AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

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In the Matter of the Arbitration between

**TEAMSTERS LOCAL UNION NO. 553 IBT,**
Union,

and

**FRED SCHILDWACHTER & SONS, INC.,**
Employer,

Re: (Violation of Subcontracting Provisions)

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AAA Case No.
13 300 00253 13

**Before**
**RUTH MOSCOVITCH,**
Arbitrator

**Appearances**

**For the Union:**
Jae W. Chun
Friedman & Wolf
1500 Broadway
New York, NY 10036

**For the Employer:**
Sam Samara
Pashman Stein, P.C.
Court Plaza South
21 Main Street, Suite 100
Hackensack, NJ 07601

**DECISION AND AWARD**

Pursuant to my authority under the parties' collective bargaining agreement, I was designated as the arbitrator to hear and decide this dispute. On April 23, 2013 I conducted a hearing at the offices of the American Arbitration Association in New York City, New York at which I heard evidence and took arguments on the Employer's Motion to Dismiss and other issues. On June 13, 2013 following my denial of the Employer's Motion to Dismiss, I conducted a second hearing day, during which both sides presented additional testimony and introduced more documents into evidence. At the conclusion of the evidence, the parties stipulated to the outstanding issues. The parties requested the

opportunity to submit written closing arguments, and they did so by July 15, 2013. Neither side has raised any objection to the fairness of this proceeding.

## RELEVANT CONTRACT PROVISIONS

### 2010-2013 MASTER CONTRACT OF TEAMSTERS LOCAL UNION NO. 553 IBT

### GENERAL CONDITIONS

**COVERAGE**

SECTION 1: This Agreement shall apply to the operations of the Employer in New York City (including New York, Kings, Bronx, Queens and Richmond Counties) and Vicinity and in Nassau and Suffolk Counties.

**SCOPE OF AGREEMENT**

SECTION 10: Except as herein otherwise provided, it is the intention, understanding and agreement of the parties that the Employer's work within the categories covered by this agreement shall be performed by employees of the Employer employed under the terms of this agreement.

**WORK PROTECTION**

SECTION 11: The Employer shall not contract out or subcontract to others work in any category covered by this Agreement, unless (a) all employees on the seniority list are fully employed, (b) the Employer has given the Union reasonable advance notice of the need for additional employees, and (c) Pension Fund contributions are made as required by Section 49. In the event that the Employer utilizes truckers in violation of this section, all employees on the seniority list who did not work and should have worked on the day or days that such violation occurred shall be paid for that day or those days.

**LETTER AND SPIRIT**

SECTION 12: The Union and the Employers recognize that the maintenance of fair union standards and conditions of employment are in their mutual best interests and it is therefore agreed that the parties shall cooperate to maintain and enforce the letter and spirit of this Agreement and to curb abuses and to prevent evasions of each and every part of the Agreement including the sections relating to subcontracting.

**SUBCONTRACTING COMPLAINTS**

SECTION 13: The parties agree that in the event that any complaint or charge is made that the provisions of this Agreement relating to Subcontracting have been avoided or evaded or otherwise abused, any party shall have the choice of either of the following procedures for dealing with the matter:

(a) By filing a demand in writing for arbitration with the Union and with the Chief Executive Officer (CEO) of the New York Oil Heating Association, Inc. for submission to a Joint Union and Management Committee. This Committee shall consist of four (4) members, two (2) Union representatives to be designated by the Union, and two (2) management representatives to be designated by the New York Oil Heating Association, Inc. The charge, dispute, or grievance shall forthwith be referred to the Joint Committee which said Joint Committee shall act as a Board of Arbitrators. If the Joint Committee fails to resolve the dispute within five (5} working days, after receipt of the complaint or charge, or if the Joint Committee deadlocks, the dispute shall be forthwith referred for arbitration to the American Arbitration Association at New York, New York ("AAA").

(b) By filing a demand in writing for arbitration of the charge, dispute or grievance directly with the AAA.

SECTION 14: if a charge, dispute or grievance pertaining to subcontracting is submitted to the AAA. the AAA Shall submit a Panel of Arbitrators to the panics within forty-eight (48) hours after receipt of the request therefore the parties shall select an Impartial Arbitrator twenty-four (24) hours after the receipt of the Panel and the Arbitrator shall have a period of ten (10) days after selection to hear and decide the issue involved. The award of the Joint Committee or the Arbitrator designated by the AAA, as the case may be, shall be final, binding and enforceable in any court of competent jurisdiction.

**EMPLOYER CONTRIBUTIONS**

SECTION 49: (d) Whenever the Employer utilizes a person not covered by this Agreement to perform covered work, the Employer shall Contribute to the Local 553 Pension Fund ("PENSION FUND") one (1) day's contribution for such day or part thereof for each person so utilized: provided that this shall not apply (1) if such person is then covered by a collective bargaining agreement with this Union requiring contributions to the PENSION FUND or (2) where the work involved is not customarily performed in the normal and usual course of employment of the covered employee. This provision shall not be construed to permit an Employer to use other than covered employees in any respect otherwise in violation of this Agreement.

**ISSUES PRESENTED**

At the inception of this case, the parties agreed upon the following

statement of the issue, as presented in the arbitration demand the Union filed with the American Arbitration Association:

> Has the Employer violated the Agreement by improperly contracting out or subcontracting bargaining unit work, by having bargaining unit work performed other than by employees of the employer employed under the terms of the Agreement and by otherwise evading its obligations under the Agreement? If so, what shall the remedy be?

At the close of the proofs, the Company conceded it has subcontracted bargaining unit work, and further stated that an audit is appropriate to ascertain the scope and particulars of subcontracting. The parties agreed that the time period at issue in this grievance is January 2009 to the present.

After some discussion, the parties agreed that the following issues remain to be decided in this arbitration:

1. Did the Employer violate the collective bargaining agreement by deciding to contract out work north of Interstate 287, rather than assign all delivery work in Westchester County to its unionized employee-drivers?

2. Did the Employer violate the collective bargaining agreement by utilizing subcontractors with the effect of reducing the bargaining unit?

3. Did the Employer violate the collective bargaining agreement by using subcontractors to perform work rather than assigning that work to unit members as overtime or premium pay?

4. Does this arbitrator have the authority to issue a cease and desist order as requested by the Union or is the arbitrator's remedial authority limited to the remedies outlined in the collective bargaining agreement?

## FACTUAL BACKGROUND

Many of the pertinent facts were recited in my earlier ruling on the Employer's Motion to Dismiss. Some are repeated here, augmented by facts presented during the second day of hearings.

The Employer, Fred Schildwachter & Sons, Inc. (the Company), is

engaged in the business of delivering fuel oil to residences and businesses in the New York City metro area. During the heating season – from October 15 to April 15 – the Company hires members of the Union, IBT Local 553, to drive its trucks and deliver oil to its customers, 95% of which are residences located in the Bronx, Westchester and Manhattan; the rest of the customers are commercial.

The current collective bargaining agreement between the parties runs from 2010 to 2013 (Master Agreement, Jt. Ex. 1); it is not the first agreement between these parties. Other fuel oil delivery companies are signatories to this Master Agreement.

At each stop where a driver delivers a load of fuel oil, the driver fills out a ticket. (See, e.g., Union Ex. 7, 10) The ticket identifies the delivery address, the date of the delivery, the amount of fuel oil delivered, and other pertinent information. The driver initials or signs the ticket. When a subcontractor delivers oil to Schildwachter customers, its drivers use Schildwachter tickets.

At the first day of hearing, the parties stipulated as follows:

1. The Employer has engaged subcontractors to deliver fuel oil during the relevant time, 2009 to present, including within the territory of the Bronx (from 2009 through 2012) and Westchester County (from 2009 to the present).
2. The Employer has provided the Union with records in the form of invoices submitted by subcontractors for Schildwachter work performed, for which the subcontractors' drivers used Schildwachter work tickets.

To supplement these stipulations, the Union presented the testimony of Demos Demopoulos, currently the secretary-treasurer of Local 553. He has held

that position since 2004 and before that was the Union's president. In addition, the Union presented the testimony of three drivers and one mechanic, all of whom have worked for the Company.

The Company presented the testimony of Daniel Schildwachter, the current president of the Company as its sole witness. He has worked at the Company for 41 years, serving as its president since 2002. This is a family business: Daniel took over from his father; his cousin David Schildwachter handled labor relations for many years until his retirement; Marisol Schildwachter currently handles accounts payable; and Peter and Andrew Schildwachter also work for the Company. Daniel Schildwachter personally never engaged in negotiations with the Union. His knowledge about Union relations and prior understandings between the Company and the Union comes from what his cousin David told him.

**Evidence of the use of subcontractors.** According to Mr. Schildwachter, the Company began using subcontractors in 1977, when it took over an oil company with accounts far up in Westchester County. The Company tried to handle the new deliveries itself, but found it uneconomical and, after consulting the New York Oil Heat Association, decided to hire another trucking company to make the deliveries for it. The Company did not inform the Union at the time of this use of subcontractors. The Company continues to use subcontractors to deliver oil to Schildwachter customers in Westchester County. Currently the Company uses NNS, but has also used A&N, American and Pullum/Sibling trucking companies.

The evidence confirms what the Company conceded, namely that it has

used subcontractors to deliver heating oil. However, the evidence shows that the Company's use of subcontractors has not been limited to accounts far up in Westchester County, but has included accounts within the five boroughs and nearby suburbs of New York City. Below I summarize the testimonial evidence regarding subcontracting.

| **Source of Evidence** | **Loading/Delivery Location** | **Date** | **Subcontractor** |
|---|---|---|---|
| Cortland Irizarry, Ex. 12 | Throng's Neck | 2008 | West Star |
| U. Ex. 18 | Unknown | Oct. 14, 2010 | N&S |
| John Morris | Scarsdale, Yonkers, Bronxville | 2010-11 season | N&S driver Freddie drove truck, returned w/ Schildwachter tickets |
| John Morris | Unknown | 2011-12 season | Pullum driver Ronny drove Truck #422, brought back w/ Schildwachter tickets in truck |
| John Morris | Unknown | 2011-12 season | N&S driver (fat guy) drove Truck #525, returned w/ blank Schildwachter tickets; also saw N&S trucks in yard. |
| Ivan O'Connor, Ex. 7, 8, 9 | 6 Wildway Bronxville, NY | 1/22/11, Saturday | Pullum |
| Ivan O'Connor, Ex. 10 | 475 Tuckahoe Rd Yonkers, NY | 1/22/11, Saturday | Pullum |
| Ivan O'Connor | Yonkers, Scarsdale, Westchester | Jan – March 2011 | Pullum |
| Cortland Irizarry, | Not identified | Not identified | Andrew Schildwachter driving truck |
| Cortland Irizarry, | Bronx, Manhattan accounts | Repeatedly, as Reported Feb. 2012 | American Home Heating, Weststar Fuel, Pullman |
| Cortland Irizarry, | Westchester accounts | Repeatedly, as Reported Feb. 2012 | N&S, A&S, Almeida |
| John Morris, | Unknown | Oct. – Nov. | A&N drove Truck |

| | | | |
|---|---|---|---|
| Ex. 17 | | 2012 | #488, later #492, Schildwachter tickets in truck |
| Cortland Irizarry, Ex. 15 | Loading in yard | Oct. 2012 | A&N – 3 trucks |
| Cortland Irizarry, | 4151 Gunther Ave. Bronx | Nov. 5, 2012 | Customer told him American Home Heating had delivered in past |
| Cortland Irizarry | 1400 Ferris Place Bronx, NY | Nov. 2012 | Subcontractor in Schildwachter truck |
| Cortland Irizarry, Ex. 13 | Loading in yard | Feb. 2013 | Subcontractor in Schildwachter truck |
| Cortland Irizarry, Ex. 14 | Loading in yard | Jan. 2013 | Subcontractor in Schildwachter truck |
| Daniel Schildwachter | Bronx, Manhattan | 2012-13 | Dan Schildwachter |

In addition to this testimony, the Union produced invoices that demonstrate the Company paid local trucking companies (N&S, American Home Heating, Pullum/Sibling and A&N) for making fuel oil deliveries in 2010, 2011 and 2012. (Union Exhibits 18, 19, 20, 21, 22 and 23) The invoices do not include information on where the customers were located.

**The line at I-287.** Mr. Schildwachter testified that in deciding which accounts in Westchester to assign to subcontractors and which to its own drivers, the Company dispatcher uses I-287 as a "rule of thumb": above I-287 subcontractors are used, while below the work goes to its Local 553 employees. He believes that his cousin David reviewed this rule with the Union, but has no personal knowledge of whether that happened. Notwithstanding this "rule," Mr. Schildwachter acknowledged that at times the dispatcher will group deliveries without regard to I-287. For example, a Schildwachter driver may make deliveries to customers north of the line, in White Plains, if those customers are

within three miles or so of customers below the line. Likewise, a subcontractor may make deliveries below the line to customers located near customers above the line.

Mr. Demopoulos testified that he has never heard that I-287 line is a line of demarcation between union and non-union work; he is unaware of any understanding between the Company and Union about such a division of work. Mr. Demopoulos testified that the Master Agreement that applies to the Company covers 30 to 40 companies in addition to Schildwachter. Of those, several, including Pullum/Sibling and Castle, make deliveries in Westchester County, including above I-287.

Mr. Demopoulos further testified that he was told, in passing, that some of the Company's most northern work was occasionally done by subcontractors; his understanding was that the work in question was in Putnam rather than Westchester County. Mr. Demopoulos testified that the Union was not concerned with this type of subcontracting because Putnam County is further north, and at the time he became aware of that practice the Union's seniority list with the Company was "healthier" than it is now, and "men were working." Mr. Schildwachter testified that the Company has never had any customers in Putnam County.

**2010 Audit of Subcontracting.** In 2011, after hearing reports that the Company had been using subcontractors in violation of the collective bargaining agreement, the Union conducted an audit. The audit results for the calendar year 2010 were reported to the Company in September 2011. (Union Ex. 3) Attached to the findings for 2010 are findings for 2011 and 2012. The findings

may be summarized as follows:

| Time Period | Subcontractors | Gallons Delivered | Due Pension Fund |
|---|---|---|---|
| Jan-Dec. 2010 | N&S<br>A&N<br>Am. Home Heating<br>Fortune | 1,217,232<br>476,398<br>114,572<br>148,940 | $2,385 |
| Jan–Dec. 2011 | A&N<br>American | 915,235<br>91,845 | $2,242 |
| Jan-Dec. 2012 | A&N<br>American | 1,279,015<br>317,121 | $2,808 |

(U. Ex. 3)

The audit contains the following notation: "For every 32,500 gallons delivered equals 8 hours."

**Size of the workforce.** In 2009-2010 the Company had eleven drivers on its seniority list. (U. Ex. 1a-e; Testimony of Demopoulos) By the fall of 2012, however, the workforce had fallen to just six drivers. Mr. Schildwachter testified that the Company increased the number of workers in January or February, 2013, after he met with the Union regarding subcontracting. He added two drivers to make the total number of drivers seven, with an eighth driver still on probation. Mr. Schilwachter testified that the reason he decided to add drivers was because he got tired of driving trucks himself: he had been "on the oil truck 3-4 days/week and I have my own job to do." He testified that he had been making deliveries in the Bronx and Manhattan. Cortland Irizarry testified that he has seen not only Daniel but also Peter Schildwacheter driving a Company truck.[1]

[1] There is no evidence that any Schildwachter family member is a member of the Union, though of course, they are free to join and become eligible to make deliveries.

**Fully-employed.** Two of the drivers who testified in this hearing recounted that they were denied the opportunity to work for the Company, allegedly due to lack of work, when the Company was, in fact, using subcontractors to deliver heating oil to regular Schildwachter customers within the service area; a third driver testified to diminished overtime.

- **Ivan Jose O'Connor (formerly #18 on seniority list):**
    - In October 2009, when he was #18 on the seniority list, he reported to the Company but was told there was no work;
    - In the fall of 2010, he called the Company and was told there was no work for him, whereupon he drove for another company that paid less; in November 2010 he did receive work from Schildwachter;
    - In January 2011, after being denied work for the Company, he was hired to drive for Pullum, another delivery company; however, starting sometime in February 2011, Pullum assigned him to drive a Schildwachter truck and make Schildwachter deliveries in New Rochelle, the Bronx and Mt. Vernon, including on a Saturday (which would have been overtime for a regular Schildwachter driver); he received less pay doing this work than if he had been a Schildwachter driver.
- **Cortland Irizarry (#5 on seniority list):**
    - In September 2012 he reported to work and was assigned only one or two days or week each week until November when he began to receive full time work.
    - Likewise in the 2011-12 and 2010-2011 season, he did not receive full-

time work until November.

- **Milton Winckler (#1 on seniority list):**
    - In the past year, he has received less overtime than in past years: for example, in 2009 he estimates he was getting 12 hours of overtime per week, but during the past year, his overtime has dropped to 4-6 hours and sometimes 8 hours.

## POSITIONS OF THE PARTIES

The Union argues that it has met its burden to prove the Company's subcontracting practices violate the collective bargaining agreement in that: (1) the uncontested evidence establishes that the Company has violated the clear language of the collective bargaining agreement that prohibits subcontracting bargaining unit work unless three conditions are met: (a) all employees on the seniority list are fully employed; (b) the Employer has given reasonable advance notice to the Union of the need to subcontract; and (c) pension fund contributions are made; the evidence shows that the Company did not give the Union the required contractual notice before subcontracting – in fact, Mr. Schildwachter himself admitted that the Company did not discuss subcontracting with the Union; further, the evidence shows that all employees on the seniority list were not fully employed before the Company engaged in subcontracting; (2) despite the work protection provisions of the collective bargaining agreement, the Company has used subcontractors and the labor of its own managers to diminish the size of the bargaining unit, to deny employees the opportunity to return to work in the fall, and to deny overtime to its drivers; the evidence further shows that the Company deliberately sent its drivers to subcontractors to

perform Company work for less pay; (3) further the Company violated the spirit of the collective bargaining agreement by its willful disregard of the work protection and subcontracting provisions; (4) the Company should not be allowed to use I-287 as the outer limit of the territory covered by the collective bargaining agreement because: (a) the Company failed to establish that the line was ever agreed upon or even communicated to the Union; Mr. Demopoulos denied any knowledge of the line and the Company's only witness had no personal knowledge as to when or how it was communicated; (b) the Company's witness was not credible and changed his testimony frequently; (c) other companies covered by the same collective bargaining agreement do not recognize such a line; (d) the Company's own conduct, which includes regularly assigning work to subcontractors below the line and to Union members above the line subcontractors, violates its "rule of thumb"; (5) the contractual remedy of payment into the pension fund is inadequate to address all of the proven violations in this case; the uncontroverted evidence shows that the Company diminished the size of the bargaining unit, and repeatedly denied full-employment and overtime opportunities to its employees in favor of assigning work to subcontractors; its flagrant and repeated disregard of the collective bargaining agreement over a four-year period (2009 – 2013) warrants the imposition of a cease and desist order in addition to the remedies of individual damages for employees affected by the Company's subcontracting, and contractually mandated payments to the pension fund.

On the other hand, the Company argues that its liability in this matter is limited to whatever pension contributions are revealed to be necessary after an

audit establishes the scope of subcontracting, because: (1) the Company has engaged in the use of subcontractors in the northern part of its service territory for many years; such use has been open and known to the Union; Mr. Demopoulos' testimony that he was unaware of such use of subcontractors is not credible, given that he received the results of prior audits that revealed subcontracting; (2) Mr. Schildwachter's testimony regarding the use of I-287 as a "rule of thumb" defining the area covered by the collective bargaining agreement was credible and was not refuted by Mr. Demopoulos whose contrary testimony was based upon unsubstantiated and uncorroborated hearsay; (3) the Company in good faith believed that it was never out of compliance with the collective bargaining agreement and that all of its drivers were fully employed when it hired subcontractors; it has acknowledged the Union's evidence to the contrary introduced during this proceeding and is willing to pay the contractual remedies for such violations as are established by an audit; there is no need for further remedies; (4) an injunction is inappropriate here, as would be an order requiring the Company to hire additional drivers, because the collective bargaining agreement establishes with particularity the appropriate remedies for the violations brought to light; accordingly, the arbitrator lacks authority to go beyond the collective bargaining agreement and award injunctive relief.

## DISCUSSION

Having carefully reviewed the testimony, exhibits, written submissions, citations to legal authority and the collective bargaining agreement itself, and having carefully considered all of the arguments of the parties, and taking note of the Company's concession that it has violated the subcontracting provisions of

the collective bargaining agreement and is prepared to submit to an audit to determine the extent and scope of such subcontracting, I grant this grievance. Before addressing the remaining questions posed by the parties, I make the following general observations and findings.

The Union bears the initial burden in a proceeding of this nature to prove that the Company has violated the collective bargaining agreement, and the Union has met that burden. With regard to the outstanding questions and issues of remedy, much of the burden has now shifted to the Company. For example, it is up to the Company to prove that it acted in good faith when adopting I-287 as a "rule of thumb" line demarcating union and non-union delivery areas; that it communicated that decision to the Union; and that it acted in good faith to keep its employees "fully employed" before engaging subcontractors. As set forth below, I find the Company has failed to meet its burden of proof on these issues.

**The line at I-287.**

The first question posed to me by the parties was:

> Did the Company violate the collective bargaining agreement by deciding to contract out work north of Interstate 287, rather than assign all delivery work in Westchester County to its unionized employee-drivers?

The collective bargaining agreement defines the Union's work as "the operations of the Employer in New York City (including New York, Kings, Bronx, Queens and Richmond Counties) and Vicinity and in Nassau and Suffolk Counties." (Section 1) The term "Vicinity" in this context is indeed ambiguous, susceptible of different interpretations. I find that the Company violated the collective bargaining agreement by establishing a rule of thumb using I-287 as the line demarcating the "vicinity" of Union work without informing the Union.

The Company's sole witness, Daniel Schildwachter, admitted that he never discussed the "line" with the Union and disclaimed any knowledge of historical conversations between the Company and the Union regarding the sensitive matter of the Union's territory and the Company's use of subcontractors. He further admitted that until the current grievance arose, he never spoke to the Union about work assignments. Indeed, he seemed remarkably careless about subcontracting issues, freely admitting that he had been performing Union work, and that he was aware his dispatcher often ignored the I-287 line, assigning Union work "below the line" to subcontractors and non-Union work "above the line" to Union drivers, depending on the Company's convenience.

Nor did the Company present any other witness who might be able to support its claims that I-287 was a well-established rule of thumb, or that it had communicated the establishment of this rule of thumb with the Union. I was not advised that David Schildwachter, though retired, was unavailable to testify; the Company did not call its current dispatcher or any other manager to testify. Given this paucity of evidence, I find the Company has failed to establish by a preponderance of the evidence that it acted in good faith when it adopted I-287 the dividing line or "vicinity" in the collective bargaining agreement.

I accept the testimony of Mr. Demopoulos that other companies covered by the collective bargaining agreement do not draw an arbitrary line at I-287, especially since his testimony is partially corroborated by Mr. Schildwachter's own testimony that the Company ignores I-287 when it makes sense to group customers below and above the line. On the other hand, I do not find that the

collective bargaining agreement automatically covers the whole of Westchester County, since the plain language of the agreement spells out the counties that are included in their entirety and Westchester is not listed among them.

While I find that the Company has not acted in good faith in establishing a sub-contracting line at I-287, I decline to draw any line myself. That is a matter best left to the parties. In any event, I lack the information necessary to establish a reasonable definition of the term "vicinity": the evidentiary record before me does not establish how much of the Company's business is "above the line," or close to the line, or how frequently the Company has comingled work above and below the line, as Mr. Schildwachter testified.

**Size of the workforce.**

The second question posed to me by the parties was:

> Did the Company violate the collective bargaining agreement by utilizing subcontractors with the effect of reducing the bargaining unit?

The evidence is uncontroverted that during the period from 2009 to the end of 2012, the bargaining unit shrank from 11 to 6 employees. During this time, the Company engaged in the illegal use of subcontractors and used its own managers to deliver heating oil.

However, I am unable to answer the question based upon the evidentiary record established thus far. Until a new audit is performed, I cannot tell how much work was subcontracted or performed by managers; the two audit summaries in evidence are not detailed enough or current enough to answer the question whether the amount of work subcontracted was equivalent to one or more employees. The audit that will take place as a result of my decision may

answer that question. Extensive subcontracting equivalent to the work of one or more full-time employee would violate both the spirit and the plain language of the collective bargaining agreement, which reserves to Union members the "the operations of the Employer in New York City (including New York, Kings, Bronx, Queens and Richmond Counties) and Vicinity and in Nassau and Suffolk Counties."

**Fully-employed.**

The third question posed to me was:

> Did the Company violate the collective bargaining agreement by using subcontractors to perform work rather than assigning that work to unit members as overtime or premium pay?

The uncontroverted testimony of two current and one past driver establish that the Company did violate the collective bargaining agreement by using subcontractors to perform bargaining unit work, both in the early fall and during the heating season, when employees on the seniority list were ready and available to work. I note that Mr. Schildwachter himself testified that assigning work to subcontractors, even on Saturdays, when bargaining unit members were available, would violate the collective bargaining agreement.

The extent of the Company's practice in this regard is not in evidence. The audit that will follow this decision should establish the extent of this practice and identify those employees who are entitled to backpay for regular and/or overtime work they were available to perform but that was instead assigned to subcontractors.

**Cease and Desist Order.**

The final question posed to me by the parties is:

Does this arbitrator have the authority to issue a cease and desist order as requested by the Union or is the arbitrator's remedial authority limited to the remedies outlined in the collective bargaining agreement?

As the Company acknowledged in its post-hearing brief, "in appropriate circumstances, the arbitrator has the authority to enjoin conduct that violates the CBA." The Company argues nonetheless that in this circumstance I have no authority to issue a cease and desist order because the collective bargaining agreement contains specific remedies for subcontracting in Section 49(d) – namely payments to the pension fund. The Company does acknowledge that in addition to pension contributions, the Company "must pay unit employees who do not work when subcontractors are working." The Company nevertheless argues that these specific remedies are exclusive, and no other remedies may be imposed.

I disagree. The collective bargaining agreement remedies cannot be read to exclude all other remedial relief, particularly since Section 46(d) clearly states that: "This provision shall not be construed to permit an Employer to use other than covered employees in any respect otherwise in violation of this Agreement." Where an employer persistently ignores its obligations to assign Union work to "other than covered employees," pension payments and backpay alone may not remedy the contractual violations.

The evidence before me establishes that the Company has repeatedly used subcontractors in violation of the collective bargaining agreement. Union audits in 2010, 2011 and 2012 found multiple violations. (Union Ex. 3) Despite these audit results, it is evident that the Company continued to use subcontractors, including within the Bronx and other nearby locations. Union witnesses testified

without contradiction that the Company has repeatedly and openly used subcontractors to deliver fuel oil to customers in its core service territory, allowing subcontractors to fuel up in the Company's Bronx yard and to make deliveries to regular Schildwachter customers using Schildwachter tickets.

In his testimony before me, the Company's executive evidenced a disturbing level of indifference to compliance with the collective bargaining agreement. He made no effort to talk with the Union himself about subcontracting, until Mr. Demopoulos scheduled the meeting that precipitated this grievance a few months ago. He made no effort to verify that his cousin had, in the past, pre-cleared the Company's subcontracting practices with the Union, nor did he insure that someone was handling pre-clearance currently, as required by Section 11(b). He also made no visible effort to verify that all of his employees were "fully employed." To the contrary, he had to be aware that by driving a delivery truck himself, he was depriving employees of Union work, even while he allowed the work force to shrink from 11 to only 6 drivers. Indeed, the fact that he decided to hire two additional drivers (a 33% increase in his workforce) after this grievance surfaced and after he grew tired of delivering heating oil himself, shows that the Company's violations of the collective bargaining agreement were not trivial.

The Master Agreement is quite explicit in its commitment to providing work for bargaining unit members. No fewer than five separate provisions of the collective bargaining agreement address the issues of subcontracting and preservation of work, binding the parties "to cooperate to maintain and enforce the letter and spirit of this Agreement and to curb abuses and to prevent evasions

of each and every part of the Agreement including the sections relating to subcontracting." The Company, however, has engaged over a period of years in evasions of the subcontracting provisions, preferring to pay the pension fund contribution penalty when it got caught rather than employ Union drivers to deliver fuel oil to all of its customers in its core service territory.

I conclude that the Company's repeated and flagrant violations of the subcontracting provisions of the collective bargaining agreement warrant injunctive relief in the form of a cease and desist order.

For all of these reasons, I issue the following

## DECISION AND AWARD

This grievance is granted. The Company is ordered to make its records available for an audit of the period 2009 – present to establish the nature and extent of subcontracting. The audit should review:

- All work performed in New York City (including New York, Kings, Bronx, Queens and Richmond Counties) in Nassau and Suffolk Counties.
- All work performed in Westchester County, and indicate what work was performed by subcontractors above and what below I-287.
- All work performed by non-Union Schildwachter managers during this time period.

The Company is ordered to pay the cost of this audit. In the event that the parties are unable to agree upon a single, neutral auditor, the Company shall pay the cost of the Union's chosen auditor as well as its own auditor.

Further, I order the Company to cease and desist from hiring subcontractors to perform bargaining unit work; the Company is also ordered to cease and desist from using its managers to perform bargaining unit work and from otherwise violating the collective bargaining agreement.

I find that the Company has failed to establish that the parties ever reached an understanding that I-287 is an appropriate "rule of thumb" to define the term "vicinity" with respect to Westchester County. The results of the audit I have ordered may help the parties reach such an understanding. In the meantime, I direct the Company to give advance notice to the Union, as required by Section 11, before it engages any subcontractors, including to make deliveries within any portion of Westchester County.

I will retain jurisdiction of this matter as the parties have suggested for the purpose of assisting the parties if they so request with the implementation of the remedies ordered in this Decision and Award.

Dated: August 14, 2013

**RUTH MOSCOVITCH, Arbitrator**

**AFFIRMATION**

Pursuant to CPLR 7507, I hereby affirm that I am the Arbitrator in the above matter and that I have executed the foregoing as and for my Decision and Award.

**RUTH MOSCOVITCH**