of services by claiming installation of a condenser in a car that was never in the shop for such repair. Thus, the Abbey car was significant cumulative evidence of the very same alleged (and proven) wrongdoing. Such evidence does not run afoul of the after-acquired evidence rule mentioned above.

There is, however, one aspect of the Abbey car evidence that needs further discussion. The exact date when the Company learned about and buttoned down the evidence as to the Abbey car is not clear in the record, but it was prior to the arbitration hearing. The Company, however, did not advise the Union about the Abbey's car until the day of the Arbitration hearing. Had the Union been aware prior to arbitration that two cars were implicated rather than one, it might well have decided not to proceed to arbitration with its attendant costs. As I have noted before in *Norem Buick Company*, 84-1 ARB §8200, pp. 3920-21:

> Fundamental notions of fairness—especially in discharge cases—require prompt and full disclosure of the facts or positions of the parties at the earliest steps in the grievance procedure. The aim of the grievance procedure is, and should be, to settle disputes, not arbitrate them. Settlement of disputes will be most likely when the facts and positions of the parties, and the strength and weakness of their respective cases, are fully disclosed at the earliest possible time. Arbitration, even less than litigation, should not be a guessing game—especially where the stakes are the equivalent of "capital punishment."

I believe that had the Union been told about the Abbey car prior to arbitration, there is a reasonable likelihood it would not have proceeded to arbitration. Under these circumstances, it seems appropriate to require the Company to reimburse the Union for one-half of the Union's share of the costs of this arbitration.

AWARD

For the reasons set forth in the Opinion, which Opinion is incorporated herein by reference, the grievance is denied. However, the Company is directed to reimburse the Union for one half (1/2) of the Union's cost of this arbitration.

COPLEY NEWSPAPERS —

Decision of Arbitrator

In re COPLEY NEWSPAPERS AND WAUKEGAN [Ill.] NEWS-SUN and CHICAGO NEWSPAPER GUILD, FMCS Case No. 95/12338, May 29, 1996

Arbitrator: Lamont E. Stallworth, selected by parties through procedures of the Federal Mediation and Conciliation Service

WORKING CONDITIONS

— Outside employment ▸124.45

Collective-bargaining contract that does not allow newspaper's employees to do outside work for competing publications was violated by refusal to allow employee to write article for monthly magazine, where publications have different markets that overlap minimally, newspaper did not view magazine as competitor, newspaper editors did not ask reporters to pursue stories covered by magazine, and number of advertisers they have in common is small proportion of total number in magazine.

— Outside employment ▸124.45

Newspaper employee who was wrongfully denied opportunity to do outside work for magazine that was not in competition with newspaper is awarded $600 in damages, where magazine editor testified he would have paid close to $600 for article.

— Outside employment — Burden of proof ▸124.45 ▸94.60509

Newspaper has burden of proving it was "in competition" with magazine within meaning of collective-bargaining contract forbidding newspaper employee to do outside work for publication "in competition" with newspaper, even though union generally has burden of proof in contract-interpretation cases, since competition clauses establish positive right for employees, and if publisher seeks to invoke exception to that right, it has burden to supply all facts necessary to prove exception's applicability.

— Outside employment ▸124.45

Competition between newspaper and magazine must be "more than minimal" in order to bring newspaper employees magazine within collective-bargaining contract's ban on outside employment with publication "in competition" with newspaper, since "rule of reason" is used to identify relationship between general rule and exceptions, and exception cannot be so broadly defined that it swallows general rule; rule of reason would not countenance per se rule that all print media distributed in particular county are in competition with newspaper distributed there.

— Outside employment ▸124.45

Finding that newspaper and magazine are "in competition" so as to bar newspaper employee from outside work for magazine, would not be precluded merely because magazine is monthly and newspaper publishes six times per week, since each outside activities case must be decided on its own merits.

— Outside employment ▸124.45 ▸94.60559

Collective-bargaining contract's statement that newspaper employee may not do

outside work for publication that is "in competition" with newspaper does not mean that awards construing contracts referring to "direct competition" are not instructive, where parties to contract in question did not make conscious and deliberate choice to refer to "competition" rather than "direct competition," and the two phrases have been used interchangeably by arbitrators in outside activities cases.

Appearances: For the employer — Laura Fisher, attorney. For the union — Kenneth E. Edwards, attorney.

OUTSIDE EMPLOYMENT

The Issue

STALLWORTH, Arbitrator: — The Parties submitted the following issue(s) to the Arbitrator:

Whether the Employer violated the Contract when it denied Diana Carney the ability to write for North Shore magazine and, if so, what shall the remedy be?

Applicable Provisions of the Collective Bargaining Agreement

ARTICLE XIV
ADJUSTMENT OF GRIEVANCES

* * *

6. The arbitrator's decision shall be limited to determining specific questions submitted for adjudication, and the arbitrator shall have no power to add to, subtract from, change or modify any provision of this Agreement, but shall be authorized only to interpret the existing provisions of the Agreement and apply them to the specific facts of the dispute.

ARTICLE XXIII
MISCELLANEOUS

* * *

7. Employees of the Publisher shall be free to engage in outside activities outside of working hours provided such activity is not in competition with the Publisher and provided further that no employee shall exploit his/her connection with the Publisher without the written consent of the Publisher given in response to a written request from the employee.

Background

Article XXIII, Section 7 of the Parties' 1993-1995 collective bargaining contract provided as follows:

Employees of the Publisher shall be free to engage in outside activities outside of working hours provided such activity is not in competition with the Publisher and provided further that no employee shall exploit his/her connection with the Publisher without the written consent of the Publisher given in response to a written request from the employee.

The instant grievance challenges Management's determination that North Shore Magazine is "in competition" with the Waukegan News-Sun, and that as a result, News-Sun reporter Diana Carney could not write a story for that particular magazine.

The News-Sun is owned by Copley Newspapers. The News-Sun is published six (6) times each week. Its offices are located in Waukegan, Illinois.

Diana Carney has been a Features Reporter for the News-Sun for approximately five years, and has been employed by the Publisher at the News-Sun and other newspapers since 1986.

On January 18, 1995, Craig Keller, Senior Editor of North Shore Magazine telephoned the News-Sun's newsroom. Keller's call was answered by News-Sun reporter Ralph Zahorik. Keller told Zahorik that he wanted to find a reporter to write a story about Lake County for North Shore Magazine. Zahorik replied that while he could not write the story, he would let other reporters know about the assignment. Zahorik then sent an electronic mail message (hereinafter "e-mail") about the assignment to the editorial staff of the News-Sun, including Management.

Carney saw Zahorik's e-mail that same day and contacted Keller. Keller told Carney that North Shore Magazine wanted a 2,000 to 3,000 word article that would profile Lake County for North Shore Magazine readers who did not live in that county. Carney then accepted Keller's offer and told him that she would contact him the next day, January 19, to discuss specifics.

During the morning of January 19, Carney spoke to News-Sun Editor Don Asher about the North Shore Magazine article. Asher indicated that he had concerns about Carney writing the article.

Later that afternoon, Carney met with Asher, News-Sun Managing Editor Charles Selle and Guild representative Art Peterson. Asher told Carney that the News-Sun was in competition with North Shore Magazine. In response to a question from Peterson, Asher stated that if Carney wrote the article, she would be disciplined.

Carney then contacted Keller, told him that the News-Sun would not allow her to write the article and suggested another reporter for the North Shore Magazine story.

The Guild filed the instant grievance on January 19, and subsequently

petitioned for arbitration after the grievance was denied. It is within this factual context that the instant grievance arises.

Position of the Guide

The Guild contends that the News-Sun is not "in competition" with North Shore Magazine, and that Article XXIII, Section 7 of the Contract entitled Carney to accept the assignment from North Shore. The Guild initially asserts that the Publisher has the burden of proving that the two publications are "in competition."

It is the position of the Guild that the Publisher has not met that burden of proof. In this regard, the Guild maintains that the News-Sun and North Shore Magazine have different target audiences, as demonstrated by the differences in their advertising. The Guild also maintains that North Shore's "lifestyle" content is much different than the focus of the News-Sun. In addition, the Guild stresses that North Shore's circulation is much smaller than that of the News-Sun. The Guild also emphasizes that North Shore's circulation is concentrated in Cook County, while the News-Sun is not sold in that area.

The Guild also argues that North Shore Magazine does not consider the News-Sun to be a competitor. In addition, the Guild contends that the News-Sun did not consider itself in competition with North Shore Magazine until this dispute arose. According to the Guild, the Publisher has not proven that the News-Sun has lost readers or advertisers to North Shore Magazine.

The Guild further asserts that the Publisher's definitions of competition are inconsistent with each other, and that they are so broad that they would nullify the unit members' rights guaranteed in Article XXIII, Section 7. The Guild also contends that the manner in which this provision was implemented prior to this case supports the Guild's position.

The Guild requests the Arbitrator to sustain the instant grievance and to make the Grievant, Diana Carney, whole for the lost income which would have been derived from the North Shore Magazine article.

Position of the Publisher

The Publisher argues that the News-Sun correctly applied Article XXIII, Section 7. It is the Publisher's position that the Guild has the burden of proving that the Contract was violated. In addition, the Employer contends that the Arbitrator should not interpret the phrase "in competition" *de novo*. Rather, the Publisher maintains that the Arbitrator should determine whether Management's decision was unreasonable, arbitrary or capricious.

According to the Publisher, the Guild has not proven that the Publisher violated the Contract in this case. In this regard, the Publisher contends that North Shore Magazine and the News-Sun are "in competition" under the plain meaning of that term. The Publisher maintains that the editorial content of North Shore Magazine overlaps that of the News-Sun to a considerable degree.

In addition, the Publisher contends that the News-Sun competes with North Shore Magazine for circulation and advertisers. In this regard, the Publisher argues that the publications compete for placement on newsstands, for the attention of their readers and for advertising expenditures. The Publisher stresses that a number of prospective, current or former News-Sun advertisers purchased space in the January and April 1995 editions of North Shore Magazine.

The Publisher also stresses that North Shore Magazine specifically recruited News-Sun reporters for the disputed Lake County profile article. According to the Employer, Carney's request was denied as well, because she was attempting to exploit her position with the News-Sun in violation of Article XXIII, Section 7. The Employer also contends that Carney requested Asher's permission to accept the free-lance assignment, and that this is evidence that she knew that North Shore Magazine was a competitor. In addition, the Publisher argues that it has applied Article XXIII, Section 7 in a consistent manner.

The Publisher, therefore, requests the Arbitrator to deny the opportunity to write the instant grievance.

Opinion

The instant grievance contends that the Publisher improperly denied News-Sun reporter Diana Carney the opportunity to write a Lake County profile as a free-lance assignment for North Shore Magazine. The Parties have submitted the following issue(s) to the Arbitrator:

> Whether the Employer violated the Contract when it denied Diana Carney the ability to write for North Shore magazine and, if so, what shall the remedy be?

The Arbitrator has carefully considered the facts, evidence and arguments related to the issue(s) presented. The Arbitrator concludes that the instant grievance must be sustained.

The Arbitrator's reasoning, findings and conclusions are set forth below:

Article XXIII, Section 7 of the Contract provides that "Employees of the Publisher shall be free to engage in outside activities outside of working hours. . ." That contractual right is then limited by two exceptions: (1) "provided such activity is not in competition with the Publisher" and (2) "provided further that no employee shall exploit his/her connection with the Publisher without the written consent of the Publisher given in response to a written request from the employee".

It is the conclusion of the Arbitrator that the Publisher has not proven that North Shore Magazine is "in competition" with the News-Sun within the meaning of Article XXIII, Section 7.

The Publisher and Guild disagree as to which party has the burden of proof. The Publisher correctly notes that the union generally has the burden of proof in contract interpretation cases. *See International Minerals & Chemical Corporation*, 62-1 ARB par. 8284, page 4074 (Sears, 1962). However, the Arbitrator agrees with the Guild that the Publisher has the burden of proving that the News-Sun and North Shore Magazine were "in competition" under Article XXIII, Section 7. Since such clauses "establis[h] a positive right for the employees . . . and the Publisher seeks to invoke the exception to that right, it is the Publisher's burden to supply all of the facts necessary to prove that the exception is applicable." *The News Tribune*, AAA Case No. 1830-0527S (D. House 1974), pages 6, 7 (citing *The Elizabeth Daily Journal* (M. Benewitz, 1973) and *The Home News* (B. Wolf, 1972)). *See also The Bureau of National Affairs, Inc.* (J. Sharnoff, 1989), (Guild Case No. 4), page 52; *Verniton Corporation*, 77 LA 349, 352 (M. Shipman, 1981) (job bidding grievance sustained when "evidence fail[ed] to show" that grievant fell within the stated exceptions to the general rule). Moreover, under "basic principles of contract interpretation", such exceptions are to be strictly construed and applied. *Verniton*, 77 LA at 352. *See also, Unitog Company, Inc.*, 85 LA 740, 742 (T. Heinsz, 1985); *The News Tribune* (citing *The Home News*), page 4.

The Publisher relies on *The Boston (Mass.) Globe*, which placed the burden of proof on the union in an outside activities case. The undersigned Arbitrator is of the opinion that since the arbitrator's rationale for that minority holding was not explained, the contrary authority reviewed above is persuasive. *The Boston (Mass.) Globe*, ANPA L & PL, Vol. 4, p. 152-53 (S. Ellis, 1983).

Article XXIII, Section 7 does not state how much competition, or what kind of competition, will trigger the "in competition" exception to the general rule that employees "shall be free to engage in outside activities outside of working hours. . ."

In such cases, arbitrators apply several basic rules of construction. The "rule of reason" is used to identify the relationship between the general rule and exceptions. *Bureau of National Affairs*, page 44 (contract did not list factors to be examined in implementing outside activities clause). *See also, Verniton*, 77 LA at 352 (rule of reason used to define contractual exceptions to general rule that jobs would be awarded to bidders on the basis of their seniority and ability to perform job).

In addition, the exception cannot be so broadly defined that it simply swallows the general rule, since the rule would then be meaningless. *Hamady Brothers Food Market*, 82 LA 81, 84 (S. Silver, 1983) ("It is presumed as an essential part of any collective bargaining agreement that all terms and conditions stated therein shall be given effect reasonably"); *American Federation of Government Employees*, 75 LA 1288, 1292 (A. Ordman, 1980) (arbitrator rejected interpretation of disputed contract term when that construction would leave another clause "meaningless and mere surplusage")

Based on the foregoing, it is the conclusion of the undersigned Arbitrator that the competition between the News-Sun and North Shore Magazine must be "more than minimal" in order to preclude News-Sun employees from "engag[ing] in outside activities outside of working hours" *Hearst Corporation, Capital Newspapers Division*, 79 LA 1129 (J. Shister, 1982) In *Hearst Corp.*, Arbitrator Shister concluded as follows:

> The Company contends that its newspapers and [the other publication] are in competition with one another. Unquestionably there is some competition involved. But the crucial question remains: How much? *For competition to be substantively significant it clearly must be more than minimal.* One can arguably contend that the corner delicatessen competes with the nearby supermarket; but one cannot logically or accurately conclude that such competition is anything more than minimal.

Hearst Corp., 79 LA at 1133 (bolded emphasis in original; underscored emphasis added).[1]

[1] Several cases cited by the parties involved contracts or internal policies precluding outside activities for publications in "direct competition" with the employer. *Buffalo Courier-Express* (R. Rabin, 1976) (Guild # 2), page 5; *Detroit News* (E. Teple, 1989) (Guild #3), page 8; *Pittsburgh Post-Gazette*,

Arbitrators also recognize that each outside activities case must be decided on its own particular facts. *The News Tribune*, page 4; *Bureau of National Affairs*, page 25. For that reason, *per se* rules are avoided. Thus, a finding that North Shore Magazine and the News-Sun are "in competition" would not be precluded simply because one is a monthly magazine and the other is a newspaper published six (6) times each week. *Pittsburgh Post-Gazette* (P. Parkinson, 1983) (Publisher Case D), pages 12-13. By the same token, the rule of reason would not countenance a *per se* rule that all print media distributed in Lake County, Illinois are deemed to be in competition with the News-Sun.

With these interpretive principles in mind, the facts of this particular case can be analyzed. *The American Heritage Dictionary* (Second College Edition 1991) defines "competition" as "[t]he rivalry between two or more businesses striving for the same customer or market." It is the conclusion of the Undersigned Arbitrator that the Publisher has not proven that North Shore Magazine and the News-Sun engage in competition that is anything more than minimal.

As of October 29, 1994, 99.0% of the copies of the weekend edition of the News-Sun were distributed in Lake County; 48.3% were distributed in three towns—Waukegan, North Chicago and Zion.

North Shore Magazine is distributed to "Chicago's north and north-west suburbs". Thus, while it is distributed in Lake County, it is also distributed in Cook, Kane and McHenry counties.

While both publications are distributed in Lake County, their target audiences are very different. The News-Sun is a "community newspaper covering Lake County". North Shore Magazine, on the other hand, targets only a very select portion of the Lake County community. North Shore Magazine's Editorial Profile describes its target audience as "well-educated, affluent, sophisticated" and "doers, spenders and goers".

The median annual household income of North Shore Magazine readers is $124,000. The median value of their homes is $346,200; 74% of those homes exceed $200,000 in value. The median household net worth of North Shore Magazine readers is $548,900.

No similar information was presented to profile the News-Sun's readers. However, the record contains sufficient evidence to demonstrate that the News-Sun and North Shore Magazine are not "in competition" for those Lake County readers who are part of the target audiences of both publications.

As of the week ending October 29, 1994, 28 towns received 25 or more copies of the weekend edition of the News-Sun. The record contains the median home values for 23 of those 28 towns ("Greater North Shore Guide" supplement to April 1995 North Shore Magazine, pages 53-73). These 23 communities received 95.1% of the copies of the weekend News-Sun distributed on October 29, 1994.[1]

The median home value of North Shore Readers ($346,200) exceeded the median home values of all but one of these 23 towns. The only exception was Lake Forest, in which the median home value was $493,700.

Lake Forest received just 1.1% of the copies of the weekend News-Sun distributed on October 29, 1994 to those 23 towns.

Six (6) of those 23 towns have median home values greater than $150,000: (Deerfield [$232,000], Highland Park [$257,000], Lake Bluff [$285,200], Lake Forest [$493,700], Libertyville [$188,000] and Wadsworth [$170,000]). These six (6) towns received only 7.1% of the October 29, 1994 copies of the News-Sun distributed in those 23 towns. The News-Sun itself has stated that it "does not have significant penetration" in Lake Forest and Highland Park.

In addition, the following Lake County communities are absent from the list of towns receiving 25 or more copies of the News-Sun (median home values listed in parentheses): Barrington Hills ($500,000+); Bannockburn ($500,000+); Long Grove ($430,200); Riverwoods ($407,900); Kildeer ($377,500); and North Barrington ($307,000).

Conversely, 51.0% of the October 29, 1994 News-Suns distributed in those 23 towns were circulated in Waukegan, North Chicago and Zion. The median home values in those communities were $37,080, $28,522 and $36,436,

page 9. Article XXIII, Section 7 has been in this contract since 1951. The record contains no evidence, however, that the parties to this contract made a conscious and deliberate choice to refer to "competition" rather than "direct competition." Indeed, the Publisher's bargaining notes show that this clause has not been discussed in negotiations since 1951. In addition, the two phrases have also been used interchangeably by arbitrators in outside activities cases. *The News Tribune* (quoting *The Elizabeth Daily Journal*). As a result, the absence of the word "direct" in Article XXIII, Section 7 does not outweigh the impact of the rules of contract interpretation discussed above.

[1] The percentages in this discussion were calculated from the data in Employer Exhibit No. 5 (pages 53-73) and Union Exhibit No. 3, pages 5, 6.

respectively. Those three (3) towns have the lowest median home values in the 23 communities described above.

Moreover, 81.14% of that day's News-Sun distribution in those 23 towns took place in the thirteen (13) towns whose median home values were less than $120,000. As noted, the median home value of North Shore Magazine readers is $346,200.

The following table analyzes the News-Sun's penetration in the eleven (11) towns for which the number of households was provided in Union Exhibit No. 3:

Town	Percentage of Households to which News-Sun is distributed	Median Home Value Rank Order of all towns	
Lake Villa	121.0%	$109,000	#7
Zion	61.7%	$ 68,000	#10
Waukegan	55.0%	$ 64,000	#11
Round Lake	50.0%	$ 84,000	#9
Gurnee	47.9%	$131,000	#4
Grayslake	43.1%	$111,600	#6
Libertyville	18.7%	$185,600	#2
Fox Lake	14.0%	$ 84,800	#8
Mundelein	12.6%	$116,900	#5
Lake Forest	6.8%	$493,700	#1
Vernon Hills	2.8%	$140,500	#3

Thus, the News-Sun generally reaches a much higher percentage of households in the communities with lower median home values than it reaches in those towns with higher median home values.

These statistics are not a profile of News-Sun readers. Nonetheless, when taken together, they support the following inferences: (1) that the News-Sun and North Shore Magazine have very different markets; (2) that these markets only overlap to a minimal degree; and (3) that the News-Sun and North Shore Magazine publications therefore engage in only minimal competition for readers. These inferences are unrebutted.

The record also contains evidence that the News-Sun did not view North Shore Magazine, or any other magazine, as a competitor when Carney requested to write the disputed feature story for that magazine. *Hearst Corp.*, 79 LA at 1133; *The News Tribune*, at page 5. A News-Sun "Competitive Comparison" issued subsequent to March 1994 analyzes the market penetration and advertising costs of the News-Sun and several weekly and daily newspapers. No magazines were included in that comparison.

Similarly, a News-Sun "Service Center Transaction Analysis" dated April 3, 1995 includes a category for those stopping their subscriptions because they preferred another newspaper. It contains no such category, however, for subscribers who stopped News-Sun delivery because they preferred to read a magazine.

In addition, Carney and Zahorik credibly testified that no News-Sun editor has instructed them to pursue a story covered in North Shore Magazine, while they regularly receive directions to do so for stories in area newspapers. Moreover, when the instant grievance arose, the News-Sun library did not have copies of North Shore Magazine, although it maintained copies of many other newspapers.

The advertising in the two publications is consistent with their markedly different target audiences. North Shore Magazine contains numerous advertisements for expensive watches, jewelry, furniture, handmade kitchens, resorts, houses, cosmetic surgeons and cars. See, e.g., Employer Exhibit No. 2, January 1995 issue.

The Union submitted a sampling of News-Sun advertisements. These were generally focused on lower-priced stores or items, e.g., liquor stores, discount supermarkets, inexpensive auto insurance, trade schools, hardware stores, discount clothes.

The Publisher emphasizes that the January 1995 and April 1995 issues of North Shore Magazine contained advertisements from present and prospective News-Sun advertisers. However, the number of common advertisers is a small proportion of the total number of advertisements in North Shore Magazine. Moreover, many of the common advertisers are actually regional advertisers for the Copley Newspaper chain as a whole, not local advertisers for Lake County.

The Publisher also stresses that both publications had bridal articles or supplements in January 1995 and golf articles or supplements in April 1995. However, the respective News-Sun

and North Shore Magazine special sections had no advertisers in common.

In addition, the advertising in those special sections reflects the differences in the publications' target audiences. For example, the North Shore Magazine golf section had four (4) advertisements for homes built on or adjacent to golf courses, as well as an article on such golfing communities. No such advertisements or articles were in the News-Sun golf supplement.

The Guild's position was also supported by the testimony of Northwestern University journalism professor David Nelson.

The Publisher submitted several arbitral awards in which arbitrators enforced exceptions to outside activities clauses. As noted, decisions in this area turn on the specific facts of each case. This is nicely illustrated by the decision in *Pittsburgh Post-Gazette*, on which the Publisher relies. In that case, Arbitrator Parkinson held that a newspaper photographer was properly disciplined for failing to sever his relationship with a new fashion magazine he had developed. *Pittsburgh Post-Gazette*, page 15.

The decision in *Pittsburgh Post-Gazette*, however, was grounded in the following conclusions: (1) that the two publications "vie for the same Pittsburgh area audience"; (2) that "[t]he target readership for these publications is assumed to shop in and about the Pittsburgh area"; and (3) that "[a]dvertising appearing in both publications comes mainly from sources in this same area" *Pittsburgh Post-Gazette*, page 13.

Arbitrator Parkinson determined that the photographer in that case could not "continue to be an effective and loyal employee [of the Pittsburgh Post-Gazette] while serving the interests of [the fashion magazine]" *Pittsburgh Post-Gazette*, page 15.

In contrast, the facts of this case show that the News-Sun and North Shore Magazine cannot be considered as being "in competition" under any "reasonable analysis" *Bureau of National Affairs*, page 53.

The Publisher argues in its brief that its position is also supported by the second exception in Article XXIII, Section 7. That clause provides that "no employee shall exploit his/her connection with the Publisher without the written consent of the Publisher given in response to a written request from the employee".

It is the conclusion of the Arbitrator, however, that this is a new issue that cannot be raised at this point in the arbitration procedure. The record shows no indication that the Publisher raised this defense when this issue arose or during the subsequent grievance process. Rather, the evidence demonstrates that the Publisher relied solely on the "in competition" exception. Nor was this defense raised at the arbitration hearing.

The Guild has the burden of proving Carney's damages. Carney testified that North Shore Magazine Editor Craig Keller told her that she would be paid "$600, possibly $700" for the Lake County feature article. Keller testified that he would have paid "close to $600 for that piece because it [was] a lengthy story". Carney will therefore be awarded $600 as a make whole remedy.

As a result of the foregoing analysis, it is not necessary to address the other arguments presented in the Parties' post-hearing briefs.

AWARD

The Publisher violated Article XXIII, Section 7 of the Contract when it denied Diana Carney the ability to write for North Shore Magazine. The Publisher is directed to pay Carney $600 as a make whole remedy.

The instant grievance is sustained.

RIVERVIEW SCHOOL DIST. —

Decision of Arbitrator

In re RIVERVIEW [Pa.] SCHOOL DISTRICT and RIVERVIEW EDUCATION ASSOCIATION, August 1, 1996

Arbitrator: Ronald F. Talarico

ARBITRABILITY

— **Workload** ▸100.0764 ▸100.15 ▸100.30 ▸100.45

Union may not challenge alleged violation of state law mandating that school nurse not have more than 1500 pupils under her care, where collective-bargaining agreement had no provision on school nurses or how many students they may serve, and nurse was not required to work overtime because of workload.

— **Workload** ▸100.0764 ▸100.15 ▸100.30

Union may not challenge alleged violation of state law mandating that school nurse not have more than 1500 pupils under her care, despite collective-bargaining agreement's savings clause providing that all employee benefits under public school code