BEFORE
ANDREW M. STRONGIN
ARBITRATOR

April 24, 2024

In the Matter of the Arbitration between-	:	
	:	
MASSACHUSETTS SPORTSERVICE, INC. (TD GARDEN)	:	
	:	**LRC Case No. 607-22 (Gatemen)**
-and-	:	
	:	
UNITED FOOD AND COMMERCIAL WORKERS UNION LOCAL 1445	:	

APPEARANCES:

For the Company:

Arthur Telegen, Esq.
Seyfarth Shaw LLP
Seaport East
Two Seaport Lane, Suite 1200
Boston, Massachusetts 02210-2028

For the Union:

Alfred Gordon O'Connell
Pyle Rome Ehrenberg PC
2 Liberty Square, 10th Floor
Boston, MA 02109

This proceeding concerns the Union's claim that the Company violated Art. 37.L of the parties' Agreement when it staffed the TD Garden novelty stands known as 4 East and 4 West, or 4E and 4W, with more than two commissioned Gatemen during the Eagles concerts hosted on August 27 and 28, 2021. The parties agree that in the event of a ruling in the Union's favor, the question of remedy should be remanded to the parties in the first instance, subject to the Arbitrator's retention of jurisdiction.

BACKGROUND

The Company operates the TD Garden, home of the Boston Celtics and Boston Bruins and periodic host of concert events, described as the largest indoor sporting and concert arena in New England. The Union represents certain bargaining unit employees who staff those events through permanent bid assignments in numerous specifically identified job classifications, subject to certain conditions under which those bids are retained and/or vacated, and/or through placement on a so-called "Spare" list.

Among the permanent bid positions is a classification of employee known interchangeably as "Gatemen" or "Program Vendors," principally employed in days gone by to sell programs for sporting events at the two main lobby entrance gates, East and West, of the old Boston Garden. The applicable position description provides that Gatemen sell programs and, "[i]f no programs are available they may be permitted to sell novelties, food and/or beverage products." Gatemen have been and still are paid on a commission basis during sporting events, subject to a minimum floor. It is undisputed that Spares can and have been used to cover for absent Gatemen at concert events and, on those occasions, they are referred to as Gatemen

when filling that role notwithstanding they do not hold a permanent bid in that classification.

In the days when there were approximately 100 sporting events hosted annually at the Old Garden, the Gatemen classification was a choice bid assignment, notwithstanding there were no programs for them to sell during what then were infrequently hosted concerts. It is undisputed, however, that the Company established novelty stands in the area of the two main lobby gates from which Gatemen sold concert merchandise or, to use common parlance, "merch." To provide context, the Company hosted a total of four concerts in each of 1989, 1990, and 1991.

In 1996, the Old Boston Garden gave way to the New Garden, known now as the TD Garden. It is undisputed that Gatemen continued to be assigned as program vendors at the two gates on the second level located closest to where attendees enter the seating area, newly dubbed 4 East and 4 West, and on concert dates to sell merch at stands set up in those areas. For purposes of this case at least, the parties agree that 4 East and 4 West are stand-ins for the Old Garden's East and West Lobbies.

So far as the record shows, from 1989 until the Pink concert in April 2018, the Company never assigned more than two commissioned employees to sell merch at 4 East and 4 West, and at all times these employees either were permanent Gatemen or Spares in their stead. The same staffing levels, reportedly, were used at other novelty stands established and staffed over the years, although the staffing of those stands is the subject of another, separate grievance not before this Arbitrator.

The Company asserts, and the Union does not contest, that merch sales were not a driver for Gatemen income at 4E and 4W in the early days, but the record equally is clear that as earnings opportunities from program sales at sporting events

dwindled (recently, programs no longer are sold at Bruins games), they increased dramatically at burgeoning concert events.

Thus, in contrast to the 12 concerts held in the three-year period of 1989-1991, the TD Garden hosted 62 concerts between 2012 and the Pink concert in April 2018. According to 28-year employee [redacted], who has held a Gateman bid for the last 15 years, whereas he typically makes only the minimum selling programs at sporting events (identified as $81 per game as of the date of this hearing), commission on merch sales at concerts now drives the value of the Gateman bid. During this 62-concert period, the Company's uncontested evidence shows that at 59 concerts the Company employed 2 Gatemen (or fill-in Spare) each at 4E and 4W, two Gatemen at 4W for two concerts when the Company chose not to sell merch at 4E, and one Gateman at each of 4E and 4W at one concert. As the Union shows from this evidence, the Company never assigned more than two employees to sell merch on commission at either 4E or 4W prior to April 2018, despite hosting concerts by some of the biggest draws in the business. According to the Company's uncontested evidence, commissions at these events far exceed the minimum floor typically paid at sporting events, climbing into the hundreds and even thousands of dollars for each Gateman.

In anticipation of the April 2018 Pink concert, the parties executed a non-precedential agreement allowing the Company to assign three commissioned sellers at 4E and four commissioned sellers at 4W. In June 2018, the parties once again executed a non-precedential agreement allowing the Company to assign a third commissioned seller at 4W. At the 19 concerts to follow, through July 2019, the Company again assigned no more than two commissioned sellers each to 4E and 4W.

Following expiration of the parties' former collective bargaining agreement on July 31, 2019, and before inception of the parties' current Agreement in January 2020, during which hiatus the Union retained grievance rights but not arbitration rights, it is undisputed that the Company staffed the two novelty stands at issue with more than two commissioned sellers. The Company adduces some testimonial evidence that the Union agreed to these staffing levels, but the Union disputes that testimony and cites a lack of documentary support for the claim, and the Company stipulates that the Union filed a number of grievances during this period, which it could not pursue to arbitration.

This grievance arose when, in the first post-COVID concerts to be held at the TD Garden following the inception of the current Agreement – as noted, the Eagles concerts hosted on August 27 and 28, 2021 – the Company staffed both 4E and 4W with three commissioned sellers each. The record shows that three permanent Gatemen were assigned to 4E ([redacted], and [redacted]) while three Spares were assigned to 4W. It is undisputed that either [redacted] or [redacted] was the Gateman with the lowest seniority and therefore should have been assigned instead to 4W – the Union says [redacted], the Company says [redacted] – but either way, the principal question is whether the staffing should have been limited to a total of two commissioned sellers, Gatemen or fill-in Spares in their absence, at each of the two stands.

The grievance and this proceeding followed, principally placing into dispute the parties' intended meaning of Art. 37.L of the Agreement, which reads as it has at all times relevant to this case:

> **Two (2) Senior Gatemen shall work the Novelty Location in the East Lobby and the next two (2) Senior Gatemen shall work the Novelty Location in the West Lobby.**

> **If an additional person is needed they will be compensated by those listed above.**
>
> **NOTE: All commissions are based on gross sales excluding sales tax.**

At hearing, the Company provided uncontested evidence, which the Union deems immaterial, in support of its basic contention that more commissioned sellers not only permits but demonstrably provides greater earnings opportunities for the performers, the Company, and the commissioned sellers, alike. Greatly distilled, the Company shows that more sellers equal more sales opportunities during predictably short selling periods, hence shorter lines, hence more customers, hence greater total sales for the benefit of all. The Company's evidence principally is based on comparisons of the sellers' comparative earnings at TD Garden concerts of the same performers year-over-year, where in each case the increased staffing was accompanied by greater earnings for each seller. These earnings figures might be explained any number of ways, but for purposes of this case the Arbitrator accepts the Company's evidence as offered.

THE PARTIES' CONTENTIONS

The parties filed post-hearing briefs setting forth their respective positions, the principal points of which may be summarized as follows:

The Union principally contends that Art. 37.L clearly and unambiguously limits to two each the number of commissioned sellers to be assigned to the 4E and 4W novelty stands, whether permanently bid Gatemen or fill-ins from the Spare list as per Art. 36. In so arguing, the Union points out the express provision in Art. 37.L for assignment of help in addition to the two Gatemen or fill-ins,

emphasizing that such additional help is to be paid by the Gatemen rather than to be compensated directly by the Company through an equal share of the commissions. The Union points, too, to the terms of Art. 36, which specially establish that novelty positions at 4E and 4W concerts are to be filled by "Gatemen, in seniority order," and otherwise provides that vacancies at those stands are to be filled by a pecking order of other permanent novelty workers and then Spares. To the extent additional argument is required, the Union contends that the available evidence demonstrates uniformity in the parties' application of this provision, with the exception of the two instances on which the parties specially bargained otherwise and during the period thereafter when the Union lacked arbitration rights but nevertheless grieved the Company's unilateral departure from the previous understanding. The Union notes, too, that the Company did not present any evidence of a contrary bargaining history. Anticipating the Company's defenses, the Union argues that Schedule C of the Agreement, which is silent as to the staffing of 4E and 4W during sporting events and concerts, has not been shown to supersede the express, specific terms of Art. 37.L. Finally, the Union rejects as irrelevant the Company's reliance on economic arguments, asserting that such arguments belong in negotiation, not arbitration.

Relying on management rights provisions found at Arts. 2 and 25(a) and as expressed by clear and implied terms found elsewhere in the Agreement, the Company contends that it maintains the right absent express limitation in the Agreement "to determine the size and location of work stations," and that Art. 37.L simply does not contain the limitations to the staffing of the 4E and 4W novelty stands that the Union claims. The Company argues that the Arbitrator is prohibited by Art. 17.F from adding to the provisions of the Agreement specific, unexpressed staffing requirements. To the extent the Union relies on a supposed past practice to the contrary, the Company argues that such alleged practice is unenforceable both

because the Agreement expressly so provides, and because the alleged practice runs counter to other express terms of the Agreement. The Company argues, too, that the Union must not be permitted to avoid these strictures under the guise of casting its "practice" evidence instead as "clarification" of the intended meaning of Art. 37.L. In any event, in addition to arguing that there is inadequate evidence to establish any enforceable practice, much less the one the Union specifically alleges, the Company argues that previous staffing levels are nothing more than the product of the Company's exercise of its management rights, which the Company now finds unworkable due to changed circumstances and maintains the right to change. Finally, the Company contends that the Arbitrator must not infer that the parties meant their agreement to produce illogical results, arguing that the evidence overwhelmingly supports the Company's contention that increased staffing, beyond the limits sought by the Union, advantages all concerned whereas the Union's claim disadvantages all and jeopardizes the Garden's attraction as a tour venue.

DISCUSSION

At the outset, Art. 21 of this Agreement, as is commonplace, vests with the Company the reserved rights, "[e]xcept as specifically abridged by the terms of this Agreement, the operation of the Company's business at TD Garden including, but not limited to, the right to ... increase or decrease the size of the work force to meet the needs and conditions of the business ... determine the size and location of work stations."

In terms of identifying those specific abridgments, Art. 2 – Changes or Termination – provides:

> **Any changes, supplements, or amendments made to this Agreement must be reduced to writing, numbered serially, signed by the parties and shall then become part of this Agreement. This agreement shall supersede any and all agreements, which have been entered into by the parties prior to the date of execution hereof.**

Likewise, Art. 25 – Complete Agreement – Validity – provides at subsection (a):

> **This instrument contains the full and complete Agreement between the Company and the Union. Neither party shall be required during the term of this Agreement to negotiate or bargain upon any issue whether or not covered in this Agreement unless both parties agree to do so and reduce said charge to writing. This Agreement supersedes and voids all prior agreement written and unwritten.**

In short, the Company argues that the Agreement must be taken by the Arbitrator as written, without regard to any unwritten past practice, a point grounded in and amplified by Art. 17.F: "The Arbitrator shall have no authority to add to, subtract from, alter, or amend any of the provisions of this Agreement ...."

Notwithstanding these provisions of the Agreement and their implied and express limitations on arbitral authority, it is axiomatic that an Arbitrator duly selected by the parties to resolve a grievance has the authority and the obligation to interpret and apply the language used by the parties to express their agreements in furtherance of the foundational task of identifying the parties' intended meaning of that language. Interpretation is not synonymous with alteration or amendment. It is long and well settled in what often is referred to as the common law of the workplace that an arbitrator's work properly and routinely includes reference to and reliance upon not just the plain words found in the proverbial "four corners" of their Agreement, but also available evidence of the parties' own understandings and intentions as reflected in bargaining history – not offered here, by either party –

and/or as may be reflected in their own custom and usage, sometimes referred to as "past practice." It is this latter category of evidence that oftentimes invites debate over the proximity of an Arbitrator's permissive interpretation to the line demarcating impermissible alteration or amendment of terms.

As noted in the seminal treatise on the subject of past practices over 60 years ago, parties and arbitrators have relied upon "practice" evidence as an interpretive aid over the decades in a variety of contexts:

> **It may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous. It may also, apart from any basis in the agreement, be used to establish a separate, enforceable condition of employment.**

Mittenthal, Richard, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 Mich. L. Rev. 1017 (1961), published also in 14 The Proceedings of the National Academy of Arbitrators, Arbitration and Public Policy 30 (1961).[1]

As further explained more recently by Professor St. Antoine, another noted arbitrator of labor disputes:

> **Numerous arbitrators of high repute have accepted (or at least paid lip service to) the plain meaning rule and its benighted first cousin, the parol evidence rule. Carlton Snow and Richard Mittenthal have said nearly all that needs to be said about the plain meaning rule and past practice. Snow bluntly stated: "Arbitrators' continued invocation of the plain meaning rule is anomalous in light of the trend to reject the rule by the courts, the [Uniform Commercial Code], the Restatement [of Contracts], and treatise writers." Mittenthal was prepared to declare almost 40 years ago that past practice "may be used to clarify what is ambiguous, to give substance to what is general, and perhaps even to modify or amend what is seemingly unambiguous."**

[1] Available online at http://naarb.org//proceedings/pdfs/1961-30.pdf

> **California Supreme Court Justice Roger Traynor put his finger on the problem when he said:**
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> > **A rule that would limit the determination of the meaning of a written instrument to its four-corners merely because it seems to the court to be clear and unambiguous, would either deny the relevance of the intention of the parties or presuppose a degree of verbal precision and stability our language has not attained.**
> >
> > **In my view, if fidelity to the parties' intent (or their putative intent about an unanticipated problem) is the touchstone of sound contract interpretation, the *a priori* rejection of any evidence reasonably probative of that intent cannot be justified. In collective bargaining, what I call "contextual interpretation" is likely to be grounded in evidence concerning negotiating history and past practice.**

St. Antoine, Theodore J., "*Contract Reading" in Labor Arbitration*, ADR Currents 5, No. 3 (2000): 1, 14-6 (footnotes omitted).[2]

Even assuming without deciding for purposes of this case that the Company is correct that the above-cited limitations to arbitral authority strictly prohibit the Arbitrator from relying upon practice evidence to establish what would amount to a new or changed term of agreement, typical practice evidence properly is considered for the purpose of informing the Arbitrator's understanding of the parties' intended, shared meaning of their Agreement and Art. 37.L in particular.

Thus, interpretation of Art. 37.L properly is informed by provisions of other Articles, including Art. 36, together with evidence of the way in which the parties consistently applied Art. 37.L without dispute over the years except in two cases where a difference specially was negotiated and during the period when the Union lacked arbitration rights to challenge unilateral change.

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[2] Available online at https://repository.law.umich.edu/cgi/viewcontent.cgi?article=2431&context=articles

On the question whether Art. 37.L, strictly speaking, is clear and unambiguous, the Union acknowledges that it does not itself address the Company's right – uncontested by the Union – to use fill-in Spares to staff 4E or 4W in the absence of a permanent Gateman. Both parties acknowledge that although Art. 37.L allows for the use of "an additional person," Art. 37.L does not specify that such person must be drawn from among the Helpers defined at Art. 11, or the pool from which such person is to be drawn, whether the Spare list or otherwise. Neither does Art. 37.L by its plain terms address the Company's right – again uncontested by the Union in this case – to assign *fewer* than two Gatemen to staff novelty stands at each of 4E and 4W or specifically state that the Company shall assign *only two, and no more than two,* commissioned Gatemen to work each of the two stands.

Although the contours of Art. 37.L admit of some ambiguity, its basic staffing term is as plain as the "B" on the Garden's center ice: Under the heading, "Gatemen Staffing for Concerts," Art. 37.L provides: "Two (2) Senior Gatemen shall work the Novelty Location in the East Lobby and the next two (2) Senior Gatemen shall work the Novelty Location in the West Lobby." If the first part of the sentence did not plainly imply that the two "most" senior Gatemen shall work 4E, the next part – providing that "the next two" shall work 4W – would remove any reasonable doubt as to the parties' shared intention that the provision references the four most-senior bid Gatemen and, by extension, no others. Indeed, notwithstanding the issue in this very case, it is undisputed on this record that one of the three Gatemen assigned to work 4E at the Eagles concert should have been assigned to 4W because she ([redacted]) or he ([redacted]) was the least senior of the bid Gatemen. Likewise, it is undisputed that insofar as only three bid Gatemen apparently were available for the Eagles concerts, the Company properly used a Spare to serve as a fourth commissioned seller.

If the foregoing were not enough to demonstrate a limit of two Gatemen each per stand at 4E and 4W, the second sentence of Art. 37.L provides significant clarity to the intended meaning of the preceding sentence of the provision: "If an additional person is needed they will be compensated by those listed above," *i.e.*, the Gatemen who all agree are paid on commission, subject to a minimum floor. This provision, it bears emphasis, makes plain that if additional help is needed to augment the two-and-two staffing established for 4E and 4W, such person is to be compensated by the Gatemen – by what calculation and from what funds is not identified in the provision but is not at issue in this proceeding – not paid a share of the commissions to be paid directly by the Company to the Gatemen. Plainly, Art. 37.L establishes that if additional help is needed at 4E and 4W to sell merch during concerts in addition to the four senior Gatemen, such person is to be paid by the Gatemen, not paid by the Company share-and-share-alike with the Gatemen.

Even if reasonable minds could differ as to whether the foregoing is sufficient to decide this matter in the Union's favor, the available evidence of the parties' shared understanding of the intended meaning of the provision conclusively buttresses the Union's position. First, notwithstanding the Union's apparent acquiescence to the Company's periodic assignment of *fewer* than two Gatemen to each of 4E and 4W at three concert events since 2012 – once when the Company assigned one Gateman to each of 4E and 4W, and twice when the Company chose not to open a stand at 4E – on every other occasion subject to the Union's arbitration rights, accepted by the Union as 62 events since 2012, the Company assigned two, and only two, Gatemen to each of 4E and 4W, whether they were permanent Gatemen or Spares in their stead.

Second, on the only two occasions the Company ever assigned *more* than two commissioned Gatemen at each of 4E and 4W during periods when the

Union enjoyed arbitration rights, the Company executed special agreements with the Union, a very strong if not unmistakable reflection of the Company's understanding that Art. 37.L limits its staffing discretion just as the Union says. To be sure, it is possible that the Company specially negotiated those limits to avoid engendering any ill-will with the Union or as a matter of good faith labor relations, but that limited view of those dealings is diminished when considered against the Company's unilateral determinations during the hiatus period to increase commissioned staffing at 4E and 4W, despite grievance filings, at a time when the Union lacked access to the arbitration process, and then by the unilateral action in this case. If the earlier exceptions were negotiated without strict requirement as a matter of good labor relations, there is no explanation offered for the Company's turn to unilateral action over the Union's objection prior to this case only at times when the Union lacked any effective means through which to challenge such action. There simply is not any evidence of any concert subject to the Union's arbitration rights where the Company ever increased staffing over the Union's objection to the two-and-two levels prescribed by Art. 37.L. Attaching this import to the parties' negotiated exceptions to the staffing limits of Art. 37.L in no way punishes the Company's previous resort to negotiation; to the contrary, it honors the parties' evident commitment in Arts. 2 and 25(a) to the way in which they agreed the settled terms of the Agreement can be changed mid-term.

As the Company intimates, consideration of practice-related evidence demands a careful eye on the difference between what venerated Arbitrator Shulman termed "present ways, not prescribed ways" of doing things, lacking the mutuality necessary to a finding of what amounts to an agreement with the force of a written instrument:

> **There are other practices which are not the result of joint determination at all. They may be mere happenstance, that is, methods that developed without design or deliberation. Or they may be choices by Management in the exercise of managerial discretion as to convenient methods at the time. In such cases there is no thought of obligation or commitment for the future. Such practices are merely present ways, not prescribed ways, of doing things. The relevant item of significance is not the nature of the particular method but the managerial freedom with respect to it. Being the product of managerial determination in its permitted discretion, such practices are, in the absence of contractual provisions to the contrary, subject to change in the same discretion.**

Ford Motor Co. and UAW, Op. No. A-278 (Shulman 1952) (quoted favorably in Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, *Id*. at 54-55).

On this record, and especially considering the evidence of the parties' two specially executed agreements to permit an increase in commissioned staffing of the 4E and 4W novelty stands, the clarity, consistency, and longevity of the parties' practice persuasively demonstrates the parties' shared understanding that staffing of the 4E and 4W novelty stands is governed, literally and figuratively, by Art. 37.L, capping that number at two commissioned Gatemen (or Spares in their stead) each except as otherwise agreed.

In so concluding, the Arbitrator is not persuaded that the provisions of Schedule C properly are taken to diminish the import of the terms of Art. 37.L. Schedule C sets forth staffing levels for certain stands in the Garden, including for example 5E and 5W, but it does not set forth staffing levels for 4E and 4W. One might wonder at the decision to exclude 4E and 4W from Schedule C, but any arbitral concern over that question is dissipated by the fact that Art. 37.L, which falls under Schedule B, specifically does set forth such staffing levels, as noted, under the heading, "Gatemen Staffing For Concerts." Schedule C does not, by its terms or

reasonable implication, override the specific, express terms of Art. 37.L as it relates to Gatemen staffing for concerts at 4E and 4W.

To the extent the Company argues, too, that staffing novelty stands initially was meant as nothing more than a "side gig" for the Gatemen, the fact remains that the parties elevated that gig by including it in the Agreement. If over time the Gatemen's incentive for bidding and holding those positions changed from program sales to merch sales, that does not alter the fact that both provisions remain express in the Agreement, subject to enforcement. Indeed, if program sales now serve as the loss-leader for the right of Gatemen to work lucrative concert events, that does not serve to excuse the Gatemen from meeting the minimum sporting event requirements to enable them to hold what has proved to be a valuable bid for concert events. An employee cannot hope to work the concert events as a Gateman if the employee does not show up for the requisite number of minimum-pay sporting events. In this regard, it is perhaps helpful to note that collective bargaining agreements commonly include terms the import of which change to the benefit or detriment of one party or the other seasonally or with fluctuations in a company's business. Such business fluidity is not a reason, in and of itself, to refuse enforcement of the term. The fact is, the Company and the Union had reason to know at the time they negotiated the current Agreement that program sales were waning even as merch sales were waxing, but they chose not to alter the terms of Art. 37.L.

Notwithstanding the foregoing, the Arbitrator does not gainsay the Company's detailed evidence about the business acumen underlying and justification offered for its decision to increase staffing over the Union's objection, but has no difficulty in concluding that such explanations, in light of the persuasive evidence of the parties' heretofore shared understanding of the meaning of Art. 37.L,

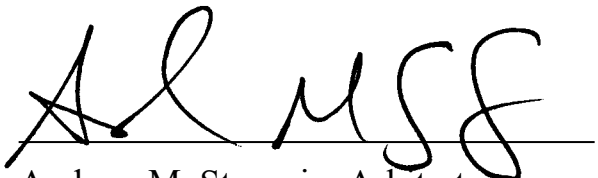
belong at the negotiation table, not arbitration. Likewise, that the merch business has increased and payment technology has changed from throwing cash into shoeboxes to collecting credit card swipes, taps, or sticks, might be grounds to question the continuation of a practice not founded in specific contract language, but it does not provide any proper basis for refusing to enforce the existing, written terms of this Agreement as evidenced by its written terms, the apparent meaning of which is supported by clear evidence of practice. If the Company wants to bargain a mid-term change to the longstanding limitations of Art. 37.L, Arts. 2 and 25(a) of the Agreement specify how that desire is to be pursued. The Arbitrator is without authority, as the Company itself notes, to alter the settled terms of the Agreement even if there is arguably good reason to do so.

Finishing this discussion where it started, this Agreement, as is commonplace, recognizes the Company's reserved management's right to operate the TD Garden "except as specifically abridged," and the Arbitrator finds on this record that Art. 37.L is just such an abridgment of its right to assign over the Union's objection more than two commissioned Gatemen, or Spares in their stead, to staff novelty stands at 4E and 4W during concert events.

DECISION

The grievance is sustained. Consistent with the parties' agreement at hearing, the question of remedy is returned to the parties for settlement in the first instance, subject to the Arbitrator's retention of jurisdiction in the event they cannot agree. Either party may return the matter to the Arbitrator for final

decision on remedy and such further hearing as may prove necessary or desirable.



Andrew M. Strongin, Arbitrator

Cape Elizabeth, Maine