In the Matter of the Arbitration:

between:

United Steelworkers of America, Local Union 12457

and

Allied Chemical

OPINION and AWARD

Case #84K/15077

The stipulated issue is:

What shall be the disposition of the Union's grievance 18-1984 dated January 26th, 1984?

A hearing was held in Solvay, New York on October 11, 1984 at which time representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union gave an oral summation; the Company filed a post-hearing brief.

Grievance 18-1984 reads:

Protest: On 1-26-84 we the Bottom Kiln cleaners were told to clean the Elevator Pit. We feel that utilizing us as cleaners on the days we have a Kiln to clean is not part of our job description, and the Company has been treating us unfairly.

In this arbitration the Union also protests similar but subsequent assignments in the Elevator Pit. Whether those later work assignments are part of this grievance is immaterial because I am satisfied that the decision in this case will be dispositive of all instances in which this dispute substantively arose.

The question is simply whether the Company had the right to assign Bottom Kiln cleaners to clean the Elevator Pit, when
indisputably the cleaning of Kiln bottoms is their primary job.

This contractual relationship does not include traditional job descriptions of the various job classifications. Rather, the jobs are classified for pay purposes, though the primary duties may be stated. Coupled with the Management Rights clause of the contract, which provides in pertinent part:

"The Company shall remain vested with all management functions...subject to the...provisions herein contained,"

the Company would have the right to assign duties to a classification that the employees in those positions have regularly and traditionally performed as well as other duties for which the employees are qualified or have the ability to perform and for which they are properly paid. A more precise delineation of duties confined to the classification or, conversely, excluded from the classification, are matters for collective bargaining and for the negotiation and/or promulgation of formal job descriptions, but not for arbitration. In short in the absence of a contract or job description limitation, the Company has retained the right to determine job content.

Here, however, there has been a modification of the foregoing managerial authority. It is a limited restriction which the Company apparently imposed on itself when it established the Bottom Kiln cleaner position. In letters dated August 22, September 10 and September 29, 1975 to the Union, the Company set forth generally, the primary duties and expected duties of the Bottom Kiln cleaner. The last letter in the series, dated September 29, 1975 (Union Exhibit #6) appears to be the final
word on those duties or assignments. In pertinent part it states:

"These people will be used primarily to clean Kiln bottoms and will be assigned supplementary work that is presently performed by Kiln cleaners." (emphasis added)

By that letter, the Company agreed that the primary duty of the Kiln Cleaner would be to clean Kilns. Hence, any work assignment that by type, magnitude or duration pre-empted the primary duty of Kiln cleaning would be violative of that understanding and hence violative of the contractual relationship.

On the other hand, by including a provision for the assignment of "supplemental work that is presently being performed by existing Kiln Cleaners" the Company clearly set forth its intention and right to assign different incidental and short term duties to the Bottom Kiln Cleaners in addition to their primary work of cleaning Kiln bottoms.

Accordingly, the questions in this case are (1) whether the cleaning of the Elevator Pit pre-empted the primary work of cleaning Kiln bottoms and (2) whether the Elevator Pit cleaning was "supplemental work that is presently being performed by Kiln Cleaners" within the meaning of the September 29, 1975 letter.

It is obvious that the first question is to be answered in the negative. Under the facts presented, the Elevator Pit work was only for a matter of hours and thus did not reach a quantity or duration that would supercede Kiln cleaning. And I find that
to be so regardless of whether at the time the employees were assigned to the Elevator Pit, there was or was not a Kiln available to be cleaned. Pre-emption of the primary duty of Kiln bottom cleaning would require the replacement of that work by the cleaning of the Elevator Pit for a regular and extended period of time equal to a majority or at least a significant part of the work week. That was not the case in the instant situation, nor in the subsequent disputed assignment.

The Union's concession that assignment to the Elevator Pit would not be objectionable if there is no work on Kiln bottoms, is prejudicial to the Union's position. The concession means that there is a circumstance when assignment to clean the Elevator Pit would be proper; that cleaning the Elevator Pit was a task within the ability and qualifications of the Kiln Cleaners; and that the Elevator Pit work was not unreasonably related to the primary work of Kiln bottom cleaning. But, I find nothing in the record which limits the assignment of Elevator Pit cleaning to times when there are no Kilns to clean. Nor has it been probatively shown in this record that on January 26, 1984, there was a Kiln bottom available and ready to be cleaned. In short, the circumstance under which the Union would permit the Kiln cleaners to clean the Elevator Pit may well have been present at the time this grievance arose. However that is immaterial, because in the absence of any such
restriction, the decision of whether to clean a Kiln bottom or an Elevator Pit at a particular time remains an exclusive managerial decision.

The evidence in the record supports an affirmative answer to the second question. The Company offered persuasive testimony showing that Kiln cleaners were assigned to clean the Elevator Pit from time to time for the period at least from 1968 to 1971. There is no showing that these periodic assignments did not continue into 1975 when the September 29th letter was written. Indeed, there is no evidence in the record which identifies any other work as constituting the "supplemental work... presently being performed by existing Kiln cleaners." So it is logical and reasonable that that phrase written in 1975 meant or at least included cleaning the Elevator Pit.

In the absence of a contract change in point or the promulgation of job descriptions which change or more precisely delimit the job duties (and neither have occurred in this situation), I cannot hold that what the Kiln cleaners were assigned as "supplemental work" in 1975, was not applicable and equally assignable in 1984. Therefore, assuming arguendo that there was a hiatus in the assignment of the disputed work between the mid-1970's and 1984, without any relevant contract or other binding changes during the period I cannot construe any such hiatus as a waiver of the Company's retained right to renew the assignment to the Elevator Pit as "supplemental work"
for the Bottom Kiln cleaners. Nor do I construe the Company's contract proposal in 1984 for a "Secondary Skills Utilization Program" to be evidence of a waiver of that right. I am satisfied that the effort to get a "Secondary Skills Utilization Program" was to gain greater flexibility in assigning employees to primary or regular duties and was not intended to apply to incidental or supplementary duties.

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

The Union's grievance 18-1984 dated January 26, 1984 is denied.

DATED: January 24, 1985
STATE OF New York )
COUNTY OF New York )ss.:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
November 29, 1984

Local 1559 District Council
37, AFSCME, AFL-CIO
Att: Richard J. Ferreri, Esq.
125 Barclay Street
New York, New York 10007

Finley, Kumble, Wagner,
Heine, Underberg & Casey
Attorneys for Respondent
Att: Raymond L. Vandenberg, Esq.
425 Park Avenue
New York, New York 10022

Gentlemen:

We forward to the Arbitrator a letter dated November 26, 1984 from Richard J. Ferreri, Esq. We note all interested Parties received same.

We ask the Arbitrator to advise as to the status of this matter after his perusal of above.

Very truly yours,

Lenore Kappen
Tribunal Administrator
Call Direct: 484-6065

LK:ads
cc: Company
Arbitrator w/encls.
Ms. Lenore Kappen
Tribunal Administrator
American Arbitration Association
140 West 51st Street
New York, New York 10020

Re: AAA-1330-0888-84
(Harry Jacobson and the Museum of Natural History)

Dear Ms. Kappen:

Please forward this letter to Eric Schmertz, the designated Arbitrator in the above-captioned matter.

Please take notice that this office is withdrawing as counsel for Harry Jacobson, the grievant herein, for the following reasons. After repeated unsuccessful attempts to reach the grievant by telephone in regard to his failure to comply with the stipulation of settlement, I wrote to him on three occasions advising him to contact me immediately to discuss this matter. To date grievant has not contacted me. These letters, dated October 18th, October 24th and November 1st, 1984 were sent by regular mail and apparently received by grievant as they were not returned to me. The last letter was also sent "certified mail - return receipt requested" and was returned to me because the addressee (grievant) "refused" to accept it. This last letter informed grievant that his failure to respond to me by November 16th, 1984 would result in this office's withdrawal as his counsel.

It is clear from the aforementioned conduct of grievant that he does not wish this office to represent him. Therefore, this office has no other choice but to withdraw as counsel for grievant. Any future correspondence from the American Arbitration Association, the Arbitrator or counsel for the Museum should be forwarded directly to grievant.
Copies of this letter are being sent to grievant by regular and certified mail.

Very truly yours,

Richard J. Ferreri
Assistant General Counsel

RJF:elL11267

cc: Harry Jacobson
    Raymond Vandenberg, Esq.
    Mark Zelek, Esq.
    Guido Menta
    Tony Griesi
    Joseph Barritteau
AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

In the Matter of the Arbitration between

Local 1559 District Counsel 37, AFSC&ME, AFL-CIO

and

American Museum of Natural History

CONSENT AWARD

Case #1330 08888 84

The issue is:

Whether Harry Jacobson was terminated in violation of the contract between the Union and the Museum?

A hearing was held on September 14, 1984 at which time Mr. Jacobson, hereinafter referred to as the "grievant" and representatives of the above named Union and Museum appeared.

At the outset of the hearing, the parties settled the dispute. At the request of the Union and the Museum, that settlement is made a Consent Award, as follows:

1. The grievant will apply for a disability pension.

2. The grievant will cooperate with the medical personnel he is directed to see by the Museum or Pension Board.

3. Whatever medical expenses the grievant incurs in connection with his application for the disability pension will be borne by the Museum or Pension Board as appropriate.

4. If the grievant's application for a disability pension is denied, the Museum will pay to the grievant the dollar equivalent of the disability pension from September 14, 1984 in the amount of $5460 per year on a monthly basis, up to and including December 1, 1987 (when he becomes eligible for early retirement).
5. The reasons for the grievant's discharge on March 27, 1984 shall be expunged from his personnel record and shall not be disclosed to any source.

6. The grievant shall receive from the Museum as part of this settlement the sum of

7. The grievant shall execute a general release in favor of the Museum and shall withdraw his complaint before the U. S. Department of Labor, Division of OSHA (Case #2-4173-84-27).

8. Such general release and withdrawal of case #2-4173-84-27 shall not bar the grievant from filing a later Workmen's Compensation claim in regard to a later discovered occupationally related disease or disability.

9. The arbitration case #1330 0888 84 is withdrawn, except that the Undersigned retains jurisdiction of this matter for the interpretation and application of the foregoing.

DATED: September 17, 1984
STATE OF New York )
COUNTY OF New York )
ss.: 

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

Eric J. Schmertz
Arbitrator
In the Matter of the Arbitration
between
United Food & Commercial Workers
Local 22, AFL-CIO
and
American Stores Packing Company,
Division of Acme Markets, Inc.

Case No. 84K/01219

The stipulated issue is:

Do retiree benefits, other than pension benefits, survive the expiration of the contract? If so, what shall be the remedy?

A hearing was held in Chicago, Illinois on September 12, 1984 at which time representatives of the above named Union and Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived. The Union and Company filed post-hearing briefs. The Company filed a reply brief.

The benefits which the Union claims continue after the contract expiration are the social security supplemental; prescription benefits; hospital, surgical and medical coverage; and life insurance.

I have carefully reviewed the cases cited. It is axiomatic that rights and benefits that accrue during the term of a collective bargaining agreement may be asserted and enforced, for that accrued or applicable period, in a proceeding after the contract expires. However, I remain persuaded that contract benefits do not remain prospectively effective or continue in force after the termination of the contract, unless the contract expressly provides for said continued effectiveness or survival, or the contract language is at least ambiguously susceptible to
such interpretation or external law so mandates.\textsuperscript{1}

In the instant case, the Union has not met the burden of showing any of the foregoing conditions.

There is no assertion by the Union that there is statutory or external law mandating the survival of the disputed benefits, other than pension benefits, for retirees.\textsuperscript{2} The contract is silent on the matter and hence cannot be construed to provide for survival or prospective effectiveness, even on an ambiguous basis, and the Retiree Benefit Handbook, incorporated by reference into the contract (and hence an effective part of the contract) contains language which points to termination of the benefits of retirees with the contract expiration, not to any survival or continuation thereafter.

The latter, under the heading Benefit Termination or Disqualification provides

"Subject to the terms and conditions of applicable Collective Bargaining Agreements on any premium due date the Plan Administrator may terminate the policy or policies...No consent of any participant...referred to in the policy or policies is required to terminate...the policy or policies..." (emphasis added)

Under Eligibility the Handbook reads:

"Employees are eligible for participation and benefits under the Plan in accordance with applicable negotiated Collective Bargaining Agreements..." (emphasis added)

Under When Insurance Terminates the Handbook reads:

"Your insurance terminates when you are no longer eligible or when the group policy terminates, whichever happens first..."

\textsuperscript{1} Note the need for ERISA to protect future pensions and pensions of retirees under circumstances relevant to the instant facts.

\textsuperscript{2} The Union stipulated that its case is based solely on the contract and alleged promises made to the retirees.
The foregoing clauses cannot logically be interpreted to mean that retirees will enjoy coverage for life, even if as here, the contract terminates and the plant closes permanently. In my view the more reasonable and proper interpretation is that the retiree benefits are founded on an effective and continuing collective bargaining agreement and group policies which are part and parcel of that agreement. The premiums to the policies are paid by the Company; when the contract ends, the contributions end, and the group policies end. And those consequences are supported by the foregoing provisions.

Indeed, if the Union is correct in its assertion that retirees enjoy the benefits "for life" the Handbook's provisions under Extended Benefits for continuation of benefits after "insurance terminates" for retirees "totally disabled," would be unnecessary. The grievants in this case are not disabled and do not fall within this exception. The language can have only one logical meaning that is applicable to this case, and that is that there are circumstances under which the "insurance terminates" short of a retiree's death. I must conclude that in the instant situation the insurance termination occurs when the contract and the group policies terminate. As the grievants were not within the excepted class of "disabled," their benefit coverage terminated as well.3

The Union asserts that the retirees were promised coverage and benefits "for life" at a retirement dinner at which the

3. There is no dispute that the plant closed for bona fide economic reasons and that the contract term had been completed as of December 4, 1982.
benefits were explained. To be binding as a contractual promise and as a "grafted on" addition to or amplification of the otherwise silent contract, the promise must be shown as explicit and authoritative. The Union's evidence falls well short of that test. It is not clear who, if anyone, made any such promise.

The person or persons allegedly making the promise or explaining the benefits could not be identified. The testimony tends towards the identification of a representative of the insurance carrier, not the Company. Without identification and without evidentiary imputation to the Company, I cannot find that any such promise or assurance was given which authoritatively bound the Company. Probably, I think, any statement that benefits for retirees would continue for life, was based on implied and expected, albeit unstated assumptions that the collective agreement and the group policies would continue in place.

Finally, the fact that the Company may not have cancelled the benefits during a prior strike period after the contract expired is not determinative for two reasons. First, and again, the evidence does not clearly establish that the disputed benefits were continued. A reasonable interpretation of the testimony on that point is as much supportive of the assertion that the benefits paid during the strike were delayed payments for a prior calendar period while the contract was in effect, as it is supportive of a contrary conclusion. And second, a strike period is significantly different than a contract termination and permanent plant closing.

In the former, a resumption of work and the renegotiation of a contractual relationship are anticipated. That being so, an employer may continue benefits during the hiatus between
contracts as a matter of strategy or as a realistic response to the needs of those who are lawfully still employees and who are expected to return to active employment. (And the retirees benefited thereby). But those expectations are not present when the plant is permanently closed at the contract expiration. The severance of the employee-employer relationship is permanent, and no political or practical reason exists to continue benefits for former employees (or for retirees).

In short, if the Company continued benefits during the strike period, it could do so for the reasons indicated, but it may not have been required to do so. That being so, that situation provides no precedent for the prospective continuation of the benefits claimed in this case for retirees after the contract ended and the plant closed.

I am painfully mindful of the harsh consequences of this decision. Yet, as much as I deplore the loss of important benefits by retirees, I am bound to the terms of the contract and the facts as I see them. I may not legislate provisions or benefits which have not been bilaterally negotiated or agreed to by the parties. The result the Union seeks is for collective bargaining or legislation, not arbitration.

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

Retiree benefits other than pension benefits, do not survive the expiration of the contract.

Eric J. Schmertz
Arbitrator

DATED: February 21, 1985
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 702, I.A.T.S.E.

and

Arta Labs

AWARD

The Undersigned, duly designated as the Permanent Arbitrator under the collective bargaining agreement between the above named Union and Employer and having duly heard the proofs and allegations of said parties at a hearing on January 8, 1985, makes the following AWARD:

The grievant, Richard Raskin was laid off out of seniority in violation of the contract.

The evidence established that at the time of his layoff, the grievant was the shop steward. I conclude that the Employer knew or should have known that the grievant occupied that position. The grievant processed enough grievances and represented the employees in matters under the contract in a manner sufficient to give notice to the Employer of his status as the shop steward.

Under Section 7 paragraph (3), the shop steward enjoys "super seniority" and "shall be the last one to be laid off in the plant, provided film is being handled or processed in the laboratory.

The evidence established that at the time of the layoff film was being handled or processed in the laboratory and that other bargaining unit employees, with less seniority than the grievant (or less than the grievant's "super seniority") remained employed and were performing the work. Accordingly, under that
circumstance, the grievant as shop steward should not have been laid off. Under the facts established, his layoff violated the express conditions of Section 7 paragraph (3) of the contract.

Therefore the grievant is entitled to reinstatement and shall be reinstated and made whole for wages lost as a result of the layoff, less the amount of money he received in severance pay and less any other earnings he may have received from gainful employment since his layoff.

DATED: June 11, 1985
STATE OF New York )
COUNTY OF New York ) ss.:

I, Eric J. Schmertz do hereby affirm upon my Oath as Arbitrator that I am the individual described in and who executed this instrument, which is my AWARD.
August 16, 1985

Joseph Good, Esq.
International Ladies' Garment
Workers' Union
Legal Department
1710 Broadway
New York, N. Y. 10019

James W. Wimberly, Jr., Esq.
Mitchell, Clarke, Pate,
Anderson & Wimberly, Esqs.
Georgia Federal Savings Building
20 Marietta Street, N. W.
Atlanta, Georgia 30335

RE: ILGWU —and— Barbizon Corporation

Gentlemen:

I enclose to you each herewith, two duly executed copies of my Award and Opinion in the above matter.

My bill for services and expenses will be sent to you under separate cover.

Very truly yours,

Eric J. Schmertz
Arbitrator

EJS:hl
Encl.
In the Matter of the Arbitration
between
International Ladies' Garment Workers' Union
and
Barbizon Corporation

This arbitration proceeding was held pursuant to the provisions of a collective bargaining agreement (the contract) covering the period from February 1, 1981, to January 31, 1983, between the International Ladies' Garment Workers' Union (Union) and Barbizon Corporation (Barbizon). The Undersigned was selected as the Arbitrator. Hearings were held on November 14, 1982, December 22, 1983, and April 3, 5, 9 and June 19 and 28, 1984. Both parties presented oral testimony, documents and legal memoranda and each party submitted a post-hearing original brief, an answering brief and a reply brief. The Arbitrator's Oath was waived.

The Union initiated the grievances which are the subject of this proceeding by a letter of complaint, dated July 21, 1983, which was amended by a letter of complaint, dated August 24, 1983. These written complaints alleged Barbizon had violated the contract by: (1) failing to pay required benefit fund contributions; (2) operating a non-union shop in Puerto Rico; (3) using non-union outside contractors; and (4) refusing to furnish certain books and records to the union auditors to enable the union to determine whether Barbizon had used additional non-union outside contractors.

At the first hearing, the Union purported to amend its complaint by claiming the contract was extended by operation of law beyond January 31, 1983, and demanded access to Barbizon's books and records for the extended period. The Union withdrew
this last claim in its original brief. Furthermore, the parties have reported that the first claim (benefit fund contributions) has been settled and it has been withdrawn.

The Union has demanded liquidated damages in the amount of $211,292.28 for Barbizon's use of non-union outside contractors. The amount demanded is not in dispute as constituting a correct calculation if Article XXIV of the contract is applicable and enforceable. It also demands damages for Barbizon's operation of the non-union shop in Puerto Rico. Further, the Union demands access to the books and records denied it by Barbizon and damages, if any, based on what an audit would reveal concerning Barbizon's use of non-union outside contractors.

THE ISSUES

(1) Did Barbizon violate Article XXX of the contract by employing non-union outside contractors during the term of the agreement under conditions which did not meet the requirements of Article XXX?

(2) If Barbizon did violate Article XXX, would payment of liquidated damages to the Union in accordance with paragraph 1 of Article XXIV of the contract violate the provisions of LMRA Section 302?

If such payment does not violate Section 302, is the liquidated damage clause (par. I, Art. XXX) enforceable as a matter of contract law? If not, what is the measure of damages?

(4) Did Barbizon's operation of a non-union plant in Albonito, Puerto Rico, violate the contract or the supplemental letter agreement, dated June 19, 1981, or both?

(5) If the operation of the non-union plant in Puerto Rico violated an agreement between the parties, what is the proper measure of damages?
(6) Are any of the Union's claims time-barred in whole or in part?

(7) Did Barbizon violate the contract when it refused to give the Union access to certain books and records?

(8) Is the Union entitled to interest on a damage award?

BARBIZON'S USE OF NON-UNION OUTSIDE CONTRACTORS

It is undisputed that Barbizon used non-union outside contractors from February 1, 1981, for a period during the 1980-83 contract.* The Union claims that this use of non-union outside contractors by Barbizon violated paragraph 5 of Article XXX of the contract (hereafter "outside contractor" clause). Paragraph 5, Article XXX, provides:

In order to safeguard working standards and employment opportunities of the employees covered by this and other agreements in the garment industry, it is agreed that all garments or parts thereof (not including the application of trim or embroidery) manufactured and/or distributed by the Employer during the term of this agreement, whether finished or partly finished, shall be manufactured exclusively either in its own plants or, as parts of an integrated process of production under the jobber-contractor system of production, in a plant under contract with a unit of the International Ladies' Garment Workers' Union and accordingly the Employer shall not handle, purchase, or otherwise obtain, directly or indirectly, any other wholly or partly finished garments whatsoever (not including the application of trim or embroidery) during the term of this agreement.

Barbizon claims that the contract permitted it to use such contractors because it met the requirements of paragraph 8 Article XXX which provides:

The provisions contained in the immediately preceding paragraphs shall not apply to the imports of piece goods, laces, buttons and the like, and to garments and accessories if, at the time an Employer desires to purchase

* Apparently its use of non-union outside contractors for the earlier part of the contract term was the subject of a $10,000 payment to the Union by Barbizon (Daniels, T.733). However, the Union had not filed a grievance with respect to Barbizon's use of non-union outside contractors prior to the one which initiated this proceeding. (Fischer, T.92)
or manufacture or otherwise obtain such garments or accessories, they could not
be manufactured in shops with contractual relations with International or any affil-
iate thereof.

Resolution of this aspect of the dispute requires examination of some contested facts, characterization of the facts estab-
lished by the evidence and determining the meaning of and applying paragraph 8 of Article XXX (hereafter referred to as the
"exemption clause").

The use of outside contractors (union or non-union) was not a matter of serious concern for Barbizon until it determined to
and did close down its own union shops. This was a process which began in the early 70's, but Barbizon's need for outside con-
tractors did not become acute until it began to close its union plant in Provo, Utah, in 1979. The closing of this plant was
completed in June, 1981. When it closed production in 1979, the Provo plant produced 92% of Barbizon's output. There was testi-
mony from witnesses called by Barbizon that with Provo's closing, Barbizon was under time pressure to meet its need for outside
contractors and by the early part of 1981 the need had become "critical". (T. 135-36, 130, 139). Barbizon had a need for
facilities with adequate production capacity, an ability to meet production and delivery schedules and with machine operators able
to handle the special fabrics and special manufacturing require-
ments and equipment used for Barbizon's production specifications.

Barbizon products were in the higher price range and Barbizon sought to and had conveyed an image of quality to the
consuming public. Quality was reflected in the fabrics which were produced by Barbizon and in some special steps in the
manufacturing process. The fabrics required handling unique to their special characteristics and the manufacturing process re-
quired some special machinery as well as adaptation of the non-
special machinery to satisfy Barbizon's product specifications. It was necessary to train the operators who ordinarily would not be familiar with the requirements for those fabrics. There was no claim to the contrary and the evidence was that there was no correlation between the status of operators as union or non-union with respect to the ability of Barbizon to train them and their ability to learn.

It was possible, but not likely that a contractor would own or otherwise possess the special machinery needed for Barbizon production. The machinery could be acquired by purchase or rent or even loaned by Barbizon. Here, too, there was no distinction among contractors necessarily related to the existence or non-existence of an ILGWU contract with the contractor.

It appears from the evidence that upon closing of the Provo operation, Barbizon had not assured itself of sufficient outside contractors either with respect to the quantity of its expected production or with respect to those contractors Barbizon considered "suitable" for the work. In fact, there was evidence that during 1980 and 1981 problems with respect to the production of goods by a concededly good union contractor, Dorfman & Hoffman, were attributable to the changes in Barbizon's operations. (T. 536-7).

The search for outside contractors appears to have begun sometime in 1980 with efforts by several production managers and quality control people and some Barbizon executives. More intensive efforts were warranted in early 1981. These efforts involved advertisements in Women's Wear Daily and other newspapers, requests for referrals addressed to the Union and contractors and various personal contacts by several Barbizon executives.
A few union contractors who were contacted were not interested, according to Barbizon, and a larger number were not deemed suitable for various reasons. Of this latter group, only a small number were specifically identified and reasons for rejection by Barbizon were offered for an even smaller number.

Several witnesses called by Barbizon described the problems Barbizon claimed it was having in finding union shops and meeting its production requirements when it did use outside union contractors. The difficulties were described as those shops not having either cutting facilities, machinery or required capacity or that their prices were too high. As for prices, while not conceding that most union shops' prices were too high, it was conceded that price was partially the reason for Barbizon's difficulties, but not with respect to every single shop. (T.134-5, 142). Some witnesses testified in rather conclusory terms, but others did identify a few union shops and claimed they had one or more specific problems with respect to such factors as cleanliness, production capacity and the ability of the contractor's operators to work the Barbizon fabrics and the special machinery and processes required for Barbizon's specifications. In addition, price or cost was a factor and sometimes the only factor identified as a reason for not awarding work to a union shop. There was some evidence of manufacturing difficulties and a failure to meet production and delivery schedules when the shops were awarded the work.

The first Barbizon witness with respect to the search was Mr. Edward Vittorio, who was a production manager charged with finding outside contractors. His employment by Barbizon began sometime at the end of 1979 or the beginning of 1980 and ended in February or March 1981. According to Vittorio he was one of
three production managers pursuing this search. The other two did not testify.

Vittorio testified that Barbizon was satisfied with the union contractors given work by Barbizon upon Provo's closing. He named only one union plant that he had visited in his search, but never testified whether or not it was satisfactory. He described problems with production and delivery as critical when he left Barbizon in early 1981. A repeated theme of his testimony concerning the employment of union contractors was that Barbizon has to "settle" rather than select. He never identified specific respondents to advertisements nor associated specific reasons for rejection by Barbizon with a specific contractor. He concluded that Barbizon had done all it could to find union contractors.

Mr. David Kerr, 40 years with Barbizon played a role in quality control with Barbizon contractors. He had set up facilities in Costa Rica and Blue Bay, Pennsylvania, and found that most operators had no experience with Barbizon's special needs. With respect to one specification ("roll stitch") he testified there are problems to this day. He testified there were quality problems in 1980 and 1981 and reports of visits to union contractors reporting some problems were received in evidence. He concluded much of the problem was due to lack of experience on the part of the outside union contractors and the lack of equipment.

As to specific contractors, he testified one was a "nightmare" with respect to quality and that there had been a contract dispute with it (New Quaker). Others also had quality problems (SLC, Sayre) or were "loaded to capacity" (D&H, J.D.V.) or had insufficient equipment (Exeter). According to Kerr, he visited so many shops he couldn't remember them, i.e. maybe 12 or 15 shops.
Most, he said, had no further capacity to handle Barbizon's produc-
tion and no equipment. However, Barbizon had loaned D&H
equipment in early 1980. In 1981, Kerr concluded he couldn't
seem to find any shops with sufficient capacity to be of any
value and those he found wanted Barbizon to supply the special
equipment.

He did locate Charles Henry, a non-union contractor, in the
South. It had equipment, had manufactured lingerie previously
and was willing to do Barbizon work exclusively. Charles Henry
was engaged by Barbizon. Kerr testified that Barbizon supplied
some additional equipment to Charles Henry. It also had supplied
equipment to shops in Venezuela and Costa Rica. According to
Kerr and other witnesses, some of Barbizon's equipment also had
been supplied to Better Cutting, a plant opened by a former
Barbizon executive.

Kerr conceded that people could be trained to use the
machines properly and that he had trained them. If they had some
experience, it would take a "very short period" of training. Even
though the Costa Rican operators could not be trained to operate a
"tucking machine", one of those needed to meet Barbizon's spec-
ifications, that shop was still used by Barbizon. Kerr, who was
not involved in quality control in 1980 and appears to have had
his basic experience in mechanical and maintenance problems of
machines and buildings, testified he knew nothing about pricing
or price as a factor in the selection of contractors.

William Mandera, a Barbizon employee for 34-35 years and
involved with design and the management of design, testified that
in 1981, the quality of work for Barbizon was poor. He speculated
that it might have been due to the operators or the lack of
contractor engineering support for the machines. Charles Henry, he testified, had the proper equipment, the mechanics on hand and did good quality work. It did Barbizon work for eight months, when, in order to comply with the contract the business was given to union contractors after Charles Henry went out of business. It appears from Company Exhibit 13, that this occurred in February, 1982.

Joseph Massey joined Barbizon as a Vice-President for Manufacturing in May, 1981, when he found Barbizon was faced with problems from lack of production capacity. Outside contractors were "basically booked" and as a consequence Barbizon had delivery problems. He described some contractors as booked to capacity (D&H, Sayre, West Orange) and another as a competitor of Barbizon concentrating more on its own work than the contractor part of its business (SLC). Another had burned down but Barbizon loaned it equipment and helped re-establish the business (JVD). New Quaker, the competitor which had been involved in a contract dispute with Barbizon, refused to do work for Barbizon, according to Massey.

He testified there were efforts to obtain union contractors through written and oral requests to the Union. The need was great because 1981 was a "boom" season; it was followed by a sharp downturn. According to Company witness, Charles Henry was used in 1981 to do the excess work union operators would not do for Barbizon in 1981 (T. 267). Charles Henry did satisfactory work, but Barbizon preferred union shops, Massey testified. Barbizon was Charles Henry's only customer. When the work was given to union shops at the beginning of the Spring, 1982 season Charles Henry was shut down. Massey stated, "We (Barbizon) shut him down". (T. 268).
Massey stated that union shops refused to do samples for Barbizon and Asia Perez, a small non-union operation, agreed to do them provided Barbizon gave Asia Perez additional work during the year. Barbizon did so. He stated he had asked D&H to do samples. His testimony contains no D&H response to the request. While he had no personal knowledge about requests of other contractors to do samples, Massey said he believed Kerr had made inquiries of smaller contractors. Kerr did not testify about such inquiries. JDV and Stanley, union contractors, did samples in the summer of 1982, but were unwilling to do so prior to that time.

Company Exhibit 13 was introduced through Massey. It purported to show delivery and quality problems with contractors during 1981 and 1982. It identified contractors as union or non-union, the original delivery date of a specific "cut #" (authorization or order) and comments on quality and delivery problems. It did not show the reasons for the alleged deficiency, such as late delivery of goods to the contractor by Barbizon or contractor deficiencies.

Mr. Massey also testified with respect to extensive negotiations concerning a new plant Barbizon established in Albonito, Puerto Rico which is considered later in this Opinion. He testified that the Albonito plant operated for 1 to 1½ years before it was profitable. (T. 313-14).

Nancy Gross and Susan Fay Krivit handled customer complaints for Barbizon and testified there were a large number of complaints in 1981 and 1982. Some letters were produced, but those prior to that period and some for 1981 had been destroyed. The ones
produced were from January to March, 1981, November and December, 1981, and the first 4-6 months of 1982. The manufacturing sources of the goods were not identified. Further, there was no evidence about the cause of the claimed deficiencies.

Anthony Ritter, President of Barbizon since 1979 and connected with the Company since 1951, described Barbizon's history as the only vertical operation in the woven field and as one of several high-quality manufacturers in the sleepwear field. He described in detail the uniqueness of the Barbizon fabrics and the special character of the manufacturing process for its daywear and sleepwear. Forty percent of Barbizon's fabric, "Cuddle-skin", was sold to other manufacturers. Ritter reiterated that when Barbizon closed its Provo plant, demand was high and in 1980 and 1981 Barbizon's need for contractors intensified. He also described a large turnover of management personnel in 1980 and early 1981.

Ritter testified that in December, 1980, he became alarmed at returns for poor quality. He took various steps such as memoranda to contractors, delivering to the Union a list of poor contractors not to be recommended. He even went so far as to show his people a film on quality control produced for another major corporation. As part of a monitoring process, he announced in writing a policy to document all visits to contractors.

A search for union contractors not affiliated with their own product line (T. 426) was conducted at his request by his production people and one, Daniel King, who contacted state offices. Ritter also made inquiries and he requested Barbizon employees to make requests of the Union. Newspaper advertisements also were run.

As for union contractors, Barbizon used D&H during 1981, and
it probably could have increased production but, according to Ritter, not at the right time of the year. JDV, another union contractor, was fine but it had burned down. Prior to its destruction, Barbizon had agreed to supply JDV with equipment and to support the enlargement of its premises. Sayre, another union contractor was the subject of rumors of the retirement of its founder and Ritter stated it was characterized by poor planning, shortages and late deliveries. Better Cutting was ill-equipped to enlarge production or provide more than a few samples. Gossard was sold and closed. Exhibit 13 shows this occurred in April, 1981. New Quaker and SLC were competitors and relegated Barbizon's production to a secondary position. Furthermore, according to Ritter, there were quality and delivery problems with the former and a claim of copying goods with the latter. He described the experience with West Orange as poor -- "slovenly" and "no engineering." However, he did do business with West Orange and SLC in 1981. Union shops represented by Peter Letkany located in Brooklyn and visited by Ritter were "unclean," "unprofessional" and in "bad areas." There were also thefts, shortages, late deliveries and an instance of counterfeiting with those shops. Charlotte Undergarment, a shop recommended by the Union, had been the subject of a very bad prior experience with Barbizon.

According to Ritter, Charles Henry was selected because of its experience in lingerie and woven goods and it devoted its entire operation to Barbizon production. It had most of the necessary equipment and Barbizon loaned it the balance required. Ritter's recollection was that Charles Henry was phased out toward the end of 1982, because of a soft economy and the availability of union contractor capacity. (T. 441-2). Exhibit 13 (p. 34) shows discontinuance of Charles Henry in what appears to
be the very early part of 1982 and union contractors used thereafter. As for Asia Perez, it did samples and needed additional work to stay in business. Ritter identified three other non-union shops used by Barbizon, although he thought one contractor (Kellwood) was using its union shop.

The Union called several witnesses, including Roger Horne, a plant manager for New Quaker. He testified that New Quaker had its own quality line to which it devoted 80% of its manufacturing capacity. The balance was devoted to contractor work, including Chevette and Christian Dior. It had experience with and still does "Cuddleskin" and did contract work for Barbizon from May, 1980, to February, 1981. There was a fall-off of Barbizon shipments of trim early October to mid-December, 1980, and on March 27, 1980, it received a letter from Barbizon acknowledging that "Barbizon has had some problems historically with the efficiency of [Barbizon's] scheduling system," requesting that Barbizon be notified about shipment problems and of shut-down dates for New Quaker so that Barbizon could plan its production with New Quaker. (U. Exh. 12).

Horne denied that New Quaker had ever refused work from Barbizon and in fact testified that he had discussed and been promised more business by Barbizon's Kerr from February to April, 1981. (T. 629-35; U. Exh. 13). He denied he had received adverse comments from Kerr and when Kerr visited the plant Kerr stated he believed New Quaker had received additional Barbizon work. Horne testified about the dispute with Barbizon which concerned whether or not Barbizon was liable for increased costs due to retroactive taxes. New Quaker held Barbizon machines and the dispute was resolved by an exchange of some of the machines in satisfaction of New Quaker's claims. (T. 635-37; U. Exh. 15).
He testified New Quaker could have handled Barbizon work in 1981 and 1982, if requested.

In response, Jack Kreshover, a 40 year employee with New Quaker (or its parent company) was called as a witness by Barbizon. He left New Quaker after a dispute with New Quaker. The subject of the dispute is not in the record, but Kreshover testified he objected to New Quaker's position in its contract dispute with Barbizon concerning retroactive taxes and he had complained that New Quaker was using Barbizon machines for New Quaker's product line. He testified that while initially there were few complaints from Barbizon about New Quaker's work, complaints increased rapidly toward the end of their relationship. He attributed increased quality problems at New Quaker to use of inexperienced operators and relegating Barbizon work to a subcontractor and giving primary effort to New Quaker's own line. He also described trouble he had with the Union because New Quaker had used a non-union plant (Millcrest) instead of a union plant (Dushore) for some of its work. Some of the Barbizon work was done at Dushore. He conceded that Barbizon's delivery of trim to New Quaker often had been late and the trim faulty. At the time he testified, he did business with both Barbizon and New Quaker's parent company.

Bennett Lyons, the President of D&H, testified D&H did and continues to do substantial business with Barbizon. In 1981, he stated, due to the changeover in Barbizon's operation in 1980 and 1981, they experienced an increased number of quality problems in goods supplied by Barbizon. Some were reflected in letters and memoranda to Barbizon (T. 536-72; U. Exh. 7-10). In 1981 and 1982, there were many late Barbizon deliveries not typical of other periods. There also was difficulty due to inadequate lead times
for the Fall and Spring season (T. 551-52). He detailed numerous problems caused by Barbizon deficiencies, some of which were listed as union contractor problems in Co. Exh. 13.

He testified that Barbizon never requested D&H to make samples and D&H had substantial new capacity when it acquired its Somerset plant in the summer of 1980 and advised Barbizon of its availability. Barbizon never responded. Historically, D&H had never refused to give Barbizon all the production it requested (T. 572), and it would have made every effort to handle Barbizon's work in its Somerset plant in 1981 if there had been a request. He conceded that increased work for Barbizon in 1981 most likely would have meant cutting back on production for others, but it is unclear if this comment concerned the Somerset plant because his testimony consistently distinguished between Somerset and D&H's original plants. All witnesses who testified on the point conceded D&H's work was satisfactory.

Charles Azrak, the owner of Valmar, a union shop, did work for Christian Dior and other high priced lines. To obtain Barbizon business in April to November 1979, he cut his price to Barbizon by 15-20%. He did work for Barbizon using Cuddleskin and received no complaints and had no problems. He had the capacity to produce the Barbizon product and was willing to do samples and duplicates during the relevant period. (T. 597-602).

Victor Rosenblum, the President of Millicent Lingerie and R&W, testified to available capacity and that it would have been easy for him to expand. Some of the Barbizon-supplied fabrics were defective, but the Barbizon inspectors characterized his work as good.

In rebuttal, Mr. Ritter testified that Azrak did loungewear and this did not provide sufficient expertise for handling
Cuddleskin sleepwear and further it would have been too costly for Barbizon to oversee an operation with so small a capacity. He testified similarly with respect to Millicent's capacity. As for Azrak, Ritter said he believed Azrak had a policy typical of most contractors not to sew samples unless the style was manufactured in the shop.

THE USE OF NON-UNION OUTSIDE CONTRACTORS -- DISCUSSION

It is undisputed that non-union contractors were used by Barbizon during the relevant period. To determine whether the contract was breached by Barbizon requires the application of the exemption provision to the facts of record. The contract agreed to by the parties is the sole standard for determining this issue. The exemption is a defense to breach and in accord with general rules governing defenses and more importantly in the context of this contract Barbizon has the burden of establishing the defense.

Up until the 1980 agreement, there had been no exemption clause in the ILGWU-Barbizon agreements. In fact, the record shows that no ILGWU contract contained this type of clause. Thus, without the exemption clause the only provision applicable to Barbizon was the outright prohibition on the use of non-union shops. The importance of this prohibition cannot be overstated; indeed, its legality, not challenged in this proceeding, rests on special legislative authorization. It was an important part of the Union's contracts throughout the industry and it was enforced by the Union.

Barbizon's request for an exemption clause in the 1980-83 contract met with strong Union opposition. It is uncontradicted that its request for an exemption clause which would recognize
an inability to meet delivery dates and the like as a defense was rejected outright. A narrowly fashioned channel to exemption was negotiated in categorical language, i.e. Barbizon could use non-union shops if it "could not" manufacture the goods in union shops. Further, in the failed negotiations for a successor contract, Barbizon demanded an exemption clause which would have permitted a defense of an inability to find "suitable" union contractors with explicit references to competitive price and the like as characteristics of suitability. This was rejected by the Union and is evidence that the 1980-83 contract recognized no such grounds for exemption.

Mr. Vittorio was correct when he testified that Barbizon could not "select," but had to "settle" when it came to outside contractors. Limitation on conduct is the very essence of contractual obligation and Barbizon's rights with respect to using outside contractors were sharply limited by the contract. Indeed, much of the evidence offered in Barbizon's behalf reflected its inability to select and frustration at the contractual compulsion to "settle." I need not determine whether its motives involved a desire to avoid dealing with union contractors entirely or to avoid the economic costs or operational realities (which is nothing more than another matter of costs) involved in dealing with union contractors. None of these reasons satisfies the narrow defense established by paragraph 8 of Article XXX of the contract.

The evidence, even when viewed most favorably to Barbizon, supports a conclusion no broader than that Barbizon would incur economic costs if it used union contractors. Even severe economic costs would not be a defense to the breach of Article XXX, paragraph 5, for this is one of the risks necessarily implicit in the prohibition clause itself and the narrowly stated exemption in paragraph 8 does not provide for avoidance of economic costs.
It applies only when products "could not" be manufactured in ILGWU shops. The language suggests impossibility or something close to it as the standard for exemption. Wilbur Daniels, who negotiated it for the Union, testified to this very narrow scope of the clause. (T. 707). There was no contrary evidence and Daniels' view is consistent with the contract language. Indeed the words "impossible" and the phrase "unable to be done" are dictionary synonyms. It is unnecessary to determine the precise limit of the language to conclude that avoidance of economic costs or operational inefficiencies under the circumstances of this case are not defenses. In any event, the evidence in this case does not establish the level of economic costs involved in compliance or that union shops were unavailable.

It is clear that Barbizon's difficulties can be traced to the closing of its Provo plant. Its right to do so is not an issue. However, the consequences of closing the plant and its changeover from using its own shops to reliance on outside contractors necessarily are affected by the prohibition of Article XXX, paragraph 5. Problems were initially inevitable for a manufacturer as concerned with quality control as Barbizon claimed. Seymour Rosenberg, President of New York Sewing Machine Attachment Corp., who made special machines for Barbizon and the industry generally described the kind of experience required to produce Barbizon products and testified that to avoid problems which Barbizon said it met with outside contractors, most better manufacturers like Barbizon manufactured in places they owned. (T. 109, 114).

Mr. Lyons described the difficulties in 1980 and 1981 as attributable to Barbizon's change in operations and D&H, by all accounts, did a good job with Barbizon production. While Company
Exhibit 13, an exhibit prepared for the Arbitrator, indicated some deficiencies in delivery and production by some union shops, there was substantial testimonial and documentary evidence of contemporaneous deficiencies in Barbizon's goods and its meeting its delivery obligations which presents a picture of a general decline in Barbizon's own organization for production during this period. The probability that this was so is supported by the substantial turnover of some middle management employees charged with production during the period.

While Barbizon claims it "could not" produce in union outside contractors shops and had to use non-union shops because with the union shops there were additional costs attendant to insufficient available capacity or expertise or experience and/or it had some bad experiences with delivery and manufacturing defects, it attributes practically no problems at all to the non-union shops it used.

Reduced to the essentials, the evidence shows claimed or possible economic costs in the use of union shops. This is evidenced by frequent references to price or competitive price or the need to train operators or the costs of monitoring union shops as reasons for not using union shops. Difficulties with production because of perceived or actual contractor difficulties with operators or lack of machinery or delivery problems are not sufficient. Whatever force they might have in another factual context, it is insufficient here because there is evidence that Barbizon could and sometimes did remedy these perceived deficiencies by expending its own resources in training, providing machinery, and supervising quality control when dealing with union and non-union contractors. In the context of this case, these are merely economic problems.
The consumer complaint letters establish little except that there were some defective pieces produced. However, even if relevant, none of the goods was attributed to a particular shop and there is nothing in the record which indicates the significance of the relatively small number of complaints in evidence in the context of the thousands of dozen pieces produced by or for Barbizon.

As for unavailable capacity, the proof falls far short of establishing this Barbizon contention. Indeed, it may well show the contrary in view of Barbizon's failure to follow up on Somerset in particular and D&H generally, as well as R&W, Millicent and Valmar. The evidence shows that the use of Asia Perez surely could have been avoided considering its relatively small capacity and that Somerset would have equalled Charles Henry's output. The search was neither thorough nor well documented.

The real thrust of Barbizon's evidence is not that it "could not" find union contractors, but that it would suffer some economic harm if compelled to use some union contractors. The economic harm, if any, however, appears to be characteristic of the immediate effect of Barbizon starting a new kind of operation. Thus, the evidence shows that for a year to a year and a half from its commencement, the Albonito, Puerto Rican non-union shop was not profitable but Barbizon continued to use it. The change from the Provo operation to outside shops as with the Albonito shop was the beginning of a new operation and bore the characteristics of one for which Barbizon was not wholly prepared. When Provo closed, insufficient outside contractors shops had been identified, Barbizon deliveries to contractors often were late, plans for a particular season were not in place in sufficient time and there was significant middle management turnover. It
may well have not been prepared for the boom season.

Even accepting Barbizon's assertions that some union shops were deficient, and some of that evidence was contested, it does not meet the burden of proving it "could not" obtain union shop contractors. The so-called deficiencies could be remedied by Barbizon and Barbizon concedes it had done so with respect to some contractors, union, non-union and foreign. The burden of doing so and the economic costs of doing so was allocated to Barbizon under the contract. Under the contract language it had to "settle" and not select free of contract limitations. Indeed the continued use of the Costa Rican shop even though its operators could not be trained to use the special "tucking" machine casts doubt on Barbizon's reasons for not using some union contractors.

There is one significant point which transcends Barbizon's case - and that is that to use union shops would involve additional costs. Either direct costs of production, or costs attendant to supervision, training of employees and/or in providing additional or needed equipment. Barbizon's use of non-union shops may have been supported by good business judgment and, except for the contract restrictions could be sustained. But it is to the contract that the Arbitrator is bound.

Let me summarize my findings based on the critical contract language. Article XXX does not allow for the circumvention of union shops because of costs or operational difficulties. In view of Barbizon's prior help to non-union shops in providing equipment
and in training employee's I find that Barbizon had no less a
duty to do so for the union shops in the instant circumstances,
in order to comply with the spirit and intent of the contract
restriction. Especially so when, as here, Barbizon's problems
were in large measure of its own making due to closing its own
plant.

The contract restriction is rigid, and the exemption is
narrow. In the instant case, union shops were clearly available
and the work could have been done in and by these shops had
Barbizon in some instances been willing to incur additional costs
and had it met the foregoing duty. Considering the unrefuted
testimony on the negotiations history of this narrow exemption
to what had previously been an absolute contract prohibition on
the use of non-union contractors, and Barbizon's unsuccessful
attempt in recent negotiations to expand the exemption if union
shops were "unsuitable," I must conclude that the present contract
language allowing for the use of non-union shops only if the goods
could not be made in a union shop is the sole exception to the
ban on use of non-union contractors. And that the reasons advanced
by Barbizon in this proceeding do not meet that narrow test.

In sum, as a key Barbizon witness stated, I find that what
Barbizon was attempting to do was to "select" for business pur-
poses, what it viewed, as the suitable shops, and to avoid "set-
tling" on what it considered non-suitable union shops. The con-
tact does not support this purpose or action. That right re-
mained a matter for collective bargaining and not arbitration.
Simply put, "suitability" and "expensiveness" are not synonymous
with "cannot be manufactured."

Additionally, the foregoing not withstanding, there is ample
evidence in the record showing that in fact there were available
union shops capable of performing the Barbizon work without significant additional costs and/or operational problems. At the very least the record establishes that Barbizon failed to adequately consider or contact those union shops, or rejected serious consideration of their use on grounds beyond Barbizon's contract rights.

THE USE OF THE ALBONITO, PUERTO RICO, PLANT

Contemporaneously with the parties agreement to the 1980-83 contract (the master agreement) they entered into a side agreement dated June 19, 1981. There were extensive negotiations concerning this side agreement and negotiations concerning the Albonito plant followed as well. The evidence shows that the Employer's plant in Albonito, Puerto Rico, was not covered by the master agreement. It was covered by that side agreement which provided that conditions for any newly-opened inside shop "would be negotiated to conform with the area standards in the area of its location." The undisputed evidence also showed that the parties continued to negotiate the terms of an agreement for the Puerto Rican shop until long after the Master Agreement had expired and until the Employer had expressed a good-faith doubt about the Union's majority at the one remaining Union facility. Accordingly, I hold that the Employer met its obligations under the side agreement and the Union's request for damages premised on the Employer sending work to its non-union inside shop in Puerto Rico must be denied.

DAMAGES

The Union relies on paragraph 1 of Article XXIV for the measure of damages. It provides:

    Should the Employer have any work performed in a non-ILGWU plant in violation of Article XXX, the parties agree that such violation would result in damaging the interest of the employees represented by the Union and of the Union itself
in the establishment and maintenance of the labor standards provided in this agreement. The parties also agree the specific amount of damage to the Union upon such violation is difficult, if not impossible, to ascertain. Therefore it is agreed that upon such violation the Employer shall pay twenty percent (20%) of the contractor’s statement without any offsetting credits.

Barbizon claims:

(1) a payment by Barbizon to the Union pursuant to the liquidated damage clause would violate LMRA section 302; and

(2) in any event, the clause involves the imposition of a penalty and therefore is not enforceable as a matter of contract law.

THE LIQUIDATED DAMAGE CLAUSE AND 302

Barbizon argues that payment of damages to the Union pursuant to the liquidated damages clause would violate section 302(a) of the Labor Management Relations Act. Section 302(a) and its counterpart for unions, 302(b) provide:

(a) It shall be unlawful for any employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other things of value - -

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

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

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.
The Union argues that such payment is excepted from the prohibitions of section 302(a) and (b) by virtue of 302(c)(2), which provides:

(c) The provisions of this section shall not be applicable.

* * *

(2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress.

* * *

I find that the payment or damages to the Union for breach of Barbizon's contractual promise not to employ outside non-union contractors does not violate section 302(a). Whatever plausibility there may be to Barbizon's arguments to the contrary dissolve on analysis.

Barbizon would place the damage payments in this case in the same category as payments declared to be prohibited by 302(a) in ILA v. Seatrain Lines, Inc., 326 F. 2d, 916 (2d Cir. 1964). In Seatrain, the Second Circuit decided that a contractual obligation to pay money to a union which was of the same kind covered by 302(c)(5) had to meet the requirements of 302(c)(5) and did not satisfy the requirements of 302(c)(2) solely because it was based on a contractual obligation. Otherwise the court reasoned, the prohibitions of 302(a) and the specific exceptions of 302(c) could be nullified by characterizing all payments as settlements or demands under 302(c)(2). Consequently, the Court concluded that the existence of a contractual obligation to pay money does not alone create an exemption from 302(a) for the payment unless the obligation to pay is authorized by or otherwise satisfies applicable statutes. It did not purport to and in fact explicitly
refrained from defining the limits of 302(c)(2).

In Seatrain, the breach of contract was simply a failure to pay money to the union. Those were the terms of the agreement and that was what was contemplated by the parties, and payments to the union which did not satisfy an exception are barred by 302(a).

This case is materially different than Seatrain. Here, the contractual obligation is that Barbizon may not use non-union outside contractors unless certain conditions are met. The breach is the failure to abide by the promise not to use non-union outside contractors. The obligation to pay is a consequence of that breach; the breach is not the failure to honor a contractual promise to pay money which was the case in Seatrain. Barbizon's position would stand Seatrain's rationale on its head and transmute every payment of damages for breach of contract into a contractual obligation to pay money and thereby preclude all damage payments for breach of contract from satisfying the requirements of the 302(c)(2) exception. We need not resolve the jurisprudential and perhaps esoteric question whether payment of damages for breach of contract and compliance with contractual promises simply are options in the hands of the promissor. (See, Holmes, "The Common Law" (Howe, ed., Little, Brown, Boston (1963) at 236). Here, we have a question of statutory construction and there is no reason to exclude ordinary contract damages, liquidated or otherwise, from 302(c)(2).

Nothing in the legislative history, the language of 302 or the reasoning or language of Seatrain requires excluding all breach of contract claims from the coverage of 302(c)(2). While the fact that a contract requires the payment of money to the union alone does not satisfy the requirements of 302(c)(2), according to Seatrain, it does not follow that because a payment
of a claim arises from a breach of contract, 302(c)(2) cannot be satisfied.

Barbizon reluctantly recognized these implications of its argument. While conceding that ordinary contract damages could be paid under 302(c)(2), it asserts that 302(c)(2) does not permit payment of damages in this case because there is reliance on a contractual obligation to pay money to the Union within the meaning of Seatrain. I disagree.

If there were no liquidated damages clause and there was either recovery of damages for breach of contract or payment in a settlement of the claim, there would be no violation of 302. The presence of a liquidated damage clause which merely measures recovery for breach in advance of the breach does not change the conclusion that 302(c)(2) is satisfied. Here, the liquidated damage clause is intended to and does serve the purpose of measuring damages for the breach of the non-monetary contractual obligation not to use outside non-union contractors. It is not intended to be nor does it serve as a contractual alternative to another obligation as in Seatrain, and there is no purpose to create a source of unsupervised union funds as in Seatrain. Compliance by Barbizon with the substantive provisions (par. 5 and 8, Art. XXX) is contemplated and desired by the Union. To be sure, this does not resolve the question of whether the liquidated damage clause is enforceable as a matter of contract law, but it does resolve the question of whether payment of damages for breach of contract measured by that clause violates section 302. I hold it does not because it qualifies as an exception under 302(c)(2).

THE LIQUIDATED DAMAGE CLAUSE UNDER THE LAW OF CONTRACTS

Barbizon argues that even if it breached the collective bargaining agreement, the Union suffered no damages and is not
entitled to recover anything or at most it may recover nominal damages. In support of this proposition, it claims that Union members lost little if anything by virtue of the breach because there was no proof that there was available capacity which would have employed any additional employees represented by the Union if Barbizon had abided by its agreement. In my findings concerning breach of the agreement, I found that even assuming its relevance, there was a failure of proof to establish the lack of available capacity and indeed, there appeared to be available union contractor capacity which Barbizon could have utilized. Hence, even assuming the materiality of Barbizon's position on this point, the facts are contrary to its position.

Barbizon's contention that some damages must be established before there can be recovery under the liquidated damage clause is of doubtful validity in any event. A rare opinion has suggested such a possibility, but this only would be applicable if no damage at all was shown which is rare and not the case before me. Dobbs, "Remedies" at 822. See, e.g., Berger v. McBride & Son Builders, Inc. 447 S.W.2d 18 (Mo. App. 1969). The majority of jurisdictions reject even this limited proposition.

Barbizon also claims that Article XXIV par. 1, is not a liquidated damage clause at all but an "unliquidated or compensatory damage clause." According to Barbizon, it has been consistently ruled that for a liquidated damage clause to be valid it must provide for a sum certain and must not require future action by the court to determine the amount thereof. "[D]amages are unliquidated where they are in an uncertain quantity." For these rather surprising propositions, Barbizon cites various parts of "Corpus Juris Secundum." However, the authoritative view is that liquidated damages may involve a sum certain provided in the
contract or the application of an agreed formula for fixing damages in the event a contract is breached. See, e.g., Dobbs, "Remedies" § 12.5, p. 821. Evidence to establish the basis upon which the sum certain is to be assessed or the formula applied always is required and does not affect the status of the agreement as one for liquidated damages. See, e.g., United States v. Carter, 353 U.S. 210, 220 (1957).

Lastly and most vigorously, Barbizon urges that the clause in reality is an agreement for the payment of a penalty and consequently is unenforceable. The Union responds that it is not a penalty but even if it is, it is proper to award punitive damages or impose a penalty for violation of an agreement under section 301, LMRA. Whatever the merits of the arguments concerning the arbitrator's power to make punitive awards, I need not decide it because I find that the liquidated damages clause is reasonable and necessary on the record of this proceeding and is not a penalty.

The standards usually applied to determine if an agreement is one for a liquidated damages rather than one for a penalty is satisfied. Damage to the Union as an institution or organization by virtue of the breach of a non-monetary obligation under a collective bargaining agreement is difficult to measure in any event. It is no easier to ascertain at the time of breach than when the agreement is made. Here, where the violation of the contract involves a vital aspect of the Union's power specially sanctioned by law, the need to assure some measure of damages also is necessary. Thus, breach threatens the organizational effectiveness of the Union and its power with respect to representing existing and prospective union members is jeopardized by breach. Further, the national policy of the importance of union labor to
the consuming public also is undermined. That these are important
cannot be denied but their monetary value is difficult to measure.
At the time of contract, damages are difficult to prove and the
amount is uncertain, but it is certain that breach will damage the
Union. Furthermore, damages remain difficult and uncertain at the
time of breach. These aspects are similar to damages to the good
will of a business for which liquidated damage clauses have been
sustained. See, e.g., Williams v. Dakin, 22 Wend. 201 (N.Y. 1839).

Barbizon argues, however, that the agreed formula is a penalty
because it is unreasonable and was designed as a penalty. For
this it relies extensively on part of the testimony of Wilbur
Daniels, the Union negotiator, who did testify that, in part, the
formula was to serve as a deterrent for breach. However, "all
provisions for damages are, of course, deterrents of default."
This does not make them "punitive" in the sense that they are
unenforceable agreements for penalties.

The inquiry concerning whether or not a clause is one for a
penalty essentially is concerned with the disproportionateness of
the amount of recovery to the contemplated injury. Is the sum
recoverable under the agreement "so large as to be characterized"
as a penalty? See, Farnsworth, "Contracts" at 895. Barbizon pre-
sented no evidence in support of a claim that the amount is dis-
proportionate to the Union's loss. It merely asserts it. On its
face, the amount does not appear to be unreasonable, and is no
evidence or reason to believe it would be coercive in the sense
that the employer is left with no option but to comply with the
contract. Rather, the formula is designed not to permit breach
without cost and this is no indictment of its validity.

The current trend is to uphold clauses for liquidated damages,
especially where they have been the subject of intense negotiation between parties of equal and substantial strength, where the damage is real but the amount difficult to ascertain, the savings in litigation costs make such a clause valuable and where some assurance that damages will be assessed upon breach is necessary to assure the integrity of the contractual arrangement. Priebe & Sons, v. United States, 332 U.S. 407, 411 (1947); Bricklayers Union 21 v. Thorleif Larson & Son, Inc., 519 F. 2d 331, 337 (7th Cir. 1975); Frank's Nursery Sales, Inc., v. American National Insurance Co., 388 F. Supp. 76, 83 (E.D. Mich. 1974). All of these factors are present in this case and I find that the Article XXIV, par. 1 is an enforceable agreement for liquidated damages and not one for the imposition of a penalty.

ACCESS TO BOOKS AND RECORDS

Article XXVII, par. 2, of the collective bargaining agreement provides:

With regard to any matter covered by this agreement the Union may request the Employer to submit to a representative of the Union for examination such records and data are pertinent or necessary in connection with the Employer's compliance with this agreement. Such request shall state the purpose for which the examination is sought. In the event of any dispute between the Employer and the Union concerning the records to be investigated or examined or concerning the scope of the examination, the matter may be referred by either party to the arbitrator hereunder.

The Union claims it was denied access to certain books and records to which it was entitled under the foregoing clause. Barbizon claims the examination of the records and books are neither "pertinent nor necessary" in connection with Barbizon's compliance with the contract. The parties agree that the issue is referrable to the arbitrator for determination.

Edward Agra, supervisor of the Union's auditing department
for seven years and an employee of the department for 22 years, testified that Barbizon had never denied a Union request for access to books and records until the audits for the February 1, 1982 - August 31, 1982 and the September 1, 1982 - January 31, 1983 periods. Agra supervised the audits which were done by Louie Denar, and Martin Hoffman, respectively.

Denar was denied access to the portion of the general ledger showing Barbizon bank accounts. He also was not shown the books of Barbizon Lingerie Corporation of Puerto Rico on grounds they were "not available." Those books were required to compute contributions for the Albonito operation and to learn if non-union contractors were used. It was claimed Hoffman, the auditor for the September 1, 1982 - January 31, 1983 period, was denied access to parts of the general ledger, parts of the chart of accounts, invoices with back-ups and cancelled checks.

There is some confusion in the record with respect to what was shown for February 1 - August 31, 1982 period. Beverly Pegnator, a Barbizon audit employee, testified that for that period the Union was shown only that portion of the general ledger showing contractor accounts, there had been no request for cancelled checks and the Union was shown all invoices requested. The Union was shown only that part of the charge of accounts dealing with contractors. Thomas L. Foley, Barbizon's Vice-President for finance, confirmed the substance of Pegnato's testimony. Neither made any clear distinction between the two audit periods except Pegnato confirmed the Union testimony that the books for Barbizon Lingerie Corporation of Puerto Rico were not available and Foley testified the Union was not given access to subsidiary corporations of Barbizon. It is unclear whether Barbizon Lingerie was the only subsidiary. Pegnato began working for Barbizon in November, 1982,
and Foley in December, 1981. Neither had any personal knowledge of prior practice with respect to Union audits.

The Union claims that it requires access to the entire general ledger and all bank records, including statements and cancelled checks, in order to determine whether there are payments to non-union contractors which do not appear in that portion of the accounts designated by Barbizon as covering outside contractors. It claims it has never been denied access to books and records it requested from Barbizon and its general practice in audits of all employers is to see the general ledger. The Union witness conceded that it had not previously found Barbizon books to be false and had filed no previous grievances against Barbizon with respect to books and records.

Barbizon claims that the books and records they submitted to the Union are sufficient for the purpose of learning about outside contractors. Foley conceded that the Union would have to rely on Barbizon's words that the books shown the Union contain all the necessary information about outside contractors. However, Barbizon had offered to supply a verification by Arthur Young & Company, who audit Barbizon, with respect to matters which concerned the Union. The offer was repeated at the hearing.

Barbizon is a privately-held corporation which files no public financial statements. It deems its books to be "confidential." There is very limited access to the general ledger which contains the kind of information Barbizon would want to remain confidential, such as, its cash position, loans, assets and executive compensation. Foley characterized the information supplied to the Union as that which deals with the cost of manufacturing. This is what is "necessary and pertinent" under the contract, according to Barbizon.
The Union claims it should not be required to rely on Barbizon's word or that of a third party auditor to determine the existence of payments to outside contractors. Such payment can be concealed in a variety of ways and access to the entire chart of accounts, the general ledger and bank records is the only way a proper audit can be conducted to determine whether there were payments to outside contractors.

Barbizon argues that the imposition on it to reveal confidential information where there has not been a claim of dishonest or faulty books is not justified. Barbizon's offer of Arthur Young's verification should suffice. In any event, the Union is not entitled to damages but only to the arbitrator's determination of which books and records should be made available.

The contract clearly provides that the Union should be provided all "pertinent or necessary" records and claims of confidentiality cannot preclude access to such records. The importance of the Union's contractual right to examine books is underscored by the provision of paragraph 3 of Article XXVII that the "failure of the Employer ... to submit such books and records shall be presumptive evidence of the violation complained of." Uncontradicted evidence that the Union had access to the records in the past shows that both parties found them to be "necessary" or "pertinent" under the contract, according to the Union. As for confidentiality, the Company has bargained away the claims where records are "pertinent or necessary."

The evidence is somewhat confusing with respect to which books and records Barbizon refused to submit to the Union. Mr. Agra was quite specific about different ones in the two audits; whereas the Barbizon witnesses did not and apparently could not distinguish the audits as sharply. Agra claimed that Barbizon
had not denied the Union's request for records in previous audits but did not testify explicitly that a request for the general ledger had been made. Donald Fischer, the Union's Director of Welfare Funds Control and involved in audits for the Union for almost 35 years, testified that access to general ledgers was common and necessary. It was the only way hidden payments could be discovered. Barbizon did not deny this assertion but claims there is no basis for believing Barbizon's records limited to contractors are incomplete, false and, in any event, it is willing to supply verification by Arthur Young & Company.

I find that the Union is entitled to have Barbizon submit to it for examination the records it demanded. This includes the chart of accounts, the general ledger, bank records, including cancelled checks, and invoices and back-up.

**TIMELINESS OF THE UNION'S CLAIM**

Barbizon's claim that (1) the doctrine of laches should bar the Union's claims and (2) the six months statute of limitations in NLRA §10(b) bars the claim. To the extent Barbizon's position is that the claim with respect to the Albonito plant was not timely asserted, there is no need to address it in view of my disposition with respect to that plant.

**LACHES**

Both parties recognize that laches involves (1) inexcusable delay or lack of diligence on the part of a claimant and (2) injury to the other party from the delay. The record shows ongoing discussions, negotiations and ample notice that the Union was asserting a claim. The failure to immediately file a grievance under the circumstances is understandable (even desirable under the contract) and not due to a lack of diligence. In any event, evidence of injury to Barbizon due to the passage of time is totally lacking. Without this critical element, the laches claim must
fail under the circumstance of this case.

SECTION 10(b) — SIX MONTHS STATUTE OF LIMITATIONS

Barbizon's reliance on *Del Costello v. Teamsters*, 103 S. Ct. 2281 (1983) is misplaced on two grounds. First, the Court reaffirmed the teaching of *Auto Workers v. Hoosier Corp.*, 383 U.S. 696, 86 S. Ct. 1107 (1966), that ordinary contract actions between an employer and a union are governed by state statutes of limitations unless it involves a policy uniquely implicating basic national labor policy such as a "hybrid §301/fair representation claim." In the latter event, §10(b) applies. *Del Costello*, supra, at 2289-91. This is not such a case. If brought as a court action for breach of contract under §301, it would be an action that "closely resembles an action for breach of contract cognizable at common law." *Del Costello*, at 2289, quoting *Auto Workers v. Hoosier*, supra. Therefore, even if *Del Costello* does apply to arbitration proceedings, I find it does not require the application of §10(b) to this proceeding.

Second, the power of the arbitrator in this case derives from the agreement to arbitrate and the agreement governs when arbitration must be initiated. Nothing in the agreement suggests that a short six-months period was contemplated by the parties and nothing in the policy enunciated by *Del Costello* requires that the arbitrator recognize a six-month period and I refuse to do so.

I hold that the Union's claims are not time-barred.

INTEREST ON THE AWARD

The Union first claimed interest on the award, if any, when it filed its original brief. It claims interest should be awarded at the median prime rate (15.5%) for the period February, 1981, through July, 1984, from the time each invoice was rendered by the Union. This would be interest on $190,356.22, from May 25,
1982, on $20,778.01, from November 8, 1982, and on $158.05, from 
June 27, 1983. The Union would call into play the arbitrator's 
power to grant "such other relief as the arbitrator may deem 
proper."

Barbizon objects to the imposition of interest because the 
Union raised it for the first time in its Brief and because it 
is not customary and would be unusual to award interest. For 
those reasons and because it is not expressly provided for in 
the contract, I agree, and deny the claim for interest on the 
award.

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

1. Barbizon Corporation violated paragraph 5 of Article XXX of the collective bar-
gaining agreement and was not justified in doing so under the provisions of para-
graph 8 thereof;

2. Barbizon Corporation did not violate any 
agreement with ILGWU with respect to the 
establishment and operation of a shop in 
Albonito, Puerto Rico;

3. The payment of a damage award to the Union 
in compliance with the liquidated damage 
clause would not violate section 302 LMRA 
and is not a penalty and consequently such 
payment would be lawful;

4. Barbizon violated the provisions of Article 
XXVII by its refusal to submit the books, 
records and data requested by the Union.

Barbizon shall submit to the Union for its 
examination its chart of accounts, the gen-
eral ledger, invoices and back-up, bank re-
cords, including cancelled checks, as prev-
iously demanded by the Union.

The Union's right to demand liquidated dam-
ages on account of Barbizon's use of outside 
contractors which may be discovered from the 
examination of Barbizon's books, records and 
data, is preserved.
5. The Union's claims are not barred by §10(b), NLRA, or by laches;
6. As damages, Barbizon shall pay to the Union the sum of $211,292.28;
7. The Union's demand for interest on $211,292.08 is denied.

Eric J. Schmertz
Arbitrator

DATED: August 16, 1985
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
Warner Amex Cable Communications, Inc.:
and
City of Cincinnati:

This matter was brought to arbitration pursuant to the following agreement entered into by the above named Company and City and signed June 22 and June 28, 1984.

THIS AGREEMENT is entered into by and between the City of Cincinnati, a municipal corporation organized and existing under the laws of the State of Ohio, hereinafter called "City" and Warner Amex Cable Communications of Cincinnati, Inc., hereinafter called "Warner Amex."

WITNESSETH:

WHEREAS, the City and Warner Amex are parties to a franchise ordinance and agreement, passed and entered into respectively on February 19, 1981, granting Warner Amex, a non-exclusive franchise to own, operate and maintain a Cable Antenna Television System (CATV) within the City for a period of 15 years, subject to certain terms and conditions; and

WHEREAS, among the terms and conditions contained in those documents are provisions which grant Council of the City the authority to set rates for certain cable services; and

WHEREAS, the authority of Council of the City to set certain rates was challenged by Warner-Amex on the basis of a recent Federal Communication Commission (FCC) ruling (CSR-2269) FCC released 83-525 released November 15, 1983; and

WHEREAS, the City maintained its authority to so regulate rates remained unaffected by said ruling; and
WHEREAS, many of the suburban communities in Hamilton County, having granted similar franchises to Warner Amex (either known as Warner Amex Cable Communications Company of Greater Cincinnati, Warner Amex Cable Communications, Inc., or Warner Amex Cable Communications Company) shared in the dispute over rate-setting authority based upon the terms of their various franchises; and

WHEREAS, after protracted negotiations, it was agreed between Warner Amex and the City, that if substantial participation of other suburban franchisees could be secured, a binding arbitration proceeding could be agreed upon; and

WHEREAS, a substantial number of cities, villages and townships having franchises with Warner Amex have agreed to join in said binding arbitration; and

WHEREAS, Council of the City of Cincinnati, by Ordinance No. 166-1984, has authorized the City Manager to enter into an agreement with Warner Amex Cable Communications of Cincinnati, Inc., providing for the temporary suspension of certain rate provisions of the agreement and franchise between the City of Cincinnati and Warner Amex based upon substantial compliance with conditions for a last best offer binding arbitration procedure; now, therefore,

BE IT AGREED by and between the City and Warner Amex, as follows:

1. Parties agree to submit rates for Expanded and QUBE service to "last offer" arbitration (by a panel of three (3) arbitrators) for the year April 1, 1984 to March 31, 1985. Parties agree also to submit to last offer arbitration the rate for economy level service as well for the year April 1, 1985 to March 31, 1986, if rate relief is requested by the Company.

2. Rate increases proposed by Warner Amex to go into effect April 1, 1984 (and April 1, 1985 if requested by Warner in accordance with the provisions hereof), i.e., while arbitration process is pending. Warner shall escrow in interest bearing account and refund with interest the difference, if any, between rates implemented
April 1, 1984 and rates determined by the Arbitrators.

3. Arbitrators' decision shall be based upon such data, criteria, information (oral or written) and documents as the arbitrators reasonably deem appropriate. The arbitrators' test is whether the Franchisor's or company's last offer is better calculated to enable the Company to earn a fair return on its investment.

4. Arbitrators' decision applies to Warner Amex and a substantial number of all Warner Amex franchise communities in Hamilton County, Ohio. This number is currently estimated at 26 communities, but the failure of one or more communities to adhere to the arbitration process shall not affect the binding nature of this agreement upon the City of Cincinnati and Warner Amex.

5. Arbitrators' decision will be effective for one year, i.e., from April 1, 1984 to March 31, 1985 and, assuming a new arbitration is requested by the Company in 1985, from April 1, 1985 through March 31, 1986.

6. Parties expect that all open franchise issues can be resolved mutually and they agree to make good faith efforts to resolve all such issues, outside of formal process, during the next 24 months.

7. Company shall provide Franchisors such data, information (oral or written) and documents as are reasonably necessary to submit a last offer. In the event of any dispute, this issue shall be resolved by the arbitrators.

8. Arbitration Procedure:

1984

(i) April 13, 1984 -- designation of company and Franchisors' arbitrators. Company provides data to Franchisors.

(ii) April 20, 1984 -- designation of third arbitrator.
(iii) April 27, 1984 -- "last offers" submitted to arbitrators. (Warner Amex last offer to be $11.95 and $13.95).

(iv) May 4, 1984 -- oral presentations and/or memoranda to arbitration panel.

(v) May 14, 1984 -- arbitrators select either company or Franchisors' last offer.

1985

(vi) January 31, 1985 -- announcement of intent to seek new rates (if rate change is sought).

(vii) February 15, 1985 -- Company provides data to Franchisors.

(viii) March 1, 1985 -- designation of arbitrators.

(xi) March 8, 1985 -- designation of third arbitrator.

(x) March 15, 1985 -- last offer submitted.

(xi) March 22, 1985 -- oral presentations.

(xii) March 29, 1985 -- arbitrators' decision.

9. Arbitration process is experimental; participation by Warner Amex and Franchisors is without prejudice to their respective legal positions regarding Federal preemption, rate setting authority, etc. From and after May 1, 1986, parties may proceed in accordance with applicable laws. It is expressly understood that this agreement does not change any terms of the franchise agreements other than those terms temporarily suspended as expressly contained herein.

10. Parties to bear cost of their respective arbitrators and to share cost of third arbitrator and arbitration expenses.

11. Either Franchisors or Company may elect not to participate in arbitration for the one year period commencing April 1, 1985 in the event there is a change in the current status of the law relating to rates (i.e., Congressional enactment, FCC regulations, or court decision binding on the parties).
12. Parties acknowledge that the dates set forth in section 8, above have changed by agreement of the parties.

The parties mutually agreed to a different time schedule than that set forth in Section 8 above.

The Undersigned was selected as the Chairman of the Board of Arbitration, and Richard M. Berman, Esq. and Nicholas P. Miller, Esq. served respectively as the Company's and City's designees on the Board of Arbitration. The Oath of the Arbitrators' was waived.

Following a preliminary meeting, formal hearings were held on September 6, September 18 and October 20, 1984. Representatives of the City and the Company appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. A stenographic record was taken. At the conclusion of the hearings, the Board of Arbitration met in executive session.

The issue for determination is specific. It is "whether the Franchisors' or Company's last offer is better calculated to enable the Company to earn a fair return on its investment."

Section #5 above sets forth the effective period for the Arbitrator's decision.

In question are the rates for Expanded Service and Qube Service. The Franchisors' (City's) last offer is $9.25 a month for the Expanded Service and $11.25 a month for the Qube Service.
The Company's last offer is $11.95 a month for the Expanded Service and $13.95 a month for the Qube Service. (The present Economy Service rate of $3.95 is not in dispute and is not involved in this arbitration.)

It should be noted that the stipulated issue and the agreement to arbitrate require the arbitrators to select either the rates requested by the Company or those proposed by the City as aforementioned, on a "last offer" basis. We are not permitted to fashion a different rate structure even if we concluded that rates in excess of the City's proposal but less than those requested by the Company would be "better calculated to enable the Company to earn a fair return on its investment." Rather we must decide which of the two "last offers" is "better calculated" to achieve that result.

Also, we think it important to note that we are not asked nor authorized to consider or decide such matters as what may be in the public interest, or the consumer's ability to pay, or the quality of the service provided, or the effect on the economy by a rate increase, or the "value" of the instant services as compared to similar services in other communities, or the impact of cable TV as a monopoly or as a regulated industry. Also, assuming the veracity of the original projected costs, it is irrelevant to the issue before us that actual costs proved to be considerably higher than what the Company and the City expected at the time the franchise was awarded.
However, we do think that the Company’s efficiency in operating the system is relevant to the rates that should be charged, and therefore evidence of inefficiency must and will be considered in deciding which set of rates is more appropriate.

In short, we view our authority as confined to deciding which of the last offered rates better meet the test stipulated considering the present and future state of the system and its present and prospective operation.

The Time Horizon

The City’s presentation is essentially that the optimism of a few years ago as to utilization, costs and profitability of CATV should not be abandoned. (9/18/84 Tr. 94-97). The crux of the Company’s case is, that huge losses are piling up while one waits to see whether profitability will come. It certainly has not come in the time frame that had been expected.

The urban-type cable TV industry is only a few years old, so that projections as to such crucial elements as penetration, the extent to which subscribers will accept various offerings, price elasticity, advertising sales, the availability of attractive programs, and important components of operating expenses are extraordinarily difficult to project, and degenerate to sheer guesswork as the projected year becomes more distant. Consequently, unless some distortion can be shown, the major focus should be on the five-year forecasts submitted by the Company,
rather than on the fifteen-year forecast offered by the City. It also follows that projections made at the time the franchise was negotiated, in 1979 and 1980, are of only limited usefulness.

A major factor in the City's 15-year projection is the present worth of the "value" of the system at the expiration of the 15-year franchise, computed as a multiple of the City's forecast of the net operating income in the 15th year (See the Tables in City Ex. 2, Sec. D). Thus, in the City's calculations the year in which operating results would have by far the greatest impact on the level of earned return, would be the fifteenth year - the year whose results are most difficult to project. This defect is quite apart from the obvious circularity of having the fairness of a return be derived from income levels which will themselves depend on the return being allowed.

These difficulties with fifteen-year projections are exacerbated by the uncertainties surrounding this industry. It has many competitors for the viewer's dollar, and the rate of technological change is considerable. (See Co.Ex. 5, Exhibit B, p.2).

In argument, the City made the point that a five-year horizon is too short, because the industry is generally financed with tax shelters, and anticipates low returns in the first seven years, and large cash flows in the later years. (9/6/84 Tr. 29) But assuming this to be the case as to the industry generally, it has not been shown to be the case.
with respect to the Cincinnati system. The Arthur Young 5-year forecasts (Co.Ex. 6) were stated to be based on taking "full tax benefits...in the year of occurrence," and no objection has been raised as to the calculation. The Company's detailed cash flow tables (at p.1 of Response no. 1 to Question 1, 3/20/84 for the operation in the City, and the 5th unnumbered page of response of 5/18/84 as to the suburbs) show that the tax benefits have been flowed through. The Company's method seems to have been accepted by the City's consultants. See City Ex. 2, p.c-10.

Moreover, it must be appreciated that the rates set in this proceeding are not being frozen for a fifteen-year period. Apart from federal statutes on the subject, the Franchise (Co. Ex. 14) provides that "the City reserved the right to initiate review of the regulated rates of the Company from and after the time the Company achieves a fair rate of return on a cumulative basis" (Article III Sec. 4(b)). See also Artc. III Sec. 4(e), authorizing the City to review and monitor the Company's financial calculations annually, to determine net investment and cost of service. Thus while a bonanza in the later years would raise a question of inter-generational equity, it would not lead to enrichment of the Company if the rates now set would produce too high a level of earnings in the later years. Moreover, the Arbitration Agreement explicitly provides that our decision will be effective for only one year, ending March 31, 1985, or through March 31, 1986 if a new arbitration is requested
by the Company. (Jt. Ex. 1, par. 5).

Furthermore, it could be argued in the later years that the permissable rate of return should not contain as a component an allowance for deficiencies in the earlier years; that would be retroactive rate-making.

Finally, it should be noted that when the Company (at the City's request) extended its forecast to 1995, the results were not significantly improved. Net income (i.e., return on equity) in the City and in the suburbs remained negative through 1992 and 1991 respectively, and for the full period 1980-1994 was a negative 2.64% in the city and a negative 1.5% in the suburbs, all based on the new rates.

As we accept the basic soundness of using a five-year forecast, rather than one extending well into the 1990's that will be our point of departure; and we shall then consider the City's major comments on it.

The Company's Five-Year Projection

The basic evidence of the Company is five-year forecasts of Arthur Young for each of the years 1984 through 1988, of revenues, operating expenses, depreciation, interest cost, and income tax benefits. The assumption on which the forecasts are based are the management's, but Arthur Young states that they are "reasonable." The forecasts, reflecting the Company's proposed rates (which have been put into effect subject to refund) show a net loss in 1984 of $2,028,000 in the City and
$4,201,000 in the suburbs, and net losses over the five year period of $10,743,000 in the City and $13,286,000 in the suburbs.

The Company's investment in the City is some $55 million, and $107 million has been invested in the suburbs. The Arthur Young forecasts are based on a hypothetical financing pattern of two-thirds debt and one-third common equity, and the interest rate assumed on the debt is the actual cost to Warner-Amex, which has been the lower of the prime rate and LIBOR (the London Interbank Offering Rate). Presently that rate is 11.7%, substantially below the levels in recent months for Moody's AAA and AA bonds. These assumptions are conservative, and are not questioned by the City. The result is that one may assume equity investment of one-third of the aggregate $262 million investment, or $84 million, against which, according to the Company's figures and based on its new rates, there is a negative return of $6.2 million in 1984. The cumulative 1984-1988 loss of $24 million in the City and suburbs combined cannot be set against the $162 million present investment, as considerable plant must be added in the intervening years, and adjustment must also be made for depreciation and amortization, as well as for the effects of tax benefits. The record shows that the average net investment in 1984-1988 is forecast at $55,167,000 in the City and $80,981,000 in the suburbs.

For the years 1984-1988 the Company's estimate is for a positive cash flow of $10.6 million, and $26.0 million in the
suburbs, a total of $36.6 million. This would reduce its cash exposure from a combined $132.8 million at the end of 1983 to $96.1 million at the end of 1988. While this statistic may seem to paint a rosier picture than the calculation of the return on equity, its usefulness is limited by the fact that it includes no element for the opportunity cost of money, i.e., for the foregone return on past negative cash balances.

The City's Critique of the Company's Figures

The City propounded a number of detailed interrogatories to the Company, and expressed no dissatisfaction with the completeness of the responses. The City has generally accepted the accuracy of the Company's data (9/18/84, Tr. 62; 130) but has questioned the soundness of a number of assumptions used in the Company's forecast.

(a) The Magnitude of the Capital Investment

The record shows that the actual cost of construction greatly exceeded the estimates at the time the franchise was awarded. (9/18/84 Tr.p.12). The record contains explanations and reasons for the increase, but their acceptability is not in issue here. Our only concern is the adequacy of the return on the investment.

The City's data are in a report by Rice Associates (City Ex. 2). The Rice Report, although accepting the historical capital costs, rejects the Company's forecast for the future total cost of drops, and of connectors and traps. (City Ex. 2, p. C-2 and
Tables C-3 and C-4). Rice's reason is that "The cost per new subscriber ... is unreasonably high based on ... industry standards." The Report does not state what the industry standards are or how they were ascertained or where they can be found. The Company's estimates for the total costs of drops, connectors and traps, as shown on Rice's tables C-3 and C-4, do indeed swing widely; but the Company points out that the Report's tables divide each year's capital costs for those items by the number of net new subscribers, ignoring the new subscribers who are replacing old ones, i.e., ignoring churn (9/18/84, Tr. 26, 184, 185) and replacement (ibid. 169, 170). The City does not deny this (City Ex. 9, pp. 5,6). The Company also points out that variability in annual cost results from the replacement cycle, and from purchases for inventory (ibid. 175-178).

On this record, we are not able to reject the Company's estimates of the cost of additional facilities in the 1984-1988 period.

There is one remaining respect, on this record, in which the plant constructed for the City and its suburbs might be said to be under attack as imprudent: capacities were built into the system which are not yet being utilized, and may never be utilized. The system is 86-channel, whereas only 60 are now serving. However, there is indication in the record that the City wished a state-of-the-art system; and the record contains no evidence as to the incremental cost of the presently-unused capacity.
Moreover, our terms of reference confine us to consideration of the return on the Company's "investment," and do not include any question of whether the Company, in making its investment, has over-built or gold plated. Consequently we shall disregard this possible factor.

(b) Home Office Expense

The Company's forecast is based on a charge to operations in the City and the suburbs of 7% revenue, designed to pay for technical support rendered by the home office to the local operation, including accounting, finance, engineering, operation, programming, sales and marketing. The Company claims that these services are furnished to its entire operation (of more than 130 systems, 10/20/84 Tr. 102), and consequently that in the aggregate they are cheaper than if each system arranged for those services separately, an inference which is not self-evident. The Company says that the services are furnished at cost.

There are, of necessity, three questions: is the aggregate of Home Office expense inflated, is the allocation of that aggregate to Cincinnati and its suburbs reasonable, and is there any showing that the local burden could be arranged or purchased more cheaply on a go-it-alone basis?

The record contains vigorous attacks on the product of the first two factors, i.e., the magnitude of the dollar impact on the local Company and on the suburban operation; and indeed the
amounts are large when compared with the earlier estimates. The original pro forma estimate for the City's portion for 1984 was $261,000, and it increased to $1,748,000 in the five-year forecast. The City's consultant, Rice Associates, noting the very large increase, simply reduces the estimated cost to the earlier estimates. This will not do. For us to reduce the parent company's charge, it would be necessary for us to find either that the gross Home Office cost to be allocated is excessive, or that the allocation to the Company is unreasonable, or that the services could be purchased at less cost elsewhere.

There can be little doubt that a holding company with operating subsidiaries subject to rate regulation, has an incentive to assign to those subsidiaries cost which, but for regulation, might be borne by the parent. The history of the regulation of the telephone industry, and of the treatment of service company subsidiaries of electric and gas utility holding companies, is clear indication that the temptations are not always resisted. But that is no basis for a finding in this case, on this record, that Warner-Amex has assigned to its operating systems any costs which ought properly to be borne by itself.

As to the method of allocation, Rice Associates expresses the view that a more direct method should be used, rather than distribution of the costs as a function of revenues (City Ex. 2, p. C-16). Perhaps Rice Associates is correct; but its reasoning is neither stated nor obvious. The reasons for allocation of
such common costs on the basis of an easily calculated factor or combination of factors, are the difficulty of ever finding "the correct" method of allocating joint costs, the expense of attempting to do so, and the quick obsolescence of the results of such efforts.

However, there are relevant data in the record. The Company states (Co. Ex. 7, Request I, answer to Question 9) that the City and its suburbs represented 7.6% of the parent's revenues, and 9.7% of its subscribers, while "absorbing" 6.3% of the "corporate overhead" for its "field operations." This is not entirely clear. If it means that the Home Office Expense is the corporate overhead for field operations, this suggests that the parent has made a detailed allocation study in which it has allocated the aggregate Home Office costs to the local systems on some basis which seemed reasonable to it, and has found that the City and its suburbs are actually responsible for only 6.3% of the aggregate. If one wishes to convert this so that the allocation of Home Office Expense would be a function of revenue, it would seem that one must use the 6.3%. This is 10% less than the Company's 7% figure.

Accordingly we must ascertain the extent to which a 10% decrease in Home Office expense would affect the estimate as to costs in the 1984-1988 period. The combined revenues in 1984 are estimated at $64,928,000. If Home Office expenses were charged at 6.3% of revenue rather than 7%, the reduction of 0.7% would be $454,496, before taxes. An expense reduction of 0.7% of the
combined revenues in 1984-1988 would be $2,775,584. There would, of course, be a partial offset in the form of higher taxes.

As to the third question, whether the service could be purchased elsewhere at lower cost, the record contains no evidence.

(c) Number of Potential Customers

The Company asserts that the number of homes to which it has been "able to gain access to provide service is 145,300." (Co.Ex. 16, p.5). Its figure is "based on actual count" (Co. Ex. 7, Request I, Answer to Question 2). The City, however, has informed Rice Associates that "a reasonable estimate of number of homes would be 155,000" (City Ex. 2, p. C-10). We have been given no basis for selecting the City's "reasonable estimate" in preference to the Company's actual experience. However, no choice need be made. If the City's estimate is correct the only effect is that the penetration levels (the percentage of potential customers who actually accept service) would be reduced. The City does not suggest that the Company would deliberately reject potential customers, and we see no reason why it would do so.

(d) Penetration Levels

Rice Associates states that at the time the franchise was being negotiated, the estimated penetration ratios were based on a marketing survey which forecast an overall penetration ratio of 46% in 1984, increasing to 54% by 1990. (City Ex. 2, p. C-11). In fact, however, the 1984 penetration ratio achieved by the
Company has been only 41.2%. Rice Associates proposes that the 1985 forecast be based on 48%, increasing to 52% in 1988. (City Ex. 2, Table D-8). The Company forecasts 45% in 1985, rising to 48.7% in 1988.* Rice Associates advances two reasons for its view:

i - Rice says that the 1984 level is still reduced by the economic recession through which we have passed.

The record shows penetrations in the City in the months September 1983 through February 1984 ranging from 36.4% to 41.4%, (Co. response to inquiries, 10/30/84, 1st page). It must be noted that penetration is generally somewhat higher in the winter months (10/20/84 Tr. 53) and that the recession had itself receded by about a year. It appears that the Cincinnati market in terms of penetration ratios, was not as good as had been anticipated, and we are not entitled to attribute the shortfall to the earlier recession. (After February 1984, penetration ratios fell still further, to 33.8% in September 1984, but those data are clouded by the fact of the rate increase in April 1984. Moreover, we must observe that the City's last offer also provides a rate increase, which, assuming any price elasticity at all, implies a lower penetration ratio than the ratio originally estimated, which

* Significantly higher penetration levels are assumed by the Company for the suburbs, increasing from 53.8% in 1984 to 55% in 1988. (Co. Ex. 6, Notes to Forecast). Rice Associates does not challenge these assumptions.
ii - Rice's second basis for rejecting the Company's lower estimates of penetration, is the industry's experience. It points out that "the average penetration of the top 10 MSO's (including Warner-Amex) and of the top 49 (is) approximately 59.4%," citing Broadcasting, 6/4/84, p. 81 (City Ex. 2, p. C-11). The record does not indicate whether the industry average (if that is what "top 10" and "top 49" means) used by "Broadcasting" included "classic" Cable TV (CATV) systems, which achieve a very high penetration rate because they permit subscribers to receive television who, without cable, would not be able to receive it at all. On the other hand, the Company responds with penetration levels in ten municipal markets which range from 31.1 in Dallas to 40% in Atlanta. (Co. Ex. 16, p. 5).

We have not been given adequate basis for upward revision of the Company's assumptions as to penetration rates.

(e) Additional Revenues

Cable TV has the potential of bringing to the subscriber's television set any service which can be brought to the "head end" (the central receiving and dispatching center) and then sent over the cable. Five years ago, when many cable TV franchises were being negotiated, there was optimism that the systems would be used for advertising, home security, home shopping, videotext, and other services, and revenues from these uses were assumed.
The Company states that "while the capacity for these kinds of services was built into the Cincinnati system, no one has yet discovered a way to make these ancillary services profitable." (Co. Ex. 16, p. 7).

It does not follow, however, that the full risk should rest on the shoulders of the consumers. If we could calculate the incremental cost of the facilities whose usefulness was erroneously assumed, we could entertain an argument that the investors should bear part or all of the burden of their construction, on the ground that that capacity renders no service. It might be pointed out in reply, if the facts so warrant, that the City, in negotiating the franchise, wanted that capacity built into the system, so that the cost of the unused capacity was really incurred at the behest of the customers. We are again mindful that our mandate is confined to the reasonableness of the return on the Company's actual investment, not on some stripped down hypothetical investment. In any case, in the record before us there are no data as to the incremental cost, and no exploration of the problem; we shall therefore not deal with it.

What we are left with is an argument by Rice Associates on behalf of the City, that the Company's earnings projections include no element for any of those uses. One of those uses is advertising.

i - The Company's detailed statements of revenue show,
over the fifteen year period, 1981-1995 for the City "advertising sales" aggregating $8,562,000 (Co. response to enquiries of 3/20/84, Response no. 1, p.8) and a corresponding figure of $15,244,000 for the suburbs in 1980-1994 (Co. response of 5/18/84, p.9), for a total of $23,806,000. The revenue totals which appear in the Arthur Young tables (Co.Ex. 6) in the years 1984-1988 are the same totals as appear, in those years, in the 15 year forecasts we have just referred to. Thus, the Arthur Young data include these advertising sales.

Rice Associates, for the years 1984-1988 for the City, calculates a total of $3,042,000 of additional advertising revenue, (City Ex. 2, Table D-10A), beyond the Company's total for 1984-1988 of $2,819,000. But we are given no basis, other than Rice Associates' more sanguine expectations for the future, to reject the Company's forecast; and that is not enough.

Moreover, there are costs associated with advertising revenue. Thus, for the first 8 months of 1984 the Company reported $515,000 of advertising revenue, and $351,000 of associated expenses (Co. Ex. 16, p.8). The record does not indicate the relationship between the marginal increment in advertising revenues estimated by Rice Associates at $3,042,000 over the period 1985-1988, and the marginal cost of obtaining and servicing the additional advertising; nor does the record show whether Rice Associates included, in its calculations, any such off-setting costs.
We are not warranted in adjusting the Company's forecast of advertising income.

ii - Another "additional revenue" item is security services. In the full 15 year period, Rice Associates calculates $16,192,000 of revenue from this source, of which $3,375,000 is forecast for 1985-1988. No revenue at all has been received from this source, and Rice Associates forecasts only $36,000 for 1985. The Company anticipates $7,596,000 for the period 1984-1994 (Co. Ex. 7, Response to Question 5), but has not included any revenue at all in its forecast for the period to 1994 because "it represents less than 1% of the forecasted revenue for 1984-1994." (ibid.)

This reason for ignoring the item is not compelling, since a small effect on revenue may represent a large effect on the rate of return.

The Company also points to the recurring losses thus far in Warner-Amex's house security division, the biggest cable TV operator in the security business in the country, (9/18/84, Tr. 23,24). But this too is hardly a good basis for ignoring it entirely at the local distribution level. While we do not accept the Rice Associates estimates, as they are not supported by anything other than hope and optimism, we think that the item should not be ignored. As a rough measure, we shall apply to Rice Associates revenue estimate of $3,375,000 for 1985-1988 a factor of 50% (approximately the ratio of the Company's aggregate for the
15 year period to the City's corresponding figure), and conclude that approximately $1,700,000 (before taxes) should be anticipated for revenue from security services in the five-year period covered by the Arthur Young report (Co. Ex. 7).

This figure does not reflect any expenses for security service. While no data are in the record on that subject costs must be taken into account in ascertaining whether a security service makes a net positive contribution (see Dowling 10/20/84 Tr. 87). We shall return to this matter after considering whether even the gross revenue figure, after taxes, combined with the other adjustments we make to the Company's 1984-1988 forecast, require a closer analysis.

iii - A third "additional revenue" item is the "institutional network." These are separate cables, to serve the special needs of such institutions as schools, governments, universities and commercial enterprises. The Company states that it has installed two such loops in the suburbs at a combined capital cost of $184,000 with annual operating costs of $49,000, and zero revenues. In the City it has made capital expenditures of $621,000, and has projected an additional $622,000. Rice Associates points out that the franchise forbids subsidization of the "1-NET" service by the regular commercial subscribers (Art. II Sec. D subsec. 1, 5th para.), but the Company claims that since it cannot find users who are willing to pay for the service, it has delayed completion of the network despite "threatening
protests from the City." (Co. Ex. 16, p.8).

Rice Associates correctly states that if the cost of constructing the network is included in the "rate base," but the revenues are excluded, the forbidden subsidization would occur (City Ex. 2, p.C-13). But it suggests no specific remedy, as the data are inadequate. We believe the amounts involved are too small to be a factor in our decision.

iv - A fourth "additional revenue" is Qube II programs, for which Rice Associates contends there should be an adjustment because the system has the purpose and capability of providing the services. Rice concedes that no revenues have yet materialized, but argues that "the brightening industry outlook suggests that these capabilities will likely be utilized" (City Ex. 2, p. C-12).

The Company's response is that these projections as to ancillary uses of Cable TV have proven, across the country, to be "pie in the sky". It points to the absence of additional options to offer its customers and the collapse in recent years of a number of options which had been available, including the Entertainment Channel, Satellite News Channel, CBS Cable, Escapade, Alternate View Network, Eros, American Network, and Spotlight as well as the failure of videotext, home shopping and data transmission to develop viable businesses. (Co. Ex. 5, Exhibit B.)*
If rates were now being set for all time, we might be constrained to explore further the possibilities that these or other ancillary services may in time become sources of revenue. But as of the present time, on this record, we cannot make an upward adjustment for that possibility, in the period 1984-1988.

We note that even with the adjustments we are making and even at the new rates, the Company will be earning less than a reasonable return; thus it will have every incentive to develop these possible additional sources of revenue. If so developed, the resultant net gain can be taken into account in future considerations of the adequacy of the return.

(f) Cost of Technical Operations

Rice Associates points out that the Company's expected expense for technical operations in 1984 is an increase of 234% over the 1983 level. (City Ex. 2, p. C-17). The corresponding figure for the suburbs is 90% (Co. response of 5/18/84, 9th un-numbered page).

The Company in reply refers to the large number of repair

* Although it is not in the record, we note that on November 20, 1984 Time, Inc.'s Home Box Office pay-cable television unit laid off 10% of its corporate staff. The Wall Street Journal reported that "it has had a sharp slowdown in subscribers to its two pay television services, HBO and Cinemax, in the face of rising costs and stiff competition from the video-cassette market."
calls it makes, and the numerous installation calls, reconnects, changes of service, and disconnects. However the Company's reply offers no explanation for the very large increases in 1984 over 1983. On the other hand the City does not dispute the actual 1984 experience to date, or the 1984 work load. We shall return to this matter.

(g) Sales Expense and Churn

The Rice Associates report asserts that the Company's expectations as to the future cost of sales (and incidence of churn) is excessive. It says that these costs "should decline" (Ex. 2, p. C-17); that "many industry analysts feel that better marketing efforts can improve penetration;" and that there is "a trend toward shifting marketing emphasis from pay to basic services (Broadcasting, June 11, 1984)." The report says that "The Company's lower penetration and high percentage of premium services suggest that a revised marketing strategy and improved marketing techniques may result in improved penetration and less need for the current and future rate increases." (Ibid, p. E-11).

The Company's response is that the cost of sales and resales rises as a system matures because potential customers have already rejected the service, and that retention marketing is necessary to reduce churn. (Co. Ex. 16, pp.11,12).

On this record we are unable to conclude that the Company's forecasts of its sales expense in 1984-1988 are excessive, nor absent expert marketing evidence subject to detailed gross exam-
ination are we able to determine that the Company's marketing methods are wrong.

(h) Operating Ratios; Over-all Operating Expenses

The Rice Associates report says that the over-all operating expenses of the Company are high when compared with industry averages (City Ex. 2, pp. 17,18). The Company's response is to cite high operating ratios in other cities (10/20/84, Tr. 31-34). This evidence on both sides is of little use to us. We are told nothing about wage rates, local economic conditions, competitive conditions, make ready costs, prevalence of underground vs. overhead construction, varying franchise conditions and easement availability, and the many other variables which can affect a comparison of operating costs in Cincinnati and its suburbs with those of other municipal areas. We are unwilling to assume that conditions are equal when their variability is so probable.

Conclusion as to the Company's Figures

The Company's five-year forecast shows net losses (i.e., a deficiency below a zero return on its equity) of $10,743,000 in the City and $13,286,000 in the suburbs, a total of $24,039,000. We have concluded that the forecasts should be adjusted to reflect the following changes:

(a) Home Office Expense: a reduction of $2,775,584 in expense, before taxes.

(b) Security services: an increase of $1,700,000 in revenue, before considering off-setting expenses, and before taxes.
We have also considered the City's attack on the increase in the Company's "Technical Operations" costs over the 1983 level. The actual 1983 level, in City and suburbs combined, was $3,586,000. The forecasts for the period 1984-1988 aggregate $39,890,000 (Co. Ex. 16, Response No. 1, p.5; Co. Response of 5/18/84 9th unnumbered page). If the 1984-1988 Technical Operations expense was reduced to the 1983 level, making no allowance whatever for any increases in cost, the reduction in expense would be $21,960,000 over the five year period. This does not take into account the increase in taxes which would result.

Thus, it appears that against the red $24,039,000 1984-1988 results in the Company's forecasts, there is a maximum of $25,935,000 which could be applied ($2,775,584 in Home Office expenses; $1,700,000 for Security Services revenue; and $21,960,000 of Technical Operations expense). The income tax effect, alone, would reduce this figure by nearly half, so that it is plain that the adjusted five-year forecasts (even on the unrealistic assumption we have made as to Technical Operations costs) still show that the Company will earn nothing at all on its equity in the five-year period.

It is therefore not necessary for us to consider what level of return on the equity would be reasonable, since the Company's return is less than zero (although we point out that in determining what rate of return is reasonable, we would not be bound by either the 18% rate of return on equity used by the Company in its
original presentation to the City, nor by the 21% rate which, as the City puts it, the Company now "postulates" (9/18/84, Tr. 102). (The cost of common equity capital changes over time).

We conclude therefore, that the Company's last offer (the rates now in effect), comes closer to affording the Company "a fair return on its investment" than does the City's last offer.

DATED: January 9, 1985

Eric J. Schmertz
Chairman
In accordance with Article 13, Section 10 of the collective bargaining agreement in effect between the parties, the Under-signed was designated as the Arbitrator to hear and decide the following stipulated issues:

1. Is the grievance of Mary L. Soupios arbitrable?

2. If so, did management violate the contract by denying the grievant's request for two days personal leave? If so, what shall be the remedy?

A hearing was held in the elementary school at Barton Barracks in Ansbach, West Germany on January 16, 1985 at which time representatives of the Union and Employer appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The grievant attended the hearing. The Arbitrator's Oath was waived. A stenographic record was taken. The parties filed post-hearing briefs.

BACKGROUND

The grievant, Mary Soupios, is a teacher at Ansbach Elementary School. Her mother died in the United States on November 15, 1982. The grievant did not then return for the funeral or seek a leave to do so, but returned to the United States on December 11, 1982 to assist her family in handling her mother's estate.
The Principal, Paul Seifert, granted the grievant three days any-purpose leave and two days leave without pay. The grievant sought two days personal leave (also referred to as emergency leave) instead of the leave without pay. The grievant filed a grievance concerning this matter on January 13, 1983.

Issue 1: Arbitrability

Contentions of the Employer

The Employer asserts that the grievance is not procedurally arbitrable because the Union failed to file the grievance "within ten (10) calendar days after the act or specific incident giving rise to the grievance" within the meaning of Article 13, Section 3 of the collective bargaining agreement. It is the view of the Employer that the "incident" occurred when the Principal indicated he would approve the two days without pay rather than the two days personal leave. As a result, the Employer insists that the grievant had ten calendar days from that date within which to file a grievance. Having failed to do so and having failed to obtain an extension, the Employer maintains that the grievance is untimely.

Contentions of the Union

The Union argues that the grievance is timely because the Principal requested, in a letter dated 15 December 1982, that the Personnel Officer in the Regional Office "review the case and indicate the appropriate type of leave that should be applied." As the Acting Personnel Director, A. F. Frost, responded in a letter dated December 22, 1982 and the grievant did not receive a copy of that letter until January 3, 1983, the Union position is that the grievant filed the grievance in a timely manner by submitting it within ten calendar days of January 3, 1983, namely, on January 13, 1983.
Opinion

It is my judgment that the grievance is procedurally arbitra-
ble. The first written document that the grievant obtained from
a management representative authoritatively denying her request
for two days personal leave reached her on January 3, 1983. Al-
though a written decision may not be mandatory, the willingness
of the Principal to contact the Personnel Officer to request
review of whether "there may be other cases which have created
a precedent for granting leave" in similar situations is suffi-
ciently ambiguous with respect to the Principal's intention and
sufficiently lacking in finality to lull the grievant into be-
lieving that the issue still remained open. The case involving
Marguerite C. Madden, relied upon by the Employer, is distin-
guishable because it involved a dispute concerning the payment
of a salary. In that case the decision of the Employer could
be identified unmistakably through an analysis of the payroll
statement. In contrast, the circumstances involving the grie-
vance of Ms. Soupios did not include a formal written document
or unquestionably reach the point of finality until the letter
the grievant received on January 3, 1983. In addition, the in-
conclusive wording of the Principal's letter makes the instant
case different from the Madden case. The Employer bears the
burden of proving that the grievance is not arbitrable by a
preponderance of the credible evidence. It has failed to do so
and therefore the instant grievance is timely within the meaning
of Article 13.

Issue 2: The Merits

Contentions of the Union

The Union insists that Article 19, Section 1 of the agree-
ment entitles the grievant to two days of leave in the present
case. In particular, the Union relies upon the following language: "Teacher leave may be used for . . . any personal emergency."

In support of its position, the Union cites various government regulations, directives and procedures. The Union underscores the critical importance of the grievant's return to the United States in December of 1982 to administer her mother's estate, to marshall family assets, and to deal with other members of the family, all matters more demanding of the grievant's presence and assistance than her presence at the funeral when there was "nothing she could do." Finally, the Union suggests that the Principal denied the grievant's request out of personal animosity.

Contentions of the Employer

The Employer asserts that the applicable contract language and supporting documents do not authorize the grievant to receive either emergency leave, which would have required American Red Cross involvement, or Teacher Leave under the "emergency" category, which would have required a personal emergency of an urgent nature. The Employer claims the use of such leave to settle her mother's estate was not within the meaning of the contractual term "emergency."

Opinion

The issue is a narrow one. It is whether the circumstances surrounding the grievant's request for leave constituted an "emergency." The dictionary meaning of the word "emergency" is "unforeseeability and immediacy." I see no reason why the word "emergency" in this contract should not be given its customary and usual meaning. Handling her mother's estate and dealing with the family may well have been complicated, requiring the grievant's
expertise and attention and of course it was a highly personal and probably emotional undertaking. But at that point it no longer involved the immediacy, unforseeability or compulsion of an emergency. Whereas the funeral must be held on compelling and short notice and cannot be scheduled at an accommodating time, the requirements in processing an estate are predictable and controllable as a matter of timing, albeit still with personal content. For these reasons it is my conclusion that despite the grievant's judgment on when her presence was more important, a judgment I respect, it was not a period of time that constituted a "personal emergency" within the contractual and customary meaning of that phrase. Accordingly, the Employer did not violate the collective bargaining agreement by refusing the grievant's request for the leave. Furthermore, there is no probative evidence to prove that the Principal denied the grievant's request for any reason other than a dispute regarding the meaning of the relevant contract language and related documents.

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

1. The grievance of Mary Soupios is arbitrable.

2. Management did not violate the contract by denying the grievant's request for two days personal leave.

DATED: May 7, 1985

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

Did the Company violate the contract in assigning positive work to negative developers rather than calling in positive developers to perform such work? If so, what shall be the remedy?

A hearing was held on April 23, 1985 at which time representatives of the above named Union and Company appeared. All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses. The Arbitrator's Oath was waived.

It is the Union's claim that unless positive developers refuse to accept positive developing work on overtime or call-in, the Company may not involuntarily assign positive developing to negative developers.

Though the Union introduced evidence of a past practice supportive of its position, the actual contract language and arbitral contract interpretation sustain the Company's action.

Section 13 of the contract expressly provides for temporary transfers between different classifications. I am satisfied that the assignments involved in this case, which took place on four or five days in April were of a duration and quantity to constitute temporary transfers within the meaning of Section 13. Though a positive developer had been laid off sometime prior to the disputed assignments, I cannot conclude from the record that these particular assignments "deprive(d) another employee of actual
employment or full employment within the meaning of Section 13(a). Indeed, insufficient probative evidence was offered by the Union on this last point. However, the Company is cautioned that it would be improper to lay off employees in anticipation of covering the fulltime work vacated by the lay off, by temporary transfers. I would consider that violative of the final provision of Section 13(a). But a proximate causation between the earlier layoff of a positive developer in this case and the subsequent assignment of negative developers to positive work over the few days involved, has not been shown.

Moreover, this issue had been considered and decided by a prior industry arbitrator. Arbitrator McMahon, in his Award of October 4, 1966 in the matter of the arbitration between Mecca Film Laboratories and Local 702 I.A.T.S.E., interpreted Section 13 of the contract, and held that:

"The Company has the right under Article 13 of the collective bargaining agreement, to require negative developers to do positive developing and positive developers to do negative developing."

The Article 13 referred to by Arbitrator McMahon is the same as presently found in the contract between the parties to this arbitration. Since the McMahon Award, not only has there been no change in Article (Section 13) but the effect of the McMahon decision has not been nullified or changed by the several industry-wide contract negotiations that have taken place since then. As now, the contract between the Union and Mecca was the industry-wide contract; hence the industry arbitrator's interpretation and decision is applicable industry-wide. I subscribe to the well settled rule that prior arbitration decisions covering the same issue or substantive dispute should not be lightly reversed or set aside by a subsequent arbitrator. Obviously, I do not find that Arbitrator McMahon was "palpably wrong."
With the contract language clear and unambiguously interpreted by a prior arbitration decision, any practice to the contrary is immaterial as precedent for this case.

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

The Company did not violate the contract in assigning positive work to negative developers rather than calling in positive developers to perform such work.

Ernest J. Schmertz
Permanent Arbitrator

DATED: June 19, 1985
STATE OF New York )
COUNTY OF New York )

I, Ernest 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.
Local 702 I.A.T.S.E.

Dr. Art Film Lab

The grievance of the optical printers is denied. They are properly paid at the Group Rate for color printers under the collective bargaining agreement. Their constant grievance challenging that rate is not admissible as the rate was instituted in 1975 subject only to specified changed conditions which have not now been shown or have not taken place. The conditions of Section 1719 of the contract have not been

Date: July 29, 1975

[Signature]

[Signature]

ARBITRATOR