ARBITRATION PROCEEDINGS

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration Between NEW ERA CAP COMPANY - and - CWA LOCAL 14177	Subject: Blocking Department: New Technology and Rates

Dana Edward Eischen, Arbitrator

Appearances

For the Employer:	Bond, Schoeneck & King by Robert A. Doren, Esq.
For the Union:	Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria by Mark Gaston Pearce, Esq.

Also Present

For the Employer:	Peter Augustine, Chief Financial Officer Benjamin Buren, Consulting Engineer William MacArthur, Plant Manager
For the Union:	Jeffrey Barbuto, Blocker George Brewster, Treasurer Thomas Geber, (former) Treasurer Pamela Gillette, Secretary Jane Howald, President Kathy Ketterer, Vice President Shelly Naab, (former) Vice President Charlene M. Valentine, (former) President Christine Wattie, (former) Vice President

PROCEEDINGS

The Parties appointed me to arbitrate this dispute over the interpretation and application of Articles XII, XIV and XV of their Collective Bargaining Agreement for the term October 16, 1995 through October 15, 2000 ("Agreement" or "CBA"). Hearings were begun on August 24, 1999, at Derby (including a site visit to observe the machinery and working conditions in the Blocking Department) and concluded on September 23, 1999, at Buffalo, New York. Both sides were represented by counsel and afforded full opportunity to present documentary evidence, testimony subject to cross examination and oral argument. The voluminous record was closed with submission and exchange of posthearing briefs in mid-November 1999 and the Parties graciously allowed me some extra time for rendition of the final decision.

ISSUES

Following due notice to the Union, the Company installed new machinery and technology in the Blocking Department at the Derby Plant during the annual summer shutdown in August 1998,. The *gravamen* of the present dispute was the Company's subsequent unilateral implementation of changes in the Blocking Department organizational structure, compensation scheme and rates of pay for employees. A grievance filed by the Union on September 25, 1998 claimed the Company's unilateral removal of the Blocking Department from the "cell structure" and recission of the "88% Minimum Rule" violated the Agreement, for which remedial monetary damages of "raises and bonuses" were sought. A subsequent grievance filed by the Union on October 1, 1998 alleged additional Agreement violations in the Company's unilateral imposition and continuation of Blocking Department "trial rates", for which restoration of the *status quo* plus "make whole" monetary damages were sought. Those separate but related grievances were consolidated by the

Parties for presentation and determination in this arbitration proceeding under Article XII of the Agreement.

At the outset of the hearings in this complex case, the Parties had difficulty arriving at a joint formulation of the issues. The Union suggested the following framing of the issues: *Did the Company unilaterally violate the contract when it (a) removed the Blocking Department from cellular manufacturing; (b) changed the Blocking Department's performance rate from 88% to 100% piece rate; and (c) changed the ticket price from the Blocking Department rates negotiated in the CBA?* For its part, the Company proposed the following statement of issue: *Did New Era Cap Company violate section 12.11 of the CBA with respect to changes in the Blocking Department on September 27, 1998?* After the Union modified the remedy it was seeking in the September 25, 1998 grievance from "payment of raises and bonuses" to "reinstatement of the *status quo ante*", the Parties stipulated that the following issues are to be decided in this arbitration:

1) Did the Company violate the Collective Bargaining Agreement, as alleged in the September 25, 1998 grievance (as modified by the Union at the arbitration hearing)?

2) Did the Company violate the Collective Bargaining Agreement, as alleged in the October 1, 1998 grievance?

3) If so, what shall be the remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE XII - ADJUSTMENTS OF GRIEVANCES

12.01 ADJUSTMENT OF GRIEVANCES
For the purpose of this Agreement, a grievance is defined as any claimed dispute between the Company and the Union.

12.02 GENERAL MATTERS
Purpose -The purpose of this procedure is to secure at the lowest possible level solutions to grievances which may from time to time arise. The handling of grievances at each level shall be kept as informal as practicable.

a. No action or matter shall be considered as the subject of a grievance and shall be considered waived unless filed in writing at Step Level I within ten (10) working days from its occurrence or from the time it should reasonably have become known to the aggrieved party.

b. If a decision at one step is not applied to the next step of the procedure within the time specified, the grievance will be deemed to be discontinued and further appeal under the Agreement shall be barred.

c. Failure at any step of the grievance procedure to communicate a grievance answer to the aggrieved party within the specified time limits shall permit the lodging of an appeal at the next step of the procedure within the time which would have been allocated had the decision been communicated on the last day of the specified time period.

12.03 STEPS

STEP 1 The grievance shall be presented in writing to the Plant Manger or his representative. A written response shall be given by the Company within five (5) working days thereafter. If the response is not satisfactory, then;

STEP 2 The grievance shall be presented to the President or his designee within (10) working days of the receipt of Step I answer. The President or his designee shall meet with the Union President or his/her designee and the grieving employee to discuss the grievance. The Company will answer within five (5) working days thereafter.

Employer grievance shall be filed directly at Step 2.

STEP 3 If the grievance is not resolved at Step 2, either party may submit the grievance to arbitration, and in so doing, give the other party a written notice of such intention within twenty (20) working days after the Step 2 answer. The parties shall then select an Arbitrator in accordance with the Rules of the American Arbitration Association.

12.04 AUTHORITY OF THE ARBITRATOR

The Arbitrator shall have no authority or power to add to, subtract from or modify any of the terms of this Agreement or to make any decision which requires the commission of an act prohibited by law or which is in violation of the terms of this Agreement.

12.05

The Arbitrator shall render this decision in writing to the Company and the Union, which decision shall be final and binding upon both parities and employees covered under this Agreement. The Arbitrator shall render a decision within thirty (30) days following the close of the arbitration proceedings.

12.06 SHARE COST FOR ARBITRATION

One-half of the fees and expenses of the Arbitrator shall be paid by the Company and one-half by the Union. All other expenses incidental to the arbitration, including those of witnesses, will be paid by the party which incurred them.

12.10 MANAGEMENT RIGHTS

Except as otherwise limited by the provisions of this Agreement and subject to the Grievance Procedure contained herein, the right to hire, promote, discharge and discipline for just cause, determine the methods, means and numbers of personnel required for the conduct of the Company's business, and to determine when the work required in operating its business is to be performed by employees covered by this Agreement shall be vested in the Company. The Company may promulgate and require employes to observe reasonable rules governing employee conduct and

discipline employees for just cause subject, however, to the Union's right to invoke the Grievance Procedure contained in this Agreement.

12.11 NEW TECHNOLOGY

The Company and the Union recognize that during the term of this Agreement new methods of manufacturing, new machines and other new technology may be developed which will improve the efficiency of operations throughout the entire Plant. The Company will provide notice to the Union prior to the implementation of any such changes. This Notice will include a description of the proposed changes, the Department or Departments affected and a list of the affected employees. After such notice is given, the parties will meet to discuss the proposed changes in order that the Union may voice any concerns it may have and obtain further information regarding the proposed changes.

The Company may, in its sole discretion, implement the changes on a trial basis with the length of the trial period not to exceed three (3) months unless otherwise agreed to by the parties. The purpose of this trial period will be to permit the Company to evaluate whether the changes improve the efficiency of operations throughout the entire Plant and the Union to evaluate the impact on bargaining unit employees.

At the expiration of the trial period, the parties will meet to discuss the results of the trial period and attempt to reach agreement on whether the changes should be implemented on a permanent basis. If the parties cannot agree, the Company will have the right to determine whether the changes should be implemented provided that the Company's decision is based upon a good faith determination that the changes will improve the efficiency of operations throughout the entire Plant and with due consideration for the impact on bargaining unit employees.

If it is determined that the changes will be implemented, either through mutual agreement or unilaterally by the Company, the Company agrees to meet and negotiate with the Union as to the terms of such implementation, its impact on bargaining unit employees and any proposed modifications to the contract.

Article XV - Trial Rates

15.01

All new rates will be tried for an eight (8) week trial period prior to the rate becoming permanent. The final permanent rate shall be fixed by mutual agreement between the Company and the Union. The final permanent rate must return to the employee who exerts normal effort, the average earnings made in the department on all other styles. The Company will notify the Union of trial rates upon implementation. For new set up, the trial rates shall be fixed by mutual agreement between the Company and the Union.

Article XIX - Wages

19.01

a. The wage rate now in effect shall remain in effect during the life of this Agreement unless the Union and Company mutually agree to re-negotiation of the wage.

b. It is also mutually agreed that if the Company and the Union are able to reach an agreement before the contract expires, which will additionally financially benefit all straight time workers by instituting an incentive method of payment, then that system or systems will be implemented.

Article XXIII - Wage Re-Opener

23.01

Effective October 15, 1998, this Agreement may be reopened for purposes of negotiating the issue of increasing wages (wages defined as: Rates, COLA, Cell Bonuses and Medical Benefits) as long as one party gives the other sixty (60) days notice of a desire to reopen this Agreement to negotiate such issue. Such notice must be received on or before August 16, 1998. (Article 18.01 - Strikes and Lockouts stays in effect).

APPENDIX A (DATED 12/8/95) CELLULAR MANUFACTURING MAIN CELLS, FEEDER CELLS, PEAK CELLS AND PACKING CELLS

All employees must work at the minimum of 88% of their set hourly rate. Fusers and Mitsubishi Peak Stitch operators must work at the minimum of 93% of their set hourly rate. Packers must work at 100% of their set hourly rate.

APPENDIX A-1 RATE CHART FOR ALL CELLS

S/ PER DOZEN

MAIN CELLS

OPERATION	SIZED	OPEN BACK	1 LABEL	GOLF
FIT FRONT	0.373	-	-	-

FEEDER CELLS

OPERATION	SIZED	EXTRAS/REPAIRS	NYLON
TAPING	0.24	-	0.291

PACKING CELLS

OPERATION	SIZED	OPEN BACK	CAP MACH.
CLIPPING	0.913	-	0.362

APPENDIX C NON-CELLULAR DEPARTMENTS RATE CHART

SPER DOZEN

						CAP MACHINE		
	OB	STOCK	DIAMOND	CTO'S	GOLF	OB	GOLF	SIZED
BLOCKING	0.447	0.677	0.741	0.739	0.596	0.53	0.68	0.788

BACKGROUND

New Era Cap Company ("Company" or "Employer") is the manufacturer of the caps worn by the baseball players for Major League Baseball and most collegiate teams. The Company is engaged in the manufacture of these baseball caps at facilities in Derby, New York, Buffalo, New York and Demopolis, Alabama. This dispute involves certain employees at the Derby, New York facility, the only one of the Company's plants represented by the Communications Workers of America, Local 14177 ("CWA" or "Union"). The terms and conditions of employment for the approximately 500 production and maintenance employees at the Derby plant are governed by the 1995-2000 Collective Bargaining Agreement ("CBA" or"Agreement") between the Company and the "New Era Cap Company Inc., Derby Plant Independent Union". The Independent Union elected to affiliate with CWA mid-way through the term of that Agreement, effective July 12, 1997.

Commencing with the 1995-2000 Agreement, most production operations at the Derby plant were divided into alpha-designated manufacturing cells, *i.e.*, independent production units of approximately 60 piece-rate employees, performing some 23 functions necessary to complete a run of caps. The cellular manufacturing concept is based in production cells or "mini-factories", each with the capability of producing a nearly completed cap from beginning to end. In addition to the "main cells", at the Derby plant there are "feeder cells", "peak cells", "packing cells" and "Barudan (embroidery machine) cells". However, certain other production functions, *i.e.*, "cutting", "binding/piping/attach-sweats/bar-tack", "visors", "buttons" and "blocking" [the subject matter of the instant dispute], are listed separately in the 1995-2000 Agreement as "non-cellular departments".

At the Derby plant, some 24 employes in the Blocker job classification perform one of the final procedures in the process of manufacturing a cap: bringing the baseball caps into final shape before packing. The blocking process involves retrieving caps of various sizes and styles from boxes, placing them on wooden blocks according to size, and inserting the hats and blocks inside a steam box for a set period of time. This process serves to remove the wrinkles and shape the caps. Blockers make certain adjustments to blocking production, depending on the material and style of the caps being blocked, *e.g.*, caps with plastic adjustment straps cannot withstand the same amount of steam as a made-to-size cap.

The 1992-95 Agreement specified piece rates and minimum production standards but made no reference to "cells" or the "88% Rule". As noted, *infra*, the 1995-2000 Agreement establishes

varying piece rates or "ticket prices", expressed in terms of "$ per dozen", for "cellular and non-cellular departments". Appendix A-1 sets forth ticket prices for main cells, feeder cells, peak cells and packing cells; Appendix B-1 sets forth ticket prices for Barudan cells; and, Appendix C sets forth ticket prices for non-cellular departments, including the Blocking Department. Another innovation of the 1995-2000 Agreement was the so-called "88% Minimum Rule", *i.e.*,: "All employees must work at the minimum of 88% of their set hourly rate". Appendix D of the 1992-95 contract had expressed a "Company Minimum Production Standard" in terms of the then-prevailing Federal Minimum Wage, with a four-week "grace period". That language was superceded in the 1995-2000 Agreement by the above-quoted 88% Rule in Appendices A and B [establishing piece rates for listed cellular departments, with some exceptions for "Fusers", Mitsubishi Peak Stitch Operators" and "Packers"].

Under the 88% Rule, an employee establishes an individual production rate which would, for that individual, be his/her 100% hourly rate (That set hourly rate is calculated by multiplying the number of dozens produced in an hour by the ticket price for each dozen). The 88% Rule provides the production employee with the ability to be paid at 100% of his/her set hourly rate, provided that s/he performs at 88% of his/her set hourly rate or better. If the individual produces at least 88% of that rate in a week, the employee is paid his/her individualized 100% rate. Thus the 88% Rule, referenced in several provisions of the CBA, entitles an employee covered thereby to receive his/her full hourly rate of compensation (based on individual production performance standards) provided that s/he performs a minimum of 88% of that set hourly rate. Moreover, the employee does not suffer a reduction in his/ her rate per hour unless s/he falls below 88 percent for two (2) consecutive weeks or three (3) times in a twelve (12) week period.

Of particular significance to this case, the language of 88% Rule set forth in the cellular department rates in Appendices A and B was not included in Appendix C. It is manifest that this omission was intentional, since Appendix C specifically emphasizes that it sets rates for "non-cellular departments", including the Blocking Department. Thus, under the express language of the 1995-2000 Agreement, Blockers and employees in other non-cellular departments are paid piece rates based on the number of dozens of caps actually produced in a forty-hour period, with no application of the 88% Rule. Among other negotiated non-cellular department rates, the Appendix C rate chart contains Blocking Department "ticket prices" per dozen caps. Appendix C thus lists

various types of hats made and the rates or ticket prices by "dollar per dozen", *e.g.*, "open backs" are listed at 44.7 cents per dozen; "stock caps" (a basic plain cap), is listed at 67.7 cents per dozen; "diamond caps" (the top-of- the-line, best quality fitted cap),is listed at 74.1 cents per dozen; and, "CTO's" (sized caps with mixed sizes) are listed at 73.9 cents per dozen. According to the record, the remaining caps listed in Appendix C for blocking are not currently being produced.

From the onset of the 1995-2000 Agreement until July 1996, Blockers were paid strictly in accordance with the non-cellular piece rates of Appendix C, without reference to the 88% Rule. According to the unchallenged testimony of former Union Vice President Shelly Naab, however, this changed after former Plant Manager Mark Miller summoned local Union officers to a meeting in early August and told them "the Company is going to incorporate the Blocking Department into the cells and pay the Blockers 88%, like the cells". The Plant Manager then handed the Union officers a hand-written note on Company letterhead, dated August 1, 1996, over his signature, reading as follows: "As of 8-19-96 Blocking will be under a 88% minimum 1 week basis". The record establishes that the Company unilaterally announced and implemented this deviation from the language of Appendix C of the Agreement in August 1996, without negotiating with the Union but that the Union voiced no objection and filed no grievance. Accordingly, for the next two years, through September 27, 1998, Blocking Department employees were compensated at the non-cellular ticket prices described in Appendix C of the CBA, but subject to the 88% Rule. Aside from this unrefuted evidence concerning the Company's unilateral two-year application of the 88% Rule, the record does not indicate whether or to what extent the Blocking Department was "incorporated into the cells".

During 1997, maintenance supervisors at the Company's Buffalo and Derby plants developed a prototype of a new blocking machine which substantially altered the traditional method of blocking hats. Historically, the Company's blocking machines had one box in which the hat was placed on a wood block and steamed. The door to the old style box was opened and closed manually and the duration of the steaming process for each hat was left largely to the discretion of the individual Blocker. With the new machinery, two steam boxes with hydraulically operated doors opened and closed alternately when the operator pressed a button and steaming time was preprogrammed at 12 to 15 seconds .

The Company contracted with Murak Associates, which assigned industrial engineer, Benjamin Buren to bring this project to completion. In the late fall of 1997, Buren and Company officials met with the Union and various employees in the Blocking Department, to inform them of the project. The Blockers were asked to work on the prototype and their input was sought regarding the new methods and machinery design. Through a developmental process of trial and error lasting through early 1998, the new machinery was finalized in the spring of 1998. The Company contracted with Voss Manufacturing to build the machinery and Colgate Corporation to design and implemented the steam apparatus and vacuum system. After successful trials, Voss Manufacturing and Colgate Corporation built some 50 pieces of blocking machinery for installation in the Company's Derby, New York, Buffalo, New York and Demopolis, Alabama plants. According to the Company, it ultimately expended more than $1 million on this project, some $300,000 of which was allocated to the Derby plant.

In addition to the new machinery, certain ergonomic modifications were made in the Blocking Department on the basis of studies by the consulting industrial engineer. Thus, the size of the table on which the workers placed the wooden blocks was expanded, with a "lazy Susan" design and adjustable height and reach, to allow for more efficient utilization of a greater number of blocks. Rather than being piled up in an unorganized fashion behind the workstation, the boxes of hats which required blocking were now delivered on a conveyor belt. The new technology also produced an improvement of the working conditions in the Blocking Department. The old machinery allowed substantial amounts of steam to be released into the work area, making the atmosphere extremely hot and humid; whereas, the new machinery releases very little steam.

The Company's Chief Operating and Financial Officer, Peter Augustine, testified that he anticipated these changes would result in productivity improvements of between 30% and 40% in the Blocking Department. During the final stages of the project, on June 11, 1998, Augustine and Bill MacArthur, the newly-hired Derby Plant Manager, met with Charlene Valentine, then President of the Union, along with Christine Wattie, then Vice President, Tom Geber, then Treasurer and Jane Howald, then Secretary. According to the Union witnesses, the purpose of that meeting was to discuss cell bonuses so they were caught off guard when Augustine announced that the Company now wanted to "remove Blocking from the cells", rescind the August 1996 application of the 88% Rule to the Blocking Department, and establish new reduced piece rates or "ticket prices" for

Blockers . It is not disputed that these local Union officers demurred, stating that they were willing to listen but would make no response before conferring with their CWA international representatives. Following that June 11, 1998 meeting, the local officers did confer with CWA International Representatives Albert Rudy and Bob Rosler. However, the Union made no further response to the Company's proposal to remove the Blocking Department from the cells, rescind application of the 88% Rule in the Blocking Department and negotiate new ticket prices for the Blocking Department employees.

The principal witnesses for the Company and Union have differing recollections of other aspects of that June 11 meeting and of subsequent meetings during the last few days of July 1998, immediately preceding the August 1-16, 1998 summer shutdown. According to Bill MacArthur, he spoke to Tom Geber and Charlene Valentine on July 28 and indicated, among other things, that he wished to meet with them on July 29 to review blocker rates and assignments which would be applicable after the new machinery was installed during the August 1998 shutdown. MacArthur further testified that the Union officers responded that the rates could not be changed due to wages being negotiated through a wage reopener. However, both Geber and Valentine testified that no such July 28 meeting with MacArthur took place. According to MacArthur, when he approached Valentine again on July 29 he was told that the Union was not prepared to meet on that day but on July 30, he once again met with Chris Wattie, Tom Geber and Charlene Valentine for a discussion concerning new blocking rates to be implemented after the shutdown. MacArthur testified that the Union officers stated that the Blocking Department Appendix C rates should remain the same, that they were not prepared to discuss such issues, and that they would "get back to him" after talking with legal counsel Union witnesses Wattie, Geber and Valentine all denied that such discussions took place on July 30 or that they otherwise had such any such conversation with MacArthur on this subject.

During the August 1998 summer shutdown, the old machines were removed and the new machines installed in the Blocking Department of the Derby plant. When the plant reopened on August 17, substantially the same complement of Blockers was assigned to operate the new machines. Later that same day, Augustine summoned Valentine, Wattie and Geber to a meeting in MacArthur's office. Augustine announced that the Company had come up with proposed new rates for the Blocking Department employees and presented a document, dated August 11, 1998, and titled

"New Era Cap Blocking Trial Rate". That document stated, among other things, that ticket prices for blocking work on several categories of product would be changed from the Appendix C negotiated rates effective August 17 but these changes would be introduced incrementally until October 10, 1998. The announcement further stated that upon expiration of the trial period, a decision would be made as to whether any additional adjustments were needed. Finally, the document announced that the Blockers no longer would be subject to the 88% Rule and henceforth their compensation would be based on straight piecework rates. That meeting ended when the Union officers responded that they did not want a repeat of "the fit front situation" and Augustine rejoined that the Company could not tolerate another "Packer situation".

The following day, August 18, 1998, Augustine, MacArthur and Floor Manager Julie Damerau met again with Valentine, Wattie and Geber, to discuss the Company's proposed rate changes, but no agreement was reached. After that early morning meeting, at the Company's request, the Company and Union representatives met with the Blockers and showed them the August 11, 1998 document titled "New Era Cap Blocking Trial Rate". The employees were very displeased with the Company's proposal and voiced various concerns, including ongoing problems with the new machinery. For whatever reasons, the trial rates listed in the document dated August 11, 1998 were not implemented by the Company and there were no further discussions or negotiations on that subject between the Parties.

However, on September 25, 1998, MacArthur presented Valentine with another unilateral announcement, setting forth new Blocking Department "trial rate" ticket prices, effective for the two-week period September 27 through October 10, 1998. That document also reiterated that the Company was rescinding application of the 88% Rule in the Blocking Department. The Union officers maintained that the Company had no contractual right to rescind application of the 88% Rule or unilaterally modify any of the Appendix C rates and asserted that the Union was under no duty to negotiate any such changes. The Company then informed Blocking Department employees of the number of dozens which would have to be produced to equal their former earnings, ceased applying the 88% Rule in the Blocking Department and implemented the new Blocking Department "trial rates" on September 27, 1998. The trial rates set to take effect on September 27, 1998 through October 10, 1998 were as follows: .430 for adjustable caps, .630 for leather caps, .700 for mixed sizes, and .680 for single sizes. [The record is not entirely clear on this point, but apparently there

was some carryover from Appendix C in the Company's proposed trial rates under the heading "current rates": $.447 for adjustable caps, $.677 for stock caps, and $.741 for diamond caps]. In any event, the Union promptly filed the two grievances dated September 25, 1998 and October 1, 1998, protesting both the unilateral changes in the rates and the unilateral elimination of the 88% rule.

The Company's written denial of the two grievances asserted that because the Union officers had repeatedly failed to discuss the issue of rates for the new blocking stations the Company's unilateral actions were contractually justified by Article XII, Section 12.11 New Technology. The Company further notified the Union that at the conclusion of the trial period on October 10, 1998, a decision would be made as to whether any further rate adjustments were needed. Finally, that document reaffirmed the Company's position that the Blockers would no longer be subject to the 88% Rule, that Blocking Department compensation would be based on straight piece work rates at the new "trial rates", and that if the Blocking Department average increased above $12.50, the rates would be reviewed to determine if a reduction was necessary. The Company's announcement of September 25, 1998 had stated that these Blocking Department "trial rates" were to be in effect for two weeks, commencing September 27 and ending October 10, 1998. However, both the trial rates set forth in the September 25, 1998 announcement and the recission of the 88% Rule in the Blocking Department have remained in effect in the Derby Plant through to the present day. The Union's grievances of September 25 and October 1, 1998, remained unresolved throughout handling and eventually were appealed to me for final and binding resolution in arbitration under Article XII of the Agreement.

POSITIONS OF THE PARTIES

The following statements of position have been extrapolated and edited from the respective post-hearing briefs:

The Union

The "Management's Rights'" provision of the CBA does not give the employer authority to unilaterally change negotiated pay rates or to rescind joint modifications of the Agreement regarding the 88% Rule in the Blocking Department. Analysis of the language of Section 12.11 demonstrates that the change in ticket price and the removal of the Blockers from the 88% rule are both actions outside of the scope of that provision of the CBA. Even if the arbitrator were to determine that "changes" as defined in Section 12.11 of the CBA encompasses the change in pay rates and the removal of the Blockers from the 88% rule, the implementation by the employer of these changes would nevertheless be a contract violation because the Company's decision was not based on a good faith determination that the changes would improve the efficiency of operation throughout the entire plant and with due consideration for the impact on bargaining unit employees. Requiring employees to pay for the cost of new technology and to make up for higher rates in other departments by imposing a reduced rate cannot be viewed as a legitimate business justification for the employer's unilateral action.

The final paragraph of Section 12.11 clearly means that the Company still has a duty to meet and negotiate with the Union over the impact of the implementation of new methods of manufacturing, new machines and other new technology, whether the implementation came about through mutual agreement or unilateral imposition by the Company. Further, the Company agrees by this language that it would meet and negotiate with the Union over proposed modifications of the contract resulting from the implementation of new methods of manufacturing, new machines and other new technology. Nothing in this language indicates that either party to the contract has a right to unilaterally modify the contract as a result of these circumstances. Accordingly, based on the provisions of the CBA, unquestionably, the Company inappropriately implemented the trial rates and inappropriately made the rates permanent.

There was no evidence presented that supported the Employer's claim that past practice permitted it to unilaterally impose rate changes as a result of the introduction of new technology. Assuming arguendo that there were incidents of such past practices, this would not constitute a clear and unmistakable waiver of the Union's right to the enforcement of express contract provisions regarding the terms and conditions of employment in issue.

It is undisputed that the rate changes that the Blockers were subjected to was not mutually agreed to. Nor was it as a result of a wage reopener request. Moreover, unlike what is described in Article XV Trial Rates, Section 15.01, the new rates implemented for the Blockers was not tried for an eight week trial period prior to the rate becoming permanent, and the permanent rate did not come about by mutual agreement. Based on the foregoing arguments, the Union respectfully requests that the grievances be sustained. Specifically, it is requested that the Blockers ticket prices be returned to that which was negotiated in Appendix C of the CBA. Additionally, the 88% rule application should be reinstated. Finally, the Blockers should be made whole for any loss of wages they suffered as a result of the unilateral change in pay rates and the unilateral removal of the Blockers from the 88% rule.

The Employer

The Union in this case contended that the new technology clause related solely to new machinery and did not relate, in any way, to rates which existed in the collective bargaining agreement. Such a contention makes little sense in light of the piecework compensation system in existence at the time. Improvements in efficiency, which would naturally follow from implementation of new technology, would increase productivity. With increased productivity, there would be no issue or concern of a possible drop in earnings if the new technology clause was totally unrelated to production rates, as the union contends.

If the new technology clause related solely to implementation of new machinery or method of operation, it would have been unnecessary. The management rights clause already granted the Company the right to determine the method, means and number of personnel required. Thus, the new technology clause would have been redundant. Further, the phrase "any proposed modification to the contract" in the last paragraph of Section 12.11 would be rendered a nullity. Hence, the new technology clause must mean more than the Company may implement new machinery or new methods of operations.

It is not logical to presume that the Company would be implementing improved technology with improved production only to leave production rates as they were without the large capital expenditure. Even the testimony of the Union concerning the 1995 negotiations acknowledges that earnings, the result of improved productivity, was discussed in response to the Company's proposal of Section 12.11. There would have been no reason for such discussion if the employees did not understand that "changes" equated to possible modification of production rates.

Furthermore, Section 12.11 specifically provides that the contract may be modified as a result of the permanent implementation of the "changes." The collective bargaining agreement, however, does not prescribe "methods of operations" or "new machines" or "other new technology." Thus, there are no such clauses to modify. Hence, the Union's contention that Section 12.11 only concerns the implementation of the new machinery or new production method does not explain what clauses would be subject to "proposed modification."

The Company's position that Section 12.11 includes modification of production rates gives logical meaning to the terms of the new technology clause. The impact on the bargaining unit referred to in Section 12.11 refers to employees' earnings as a result of the new technology, new method of operation, improved efficiency, and change in production rates. These changes during a trial period do not modify the terms of the contract. However, once implemented permanently, the contract may be so modified in accordance with the last paragraph of Section 12.11.

The Union's assertion that the Company failed to negotiate regarding the changes in the rates is a bit disingenuous. The Company could not negotiate with itself. The Union acknowledged that it was the one who refused to negotiate, believing it had the right to refuse to do so. The Union's claim of failure to negotiate is nothing more than an assertion that the ticket prices may not be modified without Union agreement. In spite of Section 12.11, the Union is claiming veto power of modification of the contract when new technology is instituted.

OPINION OF THE IMPARTIAL ARBITRATOR

By its grievances dated September 25 and October 1, 1998, the Union alleges that the above-described unilateral changes in Blocking Department organization and compensation, instituted by the Company effective September 27, 1998 and continued thereafter, violated Articles XII, XV, XIX and Appendix C of the Agreement. The Company denies that it violated those provisions and counters that Article XII, Sections 12.10 and 12.11 affirmatively authorized the Company, in the absence of Union concurrence, to unilaterally implement and maintain those changes.

Since the issue for determination is one of contract interpretation, it is well-recognized that the Union has the burden of persuasion. City of Cincinnati, 69 L.A. 682, 685 (Bell, 1977); Entex, Inc., 73 L.A. 330, 333 (Fox, 1979); Portec, Inc., 73 L.A. 56, 58 (Jason. 1979). For example, in Certainteed Corp., 88 LA 995 at 998, Arbitrator Nicholas held:

> In a nondisciplinary matter, . . . the grieving party must come forward and properly show with good and substantial evidence that Management did, in fact, violate the Agreement as asserted in the given grievance. This is to say the Union's proof must demonstrate that the preponderance of the evidence runs in its favor.

The arbitrator's task is effectuate the intent of the contracting parties, which usually can be ascertained best from the plain words they used in their collective bargaining agreement. Arbitrators and courts alike presume that understandable contract language means what it says, despite the contentions of one of the disputing parties that something other than the apparent meaning was intended. Independent School Dist. No. 47, 86 LA 97, 103 (1985) (Gallagher). Thus, even when the parties to an agreement disagree on what contract language means, an arbitrator who finds the language to be unambiguous will enforce its plain meaning. *See, e.g.*, Safeway Stores, 85 LA 472, 476 (1985) (Thorp); Metropolitan Warehouse, 76 LA 14, 17-18 (1981) (Darrow).

It is fundamental that the mutual intent of the parties is to be found in the words which they, themselves employed to express their intent. When the language used is clear and explicit, the arbitrator is constrained to give effect to the thought expressed by the words used. This rule is both practical and equitable: it brings order to contract construction by excluding from dispute the clear

provisions contained in the contract; and, if language is clear and unambiguous, both parties to a contract are presumed to have understood how they were bound when they executed the contract. The following two decisions, Ohio Chemical & Surgical Equipment Co., 49 LA 377, 380-391, (Solomon, 1967) and Hecla Mining Co., 81 LA 193,194 (1983) (LaCugna) are but two examples of hundreds of reported arbitral determinations which turn on these principles:

> It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. A necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And, when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry. An arbitrator may not and should not thereafter resort to the application of "equitable" principles to be cloud the other wise clear intentions reflected by the meaningful language adopted. He has no choice but to apply and enforce the provision as written.
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> . . . in labor arbitration . . . clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probable intent, and to putative intent, always governs. Clear language is the arbitrator's lodestar, his guiding light. He can neither ignore it, nor modify it; on the contrary, he must give it its full force and effect.

See also Weil-McClain, 86 LA 784, 786 (1986) (Cox); Houston Publishers Association, 83 LA 767, 776 (1984) (Milentz). A leading treatise, Elkouri & Elkouri, How Arbitration Works, 4th ed., p. 348-349 (1985), summarizes the prevailing wisdom as follows:

> . . [A]n arbitrator cannot . . . ignore clear cut contractual language, and he may not legislate new language since to do so would usurp the role of the labor organization and employer. Even though the parties to an agreement disagree as to its meaning, an arbitrator who finds the language to be unambiguous will enforce the clear meaning.

In my considered judgement, proper disposition of the two grievances presented in this case is driven primarily by the clear contract language of Article XII, Section 12.11, Article XV, Section 15.01, Article XIX, Section 19.01 and Appendix C, *supra*. On the basis of the plain language of those contract provisions, the September 25, 1998 grievance must be denied and the October 1, 1998 grievance must be sustained.

The 88% Rule in the Blocking Department

Under the plain language of Appendix C, the Blocking Department is a "non-cellular department" with its own unique piece rates or ticket prices, to which the 88% Minimum Rule has no application. The manifest intent of Appendix C notwithstanding, for a two-year period commencing mid-August 1996, the Company unilaterally applied the 88% Rule in the Blocking Department, without negotiations, consultation, express agreement or objection from the Union. Following more than two years of this deviation from the language and intent of Appendix C, however, the Company unilaterally reverted to compensating the Blocking Department as a "non-cellular department", *i.e.*, without application of the 88% Minimum Rule.

In protest, the Union filed the September 25, 1998 grievance, which rather equivocally described the dispute as follows: "It is our contention that if the Blocking Dept. is now at the 88% Minimum Rule as stated in appendix A-a, b, c, d, e, & f of the CBA, then the Blockers are indeed entitled to receive raises and or bonuses". As originally presented, that grievance claimed monetary relief in the form of: "For any and all Blockers to receive the raise and bonus to which they are entitled to be made whole in this matter". However, at the arbitration hearing the relief sought was modified by the Union to a request for reinstatement of the 88% Rule in the Blocking Department, effective September 27, 1998.

With plain and unmistakable clarity, the contract language of Article XIX, Section 19.01 requires that "the wage rate now in effect **shall remain in effect** during the life of this Agreement **unless** the Union and Company **mutually agree** to re-negotiation of the wage." (Emphasis added) For the first year of the 1995-2000 Agreement, there was no deviation from the express requirement of Appendix C that rates set forth therein for the Blocking Department and other "non-cellular departments" are not subject to the 88% Rule. There was no "re-negotiation" of this wage rate

when, effective August 19, 1996, the Company's former Plant Manager unilaterally extended application of the 88% Rule to the Blocking Department, as a *fait accompli*, without seeking or obtaining Union agreement. As discussed in greater detail, *infra*, I am not persuaded by the Company's contention that Article XII, Section 12.10 and/or Section 12.11 granted management unilateral authority to implement and perpetuate wage rates at odds with the language and manifest intent of Article XIX, Section 19.01 and Appendix C. On the other hand, I am also unpersuaded by the Union's argument that on and after August 19, 1996, the language of Appendix C was effectively "re-negotiated" to include the 88% Rule, by dint of Union forbearance in the face of the Company's unilateral departure from application of that language for a two-year period.

Thus, close examination of the record shows neither a legitimate exercise of reserved management discretion nor the mutuality required to support a finding of "renegotiation" or "binding past practice". Rather, I find only the unilateral but unopposed exercise by the Company of power it did not have to ignore the terms of the Agreement for approximately two years, followed by a reversion to the mandates of the Agreement language. In that connection, the following comments from Dean Harry Shulman in Ford Motor Company, 19 LA 237, 241-242 (1952), are appropriate:

> A practice, whether or not fully stated in writing, may be the result of an agreement or mutual understanding. And in some industries there are contractual provisions requiring the continuance of unnamed practices in existence at the execution of the collective agreement. . . . A practice thus based on mutual agreement may be subject to change only by mutual agreement. Its binding quality is due, however, not to the fact that it is past practice but rather to the agreement in which is based.
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> But there are other practices which are not the result of joint determination at all. . . . 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. . . .A contrary holding would place past practice on a par with written agreement [and would] create the anomaly that while the parties expend great energy and time in negotiating the details of the Agreement, they unknowingly and unintentionally commit them selves to unstated and perhaps more important matters which in the future may be found to have been past practice. . . .

Based on all of the foregoing, I find that the Company's failure to apply the 88% Minimum Rule to employees of the Blocking Department on and after August 17, 1998 is not a violation of the Agreement or of any binding past practice. Accordingly, the grievance filed by the Union on September 1, 1998 is denied.

Ticket Price Changes in the Blocking Department

In Article XII, Section 12.11, these Parties plainly agreed that, with or without Union concurrence, the Company may develop, implement on a trial basis and ultimately implement on a permanent basis, "new methods of manufacturing, new machines and other new technology...which will improve the efficiency of operations throughout the entire Plant". However, Section 12.11 specifically requires that the Company adhere to a six-step sequential process in exercising this new reserved managerial right: 1) detailed advance notice of "**any such changes**" to the Union; 2) meetings to discuss "**the proposed changes**", so that the Union may voice any concerns it may have and obtain further information regarding **the proposed changes**"; 3) a three month maximum trial period (unless otherwise agreed to by the Parties), to permit the Company to evaluate whether "**the changes**" improve the efficiency of operations throughout the entire Plant and the Union to evaluate the impact on bargaining unit employees; 4) meetings with the Union to discuss the results of the trial period and attempt to reach agreement on whether "**the changes**" should be implemented on a permanent basis; 5) implementation of "**the changes**" on a permanent basis, "provided that the Company's decision is based upon a good faith determination that "**the changes**" will improve the efficiency of operations throughout the entire Plant and with due consideration for the impact on bargaining unit employees; 6) meetings and negotiations with the Union as to the terms of such implementation, its impact on bargaining unit employees and any "**proposed modifications to the contract.**" (Emphasis added).

Each of the above emphasized multiple references to "changes"throughout the four paragraphs of Section 12.11 harks back to the subject matter of the first sentence of the first paragraph, *i.e.*, "[N]ew methods of manufacturing, new machines and other new technology...which will improve the efficiency of operations throughout the entire Plant". This description is the only definition of "changes" for the purposes of §12.11, as there is no other language in that provision which offers an alternative interpretation or definition. Under this clear and unambiguous language of Article XII, Section 12.11, the Union must be notified and consulted by the Company throughout the described implementation process. But in the final analysis, whether by mutual agreement or unilaterally, the Company may implement on a permanent basis "new methods of manufacturing, new machines and other new technology...which will improve the efficiency of operations throughout the entire Plant". Just as plainly, however, Article XII, Section 12.11 also specifies that "proposed modifications to the contract" in connection with such implementation must be negotiated with the Union.

The record evidence before me supports a conclusion that the Company complied fully with the good faith and notice/consultation requirements of Article XII, Section 12.11 in its development and unilateral implementation of the new machines and technology in the Derby Plant Blocking Department. However, neither Article XII, Section 12.11 nor any other provision of the Agreement expressly or implicitly permitted the Company to take the next step of unilaterally implementing, over Union objection, its proposed modifications of the Appendix C piece rates payable to Blocking Department employees under the unequivocal mandate of Article XIX, Section 19.01.

The right to determine job rates for new or altered jobs after the introduction of new technology or new methods of operation may be conferred on management by the specific provisions of a collective bargaining agreement. *See* Associated Shoe Industry Southeastern Mass,

10 LA 535; Sperry Corp., 80 LA 166 (F. J. Taylor, 1983); Borg-Warner, 63 LA 384 (Seinsheimer, 1974) and Diamond Power Specialty Corp., 46 LA 295 (Clair Duff, 1966). However, the Agreement in this case contains no express provision of that sort; nor is there any binding past practice or other implicit indicia that such was the mutual intent of the Parties.

As noted, *supra*, Article XII, Section 12.11 plainly permits unilateral implementation of changes in new manufacturing methods, machines and technology, provided the Company acts in good faith and notifies and consults with the Union. But whether such changes in new manufacturing methods, machines and technology are implemented by agreement with the Union or unilaterally, Article XII, Section 12.11 read together with Article XIX, Section 19.01, requires that proposed modifications in the contractual wage rates flowing from such implementation must be negotiated with the Union. Similarly, the Company's reliance on Article XII, Section 12.10 to justify unilateral modification of Blocking Department wage rates is misplaced because, by its very terms, the Management's Rights provision also is expressly subordinate to Article XIX, Section 19.01.

Finally, the record does not support the Company's alternative theory that "past practice" justifies. A fundamental predicate for searching in past practice to find the mutual intent of contracting Parties is lack of clarity in their contract language, and there is no such ambiguity in the operative language in this case. Moreover, the Party urging a dispositive custom or practice has the overall burden of proving its existence. The fundamental principles are set forth by Arbitrator Jules Justin Celanese Corp. of America, 24 LA 168, 172 (1954), as follows: "In the absence of a written agreement, 'past practice', to be binding on both Parties, must be 1) unequivocal; 2) clearly enunciated and acted upon; and 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both Parties." *See also* Great Atlantic & Pacific Tea Company, 46 LA 372. 374 (Scheiber, 1966). Not only is persuasive proof of the alleged past practice lacking

in this case, but the evidence shows that previous wage rate changes in the Packing Department, the Fit Fronts Department, and the Single Taping Department were products of negotiations between the Union and the Company rather than unilateral implementation by the Company.

New Era Cap Company invested a great deal of time, money and effort designing, developing, building and installing new technology in the Blocking Department which manifestly improved both the physical environment of that work area and efficiency of operations throughout the plant. It is quite understandable that the Company would wish to recoup some of that substantial investment in Article XII, Section 12.11 negotiations with the Union over proposed modifications of the contract, including new ticket prices for the Blocking Department. However, in the absence of Union agreement to such contract modifications, the ticket prices for Blockers are set by Appendix C and may not be changed unilaterally by the Company under the plain and unambiguous language of Article XIX, Section 19.01: "[T}he wage rate now in effect shall remain in effect during the life of this agreement unless the Union and the Company mutually agree to renegotiation of the wage."

This same clear contract language, which required me to deny the September 1, 1998 grievance protesting the Company's unilateral rescission of the 88% Rule in the Blocking Department, also requires me to sustain the October 1, 1998 grievance protesting the Company's unilateral override of Appendix C Blocking Department "ticket prices". Based on all of the foregoing, I find that the Company's unilateral implementation of new piece rates for the Blocking Department on a permanent basis, at the conclusion of the trial period on October 10, 1998, violated Article XIX, Section 19.01 and Appendix C of the Agreement. Any such permanent modification of the 1995-2000 Agreement wage rates for Blocking Department employees must be accomplished

through negotiations and agreement with the Union, pursuant to the last paragraph of Article XII, Section 12.11 or in negotiations for a successor Agreement.

As remedy for the proven violation, the Company must reinstate Appendix C piece rates or "ticket prices" for Blocking Department employees, effective October 11, 1998, and reimburse those employees the difference between their earnings under the Company's unilaterally imposed rates and what they would have earned under the rates set forth in Appendix C.

AWARD OF THE IMPARTIAL ARBITRATOR

1) The Company did not violate the Collective Bargaining Agreement, as alleged in the September 25, 1998 grievance (as modified by the Union at the arbitration hearing).

2) The Company did violate the Collective Bargaining Agreement, as alleged in the October 1, 1998 grievance.

3) As remedy for the proven violation, the Company must reinstate Appendix C piece rates or "ticket prices" for Blocking Department employees, effective October 10, 1998 and reimburse those employees the difference between their earnings under the Company's unilaterally imposed rates and what they would have earned under the rates set forth in Appendix C.

Dana Edward Eischen
Signed at Spencer, New York on January 24, 2000

STATE OF NEW YORK }
COUNTY OF TOMPKINS } SS:

On this 24th day of January, 2000, I, DANA E. EISCHEN, upon my oath as Arbitrator, do hereby affirm and certify, pursuant to Section 7507 of the Civil Practice Law and Rules of the State of New York, that I have executed and issued the foregoing instrument and I acknowledge that it is my Opinion and Award in the above matter.