have been psychologically or otherwise impeccable is simply unavailing here because the issue in focus concerns compliance with the requirements of the Parties' Collective Bargaining Agreement. Satisfaction of other standards is of no significance in this tribunal. The Company is free to achieve whatever lofty objectives it sets as targets, but its success in doing so does not excuse noncompliance with apposite contractual mandates.

The evidence indicated that the General Aptitude Battery screened out about 25% of the individuals taking the test, and the Electronics I test screened out approximately one-third of the test-takers. The Company submits that such cut scores are fair and reasonable. Furthermore, the Company dismisses the possibility of these individuals thus cut out being ones who may be able to perform the job as a mere incident of the imperfect testing world.

The Company is by direct implication proscribed from testing for purposes beyond the determination of sufficient qualifications to perform the work of the Installer-Repairperson job. Inasmuch as it has clearly undertaken to reach beyond its contractual license and to utilize testing which routinely eliminates even certain percentages of test-takers who may very well possess sufficient qualifications to perform the job, it has inexcusably violated its Collective Bargaining Agreement with the Union. There is no sufficient business justification for this violation which the Arbitrator is authorized to defer to, regardless of how legitimate the Company's goals may be.

A failure to pass the tests which precipitated this arbitration does not indicate that a particular test-taker/bidder lacks sufficient qualifications to perform the Installer-Repairperson job. The cutoff scores were not selected to measure sufficient qualifications for this job. Because the tests do not measure only "sufficient qualifications" for the job, they cannot be utilized to obstruct the exercise of seniority rights via the "JOB POSTING AND BIDDING PROCEDURE" set forth in Appendix B of the Parties' Collective Bargaining Agreement.

The above-quoted issue at the heart of this case must be affirmatively answered. The Union's case has merit and appropriate relief must be tailored to make affected employees who can demonstrate that they possess sufficient qualifications to perform the Installer-Repairperson job whole.

AWARD

The grievance is granted. The undersigned retains jurisdiction to receive additional evidence and/or to schedule additional proceedings over the subject of fashioning appropriate remedies until March 1, 1995, in the event that the Parties are not themselves able to settle those matters.

KELLY-SPRINGFIELD TIRE CO. —

Decision of Arbitrator

In re THE KELLY-SPRINGFIELD TIRE COMPANY and UNITED RUBBER CORK, LINOLEUM AND PLASTIC WORKERS OF AMERICA LOCAL 745, Case No. 94-4, November 7, 1994

Arbitrator: Lamont E. Stallworth

REMEDIES

— Overtime pay ▸118.806

Employee who was improperly discharged pursuant to rule prohibiting violation of physician's restrictions is awarded back pay for 38 lost overtime days, despite employer's contention that light-duty assignment he had at time of discharge did not call for overtime, where company presented no evidence that it was unable to relocate employee to suitable position in September 1993, when discharge occurred, and, if it had, he would have worked 38 overtime days.

Appearances: For the employer — James Garber, manager of industrial relations. For the union — Larry Timms, grievance and negotiating committeeman.

OVERTIME PAY

The Issue

STALLWORTH, Arbitrator: — The Parties submitted the following issue(s) to the Arbitrator:

1. Whether the Grievant shall be awarded backpay for loss of overtime opportunity after his discharge by the Company on September 17, 1993.

Background

R—, the Grievant in the instant dispute, had been employed with the Company for approximately sixteen (16) years prior to his termination Sep-

tember 17, 1993. At the time of his termination, the Grievant held the position of Cure, Inspect and Classify Specialty Tires.

The Grievant is five feet and four inches (5'4") and has been involved in weight lifting since he was a teenager. The Grievant began experiencing lower back pain in the Spring of 1993, and sought medical help. The Grievant informed Area Manager Nate Allison about the back pain he was experiencing from straining to lift tires from a bladder. The Grievant requested a modification to the layout of the press row because he had to strain his back in order to unload tires due to his short stature. The Company failed to comply with the Grievant's request.

The Grievant sought medical treatment for back strain on June 9, 1993, June 11, 1993, June 25, 1993, July 20, 1993 and on August 3, 1993. The Grievant was placed on "light duty", with a thirty (30) pound weight lifting restriction on August 3, 1993. His physician also recommended to the Company several times that the Grievant be placed in a position which would be more suitable for his height.

On September 8, 1993, the Grievant was observed by fellow employee Michael Thompson, dead-lifting 365 pounds at the local YMCA. On September 14, 1993, the Grievant was called to a meeting at which G.E. Erdmier, Passenger Business Center Manager, Larry Winters, Safety/Training Coordinator, Committeemen Larry Timms and Todd Hastings were also present. The Grievant was advised that the Company was considering discharging him for this violation, and that he was to obtain any documentation which would support the Grievant's position.

A second meeting with the same participants was held on September 17, 1993, during which the Grievant presented a Restriction/Release Form dated September 17, 1993 and signed by his physician stating that his weight restriction had been increased to fifty (50) pounds of lifting away from the body. Management determined that this document was insufficient to prevent him from terminating the Grievant, and therefore terminated him effective immediately.

The Grievant admitted to dead-lifting large amounts of weight as part of a weight training program which he believed would strengthen his back. His physician did not prescribe weight lifting in order to improve the Grievant's back problem. It is within this factual context that the instant dispute arose.

In an award dated June 27, 1994, the Undersigned Arbitrator determined that the Company did violate the Contract when it terminated the Grievant. The Undersigned Arbitrator found that the Grievant did have a recurring back problem caused by the repeated straining of his back because he was too short to properly lift tires off of the press row. The Undersigned Arbitrator further determined that the Company failed to adequately investigate the situation before discharging the Grievant.

This Arbitrator also determined that the Company did not present evidence at the hearing to show that a rule prohibiting the violation of a physician's weight restriction had been promulgated to the employees, or that the employees were aware of the consequences for violating the rule. The Undersigned Arbitrator also held that the Company should have accommodated the Grievant's "mechanical disadvantage" by either transferring the Grievant to another position where his height would not impede his productivity, or to somehow adjust the row press so that the Grievant could operate it without straining.

The Undersigned Arbitrator issued the following award on June 27, 1994:

> The Grievant shall be reinstated with full back pay, benefits and seniority. Furthermore, the Company must, without suffering undue hardship, accommodate the Grievant/s height, by either changing the equipment that the Cure, Inspect and Specialty tire uses or by transferring the Grievant to another more suitable position.

The Company's Position

The Company argues that the Grievant was assigned to light duty at the time of his discharge, and therefore, the calculation of backpay should not include payment of overtime wages. The Company argues that the Grievant would not have been scheduled to work overtime after September 17, 1993 because he worked under a light duty assignment. The Company asserts that backpay should be calculated without the addition of any overtime loss pay opportunity.

The Union's Position

The Union argues that the Grievant's backpay award should include overtime loss pay opportunity. The Union argues that, had the Grievant been examined by a physician chosen by the Company, and that physician recommended that the Grievant be disqualified from his then current position for medical reasons, the Grievant would have been placed in another

position which would have included overtime opportunity. Therefore, the Union contends that the Grievant be compensated for all possible overtime opportunity from September 17, 1993 until the date of reinstatement.

CLARIFICATION OF AWARD

In the instant matter, the Grievant was discharged pursuant to a rule prohibiting the violation of a physician's restriction for a medical purpose. The Undersigned Arbitrator held that the Company did not have just cause for terminating the Grievant on September 17, 1993. The Arbitrator awarded the Grievant reinstatement with full back pay, benefits and seniority. The Parties submitted the following issue(s) to the Arbitrator:

1. Whether the Grievant shall be awarded backpay for loss of overtime opportunity pay?

The Arbitrator has considered the testimony, evidence and arguments presented by the Parties and concludes that the Grievant shall be awarded backpay for loss of overtime opportunity after his termination on September 17, 1993.

The Undersigned Arbitrator held that the Company did not have just cause to discharge the Grievant on September 17, 1993 in Case No. 94-4. The Undersigned Arbitrator determined that the Grievant shall be reinstated with full backpay, benefits and seniority. The Union argues that the Grievant should also receive backpay for overtime work the Grievant would have had the opportunity to perform had the Grievant not been unjustly discharged. The Union argues that the Grievant has been reinstated to a position which he is able to perform without straining his back. The Union contends that the Company, rather than discharging the Grievant in September, 1993, should have placed the Grievant in his now current position. If the Company had placed the Grievant in his now current position, the Grievant would have had the opportunity to work thirty-eight (38) Saturdays, eight hours each Saturday, of overtime, according to the Union. The Union requests that the Grievant be awarded backpay for the thirty-eight (38) lost overtime days.

The Undersigned Arbitrator agrees with the Union's position. The Arbitrator determined in Case No. 94-4 that the Grievant was not discharged for just cause pursuant to the Contract. This Arbitrator further held that the Company either transfer the Grievant to a job he is physically capable of performing without injury to his back, or to modify the equipment which the Grievant had been operating prior to his discharge. In reaching this determination, the Arbitrator found that the Company had received this request from the Grievant's physician prior to the Grievant's discharge.

The Company did not present any evidence to the Arbitrator to support a finding that the Company was unable to relocate the Grievant to a suitable position in September, 1993. If the Company had relocated the Grievant to a suitable position, such as his current position, he would have had the opportunity to work thirty-eight (38) eight-hour overtime days. Consequently, any backpay remedy should cover overtime loss pay opportunities.

KTVI-TV INC. —

Decision of Arbitrator

In re KTVI-TV INC. ARGYLE TELEVISION [St. Louis, Mo.] and AMERICAN FEDERATION TELEVISION AND RADIO ARTISTS, FMCS Case No. 94/26772, February 17, 1995. Arbitrator: Fred L. Hoffmeister, selected by parties through procedures of the Federal Mediation and Conciliation Service.

DISCHARGE

— Constructive discharge ▸118.07

Television anchor man was constructively discharged and thus is entitled to contractually provided severance pay of $112,515.00, where company offer included $45,000 cut in pay and demotion to reporting and part-time anchor position, grievant had completed some 23 years of outstanding service to company, and no negative allegations have been made concerning his work and personal conduct; grievant was not required to "negotiate" in response to company offer.

Appearances: For the employer — Michael L. Lowry (Ford & Harrison), attorney. For the union — J. Dennis O'Leary (Dubail Judge), attorney.

CONSTRUCTIVE DISCHARGE

HOFFMEISTER, Arbitrator: — This arbitration arose from a letter dated September 6, 1994 sent to Ken-