The evidence adduced shows that because both Unions disputed and declined to comply with the orders of the Employer's Superintendent regarding which elevators were to be used to hoist material and which used for personnel (and when a particular elevator was to be used “in tandem” for both purposes) a cessation of work took place on October 7, 2005 for a period of time from 20 minutes to 1 hour. As part of the cessation of work at the instructions of a Union representative and in contravention of the managerial authority of the Employer, material which had been hoisted to the
7th Floor was returned by an operator to the ground floor for rehoisting in the way the Union(s) wanted it done. This not only disrupted and delayed construction, but was an impermissible “self-help” act in violation of the dispute settlement procedures of the collective bargaining agreement(s) and constituted “a delay in work” and a “withholding of labor” within the meaning of Article IV of the Plan.

Additionally, because Union representative(s) apparently instructed their members (the elevator operators) not to comply with the orders of the Employer’s Superintendent, the Superintendent had to warn those operators that they would be fired if they persisted in defying his instructions.

As a result, at present, the elevators are being operated pursuant to the Superintendent’s orders.

However, in view of the October 7th work stoppage, the obvious dispute between the two Unions regarding which and when each is to operate elevators, and the disciplinary warnings, it is probable that unless the jurisdictional issue is resolved, another cessation or interruption of construction work will again occur.

Therefore, to avoid a repetition of an action by either or both Unions that would “delay the work” or cause the “withholding of labor,” this dispute between the two Unions should be
submitted to arbitration under the New York Plan for the
Settlement of jurisdictional Disputes.

DATED: October 20, 2005

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

I, Eric J. Schmertz do hereby affirm upon my Oath as
Arbitrator that I am the individual described in and who executed
this instrument, which is my AWARD.
THE NEW YORK PLAN FOR THE SETTLEMENT OF
JURISDICTIONAL DISPUTES

IN THE MATTER OF THE ARBITRATION

between

ARCHITECTURAL & ORNAMENTAL IRON
WORKERS NO. 580

-and-

NYC DISTRICT COUNCIL OF CARPENTERS

OPINION AND AWARD

The jurisdictional dispute in this case involves the installation of steel roll up doors at the Staten Island Transfer Station - Rt. 440 and Victory Boulevard.

A hearing was held before an Arbitration Panel on January 31, 2005. The Panel consisted of the Undersigned as Chairman, and Messrs. Todd Nugent and Harry Weidmeyer, Members.

At the hearing, representatives of Local 580 appeared. No representative of the Carpenters Union appeared, dispute due and lawful notice to the Carpenters of the scheduled hearing.

The Panel directed that the arbitration proceed, and the proofs and allegations of Local 580 were heard.

The record before the Panel, including the minutes of the preceding mediation session, discloses that the Carpenters acknowledged and conceded that the work in dispute falls within the jurisdiction of Local 580. (Hence the obvious reason for the
The decision of the Carpenters Union not to appear at the arbitration hearing - namely that it does not dispute Local 580’s claim for the work).

The testimony and evidence adduced by Local 580 at the hearing fully support and affirm Local 580’s jurisdiction over the work of installing steel role up doors: It has been doing that work exclusively since at least 1967 in the Greater New York geographical area. Other affiliates of the Iron Workers have performed that work exclusively elsewhere in the United States, particularly in Los Angeles, Las Vegas. There is no evidence that this type of work has been done anywhere by the Carpenters Union.

Under the New York Plan for the Settlement of Jurisdictional Disputes, the decision of the Panel is to be based on “prevailing practice in the Greater New York geographical area” if there are otherwise no binding Green Book decisions or International Agreements. Here there are no relevant Green Book decisions or International Agreements between these trades. But Local 580 has clearly established a prevailing practice of doing the work in the Greater New York geographic area that is determinative of this case.

Together with the supporting testimony of the president of McKean Rolling Steel Doors, Inc. Local 580 introduced an exhibit
showing its performance of that work at some 29 significant work locations in the Greater New York geographical area.

For the foregoing reasons, the Panel makes the following Award:

The installation of steel roll up doors at the Staten Island Transfer Station - Rt. 440 and Victory Boulevard is work that belongs to Local 580, Architectural & Ornamental Iron Workers.

Eric J. Schmertz, Chairman

DATED: February 4, 2005

STATE OF NEW YORK )

COUNTY OF NEW YORK )

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

Eric J. Schmertz, Chairman
IN THE MATTER OF THE ARBITRATION between
LOCAL NO. 369 UTILITY WORKERS UNION OF AMERICA, AFL-CIO -and-
ENTERGY NUCLEAR OPERATIONS, INC.

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

The Company did not violate the collective bargaining agreement by not making ROBERT BAILEY, DARRELL BAKER, PAUL CORCORAN, JOHN IRVINE, GENE KAISER and ALEXANDER ROBERTSON permanent on the rating of Lead Nuclear Maintenance Mechanic as contended by the Union in P&M Grievance No. 6338 dated June 22, 2001.

Eric J. Schmertz, Chairman

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

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

STATE OF )
     ss:
COUNTY OF )

I, Edward R. Harriman, Jr. do hereby affirm upon my Oath as Concurring that I am the individual described in and who executed this instrument, which is my AWARD.

William Carr
Dissenting

STATE OF )
     ss:
COUNTY OF )

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

between

LOCAL NO. 369 UTILITY WORKERS UNION OF AMERICA, AFL-CIO

-and-

ENTERGY NUCLEAR OPERATIONS, INC.

OPINION OF CHAIRMAN

P&M GRIEVANCE #6338

The stipulated issue is:

Did the Company violate the collective bargaining agreement by not making the grievants permanent on the rating of Lead Nuclear Maintenance Mechanic as contended by the Union in P&M Grievance No. 6338, dated June 22, 2001: The grievants are ROBERT BAILEY, DARRELL BAKER, PAUL CORCORAN, JOHN IRVINE, GENE KAISER and ALEXANDER ROBERTSON.

Hearings were held on September 10, 2003 and February 11, 2004, before a tripartite Board of Arbitration. Messrs. William Carr and Edward R. Harriman, Jr. served respectively as the Union and Company designees on that Board. The Undersigned served as Chairman. 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 oath of the Arbitrators was waived, a stenographic record of the hearings taken and post-hearing briefs were filed by both sides after the first and second hearings.

The Board of Arbitration met in executive session twice, following the first hearing and again after the second hearing; in each instance following receipt of the hearing transcripts and the briefs.
What is in dispute is the applicability and interpretation of Article XIX Section 3 of the collective bargaining agreement, Article V of the Non-Exempt position Specification for the job Lead Nuclear Maintenance Mechanic of January 22, 1997 and Section (c) Memorandum of Agreement, Lead Maintenance Mechanic, dated January 17, 1997.

Respectively those cited Articles and Sections read:

**Article XIX Section 3:**

3. An employee temporarily upgraded for a continuous period of twelve (12) months for reasons other than a substitution for another employee shall, at the expiration of the said twelve (12) month period, be made permanent on the rating to which s/he was first upgraded within said period. If, however, s/he is not the senior qualified employee on the rating from which s/he was first upgraded, the senior qualified employee shall be eligible to be made permanent on such rating.

**Article V:**

**V. EXTENDED TRIAL PERIOD:**

For the first six months of the assignment as leader the individual will be subject to monthly evaluations. At any time during this six-month period management may elect to have the candidate return to their previous position and rate of pay based on unsatisfactory performance against these evaluation criteria. Also, at any time during this six-month period the candidate may elect to return to their previous position and rate of pay.
Once the period is over the candidate is permanent and is subject to the normal rules of performance and all other provisions of the collective bargaining agreement under established practices.

Section (c):

\textit{c. The Company will fill six (6) permanent Lead Nuclear Maintenance Mechanic positions and will make temporary assignments on an as-needed basis as provided in Article XIX of the principal agreement.}

In accordance with Section (c), aforesaid, the Company filled six permanent Lead Nuclear Maintenance Mechanics jobs, the appointments of which and their permanence after the six-month period set forth in Article V above, are not in dispute in this proceeding.

The Company also appointed the six grievants in this case to the “temporary assignments” also referred to in Section (c).

It is the Union’s contention that the grievants were entitled to and should have been made permanent in that title after serving therein for six months. The Union asserts that Article V, providing for permanence after six months is applicable to both the “permanent” positions and the “temporary” positions provided in Section (c).

The Company’s position is that Article V was intended and should be interpreted to apply only to the original six permanent appointed Lead Nuclear Maintenance Mechanics, but that
Article XIX Section 3 of the basic contract remains applicable and controlling with regard to the "temporary assignments" of the grievants.

At the first hearing, the Company moved for the denial of the Union's grievance on the grounds of the parol evidence rule, asserting that the contract and Memorandum language was clear and unambiguous and that it could not be changed or impeached by other evidence or testimony.

In opposition, with a similar argument on the clarity of the contract and Memorandum language, the Union moved for a ruling sustaining the grievance. The parties briefed their respective motions, after which the Board met and issued a Ruling denying both motions. In pertinent part we stated inter alia:

"The Board rules that it needs more probative evidence to determine (which)...contract provisions are controlling and/or dispositive of this case."

In short, the Board concluded that standing alone, the cited contract and memorandum provisions were conflicting and hence ambiguous.

The second hearing was responsive to that Ruling.

What has to be decided is simply whether Article V, which both sides agree changed Article XVII paragraph 13 of the contract by increasing the qualifying time limit for the
permanent appointments to this position from 30 days to six months\(^1\), also changed the qualifying period in Article XIX from twelve (12) months to six (6) months for the grievants, assigned "temporarily."

I conclude that it did not, and that the twelve (12) month period of Article XIX remained applicable to the grievants.

As the parties certainly know, it is well settled that ambiguities in contract language and provisions are resolved by arbitrators from evidence of bargaining history, customary language usage, past practice and if necessary and finally by application of the burden of proof.

Here the testimony on the bargaining history, though extensive and obviously strongly held by each side, is conflicting, offsetting and hence indeterminative. The Union asserts that in exchange for agreeing to a longer qualifying period (i.e. six-months instead of thirty days) to accommodate the Company’s need for a realistic evaluation period for this important (and previously supervisory) job, it obtained the Company’s agreement that it would be applicable for all assignments to the position "temporary" as well as "permanent."

\(^1\) Article XVII paragraph 13 reads:

"...Any employee assigned to a vacancy shall have thirty (30) days in which to qualify. If, in the opinion of the Company, s/he is unable to qualify, s/he may return to the rating from which s/he came without loss of seniority therein. Should an employee after accepting a new rating desire to return to his/her previous rating, and so informs the Company within thirty (30) days after being assigned to the new rating, s/he may return to his/her former rating when a vacancy occurs without loss of seniority therein...."
And that because both types of appointments could be based on the immediate skill and ability needed, thereby allowing the bypassing of strict seniority, the rights of bypassed senior employees to claim the job later under Article XIX Section 3 should not be delayed for as long as one year.¹

So to prevent or minimize what the Union characterizes as "cherry picking" for as long as one year, it argues that the time limit in Article XIX Section 3 correspondingly shortened the period for any Lead Nuclear Maintenance Mechanic job.

The Company's testimony denies any such corresponding arrangement.

It asserts that the parties agreed on an extension of the qualifying period from thirty (30) days to six (6) months because opportunities for "permanent" positions required closer, more intensive scrutiny of work progress than those appointed "temporarily on an as-needed basis." In other words the former were "slotted to be permanent" but the latter not. So a different qualifying period was needed for the former but not for the latter.

¹ "...If however s/he is not the senior qualified employee...the senior qualified employee shall be eligible to be made permanent...."
The Company points out that Article V is titled Extended Trial Period, and as such can only extend the shorter period of Article XVII paragraph 13, but cannot logically be interpreted to shorten the longer period of Article XIX.

As I have said, I believe that both sides not only hold to but believe their interpretations of what was bargained. But the actual consequence of those divergent views is that there was probably no precise and mutually understood "meeting of the minds" on that critical question. Hence I find the testimony on bargaining history, though logically supportive of both interpretations, is still ambiguous and indeterminative.

Based on the entire record, however, with particular consideration of the specific language of the material contract and Memorandum sections, and the evidence of past practice, I conclude that the Union has not met its burden of proof in support of its interpretation.

Section (c) sets up two categories of appointments "Permanent" and "Temporary." If it were meant and intended that both categories would become permanent in six (6) months, I fail to see the need to establish two expressly different groups. They both would be eligible for permanence in six months. So the intent must have been otherwise. Therefore I find more logical and compelling that those appointees "slotted" for "permanence" be subject to evaluation sooner and more discernibly than those appointed on an "as needed" basis. I interpret "as needed"
to mean "periodically," "off and on" and "temporary." For them a longer qualifying period is both logical and understandable.

As to the Union’s "cherry picking" argument, I fail to see how a six months trial period is more protective of senior employees than a one-year period. In either event, when permanence is obtained, an otherwise bypassed but qualified senior employee is entitled to claim the job. Indeed under Article XIX Section 3, the protection of such a senior employee is expressly preserved for and after a trial period of twelve (12) months. By that contract provision the Union has already agreed to tolerate "cherry picking" for a twelve month period. So, its argument that the twelve months of Article XVII must be reduced six months by application of Article V to gain protection for the senior employee is negated by the existing language of Article XIX.

Additionally, it is also well settled that negotiated language should be given its normal and customary meaning. Here the section of the Memorandum which triggers a change in the trial period (i.e. Article V) is entitled "Extended Trial Period" (emphasis added). If the parties intended its applicability to both Article XVII and Article XIX, they should not have limited it by the word "Extended" or they should have stated its effect on both. So, normal word interpretation compels its relevance to Article XVII not to Article XIX. And finally, again interpreting words and phrases in a normal and customary manner, Section
(c) makes explicit the conditions of and for "as-needed" temporary appointees. It states specifically that the temporary assignments will be made "as provided in Article XIX of the principal agreement." It does not say Article XIX except the trial period time limit therein. Rather it encompasses all of Article XIX, including the twelve (12), month trial period. Thus, in the absence of any probative evidence pointing to a different interpretation of that conditional language, it must be interpreted as it is written – namely by application of all of Article XIX to the grievants in this case.

Finally, the evidence of past practice supports the Company's version. Other appointees on initial "temporary" bases were not made permanent until after serving twelve (12) months. And none have been made permanent in less time.

Based on all the foregoing, and despite what I have stated is my belief that the Union sincerely believes that it intended that the grievants and others similarly situated are and should be eligible for permanent appointments after six (6) months of service, it has not met the requisite burden of proof in this case.

Eric J. Schmertz, Chairman
IN THE MATTER OF THE ARBITRATION
between
I.B.F.W. LOCAL UNION NO. 3
-and-
LABORERS LOCAL UNION NO. 78

OPINION AND AWARD

The jurisdictional dispute between the above-named Unions involves:

"The Drilling of Holes for the Installation of Electrical Work Within an Asbestos Containment Area at the Francis Lewis High School, Queens, New York."

A hearing was held on October 14, 2005 at which time representatives of both Unions appeared and were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.

The Members of the Arbitration Panel were:

Morris Napolitano
Howard Hirsch
Allan Paul
John Brunetti
and the Undersigned, as Chairman

Certain facts are not disputed. In significant part the work involved the removal of tiles attached to concrete, and then the drilling of holes in the concrete for the installation of electrical equipment.
It is agreed that the tiles (referred to above) contained asbestos.

These tiles were removed by the Laborers Local 78. It is undisputed that that work was within that Unions jurisdiction, and is not claimed by Local 3.

Because the General Contractor and/or the School Construction Authority assumed that the concrete contiguous to the tiles also contained asbestos, it or they assigned the drilling of holes in the concrete also to the Laborers Local 78.

The evidence adduced shows that certain members of both Unions have been trained and possess the required legal licenses to perform work involving exposure to asbestos.

Local 3 asserts that because the drilling of the holes was for the purpose of installing or dealing with electrical equipment, and because its members are licensed to work in an asbestos containment area, that work should have been assigned to and performed by Local 3 (concededly under the supervision of a licensed asbestos supervisor).

Local 78 asserts that with the undisputed fact that the tiles contained or were of asbestos, it was proper and in accordance with operating practice for the contractor or School Authority to deem the entire job "asbestos contaminated" and that therefore all the work in an area of asbestos (including the drilling in the concrete) was properly assigned to the trade
first assigned to handle that particular type of work, namely in this case local 78.

Both unions offered testimony, argument and evidence on other jobs each handled in which asbestos and/or other contaminants were present, so whatever practice there has been appears to be disparate, and conflicting.

The parties were expressly advised at the outset of the hearing that the authority of the Arbitration panel under the New York Plan is, inter alia and in pertinent part:

"The arbitration panel shall be bound by Green Book decisions...or when there are none, international Agreements of record between the trades. If none of these apply for any reason...the arbitration panel shall consider the established trade practice and prevailing practice in the Greater New York geographical area."

Local 78's case rests primarily on its citation of Green Book Decision # 100-j which held:

"Drilling of holes for the expressed purpose of mounting various electrical equipment in suspected asbestos containing material is the work of laborers Local 78.

(and this Decision was made 'area-wide' by subsequent action of its arbitration panel)."

Local 3 disputes the validity and applicability of that Decision. It points out that at first the local jurisdictional decision awarded this type of work to local 3, but that on appeal, Arbitrator Thomas G. Faqan in September 2002 reversed the
local decision and rendered a National Award, granting the work to Local 78. That decision argues Local 3, was erroneous and flawed.

The controlling precedent, asserts Local 3, is a National arbitration award dated January 18, 2005 in which Arbitrator Paul Greenberg, under facts similar to the case before Pagan and to the instant dispute, awarded the work (in California) to Local 3.

Under our express authority the Panel is unable to credit the Greenberg's decision over that of Decision 100-j in the Green Book. The former is not in the Green Book; it is not from the New York geographical area, nor does it qualify as a National Agreement (which must be signed by the presidents of the Unions involved).

We have previously stated that the evidence of prevailing practice is unclear and hence indeterminate.

What remains therefore is the Green Book Decision 100-j.

One of the benefits of an arbitration case is that at the hearing facts are developed that may be more accurate than and different from what the parties believed at the time the dispute arose.

That is the case here. The parties agreed at the hearing that the removal of the asbestos tiles was the work of Local 78. They also agreed that if there was no asbestos in the concrete,
Local 78 would not claim the drilling work and it would belong properly to Local 3.

The Panel believes and rules that the actual facts, as disclosed at the hearing should and therefore will “reform” the nature of this dispute, and hence be the basis for its resolution.

The critical fact that emerged at the hearing was that based on a test by an independent testing organization (apparently ordered by the School Authority) the concrete did not contain asbestos.

Therefore that accepted fact distinguishes this case from the application of Decision 100-j. That Decision applies when asbestos “is suspected.” And about 25% of the dispute of work in this case was performed by Local 78 because of that “suspicion.” But now that it is established that there is no present basis to suspect asbestos in the concrete, Decision 100-j is not prospectively applicable. And therefore the balance of the drilling may and shall be done by Local 3.

In short, though the Panel is in disagreement over whether the Pagan decision (and hence Green Book Decision 100-j) was properly decided or wrongly decided, we need not consider either overruling it or enforcing or applying it. We need not, because, as stated, the dispute is now mooted by the new evidence adduced.
at the hearing. Specifically, to reiterate, the removal of the tiles which contained asbestos was properly the work of Local 78.

But because the evidence shows that the concrete does not contain asbestos, the prospective drilling of holes in the concrete for the installation of electrical equipment was and is the work of Local 3.

DATED: October 24, 2005

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

I, Eric J. Schmertz do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
This will complete my Award of November 12, 2004.

In that Award I referred back to the parties issue #2 thereof, to afford them the opportunity to negotiate for the thirty-day period required under RI399 prior to an operational change.
The parties have now advised me (by letter dated January 9, 2005) that their effort to negotiate a resolution has failed and pursuant to my retained jurisdiction, have remanded that issue to me for determination.

Issue #2 reads:

Did the Postal Service violate RI399 by assigning clerk's to manual operation 121-48? If so, what shall be the remedy, except monetary?

Based on the record before me from the hearing of September 8, 2004, and particularly my authorized observation (with representatives of the parties) of the operation in dispute, along with other "similar" methods of operation, I conclude that the disputed manual operation is properly manned by clerks and not in violation of RI399.

I find that the "bull pen" method used to carry out the work is one aspect of a more comprehensive operation that is and has been manned by both clerks and mail handlers, and hence is and has been a "mixed" jurisdictional operation. It is well settled, generally, that where a work jurisdiction is "mixed" or engaged in by more than one craft or classification, separate aspects of the work, either new or different (but still part of the overall function) may be assigned to either or any of the crafts or unions with joint or multiple jurisdictions. (This does not mean that either craft that is working can be displaced by the other in an
existing operation. That would prejudice the existing mix jurisdiction).

But that is informational *dicta* and not necessarily the basis for this decision.

Rather, I decide this issue on the basis of practice and precedent. My observation of the operation and other "bull pen" methods persuades me that the manual operation of 121-48, manned only by clerks is substantively the same and a replication of other previously and presently existing "bull pen" operations, performing the same type of work and manned exclusively by clerks.

I recognize that those prior existing manual operations are no longer challengeably by the mail handlers, because of the "cut off" date set forth in RI399. But that does not mean that they do not establish a practice and precedent applicable to the instant issue #2. The fact is that after the establishment of those prior operations, and before the "cutoff date," the mail handlers did not challenge their establishment. So the practice and hence the precedent obtained then, and are not now vitiated or nullified by the RI399 cutoff date. In short, the cutoff date in RI399, after which this type of operation was unchallengeable, applies, not just to those pre-existing "bull pen operations," but by practice and precedent to the instant dispute, rendering it also unchallengeable.

I caution, however, that this ruling is limited to the facts and circumstances of this case and this record, and is not a
license for subsequent changed operations on which the facts and circumstances may be different and hence disputable.

AWARD

Based on the particular facts and circumstances in this case, the Postal Service did not violate RI399 by assigning clerks to manual operation 121-48.

DATED: February 3, 2005

Eric J. Schmertz
Arbitrator

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.
RI-399 JURISDICTIONAL DISPUTE
ARBITRATION PANEL

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION, AFL-CIO

-and-

NATIONAL POSTAL MAIL HANDLERS UNION

Case#AOOM-LA-J04116249

AWARD AND OPINION

Before: Eric J. Schmertz, Arbitrator

Appearances: For the U.S. Postal Services
James J. Kirk

For the APWU:
Michael E. LaPoint

For the NPMHU:
Lawrence Hill

Place of Hearing: MidHudson P&DC, Newburg, New York

Dates of Hearing: September 21; October 20, 2004
AWARD

The Service and the Mail Handlers agreed on the following stipulated issue:

Did Management violate the principles of RI399 by continuing the assignment of clerks to the Outgoing Primary on the Low Cost Tray Sorter? If so what shall be the remedy? (i.e. who gets the assignment?)

The Postal Workers stated the issue as:

Whether the assignment of clerks to the Low Cost Tray Sorter (LCTS) at the Newburgh Postal Facility was proper or not?

Frankly, I do not see this case of such jurisdictional consequence as to be controlled by the many arbitration decisions or agreements, both regional and national cited by the parties, or the bulk of their arguments thereon. Nor do I see a decision in this case as precedential for any other matter. Rather, I find that the facts in this case as sufficiently unique to confine the decision to those unique facts.

Based on the record before me I see this matter as a temporary, ad hoc use of clerks, for a few hours each day, on a particular tour, for a particular purpose. That particular purpose was to perform Act Tag work on outgoing mail to airports. And clerks were so assigned to relieve a large volume of work during the time involved. The overwhelming balance of
the work on the Outgoing Primary Low Cost Tray Sorter was officially and jurisdictionally assigned to the Mail Handlers.

To my mind the stipulated issue agreed to by the Service contains a significant word. That word is “continuing.” To me that means that the placing of clerks on the Act Tag work (in limited numbers, for limited time on one tour) was for a special purpose, and confined to that purpose. It may well have been consistent with general jurisdictional agreements and decisions that clerks could properly perform work related to sending mail to airports for air delivery. But I am not persuaded that the Service so assigned clerks in this case because of that claimed general jurisdiction or authority. Rather, I conclude that it did so, again temporarily and ad hoc, to handle the extra volume and because Act Tag work (exclusive of other methods of handling mail destined to airports) had been properly assigned to clerks in the past. In other words, I find that this dispute is solely limited to the ad hoc, temporary placing of clerks on that particular phase of the Primary Low Cost Tray Sorter operation. (Indeed it is not disputed that the clerks were not permanently so assigned). As such, when that particular function ended (the record is unclear whether it was ended in 2001 or as late as 2003) the reason and condition for which the Service assigned clerks, also expired.
The Undersigned, duly designated as the Arbitrator and having duly heard the proofs and allegations of the above-named parties, makes the following Award:

On the basis of the foregoing opinion, Management improperly continued the assignment of clerks to the outgoing Primary Low Cost Tray Sorter. The work presently involved falls within the jurisdiction of the Mail Handlers.

DATED: January 10, 2005

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

NATIONAL POSTAL MAIL HANDLERS UNION

—and—

AMERICAN POSTAL WORKERS UNION

—and—

UNITED STATES POSTAL SERVICE

---

OPINION AND AWARD

A98M-1A-J00245921-00195

CLASS ACTION

Before Eric J. Schmertz, Arbitrator:

Appearances:

For the NPMHU:

Mr. Lawrence Hill

For the APWU:

Mr. Michael E. LaPoint

For the U.S. Postal Services

Mr. Carmine V. Palladino

Place of Hearing: Mid Island P&DC, Melville, New York

Dates of Hearing: October 27, 2004; December 29, 2004
In dispute and objected to by the Mail Handlers is that portion of an assignment letter of August 11, 2000 from H.W. Johnson, Manager in Plant Support which inter alia reads:

"Mail Prep incident to other operations at SPBS:
Sweeper either craft as per current SPBS guidelines."

The Mail Handlers contend that that assignment reference is in error because the work involved, namely the untying of bundled flats and placing each flat piece in an ergo cart, is work that is and has been exclusively assigned to Mail Handlers. And that to now identify it as work for "either craft" would improperly open the door to cross assignments of clerks (i.e. Postal Workers) to that function.

I conclude that the Services assignment letter of October 11, 2000 is in error, but not precisely as contended by the Mail Handlers. The assignment letter, in my judgment, which affirms a mixed jurisdictional assignment, should apply to the overall SPBS operation. The record before me shows that both Mail Handlers and clerks work on various phases or duties of the SPBS operation, and in that respect that overall operation is undertaken on a mixed jurisdictional basis. The work in dispute is a simple process or aspect of the overall operation. It is merely a segment thereof, at which employees remove the bundling of flat mail and place each
individual piece in an ergo cart for further sorting and
distribution.

I fail to see why one aspect of a fully identified operation,
should be separately and uniquely subject to its own
jurisdictional assignment decision, when the overall operation is
already undisputed as of mixed jurisdiction. For by doing so, it
is understandable if the craft that is and has been performing
that small segment of overall operation; interprets it as a method
of replacing Mail Handlers with clerks. The fact is that the
October 11th, 2000 assignment notwithstanding, clerks have not been
regularly assigned to the disputed work and there appears to be no
plan to do so. Nonetheless, though the dispute may not yet be
justiciable (because no Mail Handlers have been displaced by
clersks), the parties have asked for a ruling in the above-referred
position of the October 11th, 2000 letter.

To do so, I think relevant is what I wrote in case J00M-1B-
503228644 (Buffalo P&D Facility) dated February 3, 2005. Therein
I said:

"It is well settled, generally, that where a
work jurisdiction is mixed or engaged in by
more than one craft or classification,
separate aspects of the work, either new or
different (but still part of the overall
function) may be assigned to either or any of
the crafts or Unions with joint or multiple
jurisdictions." (emphasis added)
But I went on to say:

"This does not mean that either craft that is working can be displaced by the other in an existing operation. That would prejudice the existing jurisdictional mix. (emphasis added)

Here, the disputed work is an has been performed as an exclusive assignment by the Mail Handlers. They are working that phase of the SPBS operation. That phase is not a new or different methodology but rather an existing process. Based on the above rulings, I would not sustain the assignment of clerks to the disputed work, causing displacement of Mail Handlers or the deprivation of existing work they have been performing.

As this case is in the nature of a declaratory judgment, I am prepared now to also rule that where an operation is worked on a jurisdictionally mixed basis, the percentages of the crafts or Union so assigned should be reasonably maintained. So for example if the mixed assignments are roughly equal, that equal representation should be maintained, and that is why one craft or Union should not be permitted to replace or displace the other craft or Union. To permit otherwise would allow the Service in mixed jurisdictional cases, to nullify or dilute the mixture, by wholesale replacement of one classification or Union by the other. That would be to do by indirection what the assignment procedures do not permit directly.
For the foregoing reasons, the Services letter of October 11, 2000 may properly identify the SPBS operation as mixed jurisdictional work for both the Mail Handlers and the clerks. Because the language objected to by the Mail Handlers could be interpreted as allowing the Service to displace Mail Handlers with clerks on the existing process of separating flats and placing them into ergo carts, that reference (i.e. "mail prep incident to other operations at SPBS sweeper either craft...") shall be deleted.

DATED: March 9, 2005

[Signature]
Eric J. Schmertz
Arbitrator

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.

[Signature]
RI399 JURISDICTIONAL DISPUTE
ARBRTATION PANEL

IN THE MATTER OF THE ARBITRATION

between

UNITED STATES POSTAL SERVICE

-and-

AMERICAN POSTAL WORKERS UNION

-and-

NATIONAL POSTAL MAIL HANDLERS UNION

OPINION AND AWARD

CASE #B98M-1A-JO222 1934
MELVILLE, NEW YORK

Before: Eric J. Schmertz, Arbitrator

Appearance: For the U.S. Postal Service

Mr. Jeffrey Smith

For the APWU

Mr. Michael E. LaPoint

For the NPMHU

Mr. Lawrence Hill

Place of Hearings: Melville, N. Y.

Date of Hearings May 2 and 3, 2006

Date of Award: June 23, 2006
OPINION AND AWARD

This jurisdictional dispute is over the classification of "Gate Keeper."

That job, physically located adjacent to the Manual Distribution area, has as its primary function to examine undeliverable mail and direct that mail to an appropriate machine (if deliverable) or, if undeliverable return it to the sender. I conclude that that work is "distribution" of the mail, and historically, contemporaneously and substantively allied and nexus to the undisputed jurisdiction of the Clerk title.

More specifically, the Gate Keeper looks at mail that is irregular or in some respects defective and hence initially undeliverable, and because of those defects, could not be processed normally to and through the various automated equipment. The Gate Keeper determines what is to be done with that mail. Among the decisional possibilities are returning or sending the mail to a processing machine; manually distributing the mail by the process of placing each item physically in pigeon compartments in the Manual Distribution locations; or returning the item to the sender. The defects that the Gate Keeper deals with include wrong addresses, wrong or inadequate postage, wrong or missing zip codes, unmanageable size (i.e. too large for the Flat Sorter).

But for those defects the mail would have been routinely handled by Clerks who
undisputedly are properly assigned to the various automated equipment.¹

Significant to my mind is that this work by the Gate Keeper is substantively the same and with the same procedurally objective as the work of the Clerks manning the various automated machines. The end result sought is to correct the irregular defectively submitted mail, conforming it to the regular processes, and, like the regular mail, prepare it for the same distribution methods and results.

Indeed, additionally significant is that some of that mail has to be manually distributed by Clerks, who physically read the addresses, and place each item into a segregated (by destination) pigeon compartment on a shelf in the Manual Distribution area; that the Gate Keeper, and his work area logically for that purpose, is located adjacent to the Manual Distribution area, and that apparently at times the Clerks interchange between the Gate Keeper job and the Manual Distribution process.

I judge that but for modern automation, distribution of the mail would (and I believe did) be handled manually, by Clerks, reading addresses, and physically placing each item in a bin, pigeonhole or other receptacle appropriately labeled for

¹ 1. Optical Character Reader (OCR); Delivery Bar Code Sorters; Bar Code Sorters, “Chunky” Sorters; Flat Sorters; and Return to Sender.
distribution designation.

Therefore, it is logical and reasonable to conclude that the automated machines are nothing more than the modern substitute for the manual handling and distribution by Clerks. And it is therefore logical that those machines be manned, as they undisputedly are, by Clerks, who previously did or would have done the work.

That then is the obvious nexus between the work of the Gate Keeper and the jurisdiction of the Clerks. Hence, I deem it substantively and operationally defensible, and jurisdictionally proper for the job of Gate Keeper to be in the primary jurisdiction of the Postal Workers (i.e. Clerks).

Lest this be considered solely my subjective view, I call attention to RI399 and Mail Processing Work Assignment Guidelines (joint Exhibit #1 in the record) which explicitly provides under the heading Primary Guidelines for multiple cited operations that the Clerk classification is the primary craft for

"identifying and reporting as appropriate, mail not meeting postal regulations."

What the Gate Keeper does meets that jurisdictional definition.

This finding in no way is in derogation of the rights of the Mail Handlers. Adjacent to the Gate Keeper, it is undisputed that the collection and transporting of the irregular mail from various locations in the facility to the Gate Keeper is the work of and
within the jurisdiction of the Mail Handlers. And similarly, the transporting of that mail to the locations and/or machines designated by the Gate Keeper is the work and within the jurisdiction of the Mail Handlers.

One final observation, albeit gratuitous. This case is unique (at least to me) because the Service does not take a position favorable to either the Clerks or the Mail Handlers. Apparently, operationally, though the Clerks have been granted the primary jurisdiction, (and as distinguished from "joint jurisdiction"), at times on or during certain shifts, Mail Handlers have been assigned, or filled in, or helped out with the duties of the Gate Keeper, on an ad hoc basis. Presumably, the Service has found this practice operationally useful, particularly with the ebb and flow of the required work. And the Service has asked, both at the hearing and in its brief, that this "status quo" be maintained.

I do not have the authority to so rule (unless I found "joint jurisdiction," which I do not). My authority and duty under RI399 is to decide which Union has jurisdiction, when, as here, exclusive jurisdiction is determinable.

My gratuitous observation is just this. With this decision in favor of the Clerks, and with jurisdiction so officially determined, both Unions may well wish to consider the Service's position and possibly agree on a "non-prejudicial" and non-binding basis, to maintain the "status quo" operationally. By doing so, though the Clerks are granted the jurisdiction over the Gate Keeper job, members of both Unions would
continue to enjoy some work in that job title, presuming that no layoffs are involved).

Of course this gratuitous observation (or recommendation) is only that and is for the
consideration of the parties hereto exclusively and in no way alters my Award.²

AWARD

The classification of Gate Keeper is within the jurisdiction of the Postal Worker
(i.e. Clerks).

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.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss:
DATE: JUNE 23, 2006

² In this regard, of course the National Labor Relations Act and the decision of the National Labor Relations
Board are not applicable here. But on an advisory basis they may be instructional and of interest.
In jurisdictional disputes under that Act, among the standards and evidence that the Board considers
relevant and to which it “gives great weight” in reaching a decision, is “the employers preference” (NLRB
v. Longshoremen’s & Warehousemen’s Union, Local 50 504F.2nd 1209).
NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD, ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION

between

PATROLMEN'S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK (PBA)

-and-

THE CITY OF NEW YORK (CITY)

-----X-----

The Undersigned, duly designated as a Public Arbitration Panel under Article IV,
Section 209 of the Public Employees Fair Employment Act (The Taylor Law), and
having duly heard the proofs and allegations of the above-named parties, and having
duly considered said proofs and allegations under the standards of said Law, namely
paragraph (v), subparagraphs a, b, c and d, make the following AWARD:

1. By operation of law, the jurisdiction of this Panel is to
determine the conditions of employment for the period
August 1, 2002 through July 31, 2004. Also by
operation of law, those determined conditions of
employment continue in effect for the subsequent
"status quo" period, namely in this case, from August 1,
2004 until a successor contract is negotiated or
otherwise determined.
2. Therefore, the term of the contract before this Panel, and between the above-named parties is August 1, 2002 through July 31, 2004.

3. For the aforesaid periods of time there shall be two across the board, retroactive wage increases. The base annual salary rates of all bargaining unit employees shall be increased by 5% effective August 1, 2002 and further increased by 5% (compounded) effective August 1, 2003, except as provided in paragraph 4(c) for newly hired employees referred to therein.

4. For the aforesaid periods of time, effective July 31, 2004, but to be implemented after the date of this Award, the following changes shall be made in conditions of employment:

(a) For increased productivity the one day a year personal leave day is eliminated, but this will not take away any personal leave days accrued as of June 30, 2004;

(b) For increased productivity the present contractual right of the Department under Article III, Section 1(b) of the 1995-2000 collective bargaining agreement as modified by
the Award of the Public Arbitration Panel dated September 4, 2002 (the "Collective Bargaining Agreement") to reschedule up to 10 tours, shall be increased to up to 15 tours;

(c) For internal savings, employees newly hired after the date of this Award shall be paid in accordance with the following schedule of base annual salary rates:

<table>
<thead>
<tr>
<th>Event</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police Academy (First Six Months of Employment)</td>
<td>$25,100 (Annualized)</td>
</tr>
<tr>
<td>Upon Completion of Six Months of Employment</td>
<td>$32,700</td>
</tr>
<tr>
<td>Upon Completion of 1 1/2 Years of Employment</td>
<td>$34,000</td>
</tr>
<tr>
<td>Upon Completion of 2 1/2 Years of Employment</td>
<td>$38,000</td>
</tr>
<tr>
<td>Upon Completion of 3 1/2 Years of Employment</td>
<td>$41,500</td>
</tr>
<tr>
<td>Upon Completion of 4 1/2 Years of Employment</td>
<td>$44,100</td>
</tr>
<tr>
<td>Upon Completion of 5 1/2 Years of Employment and thereafter</td>
<td>$59,588</td>
</tr>
</tbody>
</table>

5. All other terms and conditions of employment as set forth in the Collective Bargaining Agreement, except as modified by this Award, shall continue in full force and effect for the contract period August 1, 2002 through July 31, 2004 and during the subsequent (and present) "status quo" period.
DATED: June 2005

STATE OF NEW YORK )

COUNTY OF NEW YORK )

I, Eric J. Schmertz do hereby affirm upon my Oath as Chairman that I am the individual described in and who executed this instrument, which is my AWARD.
DATED: June 27, 2005
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Carole O’Blenes do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.

Carole O’Blenes

Jay W. Waks, Member
Concurring in the Award, including #1, 2, 3, 4(a), 4(b), 4(c) and 5
Concurring opinions to follow

DATED: June 27, 2005
STATE OF NEW YORK )
COUNTY OF NEW YORK )

I, Jay W. Waks do hereby affirm upon my Oath that I am the individual described in and who executed this instrument, which is my AWARD.

Jay W. Waks
NEW YORK STATE PUBLIC EMPLOYMENT
RELATIONS BOARD, ADMINISTRATOR

IN THE MATTER OF THE ARBITRATION:

between

PATROLMEN’S BENEVOLENT ASSOCIATION
OF THE CITY OF NEW YORK

—and—

THE CITY OF NEW YORK

OPINION OF CHAIRMAN

BEFORE

Eric J. Schmertz, Chairman
Jay W. Waks, Member
Carole O’Blenes, Member

APPEARANCES

For the Patrolmen’s Benevolent Association:

Kaye Scholer LLP
By: Peter M. Fishbein, Esq.
Barry Willner, Esq.
Rachel N. Yarkon, Esq.

For the City of New York:

Proskauer Rose LLP
By: M. David Zurndorfer, Esq.
Neil H. Abramson, Esq.

Also:

Patrick Lynch, President, PBA
James M. Hanley, Commissioner of Labor Relations, City of New York
Pamela S. Silverblatt, Deputy Commissioner of Labor Relations
Michael T. Murray, Esq., PBA General Counsel
Deborah Gaines, Esq., Counsel, Office of Labor Relations
In accordance with Section 209 of the Civil Service Law, Article IV, Public Employees Fair Employment Act (the Taylor Law) I was selected by the Patrolmen's Benevolent Association (PBA) and the City Of New York (City) and appointed by the Public Employment Relations Board (PERB) as the Chairman of a tripartite public arbitration panel, together with the panel appointees of the PBA and the City, to decide the terms and conditions of a collective bargaining agreement between them to succeed the predecessor contract which expired on July 31, 2002. Carole O'Blenes, Esq. and Jay W. Waks, Esq. served as the appointees to the panel respectively by the City and the PBA.

As contemplated by the Taylor Law and as expected, Ms. O'Blenes and Mr. Waks, though thoroughly collegial and professional and of important technical assistance to me, were ardent supporters and at times active advocates on behalf of the positions of the party which appointed them.

Hence, this Opinion and its findings of fact and conclusions are mine alone. As is the Award which, however, for validity, must be concurred in by at least one of them.

In sum, the arbitration proceedings consisted of pre-hearing briefs, a pre-hearing conference to set guidelines,
fourteen transcribed hearings, several hearings or meetings on issues of discovery, over 300 voluminous exhibits, twenty-eight witnesses (including many of professional and scholarly distinction; the Mayor; members of the City Council; a former Controller of the State of New York; the City's Budget Director; a former Budget Director; the President of the PBA and the City's Commissioner of Labor Relations); post-hearing briefs and reply briefs as well as extensive correspondence and communications throughout. Overwhelmingly all of that focused on the issue of wages.

As authorized by the parties following the completion of the hearings and the submission of briefs, I engaged in an extensive mediation effort that proved unavailing. My arbitral authority was expressly preserved in the event that mediation failed. Thereafter, preceding this Opinion and Award, the Panel met and deliberated in executive sessions.

The arbitration case was tried with extraordinary skill by counsel for the two national prestigious law firms, Kaye, Scholer LLP and Proskauer Rose LLP, representing respectively the PBA and the City.

All concerned were afforded full opportunity to offer evidence and argument and to examine and cross-examine witnesses.
Over the almost fifty years I have practiced as an arbitrator in labor management disputes and as a labor relations practitioner in which I have heard and decided some 10,000 grievance cases and dozens of interest cases in New York City, Boston, Chicago, New Haven, and Philadelphia, none have been as comprehensive, as detailed and as well tried as this instant matter.

However, notwithstanding the foregoing, and despite the professional excellence of the case presentations, a specific provision in the Taylor Law produces a result that in my view is an illogical and counterproductive restriction on the Panel's jurisdiction.

That "restriction" is the statutory provision that the Panel's award may not exceed in time and effectiveness a period no greater than two years beyond the end of the prior agreement. Section 209 (vi) reads:

"The determination of the public arbitration panel shall be final and binding upon the parties for the period prescribed by the Panel. But in no event shall such period exceed two years from the termination date of any previous collective bargaining agreement." (emphasis added)

Or in this case the Panel's authority to determine conditions of employment may be only for the period August 1,
2002 through July 31, 2004, a period of time that has obviously expired. (The last date of the predecessor contract was July 31, 2002).

In the previous arbitration before a Panel chaired by Arbitrator Dana Eischen, the first under the Taylor Law between these parties, an unsuccessful effort was made to get mutual agreement from the parties for an extension of the contract term beyond the two years. The same unwillingness to mutually agree on an extension of the contract existed this time as well. However, I made no particular effort to get an extension in this case because my reading of the Statute, and more importantly as expressly confirmed by an authoritatively sought opinion from PERB, the two-year limitation is mandatory and may not be extended even by the parties involved. PERB informed me that the words "in no event" mean just that - namely, that under no circumstance, apparently as a matter of public policy, may the two-year limitation be extended, unless the period in excess of two years is expressly approved by the Legislature. Focused on this case that limitation highlights a statutory flaw that restrains me and the Panel from a realistic and comprehensive consideration of the issues in dispute between the parties, what their present relationship is, and
particularly what that relationship should be prospectively beyond 2004.

By deciding the terms of the contract for the expired period 2002 to 2004 the parties, with their present adversial, indeed regrettably confrontational relationship, are thrust back into virtual immediate bargaining and in all probability into another interest arbitration for a contract for the period August 1, 2004 forward, at great expense and with similar limitations. No time is given them to reassess their positions, make cooperative adjustments, including productivity gains and internal savings, to seek mutual resolution of their disputes and improvement of their relationship away from the immediate pressures of resumed bargaining.

This is not to say that there should be no limitation on the term of the contract that the arbitrator can fashion but rather, the full responsibility of the arbitrator should be to make the parties and their contract at least chronologically current.

Also if I accepted the PBA's basic case that the wages of the men and women of the police bargaining unit are glaringly less than those of the police of other jurisdictions, it would be fiscally irresponsible of me to accommodate that claim by a
large increase in wages over such a short period as two years. Rather, in that circumstance, the increases should be incremental over a longer period. And if I accepted the City's basic case that pattern bargaining is applicable to this matter, the two-year limitation on a period of time that has passed raises questionably I believe, how a three-year contract can be tailored to that two-year limitation and whether it meets the statutory standards.

The flaw is further compounded by its dysfunctional implementation. The last contract expired on July 31, 2002. Almost three years have elapsed during which the parties have not negotiated a new contract and during which the "status quo" has obtained. With no change in conditions of employment the consequences of this delay are counterproductive. Any back pay award will be a lump sum liability of almost a three-year magnitude which may not only disturb the City's budget but may not be understood by taxpayers because of its cash quantity. Also the nearly three-year status quo, without a review of their wages, works understandably to depress morale among the police ranks. And a lessening of morale is hardly in the public interest.

Moreover the lapse of time between the end of the last contract and the fact that four of the last five rounds of
bargaining between these parties went to terminal arbitration suggests, ominously, of the failure of direct collective bargaining under the Statute. It is not my intention nor do I have an interest in affixing blame, but one wonders whether good faith bargaining by both sides took place or whether either or both held to their positions to impasse and engaged in delays, awaiting and relying on the arbitration forum to sustain them. Indeed that kind of "forum shopping" was not contemplated by the Taylor Law when enacted. Originally the Act did not include terminal arbitration for police and fire. The reason, possibly evidenced by what has happened here, is that it was thought that it would chill direct bargaining.

The Taylor Law should discourage both the delays and forum shopping. It should require good faith bargaining to be completed within a time fixed after a contract has expired. And for failure to do so, either by delays or bargaining failures, it should then mandate the terminal step - which in order to encourage direct bargaining could be on a "last best offer" basis.

Finally though I accept the responsibility, the Taylor Law empowers the chairman as the sole impartial judge to determine expenditures of what may well be millions of taxpayer dollars
though he is non-elected and non-accountable. The tripartite nature of the Panel which requires concurrence in an award by at least one of the other members further complicates the process by the possibility of substantive compromises in order to produce that result. Though the arbitrators under the New York City Collective Bargaining Law (which previously applied prior to the last arbitration) are also non-elected and non-accountable, those panels are comprised of three impartial members who can share an analysis of the evidence with a collective but impartial wisdom and experience and without the burden of the two-year rule or the potential need to compromise with partisan panel members.

For all of the foregoing reasons I will render a binding award concurred in by at least one member of the Panel for the prescribed contract period August 1, 2002 through July 31, 2004 because I am mandated by law to do so. But additionally, for consideration of the parties, I shall make a non-binding recommendation for continued negotiations toward a four-year contract that is not constrained by the impediments of the two-year rule.

Before I deal about the facts of this case I feel the need to make some observations, some of which are not particularly flattering. I am distressed at the apparent confrontational
relationship between these parties. Bluntly it is too antagonistic, too angry and too reciprocally suspicious. As the parties no doubt engaged in due diligence in deciding on my appointment they saw in my writings and my policy statements my repeated but respectful advice to four Mayors and several leaders of the police and fire unions that they should not be in chronic dispute. It is simply contrary to the public interest.

Both the Mayor and his administration and the PBA and its members are public servants. They all have the same fiduciary duty to the public - to prevent and fight crime, to maintain civil order and now to prevent and respond first to acts of terrorism. A longer term contract which permits time and methodologies to improve their mutual relationship on a day to day basis - not just in contract negotiations or arbitration would be a fundamental step toward that achievement.

There was not always such adversarialness. In the 1970's during the City's extreme fiscal crisis we saw an uncommon and unusual collaborative and partnership relationship between the City and its major unions of municipal employees. Granted it was formed out of a mutual fear of bankruptcy it nonetheless
served a constructive purpose and provided a lesson and commendable model that unfortunately did not last.

The collaborative effort to avoid bankruptcy and preserve the bargaining contracts took several forms. The unions bought large quantities of City municipal bonds which were then otherwise unmarketable. The unions deferred wage increases indefinitely until the City's economy revived and was back in the public bond market. The City and the unions negotiated on a continuing basis, at the bargaining table and away from the bargaining table, to do more of the essential work with less personnel and less resources to support both the budget and wage increases. That effort was successfully facilitated by the presence and activity of impartial chairmen appointed by the New York City Office of Collective Bargaining. Away from the pressures of the bargaining table in Fire Department negotiations, where I served, we were able to establish such innovative cost savings methods as adaptive response, fire company interchanges, flexible manning, and slippery water. In sanitation the late Walter Eisenberg worked with the City and the Sanitationmen's Union in establishing the gain sharing methodology, reduced personnel on trucks and changes in the garbage collection systems. The late Eva Robbins did similar work increasing productivity among the omnibus local unions.
of District Council 37. The unions and the City worked in tandem with the City's financial community, with the Municipal Assistance Corporation and the state government in reviving the City's economy. This activity with the help of skilled mediators and impartial chairmen should be renewed and a longer-term contract would permit consideration of such a structure. I see that too as in the "interest and welfare of the public" within the meaning of subparagraph (b) of Section 209 of the Taylor Law.

There are certain observations about the men and women who serve in the Police Department that are relevant. Those men and women are characterized as the "Finest." It is my view that that is a fact and not a public relations ploy. The fabric of a civil, orderly society based on law, is supported by the police of that society. Each police officer is responsible for preventing crime, apprehending criminals, protecting property and life, preparing for, preventing and responding to acts of terror (with the City on a higher state of alert than elsewhere in the country since the tragedy of 9/11), and maintaining sensitivity to the ethnic, racial and political diversification of its citizenry so that civil and
political rights are protected within the parameters of orderliness.

Yes, there have been some highly visible incidents of poor judgment, use of excessive force and even brutality by some police officers, but I am convinced that these are not only isolated incidents but aberrant, and not representative of the diligent work by police officers carried out hour by hour and day by day. And they do so prepared to put their lives on the line.

While reduction in crime in the City may be a social phenomenon the work of the "cop on the beat" certainly must be credited as contributing to that trend. Especially when currently about 2,400 less police officers are available for regular patrol and response duties. I conclude therefore that police officers are carrying out their multi-faceted jobs well and effectively and are therefore productive at a good level.1

Credit is to be given also to the Police Commissioner and his staff. Commissioner Ray Kelly, (whom I first met and gained admiration for when we both served in the Dinkins administration) is a man of extraordinary competence, a

---

1 On the matter of departmental productivity I deem it immaterial whether the reduction in the compliment of regular police officers was due to a planned budgetary program or results from recruitment difficulties.
profound knowledge of policing policy and tactics, with uncommon leadership qualities. He and his administration are uniquely suited for a new, innovative and mutually beneficial relationship between the Department and the PBA and a longer contract term which grants the opportunity for that development can make that result more probable.

In 1968 a panel headed by former United States Supreme Court Justice Arthur J. Goldberg, appointed by Mayor John Lindsay to make findings and recommendations in contract negotiations between the City, the PBA, the Uniformed Fire Fighters Association, and the Uniformed Sanitationmen's Association, stated that New York City Police Officers should be "among the highest paid in the nation." As the parties knew when I was appointed as Chairman of the instant arbitration Panel, I was a member of the Goldberg panel and indeed wrote its report.\(^2\)

It should not surprise the parties hereto that my views then are my views today. But the instant arbitration case is not to be decided on personal opinions or ideology but rather on the application of the controlling law - the Taylor Law. As the following will show I have concluded that the standards

\(^2\) The Goldberg panel, in addition to Justice Goldberg, consisted of Vincent McDonnell, Walter Eisenberg, the Reverend Philip Carey, and myself.
of the Taylor Law compel wage increases for the New York City police officers that should and will move them toward the Goldberg panel objective.

On the merits of the present case my authority and that of the Panel is explicitly prescribed in the standards set forth in the Taylor Law in determining wages (the overriding issue in this case.) The Taylor Law requires that:

(v) the arbitration panel shall make a just and reasonable determination of the matters in dispute. In arriving at such determination, the Panel shall specify the basis for its findings, taking into consideration, in addition to any other relevant factors, the following:

a. comparison of the wages, hours and conditions of employment of the employees involved in the arbitration proceeding with the wages, hours, and conditions of the employment of other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities;

b. the interests and welfare of the public and the financial ability of the public employer to pay;

c. comparison of peculiarities in regard to other trades or professions, including specifically, (1) hazards of employment; (2) physical qualifications; (3) educational qualifications; (4) mental qualifications; (5) job training and skills;
d. the terms of collective agreements negotiated between the parties in the past providing for compensation and fringe benefits, including, but not limited to, the provisions for salary, insurance and retirement benefits, medical and hospitalization benefits, paid time off and job security.

I shall refer to the standards set forth in a, b, c and d above respectively as "comparisons," "public welfare and interest and ability to pay," "peculiarities" and "bargaining history."

**COMPARISONS**

Comparisons must begin with a comparison of the provisions of the New York City Collective Bargaining Law (which obtained earlier) and the Taylor Law which now applies. The former provides comparisons of "characteristics of employment of other employees performing similar work and other employees generally in public and private employment in New York City or comparable communities" (emphasis supplied). The latter calls for a comparison with "other employees performing similar services or requiring similar skills under similar working conditions and with other employees generally in public and private employment in comparable communities."
As the parties know I was an impartial member of both the New York City Board of Collective Bargaining and the State Public Employment Relations Board and administered both statutes. This is not the forum to determine "substantial equivalency" but it appears to me that in this particular case there is a difference. Under the New York City Collective Bargaining Law comparisons need only be made among employees in the City of New York. To do so would be in compliance with that law because by its language it allows for comparisons either with New York City employees or those in comparable communities. The Taylor Law does not provide for an "either-or" option. It requires comparison with employees "in comparable communities" and therefore, at least for this particular case, has a broader scope.

Therefore I agree that although no other municipality in the country is precisely a "comparable community" to New York City, the nearest comparators are the other twenty largest cities. Yet I also accept as consequential the wages of police officers in jurisdictions proximate to New York City such as the counties of Nassau, Suffolk, Westchester and the cities of Yonkers, Newark, Elizabeth and Jersey City and the entities of
the Port Authority, the New York State Troopers and the Metropolitan Transit Authority.

In my judgment the most probative wage comparisons are the direct annual salaries at the maximum levels.

The maximum salary for New York City Police Officers at present is $54,048. Of the twenty next largest cities in the country the following have maximum salary levels greater than the City of New York as of the year 2004, as indicated:

- Austin Texas $65,012
- Baltimore $57,500
- Chicago $64,962
- Columbus $55,682
- Dallas $58,637
- Jacksonville $55,404
- Los Angeles $71,090
- Phoenix $56,098
- San Diego $65,250
- San Francisco $76,055
- San Jose $80,255
- Washington D.C. $58,569

Therefore more than half of the cities deemed as comparators as of the year 2004 paid direct annual salaries to
their police officers in a greater amount than police officers in the City of New York.

The foregoing is without including a cost of living factor. I accept the testimony in the record of Katherine Abraham, former Commissioner of the Federal Bureau of Labor Statistics, that costs of living in the various cities in different geographical areas should be taken into consideration in making wage comparisons. I believe it is well acknowledged that the cost of living in New York City is among the highest. That further depresses the purchasing power of the wages paid New York City police officers in comparison with most of the other cities.

The foregoing alone would justify a significant wage increase for New York City Police Officers if the Goldberg panel standard was to be attained.

With regard to the jurisdictions in geographic proximity, i.e., Westchester, Nassau, Suffolk, Yonkers, Newark, Elizabeth and Jersey City, and the entities of the Port Authority, the MTA and New York State Troopers, there is relevance to consideration of comparing their wage levels with those of the New York City police officers. That relevance relates not necessarily to Section (a) of the Taylor Law but rather to the statutory reference to the public interest" (b) and to the
reference to "other relevant factors" (v) above. New York City police officers need only look across contiguous borders to see police officers with less duties, less responsibilities and less stress and danger receiving greater pay. From time to time as with the Port Authority and the MTA New York City police officers work side by side with police officers from those authorities and know first-hand the pay differences. This can only depress morale among the New York City Police. And a police force with morale problems is obviously counterproductive to the very public interest and public welfare that that force is charged to protect. So within the statutory meaning of "other relevant factors" and the "public interest" comparisons between direct wages of the New York City Police and the wages in the police of proximate cities and jurisdictions are a consequential consideration in this case.

The 2004 maximum base salaries in the following proximate cities and entities are as indicated:

<table>
<thead>
<tr>
<th>City</th>
<th>Salary</th>
</tr>
</thead>
<tbody>
<tr>
<td>Elizabeth</td>
<td>$71,436</td>
</tr>
<tr>
<td>Jersey City</td>
<td>$71,220</td>
</tr>
<tr>
<td>Nassau County</td>
<td>$93,079</td>
</tr>
<tr>
<td>Newark</td>
<td>$69,255</td>
</tr>
<tr>
<td>Suffolk County</td>
<td>$84,545</td>
</tr>
</tbody>
</table>
I need not factor in cost of living for those cities and entities because they are all in the same geographical area and experience the same cost of living statistics. However, standing alone the salary comparisons put the New York City police officer significantly below the objectives of the Goldberg Panel.

Considering the foregoing comparisons alone I am persuaded that New York City police officers should have salary increases of about 20 percent which should be phased in incrementally over a four-year period, but subject to the other Taylor Law factors, primarily the "financial ability" of the City to make such payment. And for a mandated two-year contract, with the same conditions, a 10% increase would be justified.

However, the City claims that the foregoing comparable differences are sharply reduced if not totally closed by the better benefits available to New York City police officers, namely the pension plan, certain annuities, disability
retirement legislation and medical and health coverage. I do not find that the differential gap is appreciably narrowed by those particular benefits. Virtually all of the other jurisdictions have a 20-year 1/2 pay retirement pension plan. The contribution of the New York City police officer may be less but I do not conclude that the lesser contribution makes a significant difference. The other jurisdictions also have comparable health benefits. The only significant benefit that I see is the supplemental variable annuity available to New York City police officers upon retirement. It vests after six years but is receivable upon retirement. The record before me does not reveal whether other jurisdictions have disability retirement plans for presumed service connected disabilities or injuries such as conditions of the heart, lungs and certain specified illnesses all presumed service connected.

But the fact is that a New York City police officer must reach retirement age or he must become ill or injured or become otherwise disabled in order to gain these benefits. That means that for most of the years of his service, in the absence of illness or disability, he continues to work at a salary level substantially below the police officers in comparable communities or in other relevant entities. So I am not
persuaded that the benefits accorded New York City police officers though obviously generous, but so restricted, are so different from other communities and entities to which comparisons are made as to close the pay gap referred to above.

Moreover, it should be noted that the supplemental variable annuity which I have stated appears to be a significant benefit indigenous to New York City police officers represents no cost to the City. The record indicates that it is fully funded and has been for over a decade and that it is not anticipated that the City will have to make further contributions to it.

I recognize that there may be other differences regarding hours worked, the type of charts used and the relative amounts of overtime. But again, I do not see those differences of sufficient magnitude to close the pay gaps.

Moreover the argument of better benefits for New York City police officers cuts both ways. For example in Boston, a police officer gets additional compensation for attaining certain educational levels (the Quinn Bill), New York City police officers do not get a pay bonus or a pay differential for educational attainments.

Also the cost to the City of the pension system varies radically. At times the assumptions to fund the plans
require more or less financial input from the City. But there have been times when the pension plans have produced available cash for the City's budget. In my own experience the teachers pension plan was so well funded that a change in its assumptions in 1990 permitted the City to realize substantial cash withdrawals which supported wage increases for the teachers. I know that similar actions were taken by earlier mayoral administrations and I take arbitrable notice of the fact that at present the City Actuary may be considering a similar action with regard to the police pension plan which may produce additional revenue for the City.

ABILITY TO PAY

The phrase ability to pay is too simplistic. Clearly if the City is required to make a payment it can and will do so including those unpredicted and unbudgeted. The real question is one of a "delicate balance" between revenues and the apportionment of revenues and, if necessary, variations in budgetary priorities. The City is statutorily obligated to balance its budgets each year and has done so for decades. This has been achieved despite initial budgets which project large deficits.
I have tremendous respect for the process and indeed the pain the City experiences in cutting costs and developing new sources of revenue to insure the required balanced budget. I have personally experienced budgetary crises and participated in the process of dealing with them twice in the 1970’s and again in 1990 when respectively I served in the public sector as an impartial member of the New York City Office of Collective Bargaining (and as impartial chairman between the City and the Firefighter and Fire Officers Unions) and as Commissioner of Labor Relations. I am aware of the mounting costs of mandated expenses that the City cannot legally reduce and I am aware of how tax increases can discourage the location and retention of business and professional entities in the City and impede tourism. A "delicate balance" is required to accommodate fair wage increases while maintaining an economy that attracts commerce and visitors.

Obviously it is in the public interest that the City's police force is of top quality and properly paid, for that is a threshold necessity for both those purposes.

On balance, in my view, the cost of running the City, which unique to itself pays for an educational system, a hospital system, Medicaid, welfare, police, fire, parks, sanitation, infrastructure, food and water protection, the
environment, housing, among many others, includes the cost of fair and competitive wages for its employees. The "delicate balance" should leave none short changed.

All City employees are essential because they provide or implement the services promised, mandated and expected. Some like police and fire are critical to the City's welfare because they provide the essential protections that permit other municipal services to function.

The City has ended the most recent fiscal year with what the PBA (and the press) calls "a surplus". The City calls it a "roll-over" toward balancing the budget in the next fiscal year. Whatever called it is revenue in excess of expenses for this fiscal year and it amounts to over three billion dollars.

At this point the City's economy is improving. The two major sources of the City's revenue, real estate and Wall Street have shown solid economic growth with the former escalating in value with attendant tax revenue transactions. Wall Street revenues are volatile but traditional bonuses and security transactions have appeared to return to good levels providing increased tax revenue.

Clearly I cannot and would not predict the future. The Mayor and the Budget Director are tentative about the future
and that is the prudent approach. I will not nor can I substitute my judgment for that of the Mayor, other elected officials and members of his administration in judging what the future economy of the City will be. Just as budget deficits can and have been closed so too can budget surpluses dissipate. I am mindful that an unbalanced City budget could lead to a take-over of the City’s finances by the State Financial Control Board. I am also mindful that each one percent wage increase for the police costs the City $26 million and increases for police have a “global effect” on other municipal employees, particularly firefighters and superior officers.

But my authority and duty is confined to this case and the City’s ability to pay this Award. The impact on other negotiations and the ability to pay the results thereof are not before me, and must be left to the collective bargaining process in each instance.

Therefore, in the instant case, I am satisfied that the City has the ability to pay the Award, which for reasons later stated will be tempered by specific productivity improvements and internal savings.
PECULIARITIES

This standard is unique to the Taylor Law and will be dealt with under the topic Bargaining History.

BARGAINING HISTORY

My observations regarding "pattern bargaining" are limited to this case and should not, indeed may not, be construed as a formula or ruling for any other set of negotiations.

The City relies on a history of the use and the application of pattern bargaining to resolve contracts with all its municipal unions. I agree that that approach is commendably designed and appropriate to create stability and equality among the unions to provide budgetary predictability and to eliminate "whip sawing", "one-upmanship", "leap-frogging", and "me too-ism" among the unions which might otherwise be politically compelled to outdo each other. And where unions are willing to bargain on the "pattern," and as history has shown, may even find it advantageous to do so, pattern bargaining is also relevant and valid.

Again due diligence would have disclosed both my views and activities regarding "pattern bargaining" and frankly, its application by me in firefighter mediations and teacher
negotiations. But I find that I need not determine its validity, applicability or enforceability in this proceeding because I conclude that the pattern relied on by the City, namely the contract it negotiated with District Council 37, would not, if applied on to the PBA, result in "a just and reasonable determination of the matter in dispute" within the meaning of (v) above, because it would not reduce the discrepancies in pay between the New York City police officers and those of other jurisdictions that I have deemed comparative.

The Taylor Law mandates the panel to make a just and reasonable determination. If the DC 37 pattern were applied the police officers would receive no wage increase in the first year, but rather $1,000 in cash; a three percent wage raise in the second year and a two percent increase in a third year which is not part of the two-year contract before this Panel. Indeed considering acknowledged wage increases in other jurisdictions since 2004 it would set the New York City police officers further behind the police officers of those other jurisdictions, or at best leave them as they presently stand.

Accordingly I leave to other cases and other forums the question of whether a three-year contract with a civilian union under the New York City Collective Bargaining Law is
otherwise precedential or applicable to a police union under the Taylor Law. I also leave unanswered questions of whether there may not be other applicable patterns such as the wage increases granted police officers in the other cited jurisdictions; the specific increases accorded police officers elsewhere between the years 2002 and 2004, the precedent of the Eischen Panel, the first under the Taylor Law, and the arrangements in the 1980's which routinely accorded New York City police officers wage increases greater than civilian employees.

(c) above reinforces my foregoing conclusion that the District 37 settlement would not produce a "just and reasonable determination". Inter alia it makes explicit reference as standards for wage increases, "hazards of employment", "physical qualifications", "job training and skills". The job of a police officer clearly includes greater hazards of employment specific physical qualifications and specialized job training and skills (including the first six months in the Police Academy);

Not only do I conclude that (c) sets a special standard for the determination of a police officer's pay but further distinguishes police officers from civilian employees for bargaining unit formations.

I take arbitral notice that sanitation men suffer more injuries but not the potential "life threatening" consequences of police activity.
However I do find a "pattern of reciprocity" that I consider significant. By that I mean the practice of the City and the municipal unions to negotiate wage and benefit increases above a budgeted amount in exchange for discernable methods of increased productivity and measurable internal savings. Even if not in the last round of negotiations or in Eischen's arbitration award (where the then pattern was essentially followed) that practice has been present in prior years in contracts negotiated by the City and the PBA. Historically, as now, the City has taken the position that wages above a budgeted amount would be granted only in the case of offsetting increased productivity and/or other savings. My general acceptance of this practice should not surprise the parties. As previously stated I have applied and affirmed it because for me it represents the traditional give and take or quid pro quo of collective bargaining. Specifically, due diligence by the parties with regard to my appointment would have disclosed that as the Labor Relations Commissioner I negotiated in 1990 an agreement with greater wage increases for the teachers union than for others. A 5.5% wage increase for teachers was followed by a 4.5% increase for other civilian unions. The difference was based on two factors. First was the undisputed fact that the salaries of suburban teachers
were discernibly higher than New York City teachers and that City teachers were leaving for suburban jobs. And secondly, significantly, there was a quid pro quo for the wage increase—namely an adjustment of the assumptions of the over funded teacher union pension funds plus additional available state funds to make up most of the wage increase. The "balance" there was a justified wage increase for the teachers supported by internal savings leaving a net shortfall for the City to fund.

This does not mean that I subscribe to the view that all or even a substantial part of the wage increase above a budgeted amount is to be supported by internal savings and productivity improvement. Any such view would make the Taylor Law standard of Ability to Pay moot and meaningless. Indeed that standard presupposes that a wage award may not only be in excess of a pre-budgeted amount, but greater than productivity and internal savings considerations.

But again, in that regard, due diligence would have disclosed my view on the omnibus role of an interest arbitrator. I have repeatedly stated it is not just that of a de novo hearing officer to judge ab initio the merits of the case. He is part of the collective bargaining process indeed
the final step. As such he completes for the parties the bargaining which they could not do directly. He was selected, I believe, to use his expert judgment on what the parties would have agreed to had they been able to do so themselves. That, in my view is what the Taylor Law means by a "just and reasonable determination."

It is my judgment that if the parties had completed the bargaining process and settled the negotiations directly the PBA would have gained wage increases for the police officers above the pattern, and the City would have gained some methodologies or changed conditions of employment to produce internal savings and increased productivity.

And that formula will be the basis of my decision in this case.

I am satisfied that consistent with that pattern of reciprocity, the Panel has the authority to introduce specific productivity and internal savings conditions of employment during the calendar period of the contract jurisdictionally before us - namely on the last day of that contract, July 31, 2004. Otherwise, no other method of including productivity or internal savings would be available to the Panel, and the Panel would be barred (artificially I conclude) from making a full and balanced Award based on its assessment of all the
circumstances present. Indeed, the job of this Panel is to
determine what the conditions of employment are and should have
been for the contract term August 1, 2002 through July 31, 2004.
So, clearly in addition to our authority to make wage increase
retroactive, we have the same authority to insert other
conditions of employment during that period, including those
that will produce internal savings and increased productivity,
even though implementation thereof cannot be achieved until
during the status quo period in the year 2005.

Ideally, because I concluded that over a four year period
at least a 20% wage increase was justified, I undertook an
intensive mediation effort to produce that result.

Such an agreement would have, in my view, resulted in a
full, fair and mutually beneficial agreement, consistent with
the statutory standards and I recommend the parties reconsider
their position regarding that proposal and voluntarily revisit
it.

As to the mandated two year Award, the bargaining unit
police officers shall receive two 5% wage increases, the first
effective August 1, 2002 and the second 5% (compounded)
effective August 1, 2003.
Except for the personal leave day and an increase in rescheduled tours, the productivity improvements and internal savings shall apply to employees newly hired after the date of this Award, but made contractually effective July 31, 2004. Those not yet hired are not yet police officers, and for the first six months after being hired are essentially students in the Academy. They have not yet experienced the dangers, the stress and the responsibilities of incumbent police officers, and therefore at the upcoming beginnings of their careers, shall be slotted at a lesser wage rate for the time in the Academy, and with an adjusted pay schedule as set forth in the Award.

DATED: June 27, 2005

[Signature]

Eric J. Schmertz, Chairman
THE NEW YORK PLAN FOR THE SETTLEMENT
OF JURISDICTIONAL DISPUTES

IN THE MATTER OF THE ARBITRATION:

between

PAINTERS DISTRICT COUNCIL 9
-and-

OPERATIVE PLASTERERS AND CEMENT
MASONS LOCAL 530

The jurisdictional dispute in this case involves the repair, and
restoration of walls, ceilings and columns at various locations at the
Post Office at Cadman Plaza, Brooklyn.

A hearing was held on March 9, 2005, at which time representatives
of the Painters District Council 9 ("Painters") and Operative
Plasterers and Cement Masons, Local 530 ("Plasterers") appeared and
were afforded full opportunity to offer evidence and argument and to
examine and cross examine witnesses.

The Arbitration Panel consisted of the Undersigned as Chairman and

Under the New York Plan for the Settlement of Jurisdictional
Disputes, the decision of the Panel is to be based on Green Book
Decisions or International Agreements, or if there be none, on
prevailing practice in the Greater New York geographical area.

In this case both parties rely on Green Book Decision. The Panel
finds that the Green Book Decision, applicable to and determinative in
this case is Decision 191-4a which reads:

191 - 4a

The Scraping, Plaster Welding, Patching and
Re-Plastering of New and Existing Ceilings,
Walls, Beams, Columns and Staircases and
Skimcoating with Joint Compound or Any Other Similar Material to the Entire Wall and Ceiling Surfaces.

Operative Plasterers and Cement Masons Local #260 vs. Painters

District Council #9 – Henry Hudson Hotel 58th Street

The Executive Committee determined that the work be awarded in the following manner:
1) The Scraping, Plaster Welding, Patching and Re-Plastering of New and existing Ceilings, Walls, Beams, Columns and Staircases is the work of the Plasterers' Local #260;
2) When Such Skimcoating is Required to Correct Surface Imperfections In the Preparation for Painting and/or Wall Covering it is the work of The Painters District Council #9.
Decision of the Executive Committee March 20, 2000.
3) In all other instances it is the work of the Plasterers.

At the outset of the work involved, the relevant contractor assigned it to the painters, and the painters performed the work in the Post Office's fourth floor.

Thereafter, the contractor changed the assignment for the third floor (and apparently for the balance of the work) and gave it to the plasterers.

More specifically, the evidence adduced shows that the painters did the work using methods and processes consistent with ¶2 of the above-cited Decision, namely "Skimcoating to correct surface imperfections in preparation for painting and/or wall covering."

Based on the record before the Panel, the reasons for the change in assignment from the painters to the plasterers was because the
contractor determined that substantial plastering was required to repair the walls, ceilings and columns, calling for plaster welding and replastering of the existing structures. In undertaking the work, the plasterers did substantial replastering, applied a type of mesh for stability and then four coats of Dura bond 45, all preliminary to final painting. (It is undisputed that the final painting work is assigned to and within the jurisdiction of the painters.)

The painters claim that much of the enumerated work falls within the definition of "Skimcoating," and belongs to the painters.

There is no evidence in the record that the contractor did not have a legitimate operational reason to want more substantial plastering and replastering rather than a "correction of surface imperfections." Indeed it is clear to the Panel that the methods and processes set forth in ¶1 of the Decision apply to that need, rather than mere Skimcoating to correct surface imperfections. And that therefore if the methods and processes set forth in ¶1 are what is needed for repair and restoration, the craft with jurisdiction to do it is the plasterers.

The Panel feels compelled to make an observation, however, which is sharply critical of the contractor involved and the plasterers. It is that both violated Article IV Section 2 of the New York Plan by respectively directing and accepting a change in the assignment of the
work from the painters to the plasterers. That Article and Section reads:

"When any entity bound to this Plan by any means make an assignment of work he shall continue such assignment without alteration unless a change is agreed to between the contending local unions or it is directed to reassign the work in an official decision and award in accordance with the Plan. (emphasis added)

Here, when the change was made, it was not agreed to by contending local unions, nor had a decision or award in the change yet been rendered.

For that violation, the Panel admonishes the contractor for making the change and admonishes the plasterers for accepting it, under those premature circumstances.

However, as an Award is now issuing, it is useless and ineffective to attempt to remedy the violation retroactively. But the admonitions as well as a prospective directive to henceforth comply with Article IV Section 2, are part of this Decision.

Also, it is obvious that this case is fact-driven by the facts cited, and the decision standing alone does not create an absolute precedent for any other case.

However, as the Panel has relied on and interpreted Green Book Decision 191 - 4a, that Decision remains in full force and effect as precedent for jurisdictional disputes between the painter and the plasterers.
For the foregoing reasons and under the circumstances cited, the Panel makes the following Award:

The repair and restoration of walls, ceilings and columns at the Post Office Cadman Plaza, Brooklyn, is work that belongs to the Operative Plasterers and Cement Masons Local 530.

DATED: March 16, 2005

STATE OF NEW YORK )
COUNTY OF NEW YORK )

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