AMERICAN ARBITRATION ASSOCIATION,
ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION

between

LOCAL 3 I.B.E.W.

-and-

DATATECH SYSTEMS, INC.

-OPINION AND AWARD-
Case #133000988-02

The above-named Union and Employer could not stipulate a precise issue. The Union claims that the dispute involves the performance of work by bargaining unit employees on a Sunday through Thursday workweek at all or many of 443 Lowe's Home Installation Warehouses and stores in a wide geographical area. It seeks a remedy of double time pay for all employees who so worked on Sundays at all such locations.

The Company sees the issues as confined to the particular grievance filed, which, prior to being submitted to arbitration, was processed through the contract grievance procedure. In the Company's view the issue involves the claim of five employees who, in that grievance, seek double time pay for the Sundays they worked on the Combo II project, limited to those locations at which those five worked.

1The Sunday through Thursday schedule was paid at straight time as regular work days and regular workweek. The first Sunday was paid at double time as the "seventh day of the prior week."


A hearing was held on October 8, 2002 at which time representatives of the 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.

I ruled at the hearing that the scope of the issue before me was defined by the written grievance (Joint Exhibit 2a) reserving the Union’s right to process other grievances regarding the same work at Lowe’s locations performed by other bargaining unit members.

The issue involves the application and interpretation of Article X Section 10.02(d) of the collective bargaining agreement. That Section reads in pertinent part:

(d) “On certain projects only (such as fast food chains, convenience stores and retail gas stations) the workweek may be Sunday through Thursday. If requested, the need to work Sunday through Thursday shall be substantiated to the Union...”

The Company scheduled the Combo II job at the Lowe’s locations in accordance with that contract provision. It asserts that based on the language of Section 10.02(d), its negotiation history, past practice and a prior agreement with the Union, it had the contractual right to do so, thereby paying the affected employees straight time wages for the
time worked. That being so, asserts the Company, it is not obligated to pay a premium rate for Sunday work under Section 10.02(a) which, in pertinent part reads:

"...all work performed on Sundays shall be paid at the double time rate."

The history of Article X Section 10.02(d) is relevant. Previous to its foregoing wording, it was slightly, but meaningfully different. The phrase "such as" preceding the specific reference to "fast food chains, convenience stores and retail gas stations," was "i.e." It then read:

(d) on certain projects only (i.e., fast food chains, convenience stores and retail gas stations...) (emphasis added)

That change, from "i.e." to "such as" altered the meaning of Section 10.02(d), but I conclude, not in any way that made it less clear or less unambiguous. Nor, in my view, did the change support the Company's action in this case.

In its earlier form, the "i.e.," dictionary defined as "that is," meant that under Section 10.02(d) the Company could schedule a straight time workweek of Sunday through Thursday only for work performed at those three types of locations. The change to "such as" expanded the type of facilities at which work could be scheduled Sunday through Thursday beyond fast food chains, convenience stores and retail gas stations. But, the expanded authority does not extend to a such a massive, multi-product, and
widely geographically located facility as Lowe’s Home Installations stores and warehouses.

It is undisputed that Lowe’s is a major retailer of literally thousands of products used in homes for home construction, renovation and decorations. Each location covers literally hundreds of yards or acres of territory. The record indicates that it is made up, nationally, of more than 400 stores or warehouses.

I conclude that Lowe’s does not fit into the categories of business covered by Section 10.02(d) even with the change from “i.e.” to “such as.”

The well-settled rule of ejusdem generis compels this conclusion.

The Blacks Law Dictionary definition of “such (as)” is:

“of that kind; having particular quality or character specified; identical with, being the same as what has been mentioned; alike; similar; of the like; kind; is descriptive of the object particularized; refers to the last antecedent”

Clearly then, the changed and instant wording of Section 10.02(d) allows for a Sunday through Thursday straight time workweek not only for fast food chains, convenience stores, and retail gas stations; but also for facilities like, similar to, of the same character as, of the same quality as, those three
antecedents. Lowe's is so different, qualitatively, characteristically, economically and structurally that by no stretch of the imagination could it fit within the limits of Section 10.02(d) even with the change from "i.e." to "such as." Indeed, to find that Section 10.02(d) includes an establishment like Lowe's would nullify the descriptive references to fast food chains, convenience stores and retail gas stations. But the three descriptive types, for coverage and as examples, remain in the contract, and it is to the contract language that the arbitrator is bound. It is obvious to me that the parties left that language for a purpose — namely to condition, albeit with some limited expansion, the circumstances when a Sunday through Thursday straight time work schedule is proper. With that finding, I need not decide whether, as the Union asserts, the common characteristics of the three mentioned types of businesses are "mom and pop" stores, or franchised establishments.

With the foregoing compelling application of ejusdem generis, Section 10.02(d) is and remains clear and unambiguous. As such, and based on well-settled arbitration rules, it preempts any past practice, ad hoc arrangements or negotiation history to the contrary.

Nonetheless, mention of the Company's reliance thereon bears some comments. The negotiation history of Section 10.02(d)
is not contrary to the foregoing conclusions. The Company's testimony was that it told the Union that Section 10.02(d) was too restrictive and that the Company needed greater flexibility. As a result, the Union suggested changing "i.e." to "such as" and that was acceptable to the Company. The testimony did not show that the parties talked of specific examples of how "such as" was to apply. The evidence revealed no bilateral discussions of the new language as applicable for such a massive complex as Lowe's, or anything comparable to Lowe's. So, no matter what the Company thought it had obtained by the change, there is no evidence of a bilateral agreement to open up Section 10.02(d) wide enough to encompass enterprises like Lowe's.

The extensive exhibit (Employee #11) of work performed at supermarkets, banks, Libbey Owen Ford, Pet Smart, Target, Uptons, (etc.) at straight time Sunday to Thursday schedules, does not dismiss possible Union agreement to those assignments, nor does it disclose Union acquiescence or even Union's knowledge. Nonetheless, the universally well-settled rule is that past practice, though valid and enforceable when engaged in, is immaterial in the face of prospective application and enforcement of a clear contract term that is contrary.

Also, the Company's relevance on an apparent agreement on January 28, 2000 between the Company and a representative of
Local 1430 (the predecessor to Local 3) permitting this Sunday to Thursday workweek is not sufficiently probative in the instant case. That alleged agreement is in self-serving written form by the Company, and there was no testimony by its author for authentication. It stands as hearsay. As such it cannot be construed as a contract change.

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 five employees who signed the grievance of June 24, 2001 (Joint Exhibit 2a) are entitled to double pay for work they performed on project Combo II on Sundays at Lowe's Home Improvement facility.

The grievance is granted. The Company shall pay to said employees a sum equal to the difference between straight time pay they received, and double time pay as required under Article X Section 10.02(a) of the collective bargaining agreement.

Eric J. Schmertz, Arbitrator

DATED: October 21, 2002

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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

What shall be the disposition of the grievance of COLLISE BEST?

A hearing was held on February 21, 2002 at which time Mr. Best, hereinafter referred to as the "grievant" and representatives of the above-named Union and Employer appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Employer filed a post-hearing brief.

The grievant protests his discharge.

I make the following Finding of fact.

The grievant, a service technician, for the Employer, making a service call on August 21, 2001 to repair a General Electric appliance at the apartment of a resident at 35 Prospect Park Place, Brooklyn, three times used or tried to use the front
entrance of the apartment house though repeatedly instructed by the doorman and building manager that he was to use the service entrance.

I find that he disregarded these instructions knowingly and defiantly. I also find that the instructions were consistent with the rules of the apartment house and non-discriminatorily applicable to all service personnel. As such these instructions and that rule are and is common to that type of building and hence reasonable.

I also find that though the grievant did use the service entrance, albeit grudgingly, as well as the front entrance in trips to or from the resident's apartment, he made a provocative and defiant last effort to re-enter the building by the front entrance to deliver a receipt for the repairs services. When he tried to do so he confronted the building manager and two doormen in the entranceway. Instead of handing them the receipt, he tried to push through them and assaulted the manager with a punch to his face, cutting the manager's lip. He then left and was later apprehended.

Violent conduct of this type, with its obvious effect on the Employer's reputation and potential monetary or other legal liability is grounds for discipline, including discharge, regardless of an employee's prior employment record. Had this
grievant not been repeatedly instructed to use the service entrance, I would have doubted the justification of the three apartment employees blocking or standing in the front entranceway. But having been so instructed and warned, the grievant’s persistent effort to use the front entrance was a provocative act in his part and the proximate cause of the violence.

If, as here, the Employer elects to impose the summary penalty of discharge, it is, under the particular circumstances of this case a managerial prerogative within the bounds of just cause.

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

The grievance of COLLISE BEST is denied. His discharge is sustained.

Eric J. Schmertz, Arbitrator

DATED: April 1, 2002

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

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

between

LOCAL 282 IBT

-and-

GRANITE HALMAR CONSTRUCTION COMPANY, INC.


The stipulated issue is:

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

A hearing was held on June 18, 2002 at which time Mr. Torres, 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 grievant a driver/chauffeur is charged by the Company with sole responsibility for an accident with and to a boom truck which he was operating at a work site at the JFK Airport on February 6, 2002.

The Company asserts that that accident which resulted in damage to the boom truck in the amount of $16,177 together with a
prior accident to the boom truck on January 23, 2002, also driven by the grievant, warrant his discharge.

The grievant does not deny either accident and accepts responsibility, but not sole responsibility. He explains that he was working under instructions from and direction of a foreman, and that the work assignments given him by the foreman, the explicit directions of the foreman and the rush to complete various assignments within the regular work shift to avoid overtime contributed, respectively to both accidents.

With this explanation, the grievant and the Union on his behalf assert that the grievant was not, as the Company charges, solely liable for the accidents.

The second accident of February 6, 2002 was the most serious and was the triggering event for the grievant's discharge.¹

A description of that accident is in official written form from the Company. (Company Exhibit 2). It reads:

¹ The first accident of January 23rd caused minor damage to the truck's mirror and exhaust pipe.
GRANITE HALMAR CONSTRUCTION COMPANY, INC.
JFK AIRPORT - TERMINAL 7 - BRITISH AIR

ACCIDENT
FEBRUARY 6, 2002
ABOUT 2:45 PM

Foreman: Guillermo Gonzales
Teamster: Angelo Torres

Vehicle: Boom Truck #4.7076

The boom truck went into the VIP Parking Lot by Intersection #51 and unloaded forms and lumber off the back. From there, the truck went into Recirc Road to pick up a walk-behind saw.

The truck then proceeded to Intersection #51 where a compressor was hooked onto the back of boom truck for towing back to Yard.

Foreman assumed that Teamster had retracted the boom so he entered the truck and gave the Teamster the OK to go. Only after hitting the overhead DEP bridge did the Foreman realize that the boom was not all the way down.

The boom scraped the right side (underside) of the bridge. The boom got hung up on the beam and followed its course while the truck was moving. The truck was pushed into the temporary barrier and gate, to the west of Intersection #51, and then righted itself.

The truck was driven to the west end of the Terminal and examined. Then the vehicle was towed from the accident scene to the North Boundary Road facility.

There was no apparent damage to the physical structures of the DEP bridge. No pedestrians or vehicles were involved or affected by this accident.
The grievant accepts that Report as accurate.

As an official Company record, it refutes the Company's assertions at the hearing that it was not a "foreman" that worked with the grievant but a "laborer." The Report is from Forman Gonzales. Additionally, it was Gonzales that the Company asked to make out the accident report. I do not believe that if he were merely a "laborer" he would have been given that important assignment.

Moreover, that Gonzales was a foreman is consistent with the grievant's testimony and the Company could not offer probative evidence to the contrary.

More significant is the role that Gonzales played in the work activities of the boom truck and the grievant on February 6, 2002. The grievant testified that Gonzales directed him to the various work assignments that day, and, instructed the grievant where to go and what work to perform. And Gonzales was with the grievant as those assignments were undertaken and performed. That testimony of Gonzales' instructional if not supervisory status over the grievant was not refuted by Company witnesses or evidence. Indeed what the Company had to say on that matter was unclear, indecisive and entirely hearsay.
It is not disputed by the grievant or the Union that the grievant was in charge of operating the truck, and that the grievant failed to lower the boom before proceeding to the overpass where the collision between the overpass (or bridge) and the elevated boom occurred. But, asserts the grievant, Gonzales “pushed him” to complete several jobs toward the end of the shift (moving a compressor and picking up a walk behind saw) and that the intensity and pressure of those assignments, all directed by Gonzales, together with Gonzales’ “OK (to the grievant) to go,” again under time pressure to finish and avoid overtime, caused the grievant to forget to lower the boom resulting in a collision with a bridge.²

Gonzales did not testify, and the only witness for the Company, its Regional Manager, could not refute the grievant’s description of the events. So I accept the grievant’s testimony as an accurate recitation of what happened.

I find similarly with regard to the earlier accident of January 23rd. The grievant testified, also unrefuted, that Foreman Gonzales directed him to lift and move some pipes from a location that could not be seen from the boom truck because obscured by a Dempster Dumpster. Gonzales positioned himself where he, Gonzales, positioned himself where he, Gonzales,

² It is stipulated that the bridge suffered no damage.
could see the piping and the boom truck, and directed the grievant in activating the boom and retrieving the pipes. As a result, unable to see directly what he was doing, and relying on the "eyes" and directions of Gonzales, a pipe "slipped off" and struck the trucks mirror and exhaust.

I must conclude, again in the absence of contrary testimony, that while the grievant was responsible for the unsafe use of the boom, he did so on the instructions and directions of Foreman Gonzales. So, again, the responsibility for that accident must be shared by both.

In short, though I find the grievant negligent in both accidents, I do not find him solely liable or responsible. Liability and responsibility rests also with Foreman Gonzales, who acted, I conclude in a superior or supervisory capacity.

Though the grievant was responsible for operating the truck and the boom, Gonzales was responsible for putting the truck and its operation in a position and under circumstances contributing to the accidents.

Accordingly, the Company's charge against the grievant that he was solely responsible for the accident is rejected.
Under that finding a penalty for the grievant is appropriate, but less than discharge. What is appropriate is a suspension for his part in the accidents.

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

There was not just cause for the discharge of ANGELO TORRES. There is just cause for a disciplinary suspension.

Therefore as the Union requests, Mr. Torres shall be restored to the Company’s seniority list and is eligible for future employment.

However, no back pay is awarded. The period of time between the grievant’s discharge and his restoration to the seniority list shall be deemed a disciplinary suspension.

Eric J. Schmertz
Arbitrator

DATED: June 26, 2002

STATE OF NEW YORK )

ss: COUNTY OF NEW YORK 

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

LOCAL 1066, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO,

Union,

- and -

MEDITERRANEAN SHIPPING COMPANY, INC,

Employer.

Before: Eric J. Schmertz, Esq., Arbitrator

Appearances: For the Union:

Elizabeth Alexander, Esq.
Gleason & Matthews, P.C.
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For the Employer:

C. Peter Lambos, Esq.
William M. Spelman, Esq.
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INTRODUCTION

On March 6, 2002, a hearing was held concerning a dispute which had deadlocked before the Industry Appellate Committee in October, 2001. The issue submitted by Local 1066, ILA (Union) for arbitration is whether the Mediterranean Shipping Company, Inc. (Company or Employer) violated the Master Contract when two import line containers containing consolidated cargo were "stripped" by non-union labor at a live pier. A stenographic transcript of the hearing was taken. That transcript and the documents submitted into evidence constitute the record for opinion and award. The parties were represented at the hearing by counsel who waived the Arbitrator's oath. The parties were afforded a full opportunity to examine and cross-examine witnesses and to submit documentary evidence. There were no objections to the conduct of the hearing. Counsel for the parties filed post-hearing memoranda. Counsel for the Company filed a reply to the Union's memorandum.

ISSUE

As earlier noted, the issue submitted for arbitration, although not expressly so stipulated by counsel at the hearing, is the following:

Did the Company violate the Master Contract when two import line containers containing consolidated cargo were stripped by non-ILA labor at a live pier? If so, what shall be the remedy?
RELEVANT CONTRACT PROVISIONS

Master Contract

11-12. ILA JURISDICTION OVER WORK COVERED BY THE MASTER AGREEMENT

Containerization Agreement

(A) Management hereby reaffirms that the ILA employee has jurisdiction over longshore, checker, maintenance and other ILA craft work conferred on such workers by the Containerization Agreement, set forth in the Appendix.

Clerical Work

(B) Clerks shall perform all clerical work on container waterfront facilities which traditionally and regularly has been performed by them including work related to the receipt and delivery of cargo, hatchchecking, prestow, (hatch sequence sheet) plan clerking, recording and receipt and delivery of containers received or delivered at waterfront facilities, timekeeping, location and yard work, and demurrage recording, which work shall not be removed from the waterfront facility. The input and output of information by computers related to the foregoing work functions shall also be performed by Checkers and Clerks.

Port Authorities

(F) The parties agree to the creation of a joint committee for the purpose of meeting with representatives of Port Authorities on issues of jurisdiction. The issues involved therein are covered by a letter from Management’s Chairman to the ILA President of this date.

Work Opportunities

(H) The parties agree that any chance of reacquiring the work of stuffing and stripping containers requires a dedicated work force of trained, productive workers hired at compensation commensurate with the local competition and without any restrictive rules. The parties should examine into this subject and all of its conditions.
Clerks General Cargo Agreement

ARTICLE 2 - UNION SECURITY
The Employers agree that they will not directly perform clerking work done on a pier or terminal, or contract out such work which historically and regularly has been and currently is performed by employees who are members of the Union unless the Union is not able to or does not supply sufficient and qualified personnel to perform such work. Personnel supplied by the Union shall, at a minimum, be able to read and write in the English language and to perform the arithmetic computations necessary for clerking work.

ARTICLE 12 — WORK RULES
A set-up shall be defined as consisting of a minimum of one Chief Clerk, one Book Clerk and one Clerk. Set-ups as required shall be established as follows with the understanding that each set-up will not handle more than three vessels discharging and/or loading cargo at the same time. One set-up for each of the following: Commonwealth Pier, Hoosac Pier, Mystic Pier, Wiggins 51, East Boston Pier 1, East Boston Piers 3 and 4 (limited to the West Side of Pier 4), East Boston Pier 4 (East Side) and the Horn track, Army Base Berths 1 and 2, Army Base Berths 4, 5, 6, 7 and the Army Base Berths 8, 9, 10.

ARTICLE 34 — SHIP OPPORTUNITY COMMITTEE
There shall be established a Ship Opportunity Committee composed of the Executive Board of Local 1066 and representatives from the BSA which shall meet as necessary to respond to inquiries for new business. Said meetings shall be solely between the BSA and Local 1066. The purpose of this Committee shall be to attract new shippers and cargoes to the Port.

Labor and management acknowledge equally the need for union jobs and fringe benefit contributions to the funds. Both parties will jointly act to encourage, as far as legally permissible, the use of the services offered by the ILA to the operators of all vessels and assist in direct discussion by these
operators with the ILA and the BSA for that purpose with the joint ship opportunity committee.

PARTIES' CONTENTIONS

UNION

The employees who are represented by the Union have jurisdiction over the work that was done by non-union labor at a waterfront facility in the Port of Boston (Port). The Company violated the Master Contract as alleged when it voluntarily surrendered its control over the containers to the consignee. Delivery of the containers to the consignee did not end the Company’s contractual obligations to the Union. Moreover, the Company participated in a scheme with the Massachusetts Port Authority of Boston (Massport), which owns and operates the public terminals in the Port, to circumvent the Union’s jurisdiction within the Port as evidenced and established by the Company’s and Massport’s failure and refusal to meet to discuss jurisdictional issues and their similar failure and refusal to protect and promote opportunities for “stuffing,” “stripping” and other work and the acquisition of new business.

COMPANY

The Company did not have the containers stripped. It delivered the containers to a consignee pursuant to a port-to-port bill of lading. After delivery, the Company did not and could not control the consignee’s actions. The act in alleged violation of the Master Contract was not decided by or performed by the Company. Therefore, the contract was not and could not have been violated by the Company. The stripping was done at the
consignee’s direction and control, not the Company’s. The Company was powerless to
direct the consignee to use union labor to strip the containers. Indeed, any efforts in that
respect would be prohibited by a 1987 ruling by the Federal Maritime Commission
(FMC) which was affirmed by judicial decision and order. The Union’s evidence and
arguments further establish that the real grievance is an alleged failure or refusal to meet
to discuss job opportunities pursuant to the terms of the local agreement, not the Master
Contract.

**FACTS**

The material facts are not in dispute.

The Union represents clerks and checkers in the Port. These employees, who
often work with and alongside longshore workers, sort, receive, deliver and tally cargo
and baggage for loading and unloading into and off of ships in the Port and vicinity.
Their work includes “stuffing,” which is the act of filling a container with cargo, and
“stripping,” which is the act of removing cargo from a container.

The Company is a carrier which is a member of the Container Carriers Council
and a party to the Master Contract. It is also a party to the clerk’s local agreement
through its membership in the Boston Shipping Association, Inc. (BSA). BSA is a multi-
employer association that represents longshore employers in the Port. BSA is a party to
the Master Contract.

The public terminals in the Port are owned and operated by Massport, including
Army Berths 1 and 2 located at the Black Falcon Avenue terminal where the work in
issue was performed. The Union claims that these berths are known as “live piers,” which are areas that are used for the discharge or unloading of vessels, for the receipt or delivery of cargo into terminals, and for the stuffing and stripping of containers.

The Black Falcon Avenue terminal currently receives only cruise ships, not cargo ships. No employer which is a party to any ILA contract currently stuffs or strips cargo at the Black Falcon facility. Those tasks were done at that location by union labor in the 1960s and 1970s, but not since, although ILA locals have done longshore work in this area. Clerks most recently worked at Army Base Berths 1 and 2 for a few months unloading passenger ships after the September 11, 2001 terrorist attacks in New York City, which caused some ships to be diverted to the Port.

The Port has been revitalized as of late under Massport’s direction. There have been terminal and infrastructure changes and improvements, including the development of office and warehouse complexes, in and near the Black Falcon facility. Massport leases certain of its property to other businesses which in turn enter into sub-lease arrangements.

In 2001, the Union learned that cargo was being stuffed and stripped at the Black Falcon facility. The Union asked BSA and Massport for meetings to discuss work jurisdiction, but neither responded and there have not been any meetings held.

The stripping in issue was of two import line containers with consolidated cargo. These containers were shipped under a port-to-port bill of lading from Bremerhaven, Germany to the Port of Boston. The Company’s obligations as carrier were to transport

1 A consolidated container contains cargo which is destined to more than one consignee.
the container to Boston, discharge it at that point, ensure the cargo clears United States Customs and that any other necessary conditions are met, including payment. Once those matters are completed and finalized, the cargo is released at the facility and it is "TIR'd out the gate." According to the undisputed testimony of William C. Eldridge, Company Vice President, once the cargo is "TIR'd", the Company's responsibilities end.

The cargo in question was consigned to Logistics Management Network (Logistics) with a destination of Black Falcon Avenue where International Cargo Port (Int'l Port) leases the Black Falcon facility from Massport. Int'l Port apparently subleases space to other entities, including Logistics. Neither Int'l Port nor Logistics has any contract with the ILA.

The containers were transported by agents of the consignee from the Conley Terminal, where they were off-loaded, to the Black Falcon facility where they were stripped by non-union labor. All of the work from off-loading until transfer to the consignee at the terminal gate was done by members of ILA locals.

There is no evidence in this record that the Company directed or controlled the transportation of the cargo after release to the consignee or that it requested or directed the consignee to strip the cargo with non-union labor.

Such other facts as may be relevant are incorporated into the opinion which follows.

**OPINION**

The effects of containerization on the industry are many, complicated, substantial and of long-standing duration as detailed in the testimony and in the FMC's lengthy 1987
decision in which it invalidated container work rules that prohibited carriers from releasing cargo to consignees for off-pier stuffing and stripping. Reconciliation of the competing interests held by the multiple entities which are affected by containerization under collective bargaining agreements and federal labor and shipping laws has proven to be a difficult and elusive goal. The Union has legitimate concerns about a loss of existing jobs due to containerization and the reduction in pay and benefits that accompanies job losses or a stagnation in job growth. Work preservation and job growth are unquestionably important to the Union as attested to with some passion by certain of the Union’s witnesses during the hearing. Judged from the Union’s point of view, one can understand why employees believe that it “is not right” to have a consignee of cargo, which is not covered by any collective bargaining agreement, use non-union labor to strip cargo at a waterfront facility where ILA labor historically has worked on that same task. As one Union witness put it, “the work is being done in our backyard.” It, thus, may be fairly said that the equities lie with the Union which is concerned about still more of what it regards to be its work being done by non-union labor both on and away from the waterfront.

Notwithstanding these observations, the Arbitrator is constrained by the law, the applicable collective bargaining agreement(s) and the issue submitted for arbitration. Upon those considerations, this grievance must be denied because there is no violation of the Master Contract as alleged.

The undisputed evidence upon this record is that the containers in issue were shipped under a port-to-port bill of lading. Once the Company delivered the containers to
the consignee or its agent, and they were “TIR’d” at the gate, the Company’s rights, obligations and liabilities with respect to those containers ended, according to the testimony and law. The Company did not have the right to control the consignee’s actions once the consignee took possession by its designated agent. There is no evidence on the record to suggest that the Company and the consignee are in any way related entities or that the consignee was the Company agent. Nor did in fact the Company exercise or attempt to exercise any control over that property.

The Union essentially concedes that its contract rights would not have been violated if the consignee had taken the containers off the waterfront and stripped them with non-union labor. Thus, according to the Union, it is the location at which the work was done that converted what would not have been a contract violation into a contract violation. However, the Company had no more legal right to control the work done by and on behalf of the consignee at an on-site location then it did to control the work at a facility off the waterfront. The Union points to no controlling or persuasive authority that would allow or require the Company to refuse delivery to a consignee in the latter circumstance even if it knows or has reason to believe that the consignee is taking the containers to an area where union members have historically worked to have stripping done by non-union labor. Rather, it appears quite clearly that a refusal of delivery for the purpose of forcing a consignee which is not party to a labor contract to use union labor would be prohibited by the decision and order of the FMC as affirmed. Therefore, the location at which the work was performed is not and cannot be the dispositive factor in the Union’s favor. Thus, whether or not the facility is a “live pier” is not the controlling
inquiry. It is the Company’s legal inability to control the consignee which is the determining factor.

Work done by non-union labor away from the waterfront by a consignee which is not a party to an ILA agreement is not a contract violation. Work performed at the consignee’s direction by non-union labor at a waterfront facility which the Company does not own, lease or otherwise control is no more a violation of current contract even though that is particularly upsetting to the Union because the work is being done in its members’ “backyard.”

The Union is also inaccurate in its contention that the Company “voluntarily” surrendered its control over the containers or “sent” the containers to Black Falcon for stripping. The Company as carrier was under a contractual obligation to deliver the containers to the consignee Logistics or its agent at the Conley Terminal under the port-to-port bill of lading, which constitutes the contract between the shipper and the carrier. The Company had neither the contractual nor the statutory right to refuse delivery pursuant to the terms of the bill of lading. Although the Master Agreement at one time may have prohibited delivery to a consignee if the containers were to be stripped by non-union labor, that prohibition no longer exists in the contract since the restrictions were held by the FMC to violate federal shipping laws in 1987.

The Company concedes that there would have been a contract violation if the stripping had been done for a signatory to an ILA contract. The Company also admits that if it had done the stripping by itself or through its agents that would have been a contract violation. But those things did not happen. The consignee, with whom the
Company has no relationship of record except to deliver the cargo at the terminal gate, did the act which is the subject of this grievance. The Company cannot be made liable for the actions of an independent, non-signatory consignee.

The Union argues that the Company effectively conspired or schemed with Logistics, Massport and/or BSA to evade its contractual obligations to the Union and to erode its membership’s historic jurisdiction over work done within the Port. That argument, however, lacks factual support in this record.

There is a second reason for dismissal of this grievance. As the testimony developed at the hearing, it became clear that the Union’s real complaint arises predominantly under its local agreement with BSA, specifically the alleged failure and/or refusal by BSA, Massport or the Company to meet and bargain with the Union about jurisdictional issues and new businesses and job opportunities at the Black Falcon facility. Alleged violations of the local agreement are themselves subject to grievance and arbitration under Article 39 of that agreement. A violation of local agreement has not been submitted to arbitration in this proceeding. As such, I am not empowered to consider any claim that the local agreement has been violated.

Article 11-12(F) of the Master Contract creates a joint committee which is to meet with representatives of Port Authorities on issues of jurisdiction. Even assuming that this clause can be read to require the Company to meet with the Union, the Company’s alleged refusal to meet is not the subject of this arbitration. This arbitration presents

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2 I need not and do not decide whether the Company was the recipient of a Union demand to bargain or whether it refused such demand if one was made.
only the question of whether the stripping done by non-union labor violated the Master Contract. That claim does not fairly raise a refusal to bargain allegation. The grievance submitted for arbitration concerns an alleged violation of existing work preservation guarantees by specific acts on certain dates, not a refusal to meet to discuss that or other jurisdictional concerns.

This same reasoning applies to the Union’s claim that the Company did not promote ILA work opportunities in violation of Article 11-12(H) of the Master Contract. That alleged failure is not the subject of this grievance.

Both the 11-12(F) and (H) claims may be causes of action in other matters or forums or the subject of collective bargaining, but neither is within this Arbitrator’s authority in this proceeding.

**AWARD**

The Company did not violate the Master Contract when the two import line containers were stripped by non-ILA labor at a live pier after delivery of the containers to the consignee. The grievance must be, and it hereby is, denied.

Dated: July 8, 2002

[Signature]

Eric J. Schmertz
Arbitrator
State of New York   
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, 2002

[Signature]

Eric J. Schmertz
The parties could not agree on a stipulated issue.

In accordance with my authority and based on the record before me, I deem the issue to be:

Whether the Employer breached the collective bargaining agreement by employing a new hire from the hiring hall for the work of operating a "wash truck" instead of awarding that work to the grievant, TROY KERSEY, based on his seniority? If so, what shall be the remedy?

Hearings were held in Savannah, Georgia on April 12 and June 13, 2002, at which time Mr. Kersey, 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. A stenographic record of the hearings was taken, and the parties filed post-hearing briefs. The Employer also filed a reply brief.
The operation of the "wash truck" is a duty within the Mechanic Classification. Undisputedly, that duty is less skilled than other Mechanic duties.

Prior to seeking the "wash truck" work, the grievant, classified as a Mechanic, had been trained for and assigned to those other more skilled duties, including road ability repairs, repairs on Zim Hanjin equipment and chassis.

In mid-June, 2001, the Employer purchased an additional wash truck and added it to the wash truck fleet. It brought in a new hire from the hiring hall and assigned him to the new wash truck.

The Union contends that based on his seniority and notice of his interest in the work, the grievant should have been assigned to the new wash truck in accordance with Article III, Sections 1 and 2 of the contract. The relevant Sections of Article III read:

ARTICLE III
Seniority

Section 1. Seniority shall prevail to the fullest extent possible. Seniority is herein defined as: tenure of employment as a mechanic in the longshore industry, exclusively. It will govern the implementation of layoffs and assignments to newly created jobs both within and without the classifications set forth at ARTICLE I above or otherwise falling within the coverage of this Agreement.
Section 2. Whenever job vacancies occur in categories covered by this Agreement, the covered employees will be given first consideration for same in accordance with the order of their seniority under the seniority list (established by each Employer) with the concurrence of the Local Union.

The Employer contends that as a skilled mechanic, the grievant may be assigned to the greater skilled duties of that classification in accordance with its managerial right (Article XVI) to "manage its operations in the manner deemed desirable by it"; in accordance with Article II Section 5 of the contract which requires "employees to perform tasks or jobs within their job classification..."; and Article III Section 3 that "work assignments shall be at the discretion of the Employer."

The relevant parts of Article XVI - Management Rights, Article II Section 5 and Article III Section 3 state:

ARTICLE XVI
Management Rights

The Employer retains its right to manage its operations in the manner deemed desirable by it, except as waived or modified by the provisions of this Agreement.

ARTICLE II
Hiring Procedure

5. Employees shall be required to perform tasks or jobs within their job classifications and ancillary functions related to the Employer’s operations in and about the port, provided that same are not unreasonable, illegal or against public policy. All work orders shall be transmitted by each Employer to the employees through a header or
(working) foreman covered hereunder in accordance with the established port practices and unit work shall not be performed by non-union persons.

ARTICLE III

Section 3. The work assignments shall be at the discretion of the Employer.

At first impression it would appear that the Union’s grievance is sustainable under Article III Sections 1 and 2 of the contract. It can be argued that the additional wash truck was an “assignment to (a) newly created job both within and without the classification (of Mechanic),” under Section 1. And as part of a Mechanic’s duty, it fell “within that classification,” and should be filled, on the basis of seniority of incumbent employees. It can be further argued that the work is an “assignment” within the meaning of Article III Section 2, which accords “covered employees...first consideration...in accordance with the order of their seniority.”

But, it is a well-settled principle of contract and constitutional law that “some things may be within the letter of the law, but not within its intent of spirit.”

I conclude that that principle applies here.

Article III Sections 1 and 2 do not stand alone. They must be read in conjunction with the clear and unconditional provisions of Article II Section 5 and Article III Section 3.
These latter provisions stand in stark rebuttal to the Union's application of Article III Sections 1 and 2. Respectively they state unconditionally, that:

"Employees shall be required to perform tasks or jobs within their job - classifications..."

and

"The work assignments shall be at the discretion of the Employer."

These provisions support the traditional managerial authority to "manage its operations."

Indeed, it is undisputed that the Employer has regularly made assignments within a classification, as a managerial function.

For that reason I conclude that Article III Sections 1 and 2 are not limitations on managerial rights under the Management Rights clause.

It is clear to me, therefore, that Article III Sections 1 and 2 are enforceable under circumstance not within the facts of this case. Specifically, I find that Article III Sections 1 and 2 were not intended to apply to the exercise of seniority to move from one duty or task to another within the same classification. What the grievance seeks here is precisely that -- the mandatory right of the grievant to move from one set of Mechanic's duties to another. To permit that move, would,
obviously, be inconsistent with the traditional managerial authority to assign the work of a job classification to any employee in that classification, and would be manifestly inconsistent with Article II Section 5, and Article III Section 3 of the contract, even if not within a restricted interpretation of the Management Rights clause.

In my judgment, to permit an employee to choose his work assignment within his classification would require much more contractual support than is found in Article III Sections 1 and 2, when juxtaposed with Article II Section 5 and Article III Section 3.

Indeed, let me pose a hypothetical but realistic scenario, which supports this view. Assume that the grievant received the wash truck job under Article III Sections 1 and 2. Thereafter however, or even virtually with that assignment, the Employer would have the contractual right under Article II Section 5 and Article III Section 3 to remove him from that assignment and reassign him to his prior or other duties within the Mechanic classification. In short, his “success” under Article III Sections 1 and 2 in the instant circumstances would be an exercise in futility.

But assuming, as we should, that all provisions of a contract have meaning and enforceability, Article III Sections 1
and 2 must have a meaning not in conflict with Article II Section 5 and Article III Section 3.

There are circumstance when it would apply including by example, if the Wash Truck job was established as a new and separate classification or to another newly created classification which did not previously exist, or possibly where the seniority bid is to an opening or vacancy in a classification by an employee of another classification. I am sure there are other proper and compelling applications of Article III Sections 1 and 2, but for purposes of the instant case, I need not go further except to observe that I do not agree with the Employer that they are limited to promotions and to foreman positions. Suffice it to say that I am satisfied that the weight of all the relevant contractual provisions compels a finding that Article III Sections 1 and 2 were not intended to apply to a switch in assignments within the same classification. I leave to other circumstances and other cases determinations of the meaning and applications of "newly created jobs," "job vacancies" or "assignments" referred to in Article III Sections 1 and 2.

If the foregoing contract clauses are ambiguous, arbitrator look to past practice for clarification. Here, the probative evidence of past practice is mixed at best, and hence
not determinative. The Employer has asserted a practice of obtaining new employees from the hiring hall to fill the lower levels of the Mechanics classification without Union objection. It has shown that there is no posting procedure at the Employer’s location for this type of work assignment, but that postings to obtain employees for this type of assignment are posted at the hiring hall for bids based on port-wide seniority.

The Union has offered testimony of agreements to "rearrange" assignments within a classification, to permit a senior employee to pick a particular assignment that is vacant and to place the "new hire" from the hiring hall in the opening thereby created by the move of the senior employee. But persuasive probative examples of either or any of these "practices" were not provided in the record.

I do believe that consistent with the Union’s testimony there have been times when the work assignments within a classification have been "rearranged," but I believe that that was done by mutual agreement and with supervision participation and consent. That is not the same as asserting a "right" to a rearrangement under Article III Sections 1 and 2. So there is insufficient evidence of any practice that would change my contract interpretation.
With the foregoing findings, I need not consider the grievant’s eligibility for the work, when at the time the wash truck job was filled, he was on disability leave.

Also, with these findings, I find it unnecessary and not of sufficient materiality to rule on the Union’s claim that the Employer failed to “transmit work orders...through a header or (working) foreman...” as referred to in Article II Section 5.

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 grievance of TROY KERSEY is denied. The Employer did not violate the contract in refusing to allow him to exercise his seniority to claim the “wash truck” work assignment.

Eric J. Schmertz, Arbitrator

DATED: December 30, 2002

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

UTILITY WORKERS UNION OF AMERICA,
LOCAL 369, (formerly LOCAL 387),

Union,

- and -

NSTAR SERVICES COMPANY
(formerly BOSTON EDISON COMPANY),

Employer.

Before: Eric J. Schmertz, Impartial Board Chairman
Robert E. Motta, Company Board Member
William Carr, Union Board Member

Appearances: For the Union:

Anne R. Sills, Esq.
Segal, Roitman & Coleman
11 Beacon Street
Suite #500
Boston, MA 02108

For the Employer:

Glenn E. Dawson, Esq.
Christina T. Geaney, Esq.
Law Offices of Glenn E. Dawson
101 Tremont Street
Boston, MA 02108
INTRODUCTION

Suzanne King was suspended and then discharged by the Company in March 2000 for abuse of the Company's Industrial Accident Disability Benefits Plan (Industrial Plan) and for providing the Company with false information about her physical condition following an on-the-job injury King suffered in October 1999.

As the parties could not resolve the grievance, the matter was referred for opinion and award pursuant to the contractual tri-partite arbitration procedures. Mr. Robert E. Motta and Mr. William Carr served, respectively, as the Company and Union members of the Board. Eric J. Schmertz was selected as the Board Chairman.

Hearings were held on the following dates in 2001: January 25; March 9; April 26; May 23 and 24; and July 10 and 23. The parties were represented by counsel at each hearing who were afforded a full opportunity to examine and cross-examine witnesses and to submit documentary and other evidence. A stenographic record was taken. There was no objection to the conduct of the hearings. Counsel have filed detailed briefs which have been very helpful to the Board's deliberations upon a lengthy and complex record containing a great deal of expert medical opinion, much of it conflicting. The Union has also filed a letter memorandum in reply to the Company's arguments about the relevance of the Gravinese arbitration award which is discussed infra.¹

The Board met in executive session on December 12, 2001 for discussion of the record and the parties' arguments upon the issues presented.

¹ It is well established that arbitration awards involving the same parties may be cited and included in the parties' briefs.
ISSUE

The parties stipulated the following issue at the first day of hearing:

Did the Company violate the collective bargaining agreement by its suspension or discharge of the Grievant, Suzanne King? If so, what shall be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE V
MANAGEMENT RIGHTS

1. The Union and the Local recognize the right of the Company to select and hire all employees; to promote employees; to determine the necessity for filling a vacancy; to transfer employees from one position to another; to suspend, discipline, demote or discharge employees; to assign, supervise, or direct all working forces and to maintain discipline and efficiency among them; to lay off employees and to stagger employment when required because of lack of work or curtailment of work; and generally to control and supervise the Company's operations and to exercise the other customary functions of Management in carrying on its business without hindrance or interference by the Union, the Local, or by employees. If the Local claims that the Company has exercised the right to suspend, discipline, demote, or discharge employees in an unjust or unreasonable manner, such claim shall be subject to the Grievance Procedure in Article XXXII and Arbitration under Article XXXIII. If the Local claims that the Company has exercised any of the other foregoing rights in a capricious or arbitrary manner, such claims shall be subject to the Grievance Procedure in Article XXXII and under Article XXIII.

2. The Company, the Union and the Local recognize the responsibility of the employees to comply with reasonable rules, regulations and practices prescribed by the Company which do not conflict with the provisions of this Agreement.
ARTICLE XXVIII
MEDICAL EXAMINATIONS

6. Any employee upon whom his/her own physician has placed restrictions shall be subject to examination until the restriction is removed.

If any such employee is not satisfied with the conclusions arrived at by the Medical Director, s/he may at his/her own expense submit a report from a doctor of his/her own choosing for consideration by the Company. Should any conflict result between the examination reports of the doctors involved, the Local and the Company shall by agreement select a third doctor who shall be a Specialist certified by his/her respective Board who will consider the case submitted to him/her and render a decision within one (1) week from the date s/he receives the case, and his/her decision will be binding upon the parties hereto.

Should the Company and the Local be unable to agree upon a third doctor then the matter will be referred to the Massachusetts Medical Society for the selection of the third doctor who shall be a Specialist certified by his/her respective Board who will consider the case and his/her decision will be binding upon the parties hereto.

Each party shall compensate the doctor chosen by it for the time spent and expenses incurred in the case, and the parties shall share equally in paying the compensation and expenses of the third doctor.

APPENDIX

ILLNESS AND NONINDUSTRIAL ACCIDENT DISABILITY BENEFITS PLAN
AND THE
INDUSTRIAL ACCIDENT DISABILITY BENEFITS PLAN

ILLNESS AND NONINDUSTRIAL ACCIDENT BENEFITS

Illness and non-industrial accident benefits shall be governed by the following rules:

(1) ELIGIBILITY

Employees must have completed twelve (12) months regular continuous active full time service in order to be eligible.
(2) BENEFITS

Benefits shall be payable according to the following schedule:

<table>
<thead>
<tr>
<th>Years of Service</th>
<th>1-12 years</th>
<th>13+ years</th>
</tr>
</thead>
<tbody>
<tr>
<td>Waiting Period</td>
<td>5 days in any consecutive 7 day period</td>
<td>5 days in any consecutive 7 day period</td>
</tr>
<tr>
<td>Waiting Period Benefits</td>
<td>5 days</td>
<td>7 days</td>
</tr>
<tr>
<td>Weeks at full pay</td>
<td>1 per year of service</td>
<td>18</td>
</tr>
<tr>
<td>(Initial Disability Period)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weeks at 3/4 pay</td>
<td>3 per year of service up to 36</td>
<td>34</td>
</tr>
<tr>
<td>(Secondary Disability Period)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(a) **Years of Service** is defined as the number of full years of active service completed on the December 31 immediately preceding the disability. Employees are, however, considered to have one (1) year of completed service upon the completion of their initial 12 months of service.

(b) **Pay** is defined as base pay (regular compensation for normal scheduled work days, including paid holidays and vacation). No change in an employee’s rate of pay shall become effective while benefits are being received.

(c) **Waiting Period Benefits** are payable at full pay to cover the period before the initial disability period (5 days) and for short term illnesses to a maximum of 15 days. The payment of waiting period days is at the discretion of the Disablement Benefits Committee.

(d) **Waiting Period Days** may be carried over into the next year if any employee has completed at least a full calendar year of service. In no calendar year, however, will an employee be paid for more than 15 days. Unused waiting period days in excess of 15 will be held in a bank and may be used to supplement pay for secondary disability benefits or to reimburse for unpaid time while on the inactive payroll. An employee may elect not to bank unused days and instead receive an additional personal day to be taken in the following year in exchange for his or her full 5 or 7 day allotment.
(5) **REVIEW OF ABSENCES**

Employees abusing the Plan or having excessive absences shall be subject to disciplinary action by the Company. If the Local claims the Company has exercised any of the foregoing rights in an unjust or unreasonable manner, such claims shall be subject to the Grievance Procedure in Article XXXII and Arbitration under Article XXXIII.

(6) **MISCELLANEOUS PROVISIONS**

(c) Benefits shall cease when an employee is retired or when his/her employment is otherwise terminated.

**INDUSTRIAL ACCIDENT DISABILITY BENEFITS**

Industrial accident benefits, for injured employees entitled to compensation under the Massachusetts Workmen's Compensation Act who elect to proceed against the Company's insurer for compensation, shall be governed by the following rules:

(1) While the incapacity for work resulting from the injury is total, the Company will pay to the employee (subject to paragraphs (4), (5) and (9) below) the excess of the employee's base pay (as defined in the Retirement Plan as amended) at the time of the injury over the payments made by the Company's insurer under the Act.

(2) While the incapacity for work resulting from the injury is partial, the Company will pay to the employee (subject to paragraphs (3), (4) and (8) below) excess of (a) the employee's base pay at the time of the injury and (b) the payments made by the Company's insurer under the Act, or the wages earned by the employee or both; provided, however, that no payments will be made under this paragraph to an employee who refuses to accept a position which is offered to him/her by the Company.

(5) Benefits shall cease when an employee is retired or when his/her employment is otherwise terminated.

(9) The Administration of the Plan shall be under the direction of the Medical Director and the Vice President in charge of Human Resources of the Company whose decision with respect to all questions arising thereunder, including questions respecting the duration of total and partial incapacity for work shall be final. (emphasis added)
2. Third Doctor Provision

Without waiving or modifying the provisions of Section (8) of the Industrial Accident Disability Benefits Plan, the company is willing to consider utilizing the services of a third doctor as provided in Section 6 of Article XXVIII on a case by case basis provided that the medical disagreement is a disagreement between specialists in their field of medicine.

ARTICLE XXXIII

1. (d) Arbitration

   If any grievance is not settled by agreement...then it shall be submitted at the request of either party to a Board of Arbitration....

   (f) [T]he decision of the majority of the Board shall be final and binding upon the parties....

   (g) No Board of Arbitration or arbitrator shall have the power to add or subtract from or modify any of the terms of this Agreement or to pass upon or decide any question except the grievance submitted to the Board in accordance with the foregoing provisions....

PARTIES' CONTENTIONS

COMPANY

King's ability to work on and after January 19, 2000 is not arbitrable because the Company's Medical Director's decision that she could work is final pursuant to the Industrial Plan. As King was on notice of her obligation to return to work, her failure to report as ordered is a disciplinary offense for which she was properly suspended and discharged.

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2 Article XXXIV of the parties’ agreement incorporates the book of stipulations.

3 Section 8 was renumbered to 9 when the collective bargaining agreement was modified. The book of stipulations appears not to have been corrected to reflect that change.
The Company’s suspension and discharge of King was also proper because her conduct after her injury, which included her misrepresenting her physical condition to the Company and her giving false information about her physical condition, constituted a further abuse of the Industrial Plan. King was able to work light duty by January 19, 2000 and was able to resume her duties as a meter reader by February 21, 2000. The evidence submitted to the Board, including expert medical testimony and a videotape of her activities on certain dates in January and February 2000, establishes conclusively that King misrepresented the extent of her injury and her capacity to work to the doctors and the medical persons who were evaluating her fitness and ability to work. King’s testimony to the contrary was not believable and the Board should not credit her testimony.

**UNION**

The grievance is arbitrable and the Board has the full right and obligation to review King’s physical condition as of all relevant dates for the purpose of assessing whether the Company had just cause to suspend and discharge King notwithstanding any finality of the Medical Director’s determination.

The Company did not clearly and convincingly prove that King intentionally abused the Industrial Plan or that she submitted false information to the Company or anyone else. King suffered injuries while at work in October 1999 which prevented her from working in the manner the Company was requiring. Indeed, King’s good faith efforts to comply with the Company’s directives and sometimes conflicting or confusing physicians’ advice aggravated her injury to the point she became totally disabled from
work by the date of her suspension and discharge. King is a good employee who was eager to return to work but was advised not to do so by her doctor. King had a reasonable basis to believe that the Company had accepted her doctor's evaluation of disability.

The videotape, showing a few minutes of isolated activity on three days, does not prove that King was not disabled from work because the activities shown on the videotape are consistent with the limits of her physical condition and within the parameters of the activities doctors had recommended to help her recover.

Should the Board find King guilty of any disciplinary offense, discharge is too harsh a penalty.

**BACKGROUND FACTS**

The Company, formerly Boston Edison Company, is a public utility which distributes electricity to commercial industrial and residential customers in various areas of Massachusetts.

Union Local 387 had represented the Company's office-technical and professional employees, including meter readers. Local 387 has now been merged with Union Local 369, which represented the Company's production and maintenance employees.

King was hired by the Company in September 1992. She worked in the collections department until she became a meter reader in September 1998, a position she held until her discharge in March 2000. It is conceded by all that meter reading is a physically demanding job.
On October 26, 1999, King was assigned to work in an “ENSCAN” van with another employee. This van is used to obtain meter readings electronically. A computer picks up a signal from the meters being read as the van is driven through the area. On October 26, King was working in the jump seat in the back of the van when the van was struck in the rear by another vehicle. King was thrown forward and onto the floor. Both King and the employee who was driving the van were taken to a local hospital where they were seen and released. King was diagnosed with a cervical strain. Robert Harrington, King’s immediate supervisor, called King that day at home and told her she could “not disable herself” and that she would have to report to the Company doctor.

The hospital physician had written King a note for her to stay at home the next day, which note King had left in the office for Harrington. King called Harrington on October 27 to tell him she was in pain and could not work. Harrington nonetheless ordered her to report to the Company’s medical department because she could “not disable herself” and that she had to be seen by the Company’s medical department. Harrington gave King similar orders on October 28 and 29 when King called in to report she could not work.

On October 27, 1999, King was examined by John Palfrey, a Physician’s Assistant who worked for the Company. Palfrey noted neck spasms and diagnosed King with a cervical strain. He sent her home from work for that day, and placed her on restricted duty, which restrictions precluded King from driving, lifting, pushing or pulling more than ten pounds. Palfrey scheduled King for a follow-up examination on November 1, 1999.
Since King could not drive, she was assigned office work in the Meter Reading Department doing data input on a computer, placing and receiving telephone calls, and ensuring the meter readers had the keys to establishments on their routes. The bulk of King’s light office duties consisted of data entry using a computer placed on an old office desk. The monitor rested on a 3 to 4 inch pedestal that was placed on top of the computer. The keyboard was on top of the desk. In this “light duty capacity,” King had permission to get up from her work station, walk around, and change positions as she wished. King asserted during the hearing that she could remain at the computer for only short periods of time throughout this period of light duty office work because she was in pain. She frequently got up and walked around in an effort to relieve the pain and she often had to leave work before her four hours of light duty had been completed. Although King never specifically complained to Harrington about pain, in part because King believed that Harrington was antagonistic toward her, Harrington knew that she was often up from her desk and walking around and that she was leaving work early and he did not state an objection to her actions.

Palfrey saw King as scheduled on November 1, 1999. His diagnosis was unchanged and King was continued on the same light duty office work for four hours a day. Palfrey noted that King was in more discomfort that day than when he had seen her on October 27 and that King had a decreased range of motion in her neck. Because of this, Palfrey believed that King should be evaluated by Dr. Richard Conway, an orthopedic surgeon who the Company used as a consultant. Dr. Conway also served in an orthopedic consulting capacity for Liberty Mutual Medical Treatment Center, a part of
Liberty Mutual Insurance Company, which is the third party administrator for the Company's self-insured Workers' Compensation claims and benefits.

On or about November 2, 1999, King, on her own, began seeing Dr. Joseph Abate, who is also an orthopedic surgeon. Dr. Abate diagnosed her with cervical strain, right shoulder strain and multiple contusions and told her to stay out of work for four weeks. Dr. Abate recommended physical therapy and he prescribed various medications for pain, stiffness and inflammation. King nonetheless reported to work on November 3 because Harrington again told her to report because she could not "disable herself," as only the Company could do so.

Dr. Conway examined King on November 3, 1999. He diagnosed her with acute sprain of the cervical spine, moderately severe, and disabled her from any work. Dr. Conway advised against physical therapy and King did not begin therapy despite Dr. Abate's recommendation.

King called Harrington on November 4 and told him Dr. Conway had disabled her from work. After Harrington told her that she would be "abandoning her job" if she stayed home, King called both the Union office and Palfrey and on their advice she stayed home.

King was out of work from November 4 until December 21, 1999, during which time she continued to see Dr. Conway and Dr. Abate.

After seeing King on November 24, Dr. Conway recorded that King was "very disappointed about her progress." King complained of right arm and shoulder pain which Dr. Conway diagnosed as tendonitis in the right shoulder.
King saw Dr. Conway next on December 8, '99. Noting a physical setback due to King doing "a little housework," Dr. Conway noted that King was tender "along the right scapula at its vertebral border" and the "lateral aspect of the neck on the right side particularly."

King saw Dr. Abate on December 10, 1999. Dr. Abate observed restricted motion, shoulder and right cervical tenderness and a loss of sensation in the upper right forearm. King reported to Dr. Abate that the several drugs she was taking were causing her severe nausea and she reported having difficulty sleeping. Dr. Abate notes that King was upset and concerned about her pain and he again recommended physical therapy, heat, rest, medication, and an EMG.

On December 13, 1999, King saw Palfrey. King complained of right arm pain and pain when that arm was extended out to the side and above her head. Palfrey observed that King had a sensitivity to light touch at the right upper trapezius and midline spine and that she had diminished right hand grip strength.

King saw Dr. Conway on December 15, 1999 and she was allowed to return to light duty work for four hours beginning Monday, December 20.

On December 17, King saw Dr. Abate who disagreed with Dr. Conway. Dr. Abate believed that King should not work for two to four more weeks during which time she should receive physical therapy. When King called Palfrey to report Dr. Abate's recommendations, Palfrey told her to report for work on December 21, 1999, which she did. She was assigned the same type of office duties previously described.
King did not work December 29, 1999. She was in pain and stayed home with permission of her acting supervisor. She tried to see Dr. Conway that day but could not wait to be seen because she was in pain.

On December 30, 1999, King saw Palfrey and Dr. Abate. Palfrey recorded that King had pain in her right arm and right shoulder. King told Dr. Abate that she had pain in the right side of her neck which radiated down both arms more severe on the right than left. Dr. Abate also observed severe restrictions and limitations of King’s spine, tenderness, muscle spasm and a mild loss of sensation in her right forearm. Dr. Abate referred King to Dr. Vaisman for pain management.

In early January 2000, King asked Harrington if she could go back to her field duties as a meter reader. Harrington told her she could not because she was still under a no-driving restriction which would have to be lifted before she could return to field work.

On January 5, 2000, King saw Dr. Conway. She told him that she was eager to return to field work and that she thought she could drive. Dr. Conway cleared King for driving for up to four hours per day.

On January 6, 2000, King saw Palfrey who concurred with Dr. Conway and removed the no-driving restriction. Palfrey allowed her to drive four hours per day, but restricted her from lifting over ten pounds with her right arm.

On Friday, January 7, 2000, Harrington gave King a half meter route, specifically a mixed commercial/residential ride book. King was not able to complete the route in the four hours she was allowed to work.
On January 10, 2000, her next day of work, King was assigned a residential walk route which King completed satisfactorily. Harrington held a disciplinary meeting with King and a Union representative to warn her, as a consequence of her performance on January 7, that she could be suspended for not doing her job.

On January 11, 2000, King was assigned a residential ride book, for four hours that day and four hours on January 12. Harrington reviewed King’s productivity on January 11 and concluded that it was not good. King told Harrington the route was very long with a lot of driving and that she would likely be going back to the Company’s medical department the next morning. After her work on January 11, King saw Dr. Vaisman who gave her four shots of Novocain on the upper part of her back into the upper shoulder area.

On January 12, 2000, after she had been seen by Palfrey, who diagnosed her condition as cervical/shoulder sprain, King called Dr. Conway and asked to be seen earlier than her next scheduled appointment because she was in pain. Dr. Conway noted that King’s symptoms had increased since his last exam, but that she could still drive up to four hours a day provided she was not required to get in and out of the vehicle repeatedly. Dr. Conway called Dr. Paul Keefe, the Company’s Medical Director, and told him King would do best with light duty.

On Friday, January 14, 2000, Dr. Keefe examined King. Dr. Keefe believed that King was exaggerating her symptoms during the examination and that she could do more than she was willing to admit. Keefe assigned King six hours light duty starting Monday, January 17 and eight hours light duty starting January 24, 2000. When King told Dr.
Keefe that Dr. Conway had cleared her for only four hours, Dr. Keefe told her that he was the “deciding factor” as to when she had to go back to work.

King had an appointment with Dr. Abate later in the day on January 14. She reported to Dr. Abate that she was in pain and he noted neck restrictions and tenderness and mild loss of sensation in the upper left arm. King told Dr. Abate about her examination by Dr. Keefe and Dr. Abate prescribed light duty of no more than four hours, rest, no lifting of over 10 pounds and no repeated entry and exit from vehicles.

King’s next workday was January 17. The temperature that morning was below 10°F, a condition which allows the meter readers to remain indoors until the temperature increases. King asked Harrington if she and another employee could go on a coffee run for the meter readers. Permission was granted. King drove and the employees returned with coffee and food.

After the meter readers left the office for the field, and shortly after King began inputting data into the computer, Harrington was told by another employee that King was in the ladies room in excruciating pain. King told Harrington the same thing when she came out of the ladies room, whereupon King went to a hospital emergency room. She was not seen in the hospital because it was too crowded. When she returned to work, pursuant to direction, Harrington told King she had to report to the Company’s medical department before she could leave work. Palfrey tried to examine King, but she expressed extreme discomfort, flinched when her shoulder was lightly touched, requested another person’s presence, and eventually refused examination. Palfrey observed that
King was very emotional and suggested that she see her own physician and to call him the next morning.

Although she had no appointment, King saw Dr. Abate on January 17. She complained of having terrible pain in her right shoulder area and her neck. Dr. Abate reported significant muscle spasm and restrictions. King was given Valium and was told not to drive. A physical therapist administered ice to break the spasm. Dr. Abate concluded that King should be totally disabled from work for a week.

On January 18, Harrington called King when she did not report for work. King told Harrington about Dr. Abate’s report, and told him that she was in pain and could not drive because she was on medication. Harrington told her to call the Company medical department. King then called Palfrey who told her to see Dr. Conway.

Dr. Conway examined King on January 18 and he cleared her for four hours of light duty work despite her pain. Dr. Conway notified the Company of this by memorandum dated that same day. Dr. Conway that day also learned that King was seeing Dr. Abate. After Dr. Conway told King she should choose a treating physician, King selected Dr. Abate. Dr. Conway advised King to stay under Dr. Abate’s care and allow him to make decisions about her medical treatment.

On January 19, 2000, King did not report for work. Harrington called her and told her that she had to “straighten the issue out” with the Company’s medical department. King then called Palfrey and told him about Dr. Abate’s advice. Palfrey told her that Dr. Conway had cleared her for four hours light duty and that she was expected to return to work on that basis. King then called Dr. Abate’s office and asked that Dr. Abate call the
Company medical department and explain her situation. King testified that she assumed that he had done so because she did not hear anything more from the Company until she was suspended.

On January 20, 2000, Dr. Keefe authorized King to perform light office duties for four hours per day. On January 22, 2000, the Company stopped King’s disability benefits because she had not reported for light duty. About that same time, the Company’s insurance carrier retained a private company to investigate King’s disability claims. A private investigator was retained to place King under surveillance on January 22, 24, 28, 29 and February 12, 18 and 21 and he videotaped certain of her activities on January 22 and 28 and February 21, 2000, which tapes were placed into the record. Those tapes show King engaged in a variety of activities involving neck and right arm and shoulder movements.

King saw Dr. Abate again on January 24, 2000. He continued to disable her from work for another 2-4 weeks, continued her on Valium, recommended another visit with Dr. Vaisman for pain management, and prescribed physical therapy three times per week for four weeks.

After seeing the physical therapist at Dr. Abate’s practice, King changed to another therapist, Kevin Cummings, who saw her first on January 28, 2000 for approximately 45 minutes. Cummings noted right side pain and weakness, deficient grip strength, which he attributed to a right shoulder injury, moderate muscle spasm and tenderness in neck and shoulders, and restricted range of motion. There was physical therapy also on several dates in February and March.
Physical therapy was administered at Cummings’ office on January 31, 2000 and February 2, 2000. February 2 was the same day King was sent by the Company’s insurance carrier to see Dr. William Kermond, an orthopedic surgeon, for an independent medical examination (IME). Dr. Kermond examined King on February 2, 2000. He noted muscle spasm, restrictions on neck motion and right shoulder motion. He diagnosed her with a cervical strain, with secondary problems related to disc herniations, and concluded that she was not capable of returning to work, although she was well-motivated to do so. Dr. Kermond testified at the hearing, however, that his opinion changed after he was shown the videotape. It was Dr. Kermond’s opinion that King had faked her examination and that she was capable of working as of the dates Dr. Keefe had ordered.

King saw Dr. Abate again on February 7, 2000. Dr. Abate noted muscle spasm and prescribed rest and ice and that she remain out of work.

At a physical therapy session on February 16, King reported that she was feeling stronger but was still having muscle spasms. At the February 18 session, King complained of being sore with increased muscle spasms and tenderness. After modifying the exercises, King reported on February 21 that she was feeling better. By February 23, Cummings had concluded that King was not improving. Although the pain King was reporting was less frequent, it was still present, and her range of motion was still restricted. Cummings made this report to Dr. Abate and asked whether therapy should be continued.
King saw Dr. Abate again on February 23 and reported that she was “beginning to have more good days than bad but having constant pain.” Dr. Abate noted tenderness and restrictions of spine and shoulders and he recommended she continue with physical therapy two times a week for a month with Motrin and without working even light duty because he noted her symptoms improved after rest.

King continued on physical therapy and her condition apparently improved. King reported feeling better by February 28 and by March 6 Cummings noted that she appeared to have had made excellent progress.

The decision to suspend and discharge King was made in late February by David Dorant, the Company’s Director of Labor Relations, Tim Manning, then Director of Employee Relations and Health Services, Mike Flemming, Manager of Medical Services, and Robert Motta, a Labor Relations Consultant. Dorant testified that the group decided, after viewing the videotapes, that King should be terminated because she failed to return to work after being cleared and for fraud of the contract’s disability provisions. King was suspended March 3, 2000. She was notified of that action by telephone call from Harrington on March 3 and by letter dated March 6, 2000. After a hearing on the suspension, the Company found the suspension was justified. By letters dated March 13, King and the Union were notified that the suspension would be continued until March 17, 2000 at which time it would be converted to a discharge.

King continued to see doctors after she was discharged. On March 13, Dr. Abate noted tenderness and moderate restriction of spine and shoulders. By April 10, Dr. Abate
noted definite improvement, but recorded King’s complaints about her upper right arm and difficulty with prolonged standing, walking, bending or lifting.

At a May 4, 2000 visit with Dr. Abate, King complained of severe pain in the right neck and right upper arm. Dr. Abate noted “significant tenderness and restriction of the right shoulder and subdeltoid area and in the proximal humerus. All motion is painful.”

King last saw Dr. Abate in June 2000 when she was still complaining of neck and arm pain. King was subsequently referred to Dr. Elizabeth Matthew, a neurologist at the Lahey Clinic.

Dr. Matthew examined King on June 21, 2000 and believed King had rotator cuff syndrome. Dr. Matthew recommended physical therapy for 4-6 weeks. King had physical therapy in July and August of 2000 which treatment included Cortisone patches and electrophoresis to King’s right shoulder area.

Dr. Kermond examined King on August 21, 2000 who observed that her cervical strain had subsided but that King had some right arm pain and restricted right shoulder motion.

At Dr. Matthew’s recommendation, King began seeing Dr. Smiley, an orthopedic surgeon. In February 2001, King had surgery done by Dr. Smiley to correct right shoulder impingement syndrome after injections of Cortisone in October and December of 2000 did not eliminate her right shoulder pain.
OPINION

Having carefully considered the record and the parties’ arguments, a majority of the Board concludes that the grievance must be denied. This result is mandated by the provisions of the Industrial Plan that make Company-made medical determinations final. In reaching this ultimate conclusion, several preliminary issues must be addressed.

There is first a question of arbitrability raised by the Company. The Board majority does not agree with the Company that this grievance is not arbitrable. The agreement does not make a suspension or discharge of a full-time, nonprobationary employee nonarbitrable. To the contrary, the agreement expressly permits arbitration of all discipline which is alleged to be unjust or unreasonable. The Industrial Plan may make the question of an employee’s capacity to work as found by one or more of the Company’s agents final, but the finality of the fact question does not preclude resort to the grievance/arbitration procedure itself. The distinction between the finality of an issue in a disciplinary arbitration proceeding and the arbitrability of the grievance, of which the medical issue is a part, may seem a subtle one, but it is a distinction which plainly exists and must be recognized.

The 1975 Fallon arbitration award\(^4\), cited by the Company in support of its arbitrability argument, is not to the contrary. The Fallon arbitration was one in which that Board was being asked to review the Company’s determination that an employee was not able to work. The issue presented in that case went directly to the administration

\(^4\) That award and the Gravinese award arose under Local 369’s contract. That is not of consequence because the language construed in those awards is the same in material respect as the language in Local 387’s contract.
of the Industrial Plan. Such a grievance may well be nonarbitrable. But the issue in this case is just cause for discipline. Whether the Company's action was just and reasonable is an issue which does not arise directly from the Industrial Plan and it is one which may or may not rest upon the Medical Director's determination. For example, the Union argues that the charges are limited to allegations that King defrauded the Company. If fraud were the only ground for King's discipline, then King's intent to defraud would become relevant and the Medical Director's "final" determination of King's capacity to work would not be dispositive of King's intent.

Entertaining a disciplinary grievance while simultaneously accepting the finality of a determination about capacity to work is consistent with all terms of the agreement and gives effect to all without sacrifice of any. The arbitration provisions of the contract do not supercede the Industrial Plan provisions, but neither do the latter trump the former. They must be read together and harmonized. The Board majority concludes that his can be achieved only by a conclusion that the grievance is arbitrable.

Next to be considered is the parties' disagreement as to whether the Industrial Plan is applicable to King. The contract creates two disability plans which are separate and distinct. The Industrial Plan applies to on the job injuries and job-related illnesses which are subject to compensation under the State's Workers' Compensation laws. The non-industrial plan applies to other types of illnesses and injuries. Since King was injured while at work, the Industrial Plan is applicable to her.

We turn then to a consideration of the disciplinary action taken against King. By agreement, the Company has the right to suspend and discharge employees unless that
right is exercised in an "unjust or unreasonable manner." Reasonableness becomes, in
effect, the test of just cause for discipline under these parties’ agreement. Just cause is
established if the Company’s action is just and reasonable and it is absent if the action is
unjust or unreasonable.

In assessing the reasonableness of the Company’s disciplinary action, the Board is
confined to the bases for the Company’s decision to suspend and discharge King. King’s
suspension and discharge cannot be sustained upon grounds that are materially different
from those upon which she was disciplined. It becomes necessary, therefore, to first
define the reasons for which King was suspended and discharged.

Having again carefully considered the record and the parties’ arguments, the
Board majority concludes that the disciplinary charges against King encompass more
than fraud allegations, although fraud is certainly included within those charges.
Included also, however, is an allegation that King abused the Industrial Plan by not
reporting for work after Dr. Keefe had cleared her for light duty. We reach this
conclusion for several reasons.

The disciplinary charges as written are essentially two fold. The first is general,
the second is specific. The submission of false information is reasonably susceptible to
only one interpretation. King was being accused of lying about her physical condition.
That is a fraud allegation only. The same cannot be said, however, about the first
ground.

King was charged generally with abusing the Industrial Plan. The charges do not
specify how she abused the Plan. The Union argues that a dictionary definition of abuse
compels the conclusion that this was just another way of the Company claiming that King had defrauded it by lying about her condition for the purpose of receiving contractual and other benefits to which she was not entitled. But this reading of the disciplinary charges would make the first ground largely, if not entirely, redundant of the second and make the “abuse” allegations essentially superfluous.

Second, Dorant testified at several different times during the hearing, including in response to questions by the Board Chairman, that King’s failure to report for work after Dr. Keefe had cleared her for light duty was one basis for the Company’s action, the other being “fraud of the disability article of the contract.” According to Dorant, the video, which persuaded the Company that King had misrepresented her physical condition, was but “one of the considerations.” The other, as made clear by Dorant’s answer to a question by the Board Chairman, was “her failure to return to work based upon the Company’s belief she was capable to do so.” Dorant’s testimony makes it clear that the Company was taking action against King for two reasons. One was fraud upon the Company. The other was her failure to return to work based upon the Company’s belief she was capable of working at least light duty.\(^5\)

Third, the Company officials who met and decided to suspend and discharge King knew that she had been cleared to return to light duty work by Dr. Keefe. They also knew that King had not returned to work as ordered. Dorant and others in attendance at that meeting obviously relied upon that part of the Industrial Plan that they understood

\(^5\) Undisputed is the fact that employees who are on disability are required to work limited duty if capable of doing so.
makes Dr. Keefe’s determinations “with respect to all questions arising [under the Industrial Plan], including questions respecting the duration of total and partial incapacity for work...final.” Dorant testified that Dr. Keefe’s opinion was final. Moreover, Dorant had told Union representative Thomas Burke that King would be discharged if she did not come back to work because she had been cleared for light duty. Therefore, when the Company described King’s misconduct as an abuse of the Industrial Plan, they included a failure to report for work as finally ordered under the Plan as one of the reasons for King’s discipline.

Fourth, the labor relations professionals at that meeting were also surely aware of other times employees had been accused of disability plan abuse. The Gravinese grievance was a case involving an employee who was accused of abuse of the non-industrial plan. The Board majority in the Gravinese case discussed abuse in terms broader than fraud. Included in the Gravinese Board’s notion of abuse was an employee who failed to return to work when he was medically able to work at least light duty when he knew the Company wanted him to return to work. Although submission of false documents was a large part of the basis for the Gravinese award, it was far from the only basis. The Board in the Gravinese award viewed the grievant’s self-help in deciding when he could return to work as within an abuse of the plan.

The Board’s conclusion regarding the scope of the disciplinary accusations is not undercut by the Gravinese Board’s recognition that abuse of the disability plan requires a finding of “intentionality and purposefulness.” Such intent need not be to commit a fraud. As stated by the Gravinese Board, “it was not up to the Grievant to decide...that
he would make no attempt to return to work because he was living in pain and in a bad mood. Similarly...it was not up to him to decide that he would not return to work on light duty.” As with the grievant in the Gravinese award, King intentionally did not report for work despite Dr. Keefe’s medical determination that she could work. This failure to report is reasonably characterized as an abuse of the Plan’s terms.

That the Union also understood that the accusations against King were broader than her defrauding the Company is reasonably established by the Company’s discussions with Burke and with King herself. Dorant explained that the Company actually waited longer to discipline King than it might have otherwise because “we were working with the union officials on this.” Burke was complaining to Dorant that King was not being treated fairly and Dorant did not want King disciplined until he had finished looking into Burke’s complaints out of a concern that contract negotiations with the Union, which were then underway, might be jeopardized. After Dorant was satisfied that King was being treated fairly and that she had been cleared for light duty, Dorant told Burke that the Company wanted her back at work and he asked Burke to get King back, telling him by at least mid-February 2000:

The medical department is telling me she’s capable of returning to work. If she doesn’t return to work, we’re going to have to terminate this person.

King had been told repeatedly by Harrington, Palfrey and Dr. Keefe that she could not disable herself as that could only be done by the Company’s medical department and at least once she was told that she would be abandoning her job by staying away from
work without Company permission. Moreover, King’s request of Dr. Abate that he
contact the Company makes clear that she knew she had been ordered to report for work.
King testified that she came into work when ordered for fear of losing her job. From
those several statements, a majority of the Board is persuaded that the Union and King
understood that the abuse for which King was being disciplined included her failure to
report for at least light duty work after she had been approved for that work by the
Company’s Medical Director.

The next question for the Board’s determination is whether, as the Company
argues, Dr. Keefe’s determination that King could work light duty was final. As the
Union correctly points out, the Industrial Plan makes determinations made under “the
direction of the Medical Director and the Vice President in charge of Human Resources
of the Company…” final. As such, the Union argues that the Medical Director does not
have sole authority to make a determination about King’s capacity to work. That, argues
the Union, is a shared right and responsibility, which was not satisfied by the Medical
Director’s examination and determination alone.

The Board majority concludes for several reasons that the terms of the Industrial
Plan regarding finality of Company decisions have been satisfied. First, the
determination by the Vice President of Human Resources need not be made by her
personally. An agent can perform duties or undertake responsibilities for and on behalf
of a principal. The involvement of the several labor relations personnel in the meeting
which led to King’s suspension and discharge, in which they were aware of Dr. Keefe’s
determination, and agreed with it, is sufficient to establish an agency relationship. Those
persons could act individually or collectively for and on behalf of the Vice President of Human Resources. As their actions were not disavowed by the Vice President, the agency relationship is satisfied. Second, the record evidences that in cases of medical determinations, it is the Company's Medical Director alone who has made the decisions about whether and when employees could return to work. Dr. Keefe's testimony, that he has made the final decision as to whether and when an employee was able to work for the several years he has served as the Company's Medical Director, is unrebutted. Third, the Industrial Plan unquestionably leaves to the Company's agents the power to make final decisions "with respect to all questions arising thereunder..." There is no role reserved for agents of the Union. Thus, when multiple company agents, including the Medical Director and labor relations/human resource personnel concur in a decision about capacity to work, the terms of the agreement are fairly considered to have been satisfied. That those nonmedical persons clearly accepted the opinion of Dr. Keefe and deferred to his professional judgment is logical and in compliance with the contract.

The "finality" language of the Industrial Plan raises another issue. The agreement refers to decisions about "incapacity for work." A question is presented, therefore, as to whether the agreement encompasses decisions about "capacity" to work. Dr. Keefe determined that King had the capacity to work. This case does not involve a determination, like that in the Fallon award, that the employee could not work. However, the finality bestowed upon medical determinations under the Industrial Plan is not limited to "incapacity" decisions only. The language preceding the reference to "incapacity" covers "all questions arising thereunder." That language, by itself, captures "capacity"
determinations and makes them final. Moreover, it would be illogical to read the reference to "incapacity" to exclude determinations about "capacity." More often than not, the issue will be whether an employee who is out of work has the capacity to work. Less frequently will the issue be whether an employee who wants to come back to work is unable to do so. The Board cannot conclude reasonably that the parties intended to have the Medical Director decide an employee's incapacity to work but not the more frequently recurring question of an employees' capacity to work.

The Union argues lastly that the Medical Director's decision is not final because the "Third Doctor Provisions" of Article XXVIII and the Book of Stipulations' Letter 15 apply and were not used. However, the third doctor provisions by their express terms do not waive the terms of the Industrial Plan. The Company has agreed to only consider using a third doctor on a case by case basis. In other words, use of a third doctor was discretionary with the Company.

In summary, the Board's determinations to this point are:

1. the grievance is arbitrable;
2. the Industrial Plan provisions apply;
3. the grounds for suspension and discharge include both fraud and a failure to report for work as ordered;
4. the Medical Director's determination that King could work light duty on and after January 19 was final by contract and not reviewable by this Board.

In this last regard, although there could be room for argument that an arbitrary Medical Director's determination is reviewable notwithstanding the finality bestowed
upon such determination by contract, that need not be decided in this case. The record here, including the medical testimony and the videotape, is sufficient to preclude a claim that the Medical Director’s determination regarding King’s capacity to work was irrational or otherwise arbitrary.

This leaves for consideration only the question of whether King’s suspension and discharge was for just cause, that is, whether it was reasonable based upon the information the Company had at the date of the suspension and discharge. The Board majority concludes that King was properly suspended and ultimately discharged for failing to report for work pursuant to the Medical Director’s order to report which was communicated to King and never rescinded.

There is sharply conflicting opinion and testimony about King’s physical condition which consumed virtually all of the several days of hearing which were held in this case. But as the Medical Director’s decision as to King’s capacity to work was final, the Board is without power under the contract to determine whether, as the Union asserts, King was suffering from a chronic, painful and disabling neck, arm and shoulder injury until long after her suspension and discharge or whether, as the Company claims, King falsely represented her physical condition to the Company and every physician and other practitioner who examined her. Therefore, the Board does not consider the fraud and dishonesty allegations which are a part of the Company’s accusations against King. To reach those allegations would require a determination about King’s capacity to work which has already been finally determined by Dr. Keefe. As the parties well know, this Board is bound by the terms of the collective bargaining agreement. As correctly
recognized by the Board in the Fallon award, a review of the “final” decision about
King’s capacity to work would change the terms of the parties’ agreement, a result which
is prohibited by Article XXXIII. That Article prevents the Board from adding to,
subtracting from or modifying any of the terms of the agreement. For the Board to
conclude that King could not work, despite Dr. Keefe’s final decision that she could,
would cause the Board to substitute its view for that of the Medical Director’s in
violation of the express proscriptions of Article XXXIII.

In assessing the reasonableness of the Company’s decision to terminate King upon
the ground that she had failed to return to work as ordered, the Board must also consider
whether King had fair notice of her obligation to report for work and of the consequences
for noncompliance.

In this regard, it is clear that the Company did not give King written notice that
she had to report for work and that she would be terminated if she did not as it usually
does in cases of this type. Dorant testified that normal procedures were not used with
King because he was discussing King’s situation with Union representative Thomas
Burke and was investigating Burke’s claim that King was not being treated fairly.

Although written notice to King would have been the better course for the
Company to follow, its failure to adhere to its customary practice does not mean that its
decision to terminate King is per se unreasonable. The contract does not require written
notice. The reasonableness of the disciplinary action must be decided in the totality of all
relevant circumstances. The Board majority is persuaded for the reasons stated
previously that King fully understood her obligation to report for work, the procedures
she had to follow if she was to be properly released from that obligation, and knew that noncompliance with Company directives and procedures could lead to her discharge from work.

The Union claims that after January 19 no one, not even Burke, told King that her job was in jeopardy if she did not report for work. Although the Company did not contact her after that date, it is unlikely that Burke did not. Burke did not testify, although he could have been called by either party. King was in frequent communication with Burke after that date and she was keeping a log of her daily activities at Burke’s suggestion to “protect” herself. Moreover, Burke told King to get a lawyer. These statements had to have alerted King to the fact that her job was indeed being placed at risk by her not reporting for work on and after January 19. Ultimately, however, it is unnecessary to decide whether anyone specifically told King after January 19 about her obligations and the consequences of noncompliance. King had been told this several times before January 19 and nothing had occurred to change that instruction except King’s contention that she assumed Dr. Abate had persuaded the Company that she could not work even light duty, an issue to which the Board turns next.

The Board has considered the Union’s arguments that King reasonably relied upon the advice of Dr. Abate not to report for work because working, even light duty, was not allowing her to heal and was actually aggravating her condition. There are several points to be made in response to this claim.

First, King had been told several times by different Company officials on different dates that her doctors could not disable her from work and that only the Company’s
medical department could do that and that she would be abandoning her job if she did not report for work as required. King several times reported to the Medical Department at the Company's directives to secure the necessary permission to remain away from work because she knew she needed to be excused from work by the Company. This was brought to King's attention directly on January 14 when Dr. Keefe told her to report for light duty despite King's statement to him that Dr. Conway believed she could not work. That is when Dr. Keefe told King that only his opinion counted. King herself testified that she was told by the Company that she had to work unless the Medical Department, which has the "final say," disabled her from work even though "it's going against my doctor's wishes." Therefore, King knew that she could not rely on any other doctors' opinions as a basis to stay away from work despite an order to report from the Company's Medical Director.

King argues, nonetheless, that she asked Dr. Abate's office to inform the Company that she could not work and that she assumed that the Company had accepted Dr. Abate's opinion because she never heard from the Company after January 19 that she had to come to work. The Board majority does not find King's "assumption" that she had been excused to be reasonable. King had been told unequivocally that she had to come to work. That order was clear and it was never rescinded. At the very least, King should have checked with the Company to ascertain first whether Dr. Abate's recommendation that she not work was communicated to the Company and, second, whether the Company accepted Dr. Abate's recommendation. King already knew from her conversation with Dr. Keefe on January 14 that the Company did not have to accept
another doctor’s opinion, not even that of Dr. Conway who served as a Company consultant. By the time in early March that King received notification of her suspension and discharge, she had been out of work for approximately one and one-half months. King made no effort to check with anyone in the Company during this time about her status and she made no attempt through the Company or the Union to try to adjust her working conditions so that she might be able to work at least light duty. For example, if there had been any discussion about the problems allegedly caused by her computer workstation, that could have been easily corrected. Her decision to abide by Dr. Abate’s recommendation and to not report for duty as ordered without contact with the Company is precisely the type of self-help abuse of the Company’s disability plan that was discussed in the Gravinese award. It was an abuse of the Company’s benefit plans for King to simply ignore Company directives without even an inquiry as to whether the directive still applied in the face of Dr. Abate’s contrary opinion. King was not privileged to make Dr. Abate the Company’s agent nor could she or Dr. Abate negate Dr. Keefe’s decision that King was capable of working. Put another way, King could not rely on an assumption that Dr. Abate’s recommendation was reported to and accepted by the Company to excuse her from a duty to report for work as ordered. There is not even evidence that King contacted the Union in these regards. Even if King were uncomfortable for one or more reasons in speaking with the Company’s personnel about her medical condition or her working conditions, she could have and should have contacted the Union and asked its agents to assist her in some way with the order to report for work.
Nor can King find any reasonable defense for her failure to report to work in Dr. Conway’s statement to her that she should choose her treating physician (Dr. Abate) and follow his advice. Dr. Conway was simply informing King that she should not be seeing two doctors simultaneously for the same condition. But nothing in this statement could have led King to believe reasonably that Dr. Conway had bound the Company to accept Dr. Abate’s recommendations when Dr. Keefe’s determination as to her ability to work was to the contrary. Indeed, King had raised with Dr. Keefe on January 14 that Dr. Conway did not want her to come back to work at that time and Dr. Keefe told her unequivocally that it was only his determination that counted as to whether and when an employee is required to return to work from an industrial disability.

By King’s own admission, she stayed away from work on Dr. Abate’s advice because she believed that this was the only way her condition would improve. But in coming to this decision, she intentionally disobeyed the directives of several Company officials, including, most importantly Dr. Keefe’s, whose decision that she could work, and, therefore, had to work, was final under the bilaterally negotiated contract terms. Whether Dr. Keefe’s determination was accurate or not is immaterial because once it was reasonably made it was final by contract and not reviewable by this Board in the context of this grievance.

It should be obvious, therefore, that we do not reach any determinations on the medical accuracy of anyone’s diagnosis or the credibility of any witnesses who testified, one way or the other, about King’s medical condition. And, again obviously, our
decision does not touch upon matters of disability or compensation payments King received from any source.

Finally, the Chairman wishes to express to Ms. Sills and Mr. Dawson his commendations for the highest professionalism and competence in the presentation of their respective cases and for the uncommon excellence of their briefs.

AWARD

The grievance is arbitrable.

The suspension and discharge of King was confirmation of her having abandoned her job by failing to comply with the Medical Director’s determination that she was capable of working and required to report for duty. The suspension and discharge did not violate the collective bargaining agreement. The grievance challenging the Company’s suspension and discharge is denied.

Dated: February 25, 2002

ERIC J. SCHMERTZ
Impartial Board Chairman

Dated:______________________________

ROBERT E. MOTTA
Company Member, Dissenting as to arbitrability; Concurring on the merits

Dated:______________________________

WILLIAM CARR
Union Member, Concurring as to arbitrability; Dissenting on the merits
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: February 25, 2022

Eric J. Schmertz
IN THE MATTER OF THE ARBITRATION

between

LOCAL 369 UTILITY WORKERS UNION OF
AMERICA, AFL-CIO

-and-

NSTAR ELECTRIC & GAS COMPANY

In accordance with the arbitration provisions of the collective bargaining agreement between the above-named Union and Company, a tripartite Board of Arbitration was appointed to hear and decide the following stipulated issue:

Did the Company have just cause to discharge JAMES ROGERS on or about May 18, 2001? If not, what shall be the remedy?

Eric J. Schmertz was named as the Chairman of the Board of Arbitration. Ms. Lisa Amber and Mr. Phillip Trombly served respectively as the Company and Union designees to the Board of Arbitration.

A hearing was held in Dedham, Massachusetts on February 14, 2002 at which time Mr. Rogers and representatives of the Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Oath of the Arbitrators was waived. A stenographic record of the proceedings was taken and the parties filed post-hearing briefs.
The Board of Arbitration met in executive session and deliberated on May 10, 2002.

Having duly considered the proofs and allegations of the Company and the Union, a majority of the Board of Arbitration makes the following AWARD:

There was just cause for the discharge of JAMES ROGERS.

Eric J. Schmertz, Chairman

Lisa Amber, Concurring

Phillip A. Trombly, Dissenting

DATED: June 22, 2002

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

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

As the parties well know, as a matter of law, an Opinion in explanation of an Award is not required. In most cases, an Opinion provides useful guidelines for contract interpretation and future application and/or an analysis of the evidence and reasoning in support of the Award.

However, there are rare times when, with the issue fully and finally decided by an Award, an Opinion is unnecessary, inappropriate or even counter-productive. I deem this case to be one of those.

The Chairman has written an Opinion which he chooses not to issue, unless asked to do so by the Union or by both parties by mutual request.

Respectfully,

Eric J. Schmertz
Chairman
The stipulated issue is:

1. Are the duties being performed by JOAN YOUNG at the Caribbean-American Family Health Center, Charge Nurse duties entitling her to Charge Pay under Article 4 Section 5 of the collective bargaining agreement?

2. Are the duties being performed by COLLEEN DOWLING on Saturdays at the Lutheran Medical Center Walk-in clinic at the Family Health Center, Charge Nurse duties entitling her to Charge Pay under Article 4 Section 5 of the collective bargaining agreement?

A hearing was held on May 7, 2002 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.

Each side filed a post-hearing memorandum.
The actual contractual provision that is relevant to this case is Article 4 Section 5. It reads:

**Differential for Work in a Higher Classification.** A Registered Nurse who is required to work in a higher rated bargaining unit position will be paid an additional $25 per 7½ hour shift for that position from the first day of such assignment effective March 1, 2001. The amount shall be prorated for shifts other than 7½ hours. Designation of who is to work in a higher rated position shall be made by the Director of Nursing or supervisor designee.

In the instant case, it is stipulated that if the grievances are granted, back pay shall be retroactive only to the date the grievances were filed.

Also, as the stipulated issue provides, the claim of grievant Dowling for Charge Pay is limited to her work on Saturdays when a supervisor is not present in person.

As to grievant Young, the claim for Charge Pay is for the periods of time that a Nurse Manager is not present.

Both grievants are Registered Nurses. There is no dispute that the duties of Charge Nurse represent "work in a higher rated bargaining unit position." Hence, both grievants are eligible for Charge Pay, if they perform Charge Nurse duties.

I would so find, notwithstanding the last sentence of the foregoing contract provision, and dispute the fact (and the Employer's defense) that neither grievant is entitled to Charge
Pay because neither were "designated" to work in a higher rated position by the Director of Nursing or supervisor designee.

I am satisfied that Article 4 Section 5 was not intended and cannot be interpreted to deprive an employee of the higher pay differential if work in the higher classification is actually performed merely because that employee has not been designated to work at the higher rated duties. Any such interpretation would be an unfair circumvention of the legitimate right to pay for the level of work performed, and could render Article 4 Section 5 a nullity.

So here I reject the Employer's assertion that the grievants are not eligible for Charge Pay because they were not officially "designated" as Charge Nurses by the Director of Nursing or supervisory designee. In other words, if the higher rated job is in fact worked, the "designation" to it is implicit and constructive.

So, the issue herein narrows to whether either or both grievants worked as Charge Nurses for the periods of time referred to in the issues and the stipulations.

The Union asserts that grievant Dowling is a Charge Nurse on Saturdays because she has been "designated" as a "troubleshooter": handles patient complaints; provides and schedules breaks and lunch periods for medical assistants; makes
decisions to relocate patients due to security needs; orders and is responsible for medications; files daily reports; rearranges schedules and patients if a provider fails to show up; calls security to handle disruptive patients and children; handles emergencies; and has initiated discipline of an LPN and an impaired provider.

In short, the Union contends that as the only Nurse on duty on Saturdays, she must assume responsibilities normally handled by supervision. And that though she is instructed to contact Supervisors Lee and/or Vasquez for decisions in unusual situations, neither has been readily available because Vasquez has no phone and Lee has failed to respond to her beeper. Leaving it to Dowling to make medical and administrative decisions on Saturdays that otherwise would or should be made by Vasquez or Lee.

As to grievant Young it is essentially the Union’s position that she performs duties at the Caribbean-American Family Health Center similar to those performed by a RN who gets Charge Pay at the off site Sunset Terrace Clinic.

It asserts that until last July 2\(^{nd}\) she was the only RN there with no supervisor on site. It asserts that she delegates and assigns staff and is consulted by the medical staff as to procedures which she schedules in conjunction with the site
director; changes and schedules medical assistant’s breaks and lunch; handles clerical and patient problems; is solely responsible for ordering supplies; is in charge of narcotics and medications; schedules or delegates making appointments for patients; orients new nurses; arranges transportation to the Lutheran Medical Center, and is only one of three with keys to the Center. Also, it is asserted that she rearranges schedules if a provider doesn’t show up and may arrange to send patients to the main facility by taxi in coordination with the medical director and site director; acts as liaison with other clinics and clients; and maintains the security of clinic money.

The Employer’s position is simply that the presence of a single RN at an off site clinic does not make that RN a Charge Nurse. Rather, with the exception of the Sunset Terrace site, (which the Employer explains is an “aberration based on the unique job description and responsibilities...”) the job of Charge Nurse is essentially based on a responsibility to supervise a staff of other nurses. And that therefore the Charge Nurse classification is not applicable nor intended to apply to off site clinics where there is no staff of nurses. Rather, the Employer asserts, all of the work and duties testified to by the grievants and advanced by the Union on the grievants’ behalf, fall within the normal and required duties of the Registered
Nurse classification. And if there has been any communication problem for grievant Dowling (i.e. in contacting supervisors Lee or Vasquez), that can and should be cured if necessary by bargaining or administrative remedies, but does not justify the establishment of a Charge Nurse job for grievant Dowling.

Frankly, the testimony of the grievants, in the absence of testimony by an established Charge Nurse, gives me no opportunity to make comparisons with what the grievants do and what a recognized Charge Nurse does. It appears to me that at both clinics, in the absence of a Nurse Manager or other supervision on site, both grievants may well be performing some duties beyond the regular RN classification. But, the testimony and evidence available to me fall short of establishing that those duties either quantitatively or qualitatively rise to the level of a Charge Nurse.

The best evidence, and indeed in the absence of direct comparison testimony, is this job description of Charge Nurse (Employer Exhibit #1) and Registered Nurse (Employer Exhibit #3). The former, as the Employer asserts is a classification applicable to the main Lutheran Medical Center facility, and not to off site clinics. More significantly and also as the Employer asserts, it repeatedly refers to duties
relating to overseeing staff nurses in addition to traditional nursing duties. It provides, for example:

"Prepares assignment sheet - checks with Nursing Office to confirm staffing - assigns staff to districts."

Intershift Report:

From outgoing Charge Nurse

Ensures staff is going to break on time

Receives report from primary nurses...

Takes names of staffing for evening shift

Reports off to oncoming Charge Nurse

(All emphasis supplied)

There is no contrary evidence to the Employer’s contention that the foregoing applies to staff of nurses.

An examination of the Registered Nurses job description includes Responsibilities/Work Performed that fairly covers what the grievants do principally. Indeed, one of the enumerated responsibilities is significantly and obviously inclusive and applicable. Namely, under Professional Qualities/Characteristics, the RN:

"is an integral member of the health care team within the unit/site to coordinate patient care."

Again, in the absence of more detailed evidence comparing what the Charge Nurse does and what the grievants do at
their clinics, I am unable to find that the duties the grievants are required to perform, even as the sole RN, exceed that encompassing assignment.

I acknowledge that I am troubled by the fact that a sole RN at the Sunset off site facility Health Center is designated as the Charge Nurse and receives Charge Pay. But again, aside from the general assertion that the duties of that Charge Nurse are the same as those performed by the grievant(s) there is not sufficient evidence or testimony of the precise duties of that Charge Nurse, nor of the circumstances resulting in that designation. With the traditional burden of proof on the Union, it was the Union's duty to bring forth direct evidence of the similarities of both functions. That the Employer merely claims it as an "aberration" leaves essential questions, particularly comparisons, unanswered, but does not cure the deficiency in the Union's burden on that question.

Finally, I am not satisfied with the present arrangement on Saturdays at the Pediatrics Walk-in clinic, where grievant Dowling has been unable to reach supervisors when alleged important medical or administrative decisions have to be made. Because the record is not clear with examples of the magnitude or urgency of those decisions, I am unable to rule that the poor communication system warrants an award of Charge Pay.
But on the other hand, I am not prepared to accept the Employer’s view that it is either insignificant or a matter for bargaining. Rather, I conclude and direct that the Employer take steps to make a system of communication between Dowling and off site supervision efficient, effective and timely.

A failure of the Employer to do so, and/or a continuation of the difficulties Dowling has experienced in reaching supervisor for instructions and/or assistance will reserve to grievant Dowling and the Union the opportunity to renew her grievance de novo prospectively but not retroactively. Also, I do not accept the Employer’s base argument that the Charge Nurse classification does not and will not apply to off site clinics. Rather, I conclude that if a RN at an off site facility does in fact, and if probatively established, performs Charge Nurse duties, she is entitled to Charge Pay. Indeed, as I stated, the Sunset Terrace circumstance has not been adequately explained to my satisfaction. Therefore in the interest of equity and fairness, the Union’s opportunity to prove that what Dowling and Young are doing is the same as what is done by the Charge Nurse at Sunset Terrace and the Charge Nurses at the main facility, is also reserved, but prospectively, not retroactively.
The Undersigned, duly designated as the Arbitrator and having been duly sworn, and having duly heard the proofs and allegations of the above-named parties makes the following AWARD:

Subject to the stated reserved rights the claims of COLLEEN DOWLING and JOAN YOUNG for Charge Pay are denied.

Eric J. Schmertz, Arbitrator

DATED: June 24, 2002

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 five-day suspension of DOROTHY TUOHY? If not, what shall be the remedy?

Hearings were held on June 7th, October 10th, and December 7th, 2001 and January 31st, 2002 at which time Ms. Tuohy, hereinafter referred to as the "grievant" and representatives of the above-named Union and Center appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived and the parties filed post-hearing briefs.

The grievant, a Registered Nurse and the nurse in charge at the time of the event (or for a substantial part of the events) was suspended five days for "ordering" a patient (patient...
"A") out of the detox unit of the Center’s Acute Care Addiction Program in the middle of the night and into the street on May 5, 2000, despite instructions from supervision that she had no authority to do so.

The grievant denies the charge. She and the Union on her behalf assert that at no time did she order and implement the involuntary removal of patient "A," but rather that patient "A" voluntarily left the facility and/or did so under the procedures of voluntarily leaving Against Medical Advice (AMA).

After a review of the evidence and testimony I find most credible and determinative the testimonies of Security Officer Corbett and Patient Care Technician Charpeosette.

He testified that the grievant called security stating that she had a patient whom she wanted removed (or "thrown out") because of his disruptive and abusive behavior. And that he and another security guard responded to that call by going to the floor where patient "A," was located and escorted him out of the facility and into the street.

She testified not only that she heard the grievant identify patient "A" to the security officers but that the grievant expressly stated that he (patient "A") was the one to be removed. Also significantly, as referred to later herein, she
testified that patient “A” apologized to the grievant for his behavior and insulting remarks to her and pleaded to be permitted to remain in the facility.

I find these two sets of testimony credible and as such wholly inconsistent with the grievant’s assertion that patient “A” left voluntarily and/or properly under AMA procedures.

What happened, I conclude is that patient “A” was disruptive and abusive. He and others demanded the right to smoke, to watch TV and engage in other activities contrary to the Clinic’s rules. Patient “A” was leading the group and verbally insulted and abused the grievant. He created a situation bordering on chaos on the floor and appeared to be out of control. Though disputed, he may have threatened the grievant with bodily harm. Also, at one point he threatened to leave the facility and take other patients with him.

So confronted, I conclude that the grievant lost patience and decided to handle the problem by removing patient “A” from the facility and so instructed the security officers; who followed her instructions.

However, it is clear that at some point before Patient “A” was removed the grievant called her superior supervisor stating that she wanted to remove patient “A” involuntarily. And
she was told by her supervisor that she could not do so involuntarily (or "Administratively") without following certain prescribed steps, including the approval of a physician.

Despite this authoritative rejection by supervision of the grievant's plan I must conclude that the grievant remained angry and possibly frightened by patient "A's" outburst and ordered patient "A" out of the facility nonetheless by the call to security or its later implementation.

The foregoing took place, I find, before the grievant left the floor to go to the hospital with "chest pains." I reject her assertion that because she left the floor before patient "A" was actually escorted out she had nothing to do with his removal and that it was the responsibility of Nurse George who took over as the nurse-in-charge.

Even if not there when security escorted patient "A" out, it was the grievant that set that action in motion and facilitated it with her earlier order to security.

That patient "A" did not leave voluntarily, though he may have threatened to do so earlier, is apparent. For if he did or wanted to do so, there would be no reason for him to apologize to the grievant for his misbehavior and certainly no reason for him to plead to be allowed to stay. As stated earlier, I accept as accurate and credible the testimony on this point by Ms. Charpeosette.
The Union’s reliance on an AMA form (Union exhibit #2) as evidence that patient “A” left voluntarily under AMA procedures is not persuasive. The form was not signed by patient “A,” but rather bears the notation “refused to sign.” His refusal to sign is completely inconsistent with the claim that he left voluntarily. Indeed, had he left voluntarily or wished to do so he would have signed the form and left under AMA procedures. In any event, in the absence of a completed form or other supporting testimony, I cannot conclude that Union exhibit #2 is probative evidence of leaving the facility voluntarily. Juxtaposed against the aforesaid testimony, the inconclusive form (exhibit #2) is clearly pre-empted by direct testimony to the contrary by Corbett and Charpeosette.

Also, if the grievant no longer intended to have patient “A” removed at the time she left the floor to go to the hospital, that change in intention was never expressed or communicated to security or to Nurse George. So her earlier order to security was implemented and she continues to bear responsibility for it.

That the grievant was angry, exasperated or even thought she was threatened is an understandable explanation for what she did. But it is not an excuse. She is a professional nurse, trained especially in the care and treatment of persons
like patient "A." Considering patient "A's" addictions, outbursts and misbehavior are, I believe, expected if not customary. Professionally and legally she was obliged to handle the outbursts, the insults and the misbehavior of patient "A" differently then "throwing him out" of the facility in the middle of the night. Security is available to contain the problems, but not, as here, to involuntarily remove the patient. Especially when, as here, the grievant had been expressly told by supervision that she could not do so.

Accordingly enough of the charges have been proved to sustain the disciplinary suspension.

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

There was just cause for the five-day suspension of DOROTHY TUOHY.

Eric J. Schmertz, Arbitrator

DATED: April 5, 2002

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 threshold issue is:

Whether the grievances of RN JOAN YOUNG and RN COLLEEN DOWLING are arbitrable?

A hearing was held on January 17, 2002 at which time Ms. Young and Ms. Dowling appeared, together with representatives of the above-named Union and Employer.

Ms. Young claims that she is entitled to "Nurse-in-Charge" pay for working at the Caribbean-American Family Health Center.

Ms. Dowling claims that she is entitled to "Nurse-in-Charge" pay for working Saturdays at the Pediatric walk-in clinic.
The Employer contends that both grievances are time-barred from arbitration under various sections of Article 19 of the collective bargaining agreement. The pertinent sections are:

2. **Informal Discussion.** A Registered Nurse who has a grievance will present the claim promptly to the Registered Nurse’s supervisor. The Registered Nurse and the supervisor will discuss and attempt to resolve the complaint.

3. **Procedure and Time Limits: Step one.** If the grievance is not adjusted by informal discussion as provided for in paragraph 2, the Union may serve a written notice of grievance on the applicable Clinical Director, or designee, within ten (10) days after occurrence of the facts on which the grievance is based. If no such notice is served in the time specified, the grievance will be barred. Within ten (10) working days thereafter, or within five (5) days following any conference between the local representative and the Clinical Director or designee, the answer of the Clinical Director shall be given to the local representatives.

9. **Time Limits and Miscellaneous.** All time limits herein specified shall be deemed to be exclusive of Saturdays, Sundays and holidays. The time limits specified in this Section shall be deemed to be substantive provisions and failure to comply with such time limits or any of them shall be a complete bar to any action by reason of such grievance. Failure on the part of the Employer to answer a grievance at any step shall not be deemed acquiescence thereto and the Union may proceed to the next step.
The Employer points out that Nurses Young and Dowling worked in the positions and at the locations in their grievances for 3½ years and 9 months respectively before they filed grievances. And that during that time there had been no substantive or significant changes in their job duties or responsibilities.

To wait those respective periods of time before grieving, argues the Employer, is not to "present the claim promptly..." within the requirement of Section 2 of Article 19. (emphasis added)

Moreover, argues the Employer, the passage of that amount of time constitutes a failure to comply with the provision in Section 3 that the grievance be filed in writing "within ten (10) days after the occurrence of the facts on which the grievance is based." (emphasis added) Or, in other words, 3½ years and 9 months of unchanged conditions are too far beyond ten (10) days from the "occurrence" of the basis for the grievances.

And, finally, Section 9 expressly provides that the foregoing time limits are mandatory statutes of limitation.

I am persuaded that the requirement of "making a prompt" claim and reducing the grievance to written form within ten (10) days must be read by a rule of reason and within traditional interpretations of the principles of laches and statutes of limitation. In my experience, the well-settled rule
is that time limits and a requirement of "prompt" or expeditious action begin to run from the time the facts of the dispute are known or should have been known to the person(s) affected.

Therefore, in the instant case, the grievants were required to make their initial claims to their supervisors "promptly" after they knew or should have known that they were (in their opinion) entitled to "Nurse-in-Charge" pay.

Section 3 is unclear as to whether the ten (10) days includes the informal discussion of Section 2 or is a separate time limit thereafter. Logic compels an interpretation that the ten (10) days begin to run after the informal discussions of Section 2 have failed to resolve the dispute. Otherwise, the ten (10) days could be consumed within the Section 2 informal discussions, ousting the grievance from Section 3 application. I am certain that that result was not intended.

Therefore, for the instant case, the grievants were required to reduce their grievances to written form within ten (10) days of the completion and failure of the informal discussions.

I find the facts in this case to be as follows:

Nurse Dowling's undisputed testimony was that though she was in the job in question since February 1, 2000, she did not become aware of the circumstances warranting Nurse-in-Charge pay until November 2000. She testified that it was at that
latter day, because of staff reductions at the walk-in clinic that her troubleshooting responsibilities justified the higher rate of pay.

Thereafter, in December 2000 she raised the issue with supervisor Lillian Vasquez, who promised to discuss it with Sue Lee, the Director of Nursing. Dowling heard nothing further from Vasquez or Lee.

I conclude that after November 2000, when Dowling became aware of her claimed entitlement to Nurse-in-Charge pay, her asserted claim to Vasquez in December 2000 adequately met the "prompt presentation" requirement of Section 2. Considering that triggering event, I find no evidentiary basis to hold that she should have known earlier. Thereafter, Dowling filed a written grievance on January 18, 2001. Not having received any answer from Vasquez or Lee, I conclude that the time from the point that the Employer should have given an answer, to January 18, 2001 when the written grievance was filed, adequately met the ten (10) day requirement of Section 3.

I find similarity with regard to the grievance of Nurse Young. She testified, again unrefuted, that from discussions with another employee (a Ms. Granderson from Sunset Terrace clinic) who was receiving Nurse-in-Charge pay, she first learned of the facts upon which her claim is based late in the year 2000 and raised it with Ms. Hall, the site director of the
filed within the time limits of Section 2 or Section 3. So, not only has the Employer not met the burden of proof of non-arbitrability, but in failing to assert that defense in its various grievance step answers, waived any such objection, or at least did not consider it a defense.

Accordingly, the grievances of Nurses Dowling and Young are arbitrable and a hearing on the merits of those grievances shall be set. Of course, if the grievance(s) are sustained on the merits, and if there is any retroactive monetary payments, they shall not go further back than the date of the grievances.

Eric J. Schmertz, Arbitrator

DATED: February 7, 2002

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.