BEFORE THE ARBITRATOR

ROSE MARIE BARON

In the Matter of the Arbitration of a Petition by

Holmen Area Food Services
Employees Association

and

Holmen School District

Case 28, No. 50066
INT/ARB-7072
Decision 28164-A

APPEARANCES

Deborah K. Byers, Executive Director, Coulee Region United Educators, appearing on behalf of the Holmen Area Food Services Employees Association.

Richard J. Ricci, Esq., Weld, Riley, Prenn & Ricci, S.C., appearing on behalf of the Holmen School District.

I. BACKGROUND

The District is a municipal employer (hereinafter referred to as the "District" or the "Employer"). The Holmen Area Food Services Employees Association (the "Association" or the "Union") is the exclusive bargaining representative of certain District employees, i.e., a unit consisting of all regular food service employees. The District and the Association have been parties to a collective bargaining agreement which expired on June 30, 1993. On April 1, 1993, the parties exchanged their initial proposals; after nine meetings no accord was reached and the Association filed a petition requesting the Wisconsin Employment Relations Commission to initiate binding arbitration. Following an investigation and declaration of impasse, the Commission, on September 14, 1994 issued an order of arbitration. The undersigned was selected by the parties from a panel submitted by the Commission and received the order of appointment dated November 2, 1994. Hearing in this matter was held on January 12, 1995 at the offices of the District in Holmen, Wisconsin. No transcript of the proceedings was made. At the hearing the parties had the opportunity to present documentary evidence and the sworn testimony of witness.

Subsequent to the hearing, on January 25, 1995, the District submitted rebuttal evidence, i.e., Responses to Association exhibits 11, 12, 15, 16, 17, 18, 21, 22, 23 through 30. An additional response, entitled "Other" was also submitted. The Association, in a letter dated February 23, 1995, objected to the admission of these exhibits on the grounds of hearsay and lack of credible documentation. After response by the District to the objections, the arbitrator issued a ruling on April 3, 1995 in which the District's exhibit entitled "Other" was denied admission on grounds of hearsay and ambiguity requiring the opportunity for cross-examination. The other exhibits were admitted.

Because of the delay engendered by the rebuttal exhibits, the briefing schedule agreed upon at hearing required adjustment. Briefs of the parties were exchanged on April 11, 1995; reply briefs were submitted by the parties and exchanged by the arbitrator on May 8, 1995. The record was closed as of May 8, 1995.

II. ISSUE AND FINAL OFFERS

The single issue to be determined is the language involving subcontracting found in Article II, Employer/Employee Rights, B. Management Rights (Agreement, July 1, 1991 to June 30, 1993):

> Management retains all rights of possession, care, control and management that it has by law, and retains the right to exercise these functions under the term of the collective bargaining agreement except to the precise extent such functions and rights are explicitly, clearly and unequivocally restricted by the express terms of this Agreement. These right include, but are not limited by enumeration to, the following rights:
>
> . . .
>
> 13. To subcontract out for goods and services provided that no bargaining unit employee, employed as of September 28, 1992 is placed on lay-off or reduced in number of hours worked as of September 28, 1992 because of such action. (Association Ex. 6; Employer Ex. 21).

The final offers of the parties are as follows:

The Employer:

No change from the terms and conditions of the 1991-93 contract.

The Association:

13. To subcontract out for good and services provided no bargaining unit employee, ~~employed as of September 28, 1992,~~ employed as of August 12, ~~1994~~, is placed on layoff or reduced in the number of hours worked ~~as of September 28, 1992~~ as of August 12, 1994, because of such action.

III. STATUTORY CRITERIA

The parties have not established a procedure for resolving an impasse over terms of a collective bargaining agreement and have agreed to binding interest arbitration pursuant to Section 111.70, Wis. Stats. (May 7, 1986). In determining which final offer to accept, the arbitrator is to consider the factors enumerated in Sec. 111.70(4)(cm)7:

7. Factors considered. In making any decision under the arbitration procedures authorized by this paragraph, the arbitrator shall give weight to the following factors:

a. The lawful authority of the municipal employer.

b. Stipulations of the parties.

c. The interests and welfare of the public and the financial ability of the unit of government to meet the costs of any proposed settlement.

d. Comparison of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services.

e. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities.

f. Comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes in private employment in the same community and in comparable communities.

g. The average consumer prices for goods and services, commonly known as the cost-of-living.

h. The overall compensation presently received by the municipal employes, including direct wage compensation, vacation, holidays and excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

i. Changes in any of the foregoing circumstances during the pendency of the arbitration proceedings.

j. Such other factors, not confined to the foregoing, which are normally or traditionally taken into consideration in the determination of wages, hours and conditions of employment through voluntary collective bargaining, mediation, fact-finding, arbitration or otherwise between the parties, in the public service or in private employment.

IV. POSITIONS OF THE PARTIES

The following statement of the parties' positions does not purport to be a complete representation of the arguments set forth in their briefs and reply briefs which were carefully considered by the arbitrator. What follows is a summary of these data and the arbitrator's analysis in light of the statutory factors noted above.

A. The Comparables

The Association has proposed the school districts in the Mississippi Valley Athletic Conference as the appropriate comparables: La Crosse, Onalaska, Sparta, and Tomah; in addition, West Salem, a contiguous, unionized district is proposed. The primary internal comparable is the Paraprofessional and Clerical Personnel Unit of the Holmen School District.

The District has not provided data on comparables in its exhibits, however, in its brief, it makes reference to the external comparables proposed by the Association (p. 7). No mention is made of any internal comparability.

It is the arbitrator's opinion that there is a tacit agreement between the parties that the appropriate external comparables are those submitted by the Association and these will be utilized in the arbitrator's analysis. Since there was no objection by the District to the Association's reliance on an internal comparability group, the paraprofessionals and clerical unit, that

unit will also be included in the analysis.

B. Management Rights: Contracting Out

1. The Association

a. The Status Quo

The Association argues that, although it has proposed changing the dates in the existing contract from September 28, 1992 to August 12, 1994, it is the District which is seeking to alter the status quo by refusing to update the date in the subcontracting language in Article II. The subcontracting language in the first contract came about through a voluntary agreement to settle a prohibited practices complaint filed with the Wisconsin Employment Relations Commission by the Association against the District.

It is the Association's contention that the intent of the language at the time the initial bargaining agreement was settled was to protect the members of the bargaining unit from layoff, and that intent is the status quo. Thus the Association's final offer does not change the effect of this language but rather continues the accommodation the parties had previously made.

The Association claims that the District has not offered a compelling need to alter the status quo nor has it offered a quid pro quo. Arbitrators have held that the party seeking to change existing contract language has the burden of proving the need for the change and offer a quid pro quo, i.e., economic or other benefits (citations omitted). Arbitrator R.J. Miller's decision in River Falls ESP, Dec. No. 42611 (5/21/90) is cited in support of the Associations's position that the District has no right to change the status quo as it has provided no quid pro quo for the lack of protection of present bargaining unit members. Nor has the District shown a compelling business need for change.

It is the position of the Association that there is a compelling need to protect present bargaining unit members since the District has already subcontracted bargaining unit work for reasons other than economics. The Food Service program has been self-sufficient during only one of the past five

years with deficits requiring transfer of money from the general operating budget. In today's political climate of revenue caps, borrowing from the general operating budget could result in cutting educational programs. Despite assertions made in a 1994 report on the food service program that it was not a realistic candidate for replacement by contracted services, there was an expressed interest in implementing cost-saving measures. The Association points with concern to the decision to subcontract bread purchases during the 1994-95 school year. Several cooks testified that it was less expensive to continue the practice of baking bread at the school than to purchase it from a commercial baking company, i.e., $.64 versus $.73. Allegations of mismanagement of the program were made by the Association which fears that lack of control of various aspects of food service, i.e., purchasing supplies and equipment, "overfeeding of children," inequity in staffing kitchens, and loss of revenue, et al will jeopardize their positions.

b. Internal Comparable

The Holmen Education Support Personnel contract provides protection for all present bargaining unit members in the event the District decides to contract out for goods and services. Although the Association was not able to obtain similar language in collective bargaining, it was able to secure protection for all bargaining unit members at the time the initial contract was settled. The same protection granted to members of Holmen Education Support Personnel should also be afforded to the Association.

c. External Comparables

Sparta, Tomah, and West Salem contracts have language protecting present bargaining unit members by either limiting management rights or prohibiting subcontracting during the term of the agreement. La Crosse and Onalaska contracts are silent on the issue of subcontracting; the Association contends that these Districts must bargain the impact of subcontracting on bargaining unit members.

2. The District

a. The status quo

It is the District's position that the existing subcontracting language was agreed upon by the parties as an eventual "sunsetting" provision as part of an agreement to settle the first collective bargaining agreement (1991-1993). The bargaining history indicates that subcontracting was the pivotal issue and that what is now Sec. 13, which gave management a limited right to subcontract, was the result of a desire to settle both the contract negotiations and a prohibited practice change filed by the Union. The language provided that the District could subcontract for goods and services so long as no bargaining unit employee, employed as of September 28, 1992, is placed on layoff or has hours of work reduced because of subcontracting.

This is the status quo as defined in Black's Law Dictionary, Fifth Edition, 1979: "The exiting state of things at any given date." The District is not proposing any change in this language; the Union, however, proposes to change the date of September 28, 1992 to August 12, 1994. This constitutes a change in the status quo and would take away the right of the District to subcontract in each succeeding contract as the Union proposes to protect all unit members from layoff or reduction in hours as a result of subcontracting.

Relying on the doctrine of the dynamic status quo, the District argues that it has been its intent from the onset of bargaining for the initial contract that the District have the right to subcontract for goods and services, subject only to the limitations in Article II B.13.

Arbitrator Neil Gundermann's award in the case of School District of River Falls, Dec. No. 262965-A (7/90) is cited as authority for the District's position. In that case, in a similar factual situation, it was held that changing the date "...would change the status quo by extending the contractual prohibition against subcontracting for an additional two years. Additionally, in order to achieve such results it would be necessary to alter the existing contract language thereby changing the status quo." The District, in its reply brief, made reference to the fact that Arbitrator Gundermann's award regarding

the secretarial unit was subsequent to that of Arbitrator Miller's award in the River Hills ESP matter (5/90) and that Gundermann disagreed with and rejected Miller's conclusion. Gundermann relied upon the clear and unambiguous language of the initial contract as determining the status quo. The District believes that the Gundermann award provides a more comprehensive analysis and that despite its assertions to the contrary, the Union is proposing to change the status quo herein.

The District cites arbitral authority for the proposition that the proponent of change has the burden of proof and contends that the Union has failed to meet that burden. In order for the moving party to sustain its burden it must 1) demonstrate a need for the change and 2) provide a quid pro quo for the change. (citations omitted).

It is further noted that Arbitrator Sherwood Malamud has added another condition to the analysis of change in the status quo, i.e., in addition to proving need and showing that there has been a quid pro quo for the change, a higher degree of proof is required--the submission of clear and convincing evidence by the party proposing the change. D.C. Everest School District, Dec. No. 24678-A (2/88).

The Union has demonstrated no need to change the dates in the contract. The Union is well aware that the District has no intention of subcontracting services currently rendered by its bargaining unit members, see e.g., Report to the Board of Education, Union Ex. 12, Employer Ex. 22): "The District-owned Food Service program is not a realistic candidate for replacement by contracted services when the purpose for subcontracting is to save the district operational expenditures (at page 13, para. B.1).

It is the District's contention that the Union has been given no reason to feel threatened by any intent to contract out for services being performed by members of the bargaining unit since the report by Business Manager Jan Clark, supra, shows that subcontracting was not a viable alternative to the District's own food service program.

Another factor considered regarding the need to change the status quo is whether the change is supported by the comparables, i.e., evidence of an emerging pattern of agreements in this area. Of the school districts in the conference, La Crosse and Onalaska has no language restricting the right to subcontract services or goods. Tomah allows limited outside hiring during vacations, and West Salem prohibits subcontracting during the term of the agreement and requires the Board, if it considers subcontracting at the expiration of the contract, to include such a proposal in its initial bargaining proposal. Sparta has language that provides that no subcontracting can be done if it affects bargaining unit employees' hours.

The District does not believe that an "emerging pattern of agreements" exists to support the Union's position.

A comparison of the District's other employees, i.e., the internal comparables, reflects that the non-represented bus drivers are susceptible to the District's right to subcontract. The custodial/maintenance employees' contract is in arbitration on its initial contract; the language for subcontracting is at issue.

The District argues that the Union has not established by clear and convincing evidence a need to change the status quo, nor is such a change clearly supported by the comparables. There is no evidence that there has been any problem or hardship for employees of the District.

b. Management of the food service program

The District argues that the union's emphasis on the management of the food service program is a smokescreen and is irrelevant to the true issue, i.e., a change in the contractual subcontracting language. The District's administration conducted a study of the feasibility of subcontracting food services based on economic considerations and issued a report in February of 1994 (Employer Ex. 22). It was concluded that subcontracting was not viable or recommended. The District now asserts that there is nothing in the record to show that the Board is looking at

subcontracting, although it wishes to keep its options open.

The focus of the Union's evidence and testimony was the management of the food service program by its director, Sue Sullivan. Union exhibits 11 through 42 apparently were introduced to support its position that the food service program is being mismanaged and will result inevitably in subcontracting. This personal attack on Ms. Sullivan is inappropriate and irrelevant, however, the District has provided responses showing how ill-founded the Union's concerns are. An example of this is the fact that of the originally budgeted $35,000 subsidy for food services, $20,000 was for equipment purchases, while the balance appears will not be needed at all. Other Union allegations of mismanagement in ordering and inventory control are shown to be inadequate statements of fact.

The District asserts that an examination of parties' final offers in light of all relevant facts and appropriate criteria reveals that the District's offer is the more reasonable one before the arbitrator.

V. DISCUSSION AND FINDINGS

A. Which party is attempting to change the status quo?

The threshold issue in this matter is which of the parties is attempting to change the status quo. The language of Article II B, section 13 provides that management shall have the right:

> To subcontract out for goods and services provided that no bargaining unit employee, employed as of September 28, 1992 is placed on lay-off or reduced in number of hours worked as of September 28, 1992 because of such action. (Association Ex. 6; Employer Ex. 21).

The Association argues forcefully for the proposition that the status quo is not disturbed by merely changing the dates from September 28, 1992 to August 12, 1994 in order to bring more recent hires in the bargaining unit under the protection of a no-layoff clause/change in hours clause. The intent of that section, it is asserted, is what is controlling and to perpetuate such a limitation of management rights into this second contract does not affect

the status quo. The District contends that the original subcontracting language, which was the result of an agreement to settle after lengthy bargaining and a pending prohibited practices charge by the Association, was intended to "sunset" with the expiration of the contract and that the attempt of the Association to revise the dates constitute a change to the status quo. Whatever else may have occurred in the past, it would appear that there never was a true meeting of the minds as to the intent of the parties when the language of the initial section 13 was drafted and adopted.

Both parties have quoted Black's Law Dictionary definition of status quo: "The existing state of things at any given date." Absent a negotiated change, the language contained in the 1991-1993 contract would remain the same, i.e., no bargaining unit member employed as of September 28, 1992 would be placed on layoff or reduced in hours should the employer subcontract services. The arbitrator has carefully reviewed the awards of Arbitrators Miller and Gundermann cited by the Association and the District respectively in support of their positions and has come to the conclusion that the Gundermann award is the more compelling. The language of section 13 is clear and unambiguous in providing protection for bargaining unit employees hired by a specific date; nothing in the language contemplates an automatic revision of the date to include new hires as subsequent collective bargaining agreements are negotiated.

It is the arbitrator's opinion, and it is so held, that by seeking to change the date, the Association is attempting to change the status quo. The Association, therefore, bears the burden of proving by clear and convincing evidence that a need for the change exists and that an offer of a quid pro quo has been made.

B. Has the Association met the burden of establishing need?

The focus of the Association's case has been on the need to protect bargaining unit members from perceived mismanagement of the food service program. The Association introduced testimony of food service employees and

supporting documentation regarding instances of poor planning by the District, errors in ordering food products, purchasing of unneeded equipment, etc. It also alleged that the program showed deficits in all but one of the last five school years. There was testimony regarding the cost of bread production by District food service employees versus the cost incurred by the District's decision to subcontract bread production during the 1994-95 school year. The Association alleges that the cost of in-house bread baking is $.64 per loaf versus $.73 per loaf of commercially produced bread. The District, in its rebuttal exhibits, shows a significantly lower deficit for 1992-93 since some of the funds were spent on equipment. Regarding the cost of the bread, the District shows a cost of $.80 per loaf baked at the school, versus $.73 for commercial bread. Other data regarding the salad bar and power lunch, inventory and ordering, submitted by the District, point out discrepancies with the Association's figures. The arbitrator has carefully reviewed all of the relevant Association exhibits and the District's rebuttal exhibits on these matters and has reached the conclusion that it is not possible to completely resolve the discrepancies in favor of either party. Therefore, these quantitative data will not be given consideration in a final determination on the final offer.

Even if the allegation of mismanagement by the Association is ill-founded, what is of importance herein is the perception of the Association that there is mismanagement in the food service program. There appears to be grave concern about the future viability of the program on the part of the employees. It was apparent from the testimony of these employees that they are dedicated, loyal, and skilled food service workers and believe that given the opportunity, they could handle all administrative details of the program in a highly professional manner and avoid the pitfalls they fear will occur under the present administrator. Nonetheless, the reality of the matter is that these employees are not members of management and therefore have no responsibility for the management of the food service program which has been

given to the director, Sue Sullivan. Despite the Association criticism of her management style, there is no evidence in the record that would demonstrate a causal relationship between the way the program is presently being run and the probability of the District's subcontracting food services based on economic considerations.

The Association points out quite correctly that despite the report and recommendations against subcontracting in food service, there already has been subcontracting in the food service program, i.e., bread production in the 1994-95 school year. In neither its initial nor reply brief does the District refer to or discuss the subcontracting of bread to an outside source. The record indicates that there were no layoffs as a result of this decision, although there was one employee who retired who was not replaced. The arbitrator agrees that having one of the functions of the food service program transferred to an outside contractor might give rise to concern among the members of the bargaining unit. However, there is no evidence to show that any member of the bargaining unit was harmed by management's action nor is there any evidence of a grievance being filed at that time. The administration report to the Board indicated that the food service program was not a realistic candidate for replacement by contracted service, although cost-saving measures were indicated. The District consistently states that it has no plan to subcontract food services, although it wishes to retain the right to do so.

This is a very close case and it has been a very difficult one for the arbitrator. Certainly the Association's fears for the future has some validity based upon the reality of having bread production taken away from the bargaining unit and given to a commercial baker. The question of whether the Association has established by clear and convincing evidence that there is a need to change the language of the contract is a somewhat more complex matter. Based upon the totality of the evidence, and particularly the fact that despite the subcontracting, no member of the bargaining unit was harmed, the

arbitrator must reach the conclusion that the Association has failed to meet the required burden of proving need.

C. The matter of the quid pro quo

Arbitrators have long held that when a party proposes a significant reformation of a fundamental aspect of the collective bargaining agreement, some concession or trade-of, also known as a quid pro quo, is offered which would persuade the other party to accept the offer. There is no evidence in this record to indicate that the Association offered any consideration in exchange for the change in dates in the management rights clause at issue herein.

In conclusion, it is found that the Association has filed to meet its burden of proof in seeking to change the status quo relative to the subcontracting language.

D. The Comparables

The arbitrator is to consider the factors enumerated in Sec. 111.70(4)(cm)7 in determining which of the parties' final offers is preferable. To that end comparisons are made of wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes performing similar services (section d). The appropriate comparable school districts for such a comparison have been determined to be La Crosse Food Service, Onalaska Food Service, Sparta Classified Employees, Tomah Non-teaching Employees, and West Salem School Employees. Both the La Crosse and Onalaska contracts are silent as to subcontracting. Sparta provides for subcontracting as long as work historically performed by bargaining unit employees, and the hours of bargaining unit employees are not affected. In Tomah, the employer may continue its practice of hiring outside the bargaining unit on a temporary basis to perform services during school vacation periods. In the West Salem 1993-96 contract, the Board has the right to subcontract, but has agreed not to implement its right during the term of the contract. If,

at expiration of the contract, the Board considers subcontracting, it will include such a proposal in its initial bargaining position.

The Association contends that although the La Crosse and Onalaska contracts are silent on subcontracting, the employers must bargain over impact, however, there is no supporting evidence for that statement (copies of relevant contract sections were not included in the Association's exhibits. The section cited in the Tomah contract, Article 15, speaks only to the right of the Employer to hire outside the bargaining unit during school vacations. It is not clear how this equates with subcontracting in a food services program which presumably operates only during the school year when students are present. It is the arbitrator's opinion that only Sparta and West Salem offer the kind of protection from subcontracting to its employees than that being sought by the Association.

The District contends that no pattern of agreements exists which would support the change which the Association is seeking. The arbitrator must agree that there is insufficient persuasive evidence regarding the external comparables which would compel a finding in favor of the Association.

Another factor for consideration is a comparison of the wages, hours and conditions of employment of the municipal employes involved in the arbitration proceedings with the wages, hours and conditions of employment of other employes generally in public employment in the same community and in comparable communities (section e).

In addition to the food service employees, there are two other organized groups in the Holmen School District, i.e., the Education Support Personnel and the Custodial and Maintenance and Custodial workers. The maintenance/ custodial bargaining unit had not reached an agreement on its initial contract at the time the record in this matter was closed. The Education Support Personnel unit which represents clerical and paraprofessional employees has a contract presently in effect (Association Ex. 43: July 1, 1993 to June 30, 1996). Article II B(13) sets forth management rights regarding subcontracting:

> ...These rights include, but are not limited by enumeration to, the following rights:
>
> 13. To temporarily contract out for goods and services, provided that no bargaining unit employee is placed on layoff or reduced in hours because of such action.

The Association believes that a comparison with this unit should be given consideration beyond that called for by the statute because of the community of interest which is shared by both bargaining units. Both are employed by the District, both are unionized, both groups are educational support personnel and have common worksites, both have a common work year and school calendar. In addition, it is the Association's position that as educational support staff, both are subject to the whims of the District regarding subcontracting since they are viewed as dispensable.

The District, in its discussion of internal comparables, has failed to mention the Education Support Personnel bargaining unit and refers briefly to the non-represented bus drivers as being susceptible to the District's right to contract. Further, it notes that the custodial/maintenance employees' contract is in arbitration.

The arbitrator acknowledges that the Association's assertion that the primary internal comparison with the Education Support Personnel unit is well-taken. That subcontracting clause represents the best possible protection for members of its bargaining unit and might be characterized as the "gold standard" which other bargaining units might well strive to achieve. Yet it is difficult for the arbitrator to reach the conclusion that because one bargaining unit in the school district has achieved the standard which a second unit wishes to reach, that the internal comparable should be totally relied upon. There is nothing in the record to indicate how the language in the Education Support Personnel contract was reached, whether it was the result of arbitral fiat or came about through the give and take of collective bargaining. The latter appears to be the more probable and indeed the Association states in its initial brief: "Because the HESP has bargained with

the District for many years, the current level of wages, hours and conditions of employment for paraprofessionals and clerical personnel can prove to be of value when making a decision in the instant case (p. 5-6).

While the Association's final offer comes closer to the protection afforded to the bargaining unit members in the Education Support Personnel unit than does the District's final offer, the arbitrator is not convinced that it is possible to reach a final decision based solely on this factor and therefore reluctantly declines to do so.

VI. CONCLUSIONS

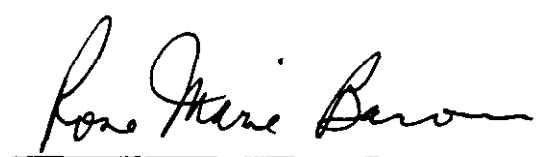
As discussed above, it was determined that the Association was the party attempting to change the status quo and therefore had the burden of proving by clear and convincing evidence that there as a need for the change and that there was an offer of a quid pro quo to the opposing party.

The Association did not meet the burden of proof regarding a demonstration of need for a change in the status quo or the offer of a quid pro quo. Further, neither the external nor internal comparables were found to have supported the Association's position.

VII. AWARD

The final offer of the Holmen School District, together with the stipulations of the parties, shall be incorporated into the parties' written Collective Bargaining Agreement for 1993-96.

Dated this 2nd day of June 1995 at Milwaukee, Wisconsin.



Rose Marie Baron, Arbitrator