that a failure to do so would be deemed insubordinate.

With regard to the grievant's absence on January 13th and 14th, the evidence on its alleged lack of bonafides, is also inconclusive.

The Company claims that the grievant called in to say that his wife was ill and that he had to baby sit his children.
The grievant testified that he had a foot injury or ailment (unrelated to his chronic gout) and was instructed by his doctor to stay off his feet for a couple of days. Understandably suspicious, because the absence was the day before a contract holiday, and also because the Company thought it may have been related to his chronic gout condition, requiring in both instances medical substantiation and a release before returning to work, the Company sought to investigate the absence. But any such investigation was superceded and preempted by the events of January 17th, and the charge of insubordination. The Company did not, as it had the right to do, ask and require the grievant to produce medical documentation for that absence. So, its real cause remained undetermined.

Also, with the new calendar year of 2000, the grievant became eligible for six sick days with pay. This is not to say that with the start of a New Year, he is immune from an overall record of excessive absenteeism retroactive 18 months. Rather it is to say that standing alone, without probative evidence of falsification of his reasons for being absent, and preempted by the charge of insubordination, the absence was not enough to trigger the discharge action in this case. In other words, the charge of insubordination stopped the investigation of the absence short of any determination of bonafides or lack thereof. And it was the insubordination charge, not the circumstances
surrounding the absence of January 13\textsuperscript{th} and 14\textsuperscript{th} that triggered the grievant's discharge. Indeed, the record shows that the grievant was paid sick pay for that absence, indicating that it was not the reason for his discharge. But for the charge of insubordination, and by the Company's own testimony, the grievant's absence on January 13\textsuperscript{th} and 14\textsuperscript{th} could and might have been resolved without disciplinary action had there been the meeting with Bidetti. So again, the charge of insubordination was the intervening circumstance of and trigger for the discharge.

As to remedy, though I shall order reinstatement, I do not find the grievant eligible for back pay.

He has suffered from an apparent severe and chronic gout. Most of his absences are from that condition. Though on new medication, I am not satisfied that he would have been able to work during the period since his discharge. Under that circumstance, what pay he would have earned is too speculative to be awarded. Moreover, he acknowledged that he hasn't worked since his dismissal. There is no evidence that he tried to get employment to mitigate damages. Both for his failure to do so and because it may also mean that he has not been physically able to work, the claim for back pay is denied.
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 EDWIN BATISTA was not for just cause. He shall be reinstated, but without back pay.

Eric J. Schmertz, Arbitrator

DATED: May 30, 2000

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

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

Whether the discharge of BRIDGET COOLEY is arbitrable?

A hearing was held on December 14, 2000 at which time Ms. Cooley, 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 Employer asserts that the most recent discharge of the grievant is not arbitrable because she was a probationary employee for the period September 2000 through June 30, 2001, pursuant to my Consent Award of June 20, 2000 and therefore subject to dismissal without challenge during that period. The discharge, which the Union protests in this proceeding, took place in September 2000.
The Union asserts that the September 2000 discharge was for a specific reason, namely the grievant’s failure to respond to and/or pay a parking ticket she received while operating her bus, which was subsumed in, covered by and disposed of by my earlier Consent Award of June 20th. In other words, the Union contends that the resolution of the grievant’s earlier dismissal, reflected in the Consent Award involved a resolution by the parties (per my recommendation) of all the then outstanding charges against the grievant, including a charge relating to the parking ticket. And that therefore that charge was wiped out by the agreement to change the grievant’s earlier discharge to a suspension and to restore her to duty on September 1, 2000. To now discharge her for the traffic ticket, asserts the Union, is a “double jeopardy” violation of the Consent Award.

The Union would be correct if the parking ticket was considered and vitiated by the Consent Award.

But the evidence persuades me that the matter of the parking ticket was not included as an issue or considered and disposed of by the Consent Award. The discharge leading to the Consent Award was for other alleged offenses. Though the parking ticket was discussed during the grievance procedure, it did not come up until a subsequent step of that procedure (following the grievant’s discharge) and then only as to the procedure the grievant was to follow to handle it. Based on the testimony adduced, the parking ticket was not only not a reason for the grievant’s then discharge, but it had not became an adversary
issue at that point, and therefore was not substantively considered or included in the agreement to reduce the grievant's then discharge to a disciplinary suspension, as recited in the Consent Award.

I am satisfied, by the evidence and testimony, that if the parking ticket matter became an issue for discipline, it did not so become until September 2000, after the grievant returned to work under the Consent Award as a probationary employee. As such, it is an issue not covered or resolved by the Consent Award. That being so, I find no breach of the Consent Award by action based on the parking ticket, taken by the Employer in September 2000, if such action was taken.

Accordingly, the discharge of the grievant in September 2000, while she was a probationary employee is not arbitrable.

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

The discharge of BRIDGET COOLEY is not arbitrable.

Eric J. Schmertz
Impartial Chairman

DATED: January 17, 2001
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.
With this decision, I think it appropriate to make a professional observation.

I have been informed that the leadership of Local 100 has changed by election and that new counsel will be representing Local 100 in future proceedings before me. That, of course, is in the normal nature of changes in Union officership, and I extend my welcome to new counsel to the forum of the impartial chairmanship.

That said, I do want to pay professional tribute to retiring counsel, Edward J. Groarke, Esq. of the law firm, Colleran, O‘Hara & Mills, for his many years of outstanding and eloquent advocacy on behalf of Local 100 and the grievances of its members. Win or lose, Mr. Groarke has always tried cases with uncommon skill, dedication, tenacity and civility. In every case, including this instant matter, Mr. Groarke presented a case comprehensively and as persuasive as the facts and contract permit, making all the arguments available to the circumstances. If, as in this case, the decision went against the Union, it was because I viewed the facts and the controlling contract language differently from that advanced by Mr. Groarke. But in doing so, I never doubted his sincere belief in the cause he was defending and I admired with utmost respect his extraordinary ability and the competence of his presentations. Local 100 was well served by his counsel.

Eric J. Schmertz
Impartial Chairman
The stipulated issue is:

Did the Employer violate the contract by failing to provide fare-box training for STEPHEN MONTEMURRO?

If so, assuming that on a day between May 3, 1999 and May 17, 1999 he was denied a tripper because he was not fare-box trained, what remedy, if any, is he entitled to?

A hearing was held on February 29, 2000 at which time Mr. Montemurro, 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.

Sometime between May 3rd and May 17th, the Employer's dispatcher announced by radio that a tripper run was available. The grievant, then a school bus driver, applied for that tripper, as "extra work" under Section 16 of the collective bargaining agreement. His application was denied on the grounds that he was
not “fare-box trained.⁶¹

The Union argues alternatively. It asserts that the contract conditions “extra work” solely on “strict seniority”; that the grievant had the requisite seniority and that fare-box training is not a part of the contractual eligibility for the work. It also argues that the grievant should have been fare-box trained by that time, pursuant to a “fare box agreement” under which all drivers were to be fare-box trained, and that the grievant’s prior efforts to obtain that training were improperly denied.

As a remedy, the Union seeks an order directing that the grievant be fare-box trained and paid for 3½ hours for that training, and also paid for the time he would have driven the tripper.

The Employer denies any “fare-box training agreement” which called for fare-box training of all its drivers. The Employer states that the agreement with the Union was to pay 3½ hours pay to those drivers who were fare-box trained (for the period of the training) and to fare box train not all its drivers but only those who drove, or gave notice of an intent to pick work requiring the use of a fare box, namely and limited to express run operators, tripper drivers or as spare operators. As the grievant was a school bus operator, not having picked an express run, a

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¹ The tripper utilized a fare box to collect fares in that run, including the use of a metrocard.
tripper or a spare operator under Section 18 of the contract, he was not fare-box trained and not eligible for that training.

Section 16 and 18 of the contract read:

Section 16. Extra Work (Bus Operators)
All bus operator's extra work, including specials and charters shall be picked by strict seniority.

Section 18. Pick Period
All runs will be posted one (1) week prior to the start of the pick.

All runs are to be picked three (3) times a year in February, June and August. With the exception of the June pick, employees at Pick Time must pick at least twenty-five (25) paid hours per week, if work is available.

There appears to be no dispute that the tripper in this case was "extra work" within the meaning of Section 16. And, apparently, also, had the grievant been fare box qualified, he would have been eligible for the assignment on the day involved, regardless of the Pick procedures and the Pick periods of Section 18. As those assumptions appear not to be in dispute in this case, I need not consider or resolve any disagreements with those assumptions.

Instead, the issue narrows to whether there was a "fare box agreement" under which all drivers would be fare-box trained, whether the grievant's prior effort to obtain the training was improperly denied, and if so, whether his rejection for the tripper run because he was not fare-box trained was based on and compounded by that impropriety. Also at issue, at the threshold, is whether Section 16 accords the grievant the right to the
tripper assignment based "strictly in (his) seniority," regardless of his lack of fare-box training.

I deal with the "threshold" question first. I am satisfied that an implicit condition of an award of "extra work" is that the applicant be qualified to perform it. Manifestly, in my view, an employee unqualified to perform any work assignment (including "extra work") is not contractually entitled to the work, even if he enjoys top seniority. Especially so in my view when, as here, the work is transportation for the public. So, I am satisfied that Section 16 includes as a condition (albeit implied, but compellingly logical), ability or qualification to perform the work, along with the requisite seniority. So, because he was not fare-box trained, he lacked the required qualifications for the tripper run that day, his top seniority notwithstanding.

The questions, therefore, narrows further to whether the Employer had erred in not according the grievant fare-box training earlier, and if so whether the Employer is consequently monetarily liable for not so training the grievant and for his loss of the tripper assignment.

Part of the answer lies in a determination of the differing positions of the parties regarding a "fare box agreement." The burden is on the Union to establish the existence of such an agreement, particularly because of its costliness to the Employer and because of its speculative applicability to school bus drivers who do not operate express runs, trippers, or spares, (where the fare box is used).
The burden has not been met. The alleged agreement was not reduced to writing. The testimony by Union and Employer witnesses is contrary to each other and hence indeterminative. The Employer's explanation and testimony that the "agreement" was limited to paying 3½ hours of pay to those drivers who had been fare-box trained and that that prior training and all future training would be limited and paid to drivers who pick express, tripper or spare work is as persuasive as the Union's assertions to the contrary. Hence, I cannot find a binding agreement under which the Employer promised to fare box train all its drivers. And the practice over the last several years, as a managerial prerogative, supports that conclusion.

However, there have been some exceptions to the practice which I find to be of sufficient quantity and circumstance as to be probative for this case. In addition to fare-box training of express, tripper and spare operators, the Employer also trained some eight driver's who did not actually pick any of those three types of work, but because and on the strength of their expressed plan to pick such work.² In other words, and logically, because the Employer thought and expected that those drivers would pick work requiring fare-box training, the training was given anticipatorily.

² Robert Velasquez, Richard P. Ortiz, Maria Marquez, Ismael Adomo, Estever Conde, Salvatore Fusco and Robert Grizzaffi each advised the Employer of an intention to pick and express run, tripper or spare operator, but picked instead MIU or school bus
I find the grievant's status at the time he responded to the Employer's solicitation for a driver for the tripper, to be substantially similar to that of the foregoing eight employees.

He, like they had the requisite seniority to exercise a preferred pick, or in this case, to claim the available extra work. He, like they could not perform the work without fare-box training. They were trained in anticipation of their picks. He was not. The difference, of course, is that there was time for the eight to be trained in the expectation of their picks, but no time for the grievant to be trained for the imminent tripper run. But, that difference obtains to and negates only the Union's claim for pay for the tripper run denied, not to the matter of fare-box training.

As to the latter, I find a sufficient similarity with eight drivers who were trained but did not pick fare-box work to require the training of the grievant. He tried to "pick" the tripper work for which the Employer sought volunteers. That was comparable to the stated intentions of the eight. And it represents enough interest and intent to seek or pick tripper work to entitle the grievant, like the eight others, to fare-box training for the future. Therefore, on the well-settled basis that employees similarly situated are to be treated equally or evenhandedly, I find that the grievant's specific interest in the tripper run, together with his seniority, put him in a position
comparable to the other eight drivers who were trained because of their expressed intentions.

Accordingly, based entirely on the special facts of this case and the special circumstances surrounding the grievant’s request for the tripper “extra work,” the Employer’s denial of his request was not improper, but he is now entitled to be fare-box trained and paid 3½ hours pay for that training.

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

The claim of STEPHEN MONTEMURRO for pay for the tripper run denied him some time between May 3rd and May 17th, 1999, is denied.

However, when he volunteered for and sought that tripper run in response to a general solicitation by the Employer, and based on his seniority, he expressed an interest in and a desire to operate a tripper. That made him eligible for fare-box training for future tripper, express or spare work to which his seniority would entitle him, comparable to the fare-box training accorded eight other identified drivers.

He shall be fare-box trained and paid 3½ hours of pay for that training.
This decision, based on the particular facts and circumstances of this case, cannot be construed as precedent for any other matter. Other matters viewed similarly must be dealt with and tried de novo.

Dated: April 21, 2000

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.
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

In the Matter of the Arbitration

-between-

NEWSPAPER GUILD OF NEW YORK

-and-

NEW YORK TIMES COMPANY

Before: Eric J. Schmertz
Arbitrator

Appearances: Newspaper Guild. . . . Vladeck, Waldman, Elias & Engelhard, P.C.
by Larry Cary, Esq. and Walter Kane, Esq.
and Meyer, Suozzi, English & Klein, P.C.
by Irwin Bluestein, Esq.

and Bernard M. Plum, Esq.

OPINION AND AWARD

Case No. 13 300 00153 96
INTRODUCTION

The Guild and the Times have a collective bargaining agreement covering 1993-2000. In April 1994, as negotiations for that contract were nearing an end, the parties agreed to place several job titles on a “60-Day List” for classification review. One of the titles on the April 1994 60-Day List is News Assistant (4 Sports and 1 T.V.). When the parties could not agree upon the reclassification of the News Assistant position from Group 7 to a wage group higher on the contractual pay scale, the dispute was submitted to arbitration pursuant to Article III (Salaries), Section 8 of the contract and the parties’ past practice.

This arbitration involves five News Assistants. Four of these News Assistants now work or at one time worked in the Sports Department on the agate pages and are sometimes called “agateers.” The agate pages are ones containing mostly statistical sports information presented in columnar format such as box scores and league standings printed in type smaller than that normally used in the newspaper. The other News Assistant in issue works on the television, radio and local event listings appearing on the sports agate pages.

The Undersigned was selected as the arbitrator under the procedures of the

1There are News Assistants employed in other of the Company’s departments, but those employees are not in issue in this proceeding.

2Joseph Brescia, Grant Glickson, Julius Green and Vincent Mallozzi. The employment circumstances of these individuals changed over the course of the hearing. As last shown by this record, Glickson took a leave of absence to work for the Guild, Brescia works two days, Green three days and Mallozzi works only one day.

3Leslie Chambliss.
Although the meaning and scope of the following is in dispute, the parties agreed at the start of the hearing to this issue:

Should the News Assistants working in the sports department and television section be reclassified? If so, what classification?

The Company claims that it agreed to this issue only after the Guild clarified on the record that it was seeking a reclassification of the News Assistants to Group 10 specifically. Therefore, the Company argues that only an upgrade to Group 10 is presented for arbitration. The Guild claims that an upgrade to either Group 8 or 9 was preserved for my consideration if an upgrade to Group 10 was held to be inappropriate.

I accept the Guild's characterization of the scope of the issue. Although the parties disagree about the type and the amount of evidence needed to support a reclassification of the News Assistants to Group 8 or 9, a reclassification to Group 8 or 9 was an issue I was to consider if a reclassification to Group 10 was denied. The Guild clearly stated on the record a request for a reclassification to Group 8 or 9 and it did not abandon this as an alternative to a Group 10 reclassification. Moreover, a request for this
type of alternative relief is not unusual under these parties' reclassification disputes.

Therefore, I have considered first whether the News Assistant position should be reclassified to Group 10 and, if not, whether reclassification to Group 9 or 8 is appropriate.

**APPLICABLE CONTRACT PROVISIONS**

**Article III, Section 8**

The classification of each position provided for in Section 1 of this Article reflects the Agreements arrived at by the Job Evaluation Committees representing the Times and the Guild. The Times shall supply the Guild with a description of the duties, responsibilities, proposed classification, and effective date of a new job, and changes in the duties and responsibilities of an existing job. The Evaluation Committees shall meet on a regular basis to negotiate such changes. Any disputes over the proper classification of those changes shall be subject to arbitration.

**Article IX**

Multiple and Temporary Classifications

1. 50 Percent in Higher Classification

An employee who, 50 percent or more of his or her regular working time, is assigned to and does the work that distinguishes a higher job classification from his or her own or who fully replaces another employee in a higher job classification shall be reclassified and promoted under Article VIII Section 6.

2. Two Hours or More in Higher Classification

An employee who temporarily during his or her regular working time, is assigned to and does the work that distinguishes a higher job classification from his or her own
or who fully replaces another employee in a higher job classification for two or more hours in a day, shall be paid as set forth in Article VIII Section 6 and accumulate experience in the higher classification as if he or she had worked his or her entire regular shift in the higher classification. Such payment shall be made on the basis of a classification claim slip or a temporary reclassification, whichever is appropriate. In addition, he shall accumulate experience in the lower classification at the normal rate.

**BACKGROUND FACTS**

According to their practice, the parties in 1948 agreed through a Job Evaluation Committee to the job description for the title of News Assistant. They also agreed to assign that position to Wage Group 7 that includes the following titles:

- Administrative Secretary
- Advertising Rebate Clerk
- Art Assistant
- Billing Control Clerk
- Cashier Receipts Clerk
- Display Charge Clerk
- EDP Control Clerk
- Purchasing Assistant
- Inhouse Printing Technician
- Maintenance Scheduling Sup.
- Morgue Indexer
- Morgue Picture Indexer
- News Assistant
- Newsprint and Ink Costs Clerk
- Payroll Deduction Control Clerk
- Photostat Operator
- Promotion Art Assistant
- Promotion Assistant
- Research/Media Services Assistant
- Telephone Solicitor
- Transient Adjuster

The job description for News Assistant provides as follows in relevant part:

(Reporting, rewriting and copyreading shall not be a requirement of the work of news assistant, although any employee so classified may be permitted to perform such work in limited amount for which no additional compensation shall be granted, and such reporting, rewriting or copyreading as he is permitted to perform shall be restricted to that particular field or area of work to which he is assigned as a news assistant. Furthermore, the amount of reporting, rewriting or copyreading permitted to a news assistant without additional compensation shall result in publication of}
Perform as assigned any of the following work:

**Compiling** - Gather and prepare accurately and rapidly for immediate publication assigned tabular matter published regularly in allotted space directly under stock or approximately stock heads or captions: Become thoroughly versed in exact requirements of tables handles, both as to content and style or composition, and thoroughly familiar with the sources from which tabular material is received or obtained; receive the material, or take the initiative to obtain it, by mail, wire or telephone, and, as required, by personal coverage of information sources; determine from memory and experience the probable accuracy of the data, correct apparent errors and compile the material to meet requirements of form and style; observe and call attention to such news developments as the material may disclose; maintain good relationships with information sources.

**Tabular Reading** - Edit accurately and rapidly assigned tabular copy for immediate publication: Determine from memory and experience the probable accuracy of the copy and correct apparent errors; know requirements of style and form for tabular material and in conformance thereto mark copy for composing room; re-check for errors, in proofs and in the paper (except that the proof room remains primarily responsible for correction of typographical errors).

**Sub-Departments** - Assist with news details in a bureau, section, sub-department or office by performing all or nearly all of the following functions: Compile tabular matter, edit tabular copy, write news notes as set forth in foregoing descriptions; know news sources in the field covered by the particular office or sub-department in which the work is performed, keep abreast of the news in the field and suggest news ideas; read releases, answer telephone calls, interview visitors, dispose of such as clearly do not merit attention of reporters or editor in charge and process the remainder in several ways, such as forwarding them for attention, rendering an oral report with suggestions for possible
Perform all work of news clerk. Perform related work as assigned.

**NATURE OF THIS PROCEEDING**

The Guild and the Company have a long history of arbitrating disputes about the reclassification (reslotting) of unit positions. Arbitration awards were submitted in this case dating back to the 1970s and 1980s, which in turn refer to yet other awards. Certain principles applicable to reclassification requests emerge from these earlier arbitration awards which are relevant to the dispute before me.

A reclassification arbitration is most nearly an interest arbitration, not a rights dispute. There is not any contract provision claimed to have been violated in a reclassification dispute between these parties. The arbitrator’s function is more quasi-legislative, than quasi-judicial. Because the proceeding is in the nature of an interest arbitration, arbitrators have not insisted upon the satisfaction of any particular burden of proof usually required in a rights dispute. This is not to suggest, however, that an upgrade can be awarded in an evidentiary vacuum. Even an interest dispute is resolved through examination of relevant standards upon a factual record.
The arbitration awards rendered in these parties' reclassification disputes reflect the nature of their compensation system. The Guild and the Company have agreed to pay unit employees according to the group into which their positions have been slotted by agreement. The slotting is done by a Joint Evaluation Committee that compares the duties and responsibilities of the positions with a view toward the worth of the positions in relation to one another. This is clear both from the prior arbitration awards and Article III, Section 8 itself. However, given the similarities in duties and responsibilities across wage groups, comparisons of duties and responsibilities among the employees seeking the reclassification with those who are in higher or lower wage groups are not always dispositive of an upgrade request.

The skills, duties and other characteristics within these parties' wage groups are not unique to one group. Employees in different wage groups regularly or occasionally do some of the same or substantially similar work. Therefore, the performance of a task or tasks within a higher wage group by an employee within a lower wage group does not, by itself, warrant an upgrade.

As both the wage groups and the position descriptions have been negotiated by the parties, the arbitrators who have considered the prior classification disputes between these parties have usually required evidence of some substantial change in duties effecting a significant change in responsibilities before a title is removed from its
assigned wage group and reslotted or reclassified into a higher one.\textsuperscript{4}

In evaluating a request for an upgrade of a slotted position, arbitrators attempt to ascertain whether qualitative changes in a job since it was last slotted have added enough extra value to the job to warrant an upgrade. If so, then the level of the upgrade is determined by a comparison of the central functions, characteristics, skills, duties and responsibilities of the position at issue with those in other wage groups. But among the many attributes of a given classification, not all have been or need be weighed equally. For example, these parties do not slot jobs at the level of the highest skill or responsibility required in the job without regard to the amount of time spent in the performance of those higher level skills or responsibilities. The greater the frequency of use of an attribute of the job, the greater the weight that attribute is given in the overall evaluation of that job.

It is in this context that the parties have submitted their evidence and have advanced their arguments and it is in that same context that my award issues.

\textbf{CONTENTIONS OF THE PARTIES}

\textbf{The Guild}

The Guild argues that the five News Assistants in issue should be reclassified to Group 10 and paid at the contractual wage rate for that group from April 19, 1994 when the 60-Day list was submitted. If an upward reclassification to Group 10 is not appropriate, the Guild argues that I should determine whether a reclassification to Group

\textsuperscript{4}Except when and as necessary to correct an obvious wage inequity among positions which had once been similarly classified (e.g., Seitz award 1972).
9 or 8 is appropriate. If reslotting of the News Assistant position to a higher wage group is not found appropriate, the Guild submits that I may, nonetheless, move one or more of the five employees, as appropriate, into the next higher wage group without actually upgrading the News Assistant position itself. If both position reclassification and individual assignment to higher classification are rejected, the Guild argues that I should order the parties to meet to discuss a new wage rate for the News Assistants pursuant to Article IX of the contract and that I retain jurisdiction to resolve any dispute over higher classification pay.

The Guild’s arguments in support of its reclassification request are based upon an alleged evolution of the News Assistant position since 1948, an evolution that has required the agateers to assume more duties and to take on additional responsibilities without the aid of any close supervision by Layout Editors and Makeup Editors. The job of the News Assistants in the Sports Department, according to the Guild, has changed dramatically over time because of advances in newsroom technology, an expansion in the Sports Department in the 1990’s, and the Company’s insistence that the agateers produce fast, accurate, high-volume sports information. From the Guild’s perspective, the News Assistants’ work now often involves the preparation and editing of text, not just statistics printed in tabular form, the latter being what was envisioned when the job was slotted into Group 7 by agreement decades earlier. According to the Guild, the News Assistants are now more accurately described as “Agate Editors” who, like other editors, have duties requiring “reportorial initiative and writing competence” with accompanying
independence, discretion, and responsibilities. The Guild argues that the employees in issue are no longer "assistants." Rather, they are now required to do substantial amounts of reporting, copyreading, rewriting, formatting and copy editing on their own as the first, last and only eyes and hands on the material they prepare. According to the Guild, the three column restriction on these tasks is exceeded regularly and "exponentially"

One of the News Assistants prepares the television, radio and local events listings for the agate sports pages. The Guild argues that this position is properly classified within Group 10, in part, because the incumbent is doing writing that a Group 10 reporter had been assigned to do at an earlier time. Beyond this, the Guild argues that this News Assistant, like the others, works independently and without supervision or review and routinely exercises judgment and discretion in her work.

The Company

The Company argues that the News Assistants are properly classified within Group 7 because the agateers' job is not new or changed. From the Company's perspective, a reclassification of the News Assistants from Group 7 to any higher wage group must be denied because there is no evidence, or at least insufficient evidence, to warrant a reclassification. The Company argues that the duties and responsibilities upon which the Guild relies for an upgrade are encompassed within the very broad and consensual job description for the position and have been required of and performed by the News Assistants for years prior to the filing of the 60-Day list. Therefore, there is no basis for a reslotting of the position to any higher wage group. To whatever extent the
News Assistants' current duties may lie outside the four corners of their job description, the Company argues that those duties still do not support a reclassification because their duties are unlike those of Group 10 personnel and there is no basis in the record for a comparison with Group 8 or 9 personnel. The Company suggests that classification "claim slips" for out-of-title pay under Article IX should have been filed if the Guild and the News Assistants truly believed that the Company was frequently exceeding the contractual limitations on higher classification work. The failure to do so, in the Company's view, strongly evidences that the reclassification request lacks merit. The Company further argues that theGuild's request for any alternative relief or remedy is not properly before me and lacks evidentiary support in any event.

**OPINION**

**A. RECLASSIFICATION TO GROUP 10**

The Guild's request for a reclassification of the News Assistants from Group 7 to Group 10 is denied. As explained hereafter, at least most of the duties and responsibilities the Guild relies upon to support its reclassification request are already encompassed within the News Assistants' long existing and broad job description. That description encompasses in the main any evolution in the News Assistants' job that has occurred over time. To whatever extent, if any, the News Assistants' duties or responsibilities fall outside the scope of their position description, those duties and responsibilities are not comparable to those required of and imposed upon the employees in the Group 10 classifications which were submitted for my review and comparison.
The essence of the job of a News Assistant working on agate in the Sports Department is unchanged in material respect since the creation of that position. Now, as before, the basic job of the four News Assistants in issue is to obtain mostly statistical sports information, usually from a wire service, and prepare that information for publication in tabular form in the newspaper within available space as determined by editors.

Through its principal witness Vincent Mallozzi, the Guild asserts the following changes in duties and responsibilities:

1. editing non-tabular material;
2. giving editorial input;
3. trimming and formatting tabular material;
4. closing the agate pages in the composing room;
5. reporting, rewriting and copyreading in excess of the limitations on the performance of those functions as specified in the job description.

In support of these claims, the Guild submitted approximately 80 copies of agate page proofs marked in different colors to identify discrete functions corresponding to those listed above. I have reviewed and considered those proofs and the testimony related to those exhibits in the summary discussion that follows.

1. **Editing non-tabular material**

The Guild argues that the News Assistants now regularly read textual material, such as injury and transaction reports, not just tabular copy. The injury and transaction
reports are provided by the AP wire service along with the statistical information it provides to the Company for a fee. Although this textual information is not presented in strictly columnar format, that text is, as the Company argues, clearly more analogous to tabular or statistical information than any treatment of a subject in a story which an editor might edit. There is little, if any, editing to be done on these reports which are admittedly accurate when issued. Moreover, the editing functions performed on these reports, or on the “filler” text the agateers prepare from time to time, are within their existing job description. The News Assistants simply read this limited textual material for “probable accuracy” and check for and correct “apparent errors,” just as they do with the statistical information. This is a task which is also admittedly within the expected job duties of a Group 7 News Assistant. The editing of this type of textual material is simply not the equivalent of the copyreading or other work required of an editor as described on the record at some length by the Company’s witnesses. Even were it copyreading in some loose sense, this type of copyreading falls within the Group 7 job description and the limits specified in the job description have not been shown to my satisfaction to have been exceeded, at least not to an extent to warrant an upgrade of the position to Group 10.

The Guild’s remaining arguments under this subparagraph are more directed to added responsibilities than duties because the editing is allegedly done without supervision and in other than an “assistant” capacity. These arguments are, therefore, addressed later in my opinion.
2. Editorial input.

A News Assistant is required by the current job description to “suggest news ideas” and to keep “abreast of the news in the field,” a requirement that includes updates on developments in the sports world.

Although News Assistants may, and occasionally have, offered verbal suggestions to members of the editorial staff about the choice of sporting events to be reported, that is a task which is within their existing job description. This input is not reasonably similar to the editorial decisions made by persons in Group 10, and being a function within the existing position description, is not a ground for reclassification.

3. Trimming and Formatting

The record establishes that the News Assistants “trim” tabular material to fit into allotted space under the “dummy sheet” that is prepared by the Layout Editor.\(^5\) I find that the need and opportunity for trimming is limited and that the standards for that trimming have been pre-established by editors and are clear. The trimming task is not new, it is by nature relatively routine, and requires little discretion or independent judgment. Rather, the skill brought to bear in trimming sports agate information is a general knowledge of sports and reader preferences, which the agateers admittedly have and are expected to have. That others in higher classifications once did this work does not establish that trimming agate sports information lies outside the Group 7 job description and certainly

\(^5\)The estimates as to the amount of time spent in trimming varied substantially among the witnesses.
not to a degree sufficient to warrant an upgrade to Group 10.

Formatting, according to Guild witness Mallozzi, involves “[s]etting the type to fit the space and design on a page” in an aesthetically pleasing arrangement. To this extent, and as Mallozzi himself admitted, formatting falls within the “Compiling” part of the News Assistant’s job description requiring the employee to “gather and prepare” the tabular material for publication in the allotted space in the newspaper.

The Guild argues, however, that “painting” the rules and boxes within which the sports information appears, tab-stopping\(^6\) and legging-over\(^7\) is work of a higher classification. For several reasons, however, this work is not a basis for reclassification to Group 10. The “painting,” tab-stopping and legging-over processes require minimal time and effort as these processes are now controlled in the main by simple computer keystrokes. As to the tasks of tab-stopping and legging-over, the Guild’s claim is also premised upon the fact that Group 10 editors once did tab-stopping and members of the ITU previously did legging-over. But again, that others outside of Group 7 did or now do those tasks does not, by itself, establish a reasonable basis for a reslotting to Group 10 because of the widespread overlapping in functions across wage groups.

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\(^6\)Tab-stopping is a process by which printed material is separated vertically into paragraphs or otherwise divided into vertical groupings.

\(^7\)Legging-over is a process by which material is lined up horizontally (side by side) across a page.
4. Closing the agate pages

This can not reasonably be considered a new task because what the agateers actually do in preparing the agate pages before they are sent to the composing room is unchanged. Rather, this aspect of the Guild’s request for reclassification is grounded upon an allegation that the News Assistants are the “first, last and only hands and eyes” on the agate material before publication because editors are allegedly no longer closing the pages. As this is also an argument based on added responsibility, it, too, is discussed later in my opinion.

5. Reporting, Rewriting and Copyreading

This aspect of the Guild’s reclassification must fail because the record does not establish that any work performed lies outside the existing job description for Group 7. Assuming it may, the record does not establish that contractual restrictions on the performance of certain of those tasks have been exceeded to an extent warranting or requiring an upgrade to Group 10.

The reporting functions of the News Assistants reasonably fall within both the “Compiling” and “Sub-Departments” sections of the News Assistant job description. As therein described, the News Assistants have always been required to “take initiative to obtain...information” from a variety of sources including “telephone calls” “inquiries” and “interviews.” News Assistants write news notes, read releases, conduct interviews and use standard reference books in their work. That is the type of reporting the agateers have done and still do. The record does not establish that the required reporting is
anything more than that addressed in the job description. Simply put, the type of reporting done by the agateers is that incidental to tasks plainly within their job description.

Included by the Guild as a type of reporting is the occasional preparation of “filler,” which is textual material used to fill space when the tabular material does not occupy all of the space allotted by editors. Preparation of this type of “filler,” whether in advance and stocked for future use, or prepared fresh on an “as needed” basis, falls within the News Assistants’ existing duty to “write news notes.” Even if it did not, the work required to produce the filler has not been shown to exceed contractual limits.

The “rewriting” work is not a basis for reclassification to Group 10 because the “rewriting” consists of little more than making changes in wording to conform to the Company’s required style. That work is within the range of “editing” and “fixing” long required and performed by News Assistants.

The reclassification request fares no better when the job descriptions of the Group 10 positions which were introduced into evidence are examined. In support of its upgrade request, the Guild submitted the job descriptions of five Group 10 positions: Times Index Copy Editor, Reportorial Rewrite Man, Graphics Deskperson, Times News Service Deskman and Reporter. These were the ones the Guild considered to be most relevant and I have reviewed all of these job descriptions. From that review, I am persuaded that the job of these News Assistants, even when the attributes of that job are
viewed most favorably to the Guild, is not comparable to the jobs in Wage Group 10.  
Although certain of the duties in the Group 10 job descriptions are also found in the one for the Group 7 News Assistant - a fact common to other job descriptions - the nature of any of the Group 10 jobs submitted for review are fundamentally different from the job of a News Assistant. Without unnecessarily detailing the specific tasks unique to these Group 10 positions, the incumbents in the Group 10 positions, overall, have higher required qualifications and levels of skill, are vested with greater discretion, and are regularly called upon to exercise independent judgment in matters of greater consequence to the Company than the News Assistants. In short, the incumbents in Group 10 jobs hold positions of much different responsibility and accountability than do the Group 7 News Assistants.

Howard Walsh, the Guild’s Reslotting Chairman, had underlined the tasks set forth in the Group 10 positions which were also required, in his opinion, of the Group 7 agateers. This, however, is not persuasive of a conclusion that the agateers should be slotted in Group 10. Only a relative few of the Group 10 tasks were common to Group 7. Again, these parties understand and have agreed that one or more of the same duties will appear in two or more wage groups. More specifically, that both agateers and editors “edit” in a sense does not mean that the agateers should be Group 10 employees. The wage slottings reflect the totality of a job’s duties and responsibilities, not one or two

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8Therefore, whether these job descriptions were selected by the Guild with deliberation and care or were, as argued by the Company, largely a last minute afterthought, is inconsequential. The job descriptions for Group 7 and Group 10 are what they are and they are different in material respect.
particular tasks that might be common in a broad sense to one or more other wage groups. It is also not possible to determine upon this record whether the tasks common to Groups 7 and 10 are major or minor aspects of those jobs.

Walsh also described the "essence" of the Guild's reasoning for its upgrade request and, given his position, I have given that great consideration. According to Walsh, the Guild was persuaded that a reclassification was appropriate because the agateers over time had become the "last set of eyes" before the agate pages were sent to the composing room. No one was allegedly checking the agateers' work and it was this added editorial responsibility which Walsh felt warranted an upgrade.

To whatever extent Walsh's conclusion that agateers alone close pages is accurate, and there is disagreement and inconsistent testimony on this point, the evidence shows that it is a responsibility that has been removed by the Company from editors over time, without new responsibilities being imposed on the agateers. From this record, the News Assistants are doing their job just as they did before editorial review was allegedly taken away or allowed to erode. There is no credible evidence to support a conclusion that the agateers are being held accountable for the accuracy of the pages they may "close," as would a Group 10 editor be held accountable for uncorrected errors. If the Company allows agate pages to be sent to the composing room without any editorial review before the papers are released for sale or distribution to the public, or with less editorial review than those pages had before, that does not mean that responsibility and accountability for accuracy has been shifted to the agateers, nor does it necessarily exact any greater
demands on the agateers, either in terms of duties or responsibilities. If a "vacuum" was created, the agateers have not been required to fill it. Thus, it can not be said reasonably that enough extra value has been added as a requirement to the job of a News Assistant by the lack or lessening of editorial review to warrant an upgrade to Group 10. I recognize and acknowledge, however, that "journalistic pride" certainly impels them to deliver work that is accurate.

The Guild's argument in this respect is quite similar to the argument made in support of a reclassification requested for Circulation Accounts Receivable Clerks. Arbitrator George Marlin in 1974 denied that request. There, as here, the employees for whom the reclassification was requested performed their duties in the same way with or without review of their work by persons in higher wage groups. As in that case, the absence of that review need not and does not in this case result in any substantial change in responsibility or accountability or require any additional exercise of discretion or judgment.

Arbitrator House's 1980 award is not to the contrary of Arbitrator Marlin's earlier award. Although a reclassification of Adjustment Clerks from Group 4 to Group 5 was ordered, the additional responsibility placed on employees by the Company's elimination of any review of their work was only one of a number of factors which combined to persuade Arbitrator House that an upgrade was warranted. Arbitrator House's award can not reasonably be read to mean that a reclassification is warranted simply because work that others in a higher classification had done is taken from those employees.
This reasoning applies equally to the Guild’s argument that a reslotting to Group 10 is appropriate because the News Assistants no longer “assist” with editing because there is no longer anyone to assist. The types of editing they do is within the scope of their broad job description and that description does not restrict the agateers’ editing to that done only under “supervision.” To the extent the duties fall within the scope of their job description, and consistent with that description, agateers may perform required tasks on their own, and when they do so, it is no basis for reslotting to Group 10.

The remaining News Assistant in issue, Chambliss, works on the daily and weekly television, radio and local sporting event listings appearing in the sports section of the newspaper. Chambliss obtains the information from different sources through different means, puts that information on a daily schedule and prepares a standard graphic to show day of event and broadcast channel or station as relevant. Chambliss does not often determine the content of the listings which are determined by the teams, leagues, collegiate athletic conferences and the broadcast media, except for a very few local sporting events.

The request for reclassification of this News Assistant position is based on alleged changes in the position in 1991, when Chambliss, employed since approximately 1985, was asked by the Company to write text to accompany the listings, a task that had been assigned previously to one Group 10 reporter.

The record establishes that the writing associated with finalizing the listings for publication was assigned to the Group 10 reporter to fill out his work schedule. The fact
that a Group 10 reporter once did this work, particularly under that circumstance, does not mean that limited writing is not also part of a News Assistant’s job. Importantly, the duties and responsibilities upon which the Guild relies to support its reclassification request for Chambliss fall within the job description for the Group 7 News Assistant position. As noted in the discussion regarding the four agateers, News Assistants are required to gather and prepare information for publication and to write news notes. The preparation of the information for publication consists of developing fairly standard graphics within which the listing information is presented. The graphics do not differ much from day-to-day or week-to-week. The preparation of the information for publication, including any needed writing, requires little, if any, of the same creativity, skill and judgment which mark the Group 10 positions. As with other News Assistants, the Guild has not shown enough reason to reclassify the position held by Chambliss to Wage Group 10.

B. RECLASSIFICATION OF NEWS ASSISTANT POSITION TO GRADE 9 OR 8

If reslotting to Grade 10 is denied, the Guild argues that an upward adjustment of the News Assistant position is still warranted to either Group 9 or 8.

The Company argues that this alternative relief must be denied because there is no evidence about any positions in Wage Group 8 or 9. Without such evidence, the Company argues that a reclassification of the News Assistants to Group 8 or 9 would be based on sheer guesswork.
I agree that the Guild’s alternative argument cannot be granted. There simply is not enough evidence in this record upon which to make a reasonably informed decision as to whether a reclassification to Wage Group 8 or 9 is warranted. In the earlier awards in which arbitrators reclassified positions to a level lower than that requested, there was an evidentiary basis for the alternative award. That is not present here. To be clear, I am not holding that any of the News Assistants are properly slotted in Wage Group 7, nor that they are not properly slotted in that wage group, only that reclassification to Group 10 is not appropriate and reclassification to Group 8 or 9 lacks an evidentiary basis in this record.

C. ASSIGNMENT OF EMPLOYEES TO A DIFFERENT WAGE GROUP

If the News Assistant position is not reclassified to a higher wage group, the Guild argues that I should place one or more of the named employees into the next higher wage group without ordering the position itself reclassified. That request is denied.

There is little evidence that this has ever occurred in any context. In none of the prior arbitration awards submitted by the parties was this done nor was it suggested to be a permissible alternative to the reclassification of a position. The one statement by Walsh that this had occurred in the past was ambiguous, was never pursued by either party, and cannot, by itself, establish a “past practice.” I cannot determine from Walsh’s statement whether individuals were ordered to be moved to a higher wage group by an arbitrator or whether the parties agreed to do that as a settlement of a classification dispute before the dispute ever reached arbitration.
More fundamentally, it would appear that the reclassification and promotion of individual employees are issues covered by Article IX of the parties’ agreement. If individual relief is warranted, Article IX should be the context in which it is obtained. As next discussed, however, Article IX issues are not properly before me.

Finally, this alternative relief is denied because the record does not establish that any individual employees appropriately belong in Wage Group 10 and the record is silent with respect to the duties and responsibilities of persons in Wage Groups 8 and 9.

D. ARTICLE IX RELIEF

As its last alternative request, the Guild asks for an order directing the parties to meet and discuss higher classification pay pursuant to Article IX. For the following reasons, that request can not be granted in this proceeding.

Article IX is an out-of-classification provision. A unit employee who is “assigned to and does the work that distinguishes a higher job classification from his or her own” is reclassified when 50 per cent or more of the employee’s regular working time is spent that way or paid the wage rate of the higher classification when the employee spends two or more hours per day doing the higher classification work.

By the Guild’s own admission, the issues in a reslotting arbitration are materially different from those in an out-of-title pay dispute. Article IX requires an assessment of a particular employee’s situation under several factors which trigger the reclassification or extra pay obligation and entitlement. An upward reclassification is based ordinarily on a change in duties or responsibilities warranting reslotting of a position to a different wage
group. Recognizing that reclassification is different from an out-of-classification dispute, the Guild's counsel specifically stated at the hearing that I was not being asked to decide whether one or more employees should be paid for working out of classification. Although the Guild argues that the issue was nonetheless left "open" because it was not revisited after a break in the hearing, I can not agree. The Guild's last statement on the record on this point was that this arbitration was not about an out-of-classification dispute. If the Guild wanted to retract that statement, it was incumbent upon the Guild to do so on the record. It would be unfair and imprudent for me to attempt any interpretation of the language in Article IX when the focus of the hearing over many days was directed to wholly different issues.

Moreover, Article IX is not a basis for an order to meet and discuss compensation. Article IX is a provision of the agreement that bestows specific rights on these parties. The parties have agreed that individual employees who work out of classification are either reclassified or paid the pay of the higher classification depending upon their individual circumstances. If there has been a violation of Article IX by the News Assistants working out of title for more than the specified amount of time, there is recourse already available under the parties' existing agreement.

CONCLUSION

The record does not establish an adequate basis to upgrade the Grade 7 News Assistants to Group 10. Any changes in the duties and responsibilities imposed upon or assumed by the New Assistants over time, whether stemming from advances in newsroom
technology, an expansion and/or restructuring of the Sports Department, the Company’s desire to remain competitive in sports reporting, or other reasons, are not so substantial or significant as to warrant or require an upward reclassification to Group 10.

Upgrading of the News Assistants to Group 8 or 9 is denied because the record does not establish a reasonable basis upon which to make a comparison of the duties and responsibilities of the Group 7 News Assistant position with those of any positions within Groups 8 or 9.

Assignment of one or more individual News Assistants from Group 7 to the next higher wage group without reclassification of the position itself is denied for the same reasons as reclassification of the position is denied and for the other reasons explained in my opinion.

The request for “out-of-title” pay or individual classification under Article IX is not part of the issue in this case. An order directing the parties to negotiate higher compensation pursuant to Article IX is denied as not within the Arbitrator’s jurisdiction.

**AWARD**

Reclassification of the News Assistant positions in issue from Wage Group 7 to any higher wage group is denied. All other alternative requests are also denied.

Dated: March 7, 2007

Erin J. Schmertz
Arbitrator
IN THE MATTER OF THE ARBITRATION

between

LOCAL 3 I.B.E.W.

-and-

PARKCHESTER SOUTH CONDOMINIUM

The stipulated issue is:

Did the Employer violate the collective bargaining agreement by giving some Christmas display work in the Main Oval to non-bargaining unit personnel? If not, what shall be the remedy?

A hearing was held on January 26, 2000 at the New York City offices of the New York State Employment Relations Board. Representatives of the above-named Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

The "Christmas display work" referred to in the stipulated issue was the hanging of lights and ornaments on the Christmas trees and the stapling of the lights (and wiring) to the other parts of the display, for Christmas, 1999.
The Union asserts that in prior years that work was exclusively assigned to and performed by bargaining unit members of Local 3. And, if any of it was performed by others, the quantity was de minimus. But that for the Christmas display in 1999, the foregoing work was assigned fully or substantially to members of Local 808, IBT, and that by doing so the Employer breached the contract by removing bargaining unit work from the Local 3 bargaining unit.

The Union seeks an order directing that the disputed work be prospectively assigned to Local 3 members and that those Local 3 members who were deprived of the work in 1999 be compensated for the time lost in an amount equal to what was paid the Local 808 members.

The Employer does not deny that the disputed work was assigned to and performed by Local 808 members, either fully or substantially, but asserts that in past years the work was not exclusively assigned to Local 3 members. Rather, contends the Employer, employees of different classifications and from different unions participated with the Local 3 electrician in performing the work. Additionally the Employer argues that its assignments for the Christmas display in 1999 were consistent with its managerial rights under Article VIII to:

"...direct, supervise, plan and control the employees covered hereunder..."

and to:
..."introduce, or change or eliminate methods, procedures, equipment or facilities..."

I find it unnecessary to decide whether the disputed work was performed exclusively in prior years by Local 3 members or whether the assignments were mixed between Local 3 personnel and other non-bargaining unit members.

Ordinarily such a determination would be needed to decide whether, by practice, the disputed work had become recognized and acknowledged as work within the Local 3 jurisdiction under the collective bargaining agreement. For, if found to have been performed exclusively (or even overwhelmingly) and consistently in prior years, a work jurisdiction would have been established which accorded jurisdiction to Local 3. And, notwithstanding the fact that the contract is silent on bargaining unit jurisdiction, I would have held, as well settled, that contractually, albeit impliedly, the work belonged to the Local 3 bargaining unit.

Obviously then, the foregoing would not be negated by reference to the Management Rights Clause (Article VIII) because the rights of management stated therein, may not be exercised "inconsistent with the provision of this agreement." For if the disputed work, by practice, had been recognized and placed within the jurisdictions of Local 3, then that jurisdictional delineation became an implied provision of the contract, and its removal to Local 808 members would have been "inconsistent with
the provisions of (the) agreement" and hence, in violation of the contract.

But, here there is contractually more to the Employer's managerial rights. The contract contains a different, but specific contract provision, which fits the facts of this case and which determinatively supports the Employer's actions.

The fourth paragraph of Article XVII (Seniority) reads in pertinent part:

"The parties agree that the Employer in its Management prerogatives may, in its discretion, which shall not be abused, interchange employees, i.e. assign or transfer employees from one job or classification including those covered by this Agreement or that with the International Brotherhood of Teamsters...Local 808, IBT..."

(emphasis added)

The foregoing is an explicit managerial right, contractually authorized and subject to the single restriction that it "shall not be abused."

The facts of this case fall equally within this specific managerial right. The Employer "interchanged" Local 3 and Local 808 IBT members. It "assigned" Local 808 members to work previously performed by Local 3 and transferred them
respectively from "one job to another." And, by express language, this right to "interchange," "assign" and "transfer" included Local 808 IBT members in a work mix determined by the Employer in "its discretion."

Hence, in view of this contract provision, the question of exclusively over the disputed work is irrelevant, and need not be determined in this case.

What remains is whether what the Employer did for Christmas 1999 was an "abuse" of its managerial authority. I find it was not. The disputed work was not of the type requiring an electrician's license.1 There is no dispute over the ability of Local 808 members to do the work. In point is the evidence regarding the shortened period of time available to mount the display for Christmas 1999. The Employer offered credible testimony that the display equipment on hand, when examined for mounting, turned out to be broken, stolen or otherwise unusable. And that on short notice, new equipment had to be bought and a monetary appropriation was required from the condominium board.

This, explains the Employer, shortened the time for the preparation of the display and the scheduled "lighting ceremony," requiring a "crash" program of construction and display mounting. To get it done in time, claims the Employer, required the use of employees like the 808 members, and others as well (i.e. carpenters, painters, gardeners, etc.) to join in performing

1 Indeed, the electrical work attendant to the Christmas display, namely electrical connections, fuses, currents, was performed exclusively by Local 3 members.
various duties. The Local 808 members were used, explains the Employer, because of the need for additional personnel and because the Local 3 electricians were fully occupied with the electrical aspect of the display and with other condominium electrical work.

As the Union suggests, there may be room to criticize the Employer for not anticipating the need for new equipment earlier and for not scheduling more time between notice to the trades to begin mounting the display and the scheduled "lighting ceremony."

But the evidence shows that the procedural steps taken by the Employer for the 1999 Christmas display were the same as in prior years. So, even if the special difficulties encountered in 1999 either should have been anticipated or otherwise dealt with, I cannot conclude that it rose to the level of an "abuse" within the meaning and intent of Article XVIII. The "abuse" intended, I think, is the willful misuse of employees under arbitrary circumstances.

The Union argues that the foregoing contract provision was not intended to "borrow an employee for a few hours to do someone else's work." The contract language makes no distinction between short term or long-term job assignments. This record does not include evidence of how long the hanging of lights, ornaments and stapling of lights took place. It may have been "a few hours" or it may have been over and during the approximate eight days between the purchase of the new equipment and the
lighting ceremony. So the assignment may well have been long enough to meet the Union's interpretation, if such an interpretation is applicable.

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

The Employer did not violate the collective bargaining agreement by giving some Christmas display work in the Main Oval to non-bargaining unit personnel.

Eric J. Schmertz, Arbitrator

DATED: February 10, 2000

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 issues are:

1. Was the discharge of JOAS FARIA for just cause? If not, what shall be the remedy?

2. Was the discharge of JUNIOR J. PACHECO for just cause? If not, what shall be the remedy?

Hearings were held on April 5th and April 17th, 2000 at which time Messrs. Faria and Pacheco 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 discharge of JOAS FARIA:

Mr. Faria, hereinafter referred to as the “grievant” was discharged on March 14, 2000 for “giving false information on an accident.”

On May 25, 1999, while backing his van into a parking space the grievant struck a pedestrian at the rear of the van. An ambulance took the pedestrian to the hospital. An Employer supervisor reported to the scene as did the police. The Vehicle Accident form, signed by the supervisor and the grievant stated inter alia.
Tech was backing up to park his vehicle when suddenly he struck a pedestrian who was jay walking. The backup alarm was working fine.

As to "Unsafe Conditions or Acts" the form stated:

"Tech should have looked on both sides of the vehicle before proceeding to back up."

As to "Corrective Action," the Form stated:

"will talk to Techs about making sure to use both rear view mirrors at all times."¹

The diagram of the accident located the van and the pedestrian just below the West corner of 78th Street at the intersection of 62nd Avenue in Maspeth, Queens.

The attending police officer also prepared a Police Accident Report, which is consistent with the Vehicle Accident Form. The police officer did not witness the accident.

At the time the injury to the pedestrian was reported by the grievant as a cut on the head. The police report makes no mention of the injury.

Reviewing on both reports, the Employer took no disciplinary action against the grievant, acknowledging that based on the information then available, no discipline was warranted.

Several months later, after receiving a report from its insurance carrier and additional information from two employees of the Motor Vehicle Department, the Employer concluded that the accident resulted in severe injuries to the pedestrian; that the grievant falsified both the extent of the injury and his driving procedures before and while backing to the parking spot and that those falsifications constituted grounds for his termination.

More specifically, the Employer asserts that it learned that the pedestrian suffered such severe injuries and trauma that she "almost died twice" on the way to the hospital. And that the grievant violated Motor Vehicle laws and Employer driving instructions

¹It's undisputed that the van had no rear window, being enclosed there by a metal panel.
and training by "making a prohibited U-turn" to get to the parking spot and wrongly backed down a one-way street much further than he stated.

The Union’s position is that this was an unfortunate accident; that the grievant did not drive improperly; that his methods of approaching the parking space were not a proximate cause of the injury; that the subsequently obtained information by the Employer is not probative; and that the Employer’s action in discharging the grievant several months after the accident was prompted only by a partisan insurance report and probable law suit. And though denied, if there was any negligence on the part of the grievant, it warranted at most, progressive discipline, not discharge.

The parties need not be reminded that this is a discharge case, with the burden on the Employer to prove the charges by clear and convincing evidence and to establish the propriety of the ultimate penalty of discharge for the offense(s).

Here, that burden has not been met by the requisite quantity and quality of probative evidence.

The only probative evidence bearing on the events of the accident are the Vehicle Accident Form, the police accident Report and the information obtained by the Employer’s supervisor who visited the accident scene.

The information that surfaced several months later is self-serving and hearsay and/or of insufficient relevance or conclusiveness to support the penalty of discharge.

First, the insurance report by the Employer’s carrier was not submitted into evidence, nor was there any testimony by any insurance employee who prepared it or who had input in any investigation by the carrier. What was submitted into evidence was an Employer report, purporting to repeat or recite what the insurance report stated. That document is obviously hearsay and, in the absence of the actual insurance report, is self-serving. In short there is no way that I can determine on a proper evidentiary basis the accuracy of the insurance
report or its objectivity. While hearsay or even self-serving matters may be received by the arbitrator, they can be of no probative value if they represent, as here, unsubstantiated information purporting to support of the "just cause" standard.

The Employer also relies on the testimony of two Motor Vehicle Department employees who were working in the vicinity of the accident to support its claim that the grievant made an illegal U-turn, backed down against the one-way street further than he said, and that the injury to the pedestrian was more severe than the grievant acknowledged.

Diana Gonzales, a Motor Vehicle Department examiner testified that she did not see the actual impact of the van striking the pedestrian, but went to the scene and saw the pedestrian "lying on the ground, with blood on the right side of her head -- a lot of blood." She stated that she saw the pedestrian jaywalking and "didn't understand why the woman didn't stop," before the accident occurred. She observed that before the accident the grievant "backed up very slowly and cautiously." As to the alleged U-turn she stated that she didn't actually see it, but, based on the position of the van's wheels, surmised that a U-turn had been made.

I do not find this testimony sufficiently contrary to the grievant's report to justify a charge of falsification by the grievant. Ms. Gonzales did not see a U-turn. She only thought it had been made. That is not probative enough. She saw the pedestrian on the ground bleeding from the head. The grievant reported that injury. The extent of the blood does not mean conclusively that the later, unsubstantiated insurance report was correct, or that the grievant had lied about the pedestrian's injury.

The grievant acknowledged he backed down into the parking space. What Ms. Gonzales saw is not materially different. At most, the difference may be in the distance of the backing down. But, I am not persuaded that such a difference, if any, adds up to falsification.

The testimony of the other Motor Vehicle Department employee, Jose Dominguez, is equally inconclusive and not up to the requisite standard of "clear and
convincing" evidence. He testified that he saw the grievant "backing up from the
intersection...past two houses." Again, that testimony relates only to the distance the grievant
backed up. Whether the "back up was past two houses or past one or a part of one (as the
grievant admits) the difference is not so dramatic or critical as to support a relevant claim of
falsification. In any event, traffic or driving rule violations of this type, standing alone, may be
subject to progressive discipline, but not summary discharge. Mr. Dominguez did not go to the
accident scene.

Also speculative, and not litigated in this proceeding, is whether the grievant’s acts were a proximate cause of the pedestrian’s injury.\(^2\) I need not decide that because the grievant was not so charged. His dismissal was based solely on the charge of falsification.

Based on the foregoing analysis, I must hold that the probative record of
evidence stops with the Accident Report, the Police Report and with the Employer’s
determination that no disciplinary action against the grievant was warranted. On an evidentiary
basis, considering the burden on the Employer to offer clear and convincing evidence of the
grievant’s culpability, the claim of falsification by the grievant of the pedestrian’s injury, of
what he reported to supervision and in the Vehicle Accident Form, of what he told the police
and how he maneuvered the van, has not been established.

Accordingly, the Employer’s initial conclusion that no discipline was warranted
remains determinative.

The Discharge of JUNIOR J. PACHECO

While driving an Employer vehicle, Mr. Pacheco (hereinafter referred to as the
"grievant") struck a 91-year old pedestrian upon or after turning on to Fifth Avenue from 79th

\(^2\) based on the facts in the record, it appears that the pedestrian was negligent or at least
ccontributorily negligent.
The Employer discharged the grievant for "reckless driving." It asserts that based on an extensive training program, including instruction manuals, the grievant violated specific instructions to "drive carefully" and "to observe the road ahead 1 to 1 ½ blocks and to be alert to hazards."

The grievant's defense is that as he turned the corner the "sun blinded him" and that he ran into the pedestrian crossing the street.

The grievant states that the pedestrian was hit at the cross-walk. The Employer claims that it happened further into Fifth Avenue, well after the turn was made. The diagram on the Vehicle Accident Form shows the impact of the accident on or in the cross-walk at the intersection of Fifth Avenue and 79th Street. The Police Accident Report diagram shows the vehicle and the pedestrian about one-third of the way down Fifth Avenue.

The trouble with the Employer's case is that it equates a pedestrian accident unconditionally with "reckless driving." That means that employees driving Employer's vehicles are "absolute insurers" against accidents involving pedestrians. In the instant case there is no evidence that the grievant was speeding or driving erratically or negligently. There is not evidence that he made a wrongful turn. There is no evidence that the pedestrian did not emerge from an unseen location jaywalking, thereby contributing to the accident. There is no evidence contradicting the grievant's explanation of sun blindness. Upon experiencing sun blindness, a driver should stop immediately. But there is no evidence here that he did not stop when sun blinded or that striking the pedestrian did not take place simultaneously. In short, the record is devoid of evidence detailing the accident or of the grievant's fault. Even the location of the accident is disputed inconclusively by the two accident reports. If that was material, the Employer should have offered supporting testimony. Remaining unproven is the matter of the grievant's fault.
The dictionary definition of "reckless" is:

"utterly unconcerned about the consequences of some action;" "rash," "heedless" (Random House Dictionary).

In short, I believe that "recklessness" is more than ordinary negligence, but rather a wanton disregard of caution. In the absence of refutation or other implicating testimony, I cannot conclude that the grievant’s explanation is either untrue or implausible or that under the facts presented he was "heedless."

Again, it appears to me that the Employer’s case is based on the theory of "absolute liability," that each driver is an "absolute insurer" of zero accidents involving pedestrians. Or that if a pedestrian is struck the driver’s fault is per se. Neither in this collective bargaining agreement nor in arbitration law generally is such a rule the standard of just cause in cases of vehicular accidents. It is not res ipsa loquitur.

I do not see as a matter before me the question of whether the grievant was ordinarily negligent, a circumstance less than "recklessness."

Finally, let me make it clear that accidents for which the driver is at fault may be dealt with disciplinarily either progressively or similarly depending on the magnitude of fault. But fault must be shown, and the particular offense charged must be clearly and convincingly proven. The Employer has not done so in this case.

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 discharges of JOAS FARIA and JUNIOR J. PACHECO were not for just cause.

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3 Sadly, the pedestrian died, apparently of the injuries, sometime after the grievant’s discharge. But his death is not probative evidence of the grievant’s “recklessness.”
They shall be reinstated with back pay and otherwise made whole for the periods of time lost.

Eric J. Schmertz, Arbitrator

DATED: May 9, 2000

STATE OF NEW YORK )

ss:
COUNTY OF NEW YORK )

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

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

A hearing was held on July 31, 2000 at which time Mr. Papraniku, hereinafter referred to as the "grievant" and representatives of the above-named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The parties filed post-hearing briefs.

The grievant, a driver of a compactor truck, employed since September 1997, is charged with four incidents of carelessness, resulting in accidents over a six month period in 1999, which (especially the last incident) required the Company to make costly repairs or pay damages.

For the four cumulative incidents the grievant was discharged in December 1999.
The incidents charged are:

(a) The grievant's failure to disconnect the hydraulic lines when picking up a self-contained compactor unit in June 14, 1999.

(b) The grievant tore an electrical cable, which operated a customer's gate when picking up or dropping off a container at the customers loading dock, on June 25th.

(c) The grievant's truck hit two parked cars while backing down Williams Street. In backing down a one way street one wheel of his truck was on the sidewalk with the other on the road.

(d) On the night of December 14th, while driving, the grievant hit a parked truck. It occurred when he took his eyes off the road to pick up a radio he dropped on the floor of his truck.

Incident (d) resulted in $18,000 damage to the grievant's truck, plus $4,372.50 in rental expense to the Company of another truck while the damaged truck was being repaired.
Incident (c) caused damage to one of the parked cars in the amount of $2,682.

There is no record of the cost of repairs of incidents (a) and (b) except that one or both were repaired by Company personnel.

Following incidents (a) and (b), the Company spoke to the grievant about the incident and advised him to be more careful and warned him that future carelessness would result in his discharge.

This admonition was confirmed in a letter from the Company to the Union, with a copy to the grievant.

The evidence, including the grievant’s admissions, clearly establishes the grievant’s responsibility for incidents (a), (c) and (d). Persuasive circumstantial evidence sufficiently establishes his responsibility for incident (b).

I am satisfied that these incidents were due in significant part at least to the grievant’s carelessness or forgetfulness. I include the Williams Street account. Though the street is narrow and congested, the backing down against the direction of a one way street and a collision with a parked car is a chargeable offense under traditional motor vehicle laws and standards, and is not, in my view, an expected or excusable work related hazard.
Therefore, it is manifest that the four incidents of this nature justify a disciplinary penalty. The question is whether the ultimate penalty of discharge was proper or whether the Company should have applied the full sequence of progressive discipline steps, before imposing termination. I conclude, under the particular circumstances of this case, that it should have done the latter, more particularly, imposed a disciplinary suspension on the grievant, before firing him.

I accept the Company’s argument that though other employees have had chargeable accidents, resulting in monetary liability, none committed four offenses within the short period of six months. So, I do not find that the grievant should be excused from any penalty because other employees who were responsible for an accident(s) are still employed.

Yet, I am not persuaded that the nature and magnitude of the grievant’s failures, singly or cumulatively were so serious as to justify summary dismissal without an intervening suspension.

I do not quarrel with any conclusion that the grievant may be “accident-prone” or even possibly chronically unable to take the care required in his job. But, I conclude that in the absence of the imposition of traditional and full progressive discipline, his conduct, albeit unsatisfactory, had not reached the level of incorrigibility warranting his discharge. The
purposes and utility of progressive discipline should have been brought to bear.

I am sure the parties know the reasons why progressive discipline is so universally applicable in industrial relations, where the offense(s) fall short of grounds for summary discharge. In that circumstance the offending employee is entitled to clear and unequivocal notice that the conduct is unacceptable and if continued will result in discharge. Mere warnings (as in this case) do not meet that test. And that is why a disciplinary suspension is built into the progressive discipline sequence. A suspension tells the employee, by dramatically removing him temporarily from work and by depriving him of pay for a period of time, that his conduct is not only unacceptable but that the next step is discharge. In that respect the suspension is both disciplinary and rehabilitative. At the same time, it "hits" the employee where he will feel it -- in the "pocketbook" and accords him owe final chance to improve. This dual purpose is deeply imbedded in the disciplinary procedures of American industrial relations. I conclude it is both applicable and the appropriate remedy in this case. Indeed, the Company began the process with its warning letter of June 30th. I appreciate its frustrations when the subsequent incident(s) occurred. But at that point, in the absence of more serious accidents, and even before the December event, a disciplinary suspension should have been imposed on the grievant. Had the Company done so, the
progressive discipline process would have been satisfied, and I would have upheld the next step -- discharge -- following the December accident.

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 ZUDI PAPRANIKU is reduced to a disciplinary suspension.

He shall be reinstated but without back pay.

The period from his discharge to his reinstatement shall be deemed a disciplinary suspension within the traditional progressive discipline sequence. Therefore, further offenses by the grievant will constitute just cause for his discharge.

Eric J. Schmertz, Arbitrator

DATED: August 25, 2000

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

Whether the Employer violated Article XV Sections 1, 4 and 6 of the collective bargaining agreement when it unilaterally implemented a new travel and expense policy? If so, what shall be the remedy?

A hearing was held on February 4, 2000 at which time 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.

Though the travel and expense policy referred to in the stipulated issue is apparently applicable corporate-wide, it is its implementation at the magazines published by the above-named Employer (i.e. Time, People, Fortune, Life, etc.) and for the Union members at those magazines, that is involved in this case.

Article XV, Sections 1, 4 and 6 of the collective bargaining agreement reads:

Section 1. The Publisher shall furnish the working supplies and equipment, which the
Publisher shall deem necessary for the Employee to use in the service of the Publisher.

Section 4. The Publisher shall pay all expenses, which shall be authorized by the Publisher and necessarily incurred by any Employee in the course of assigned duties.

Section 6. The amount of the meal reimbursement for out-of-town assignments shall be up to $12.00 for breakfast, $14.00 for lunch and $24.00 for dinner.

It is the Union’s position generally that the Employer’s unilaterally implemented “T&E Policy” substantially changed the entitlements of bargaining unit employees under the foregoing contract provisions, constituting violations thereof.

More specifically, the matters and changes complained of by the Union are:

1. The Employer now requires receipts for meals and will reimburse only the actual amount spent, but no more than $12 per breakfast, $14 for lunch and $24 for dinner.

Until the implementation of the T&E Policy on or about February 1, 1999, the practice for many years was for the Employer to reimburse employees a flat total sum of $50 (i.e. $12 for breakfast, $14 for lunch and $24 for dinner) regardless of the actual amount
spent for those meals, and no receipts were required.

The change asserts the Union, violates Section 6 of Article XV.

2. Whereas for many years prior to February 1, 1999 and particularly for employees reporting on events of "popular culture," the Employer reimbursed employees for newspaper subscriptions, movie and theatre tickets, compact music discs, and cable television. It no longer does so. And for them or others, no longer reimburses for cell phone activation or replacement, internet and computer expenses, and babysitting. These changes (and presumably others within the rule of ejusdem generis) asserts the Union violates Sections 1 and 2 of Article XV.

3. For foreign correspondent, Ed J. Barnes, who undisputedly needs $10,000 in cash to cover expenses when he is assigned to "cover a war," the bureaucratic procedures required under the new T&E Policy consumes about two days before he
can get that cash from the Employer, thereby delaying by that amount of time his departure to the war zone. Previously, before the implementation of the T&E Policy, he could get the cash in a matter of hours (or less) with the submission of a simple, single requisition.

The delays resulting from the new Policy have led him to maintain $10,000 in his own funds so that that delay can be avoided and he can leave immediately to cover such a critical and time sensitive assignment as a war, with reimbursement for the use of his own funds to be realized later.

This asserts the Union is violative of Sections 1 and 4 of Article XV.
can get that cash from the Employer, thereby delaying by that amount of time his departure to the war zone. Previously, before the implementation of the T&E Policy, he could get the cash in a matter of hours (or less) with the submission of a simple, single requisition.

The delays resulting from the new Policy have led him to maintain $10,000 in his own funds so that that delay can be avoided and he can leave immediately to cover such a critical and time sensitive assignment as a war, with reimbursement for the use of his own funds to be realized later.

This asserts the Union is violative of Sections 1 and 4 of Article XV.

Unquestionably, the thrust of the Union’s case is reliance on past practice. It argues that the longstanding, apparently unvaried practices referred to above, and in effect prior to February 1, 1999, provide meaning, definition and unconditional interpretation of Article XV Sections 1, 4 and 6. And that the changes in those practices, effectuated by the new T&E Policy, constitute contract changes requiring bilateral
bargaining. And to allow the Employer to make changes unilaterally is to accord to the Employer an unrestricted right to eliminate all the benefits and entitlements envisioned in Article XV.

Properly, the Union does not challenge the Employer's managerial right to legislate a Travel and Expense Policy per se. Indeed such a policy is in the nature of work rules, which are prerogatories of management, so long as they are in implementation of contractual conditions of employment and not in conflict with those conditions. Here, the challenge is to the application and implementation of certain parts of the T&E Policy as stated above, which the Union claims are in conflict with the contractual rights of the employees under Article XV.

The Employer interprets the disputed Sections as specifically preserving its unilateral authority to decide which expenses it will allow for reimbursement and, in the case of the meal allowance, the amount of reimbursement and the conditions to qualify for reimbursement. It points to the explicit wording of the Sections in support of the retention of its unilateral authority. It notes that Section 1 refers to "working supplies and equipment which the Publisher shall deem necessary..." (emphasis added).

That Section 4 refers to "expenses which shall be authorized by the Publisher..." (emphasis added). And that Section 6 does not guarantee $50 for the three meals but provides for
reimbursement "up to" the individual amounts specified. Or in other words, those amounts are neither guarantees nor minimums, but rather the maximum amount allowable, subject to verification. And that in furtherance of an inherent managerial right to audit expenses (for financial control and tax purposes), it has the right to require receipts.

With regard to the items referred to in #2 above, the Employer asserts that the grant, denial or charge in reimbursements of and for those items is simply an exercise of its contractual right to "authorize" or to determine which, if any are "necessary." With the contractual reservation of that authority, the Employer contends that it may make the type of unilateral changes which it made with the implementation of the T&E Policy on February 1, 1999.

The Employer points out that historically it promulgated earlier and different T&E Policies in 1994, and 1995, with attendant changes in the eligibility or methodology of providing "supplies and equipment" and reimbursing for expenses, without challenge or grievances from the Union.

With regard to the particular complaint of Mr. Barnes, the Employer points out that it did not and will not deny him the $10,000 cash advance to cover a war assignment. All that is involved, explains the Employer is a change in the method of obtaining the advance, and that if it means that Barnes cannot
get to his assignment as soon as he wishes, that is an "administrative foul up" for which in no way is Barnes held responsible. The Employer also notes that the T&E Policy makes provision for the resolution of this problem by providing for an "authorization list" for pre-approval of cash advances. The Employer suggests that Barnes (and presumably others similarly situated) would qualify for that list, thereby restoring the virtual immediacy of a cash advance.

In my view, there are three well-settled arbitral rules, which apply to this case. The first is the "rule of reason." I apply that to the Barnes complaint. I agree with the Union and Barnes that it is professionally wrong as contrary to responsible journalistic standards, for a war correspondent to be delayed covering a war assignment. I believe the Employer recognizes this when he acknowledged the Barnes situation as an "administrative foul up." Barnes is a renowned war correspondent with an acute sense of professional responsibility and journalistic pride. He should get his $10,000 cash advance as quickly as before. Applying a "rule of reason," he should be placed forthwith on the "authorization list" for pre-approval of the requisite cash advance, and my Award shall so provide.

The next rule relates to the interplay of past practice and explicit contract language. It is universally well settled that where the contract language is clear and unambiguous, a contrary, long-standing past practice is preempted.
by that contract language prospectively. In other words, either party to a contract may insist on and enforce the contract language, thereby nullifying the effectiveness of past practice at that point and for the future. Here I find the language of Section 6 clear and unambiguous. So that from February 1, 1999, the Employer may enforce the contract language regarding reimbursement for meals. That language makes clear not that an employee gets $12, $14 and $24 for the three meals regardless of what he actually spent, but rather that he is entitled up to each of those amounts. The "up to" proviso means that the Employer may confine reimbursement to the actual expenditure with a cap of $12, $14 and $24. That language contemplates those distinctions and limitations, means, impliedly but logically, that the Employer may set up a method of auditing the amounts spent. And that means, that he may require receipts. So I uphold the Employer's new rule that only the actual amounts spent shall be reimbursed, with the caps indicated, and that it may require receipts in the reasonable implementation of the clear contract language. But, again, I apply a "rule of reasons." Apparently there are circumstances where the meal taken is of the type where obtaining a receipt is impracticable - like a hot dog at a ball game assignment, or other similar fast food meals "taken on the fly." Such expenditures, as the Employer concedes, should not require receipts. Department heads or supervisors should have the discretionary authority to waive receipts in those
circumstances and reimburse the employee for those types of expenses on the employee’s word and/or written request.

The third rule relates to the exercise of a reserved managerial authority. A managerial prerogative or reserved right is not totally unrestricted. It may not be exercised arbitrarily or in an abusive manner. Here, if the Employer did what the Union projected, namely the unilateral elimination of the benefits, entitlements or reimbursements under Article XV, I would unhesitatingly identify that as an abuse of its authority and enjoin it.

Specifically, I agree with the Employer that the language of Sections 1 and 4, namely the provision that the Publisher "shall deem the necess(ity)" of working supplies and equipment to be furnished and shall “authorize” the “necessary” expenses to be reimbursed constitute a retention by the Employer of his managerial authority over these matters. But, if the items in #2 above are factually "working supplies and equipment" "necessary" for the employee to use in his employment with the Employer, a determination by the Employer that they are not to be supplied or not subject to reimbursement, would be arbitrary and an abuse of the Employer’s authority.

There is simply not enough probative evidence in this record to make a determination on the items in Paragraph 2 above. The principal evidence setting forth the complaint in this regard, namely the written statement of Lyndon Stambler was not
in-person testimony, nor was it subject to cross-examination or other supporting probative evidence. It may be that if the February 1, 1999 T&E Policy withdrew the previously reimbursable items set forth therein and those benefits were necessary for the employee’s use in the service of the Employer, a violation of Section 1 would have occurred by an act by the Employer that was arbitrary or an abuse. And, of course, the opposite is equally true.

I cannot judge from the bare written Stambler statement whether a Section 1 violation has taken place. As I see it, determinations may only be made on a case-by-case basis, and based on probative evidence of what items an employee needs to do his job, which if denied him or not reimbursed would be arbitrary and an abuse. I shall reserve the rights of the parties on that part of the dispute set forth in #2 above.

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

1. The Employer’s T&E reimbursement policy for meals under Section 6 of Article XV of the contract does not violate the collective bargaining agreement. But there shall be due regard to those acknowledged circumstances where obtaining a meal receipt is impracticable.

2. With regard to the complaint of Ed J. Barnes, I find that there are unreasonable bureaucratic impediments to his ready receipt of a $10,000 cash advance to cover a war assignment, but
not a breach of the collective bargaining agreement. However, in the interest of professional journalism, the bureaucratic procedures or what the Employer acknowledges as an "administration foul up" shall be remedied by placing Barnes on the "authorization list" for pre-approval of cash advances. This shall be done to restore the quick availability of requisite cash so that he may promptly leave to cover a war assignment.

3. With regard to the other changes set forth in Paragraph #2 above (i.e. newspaper subscriptions, movie and theatre tickets, music discs, cable TV, cell phones, computers and the internet, babysitting, et al.), there is insufficient evidence in the record for determinations. The rights of the parties are reserved for determinations on a case by case-by-case basis.

Eric J. Schmertz, Arbitrator

DATED: March 2, 2000

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

between

NEW ENGLAND HEALTH CARE EMPLOYEES
UNION 1199

-and-

YALE NEW HAVEN HOSPITAL

The stipulated issue is:

Did the Hospital have just cause to terminate VICTORIA STANBERRY on March 23, 1999? If not, what shall be the remedy?

A hearing was held in New Haven Connecticut on January 14, 2000 at which time Ms. Stanberry, hereinafter referred to as the "grievant" and representatives of the above-named Union and Hospital appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The parties filed post-hearing briefs.

The grievant is charged with fraudulently collecting disability benefits under the Hospital disability plan while, at the same time working for another employer.

The essential facts are not in dispute. The grievant was employed by the Hospital as a part-time cashier in its
cafeteria, twenty hours a week. While so employed she had a second job with a company named Con-Air, apparently in a receptionist or other clerical capacity.

In September 1999 the grievant became disabled (due to a circumstance to be referred to later) and was unable to work for the Hospital. She applied for and received disability payments under the Hospital's disability plan from September 28, 1998 through January 24, 1999. On or about that latter date the grievant was "cleared" by her physician to return to work at the Hospital, and did so beginning on January 25, 1999.

Subsequently the Hospital discovered that during her disability leave from October through December 1998 the grievant worked at a job with Con-Air. During the same period the grievant continued to receive and accept disability payment from the Hospital. The Hospital discharged her on March 23, 1999. It is undisputed that the Hospital's disability plan contemplates an inability to work while benefits are paid and prohibits occupational employment during that period of time.

Based on the evidence and testimony, I conclude that the grievant, at some point during the coincidences of her disability and work with Con-Air, knew that it was wrong for her to work at the second job while drawing disability benefits from the Hospital. I so conclude because the grievant repeatedly denied the employment when questioned by the Hospital and ultimately admitted it only when confronted with the Con-Air time
cards. In that respect I agree with the Hospital that the grievant acted wrongly. And I agree generally with the argument of the Hospital that the penalty of discharge for such an offense should not be "disturb(ed) simply because the penalty imposed differs from that which the Arbitrator might have chosen." However that principle is subject to exception where there are compelling mitigating circumstances. And if so, though the offense should not be excused, those mitigating factors may be properly taken into consideration in reviewing the appropriation and fairness of the penalty imposed.

Here, there are such compellingly mitigating circumstances.

The grievant's disability resulted from an assault on her. More specifically, as she left work at the Hospital on September 28, 1998 she was shot, and profoundly wounded. Her left arm was shattered, requiring three intricate surgical procedures to repair and remove bone, the installation of a fixator, a cast and metal plates and an inability to use the arm for several months. Bullets also penetrated her hip and knee. One bullet remains in her body.

There is no dispute that the injuries sustained disabled the grievant from her job at the Hospital, and her disability was duly certified by medical evaluations and certification. Specifically, she could not use her injured arm
and hence could not work as a cashier. She was also unable at that point to work for Con Air.

The next mitigating circumstance is the grievant’s financial condition and the fact that before she was shot and disabled, she worked two jobs (at the Hospital and at Con-Air) in order to support herself and her several children (as a single mother). This dual employment was known to the Hospital. I believe that faced with the economic adversity of receiving only sixty (60%) percent of her regular pay from disability and without a second job at that point, the grievant was in extreme need to increase her income as she had done with the second job before her disability. And when contacted by Con-Air with an offer of a light duty assignment answering the telephone which could be done without the use of her disabled and immobilized left arm, she accepted the offer. I think that it’s not unreasonable to conclude that at that point she thought that with her prior known employment arrangement of working two jobs, with her certified inability to resume work at the Hospital after being disabled, and her financial needs, it would not be objectionable or improper for her to take on the job at Con-Air that she could physically perform. Or that it would not be improperly different from when she had the dual employment before the disability.

Of course she was wrong.
To my mind however, her mistake, is tempered by the unique and particular circumstances of this case—the gravity of her disability; her history of and need to work a second job; her doctor’s orders precluding her from returning to the Hospital job, and by the fortuitous offer of light duty work by her former second employer, Con-Air.

Tempered does not mean excused. She should be disciplined for hiding the true facts of employment at Con-Air and by improperly accepting disability payments at the same time.

This is not a criminal case, but rather an employment offense. So I make no determination whatsoever on whether any laws were violated by the grievant. Indeed, despite the Hospital’s reference to the public law, no such charges were filed against her. So the penalty that may and should be imposed should be in the context of the employment relationship under the collective bargaining agreement and under the terms of the Hospital’s disability plan, not under the criminal or public law.

With that said, and considering my conclusions regarding the grievant’s culpability and the mitigating factors I have found to be compelling, the appropriate penalty is a lengthy disciplinary suspension rather than discharge. The grievant has been discharged from the Hospital job for almost a year. That period of time, namely one year, shall be the length of the disciplinary penalty.