In the Matter of Arbitration before
Myron Roomkin

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1564,

Union,

AND

SAFEWAY, INC.,

Company.

FMCS No. 13-50724-1
(Gr. No. 12-00062; Remedy)

OPINION AND AWARD

The undersigned Arbitrator, Myron Roomkin, was appointed by the Parties to hear and decide this case under the rules and procedures of the Federal Mediation and Conciliation Service. A hearing was held at the Marriott Courtyard Hotel in Farmington, New Mexico, on August 20, 2014. No transcript of the hearing was taken. Each side was afforded an opportunity to present evidence and to cross-examine witnesses. The record contains three joint exhibits (*Jt. Exs. 1-3*)*;* thirteen Company exhibits *(Co. Exs. 1-13);* and three exhibits from the Union (*Un. Exs. 1-3)*. The record was declared closed on September 19, 2014, with the exchange of Post-Hearing Briefs. Additionally, prior to the hearing, the parties filed Pre-Hearing Briefs (*Un. Ex. 1* and *Co. Ex. 1*), presenting their respective views on the matters in dispute and participated in two pre-hearing telephone conferences with the Arbitrator to discuss the framing of the issue.

APPEARANCES

For the Company

Camille Torres For Torres, Law Offices, LLC	Attorney
Witnesses	
Vanessa M. Lastrapes	Labor Relations Mgr.
Wayne Antonson	Store Mgr., Store 683
Gary Pickel	Labor Relations Mgr., ret.

For the Union	
Shane Youtz For Youtz and Valdez, P.C.	Attorney
Witnesses	
Corrinna Yazzie	Clerk
Mary Ann Montoya	Business Agent
Greg Frazier	Union President

CONTRACTUAL JURISDICTION

The arbitration was conducted pursuant to the collective bargaining agreement (CBA) between the parties covering the period from November 1, 2009 to November 1, 2014 (*Jt. Ex. 1*) for a bargaining unit of all employees at stores of the Company in Farmington and Aztec, New Mexico.

BACKGROUND

The Company operates retail grocery stores in Farmington and Aztec, New Mexico, in which employees are represented by the Union. Store employees are grouped by the CBA into different classifications depending upon their type of work or department in which they work. Two of those classifications are Food Clerks and Courtesy Clerks. Courtesy Clerks are entry-level, lower paid positions that are not normally considered career positions in the store. Food Clerks are higher paid regular positions.

This dispute concerns the remedy portion of a grievance that stems from the Company's use of Courtesy Clerks who were temporarily reclassified as Food Clerks and scheduled to perform tasks outside the Courtesy Clerk classification during the week that ended with Mothers' Day in May 2012 – a period when the Floral Department requires special staffing. Specifically, on or about May 21, 2012, the Union filed Grievance 12-00062, alleging that during the workweek ending on May 12, 2012, the Company had violated the CBA by temporarily promoting three employees classified as Courtesy Clerks (Sandie Johnson, Jaron

Shorty, and Andrew Schultz) to perform duties normally assigned to Food Clerks at the Company's store #683 in Farmington, New Mexico. Sandie Johnson and Jaron Shorty were observed working in the Floral Department and Andrew Schultz was observed restocking and hanging price tags.

Grievance 12-00062 ultimately was presented for adjudication before Arbitrator Edwin R. Render. In pre-hearing discussions, the Parties agreed with Arbitrator Render that his decision (a) would be limited to the question of liability (i.e., whether the temporary advance of the three Grievants to do work of Food Clerks was, in fact, a violation of the CBA) and (b) would not deal at all with the remedy that might be appropriate.

In his decision dated November 4, 2013, Arbitrator Render concluded that the Company violated Section 12.5 of the contract by allowing and assigning Courtesy Clerks to perform work other than the 12 duties to which such employees were restricted by the contract. (*Jt. Ex. 2* at 52.) As agreed, Arbitrator Render expressed "[n]o opinion on any aspect of the appropriate remedy in the case." (*Id.* at 51.) Unable to achieve agreement on the remedial issues, the parties sought the assistance of Arbitrator Render once again; unfortunately, he passed away before a hearing on the matter could be held. At that point, the Parties approached the Federal Mediation and Conciliation Service in order to obtain the services of another arbitrator and the current Arbitrator was selected and appointed.

In a letter dated August 6, 2014, shortly before the scheduled second hearing, the Union wrote the current Arbitrator to request guidance on the scope of the issues to be considered. Because the Company felt that this communication went beyond the Union's stated purpose, the Company requested and was granted the opportunity to file a written response and the

Parties' written communications were included in the record as Pre-hearing Briefs. (*Un. Ex. 1 and Co. Ex. 1*.)

After studying the briefs, the Arbitrator conducted a pre-hearing conference call with the Parties. Among the issues discussed was the Union's position that the appropriate remedy, as stated in the grievance, required consideration of the specific instances in which Courtesy Clerks continued to be used for improper duties by the Company in the period after the grievance was filed and before Arbitrator Render issued his Award. The Union also renewed its request for Company records so that it could identify those specific instances and prepare its offer of proof. The Company objected to having the Arbitrator consider possible violations that might have occurred after the grievance was filed, and also claimed that it would difficult providing the requested records only a few days from the scheduled hearing. In the interest of moving the case forward, the Parties agreed with the Arbitrator's suggestion that the issue to be heard would deal with the appropriate remedy for the violations specifically mentioned in the grievance and with whether or not additional remediation was required for violations that might have occurred thereafter. At this time, the Union would not be required to prove the existence of such reoccurred violations; neither was the Company required to defend itself by proving that such reoccurrence did not take place.

ISSUE

The Parties have defined the following issue in the case as: Is the remedy requested in the grievance appropriate?

RELEVENT PORTIONS OF THE CBA

SECTION 8
WORKING HOURS AND OVERTIME

8.1 Full-time employees are defined as those employees who work five (5), eight (8) hour days, forty (40) hours per week.

* * * *

8.2 Part-time employees are defined as those employees who work less than forty (40) hours per week.

SECTION 10
SENIORITY

* * * *

10.5 Available Hours. …A senior employee can claim hours of work, in his **store and** classification, for which he is qualified so long as such claim would not reduce any employee's schedule below the daily or weekly minimum except to zero….

* * * *

10.7 It is the desire of the Employer and the Union to provide full-time employment in the retail food industry for as many employees as is practical within the range of sound employment practices.

* * * *

SECTION 12
WAGE RATES AND CLASSIFICATIONS

* * * *

12.5 Definitions of Classifications.

(a) Courtesy Clerk. A Courtesy Clerk is an employee who shall perform only the following duties:

1. Bag and carry out bags and/or boxes containing the customer's purchases to Customer's vehicle.
2. General cleaning duties in the store and parking lot.
3. Sweeping, mopping and waxing.
4. Keeping check stand supplies filled and in order.
5. Collecting and lining up carts.
6. Assisting customers in handling their purchases at the check stands or counters.
7. Watering and covering produce at closing time.
8. Checking prices.
9. Handling "go-backs" and "orphans".
10. Cleaning of shelves and other display areas/cases including the removal and replacement of merchandise as required in connection such cleaning duties.

11. Courtesy Clerks may face shelves in dry grocery only, except for baby foods (no food checking).
12. **Fill ice bins**

If during the life of this Agreement, either party desires to reopen this subsection of the Agreement covering courtesy clerk restrictions, they shall be allowed to notify the other party in writing of such desire, and the parties agree to meet within one month to discuss such issues, and if agreement is reached, they shall be made a part of this Agreement. No changes may be made in courtesy clerk restrictions until this procedure is followed.

SECTION 16
GRIEVANCE AND ARBITRATION

16.1 Controversy, Dispute and Arbitration. Any and all matters of controversy, dispute or disagreement of any kind or character whatsoever existing between the Employer and the Union or Members of the Bargaining Unit and arising out of or in any way involving the interpretation or application of the terms of this Agreement shall be settled and resolved by the procedures and in the manner hereinafter set forth.

16.2 Grievances shall be filed promptly but no later than fifteen (15) days of the discovery of the event, in the following manner:

* * * *

(b) For those issues outside the realm of store level management or that cannot be resolved at the store level within five (5) days, the Representative of the Union may reduce the issue to writing and file a formal written grievance with the Company's Labor Relations Department and District Manager….

The Grievance shall specify the following:
1. The action complained of;
2. The dates, places and persons involved;
3. The contract provision allegedly violated;
4. The proposed remedy.

16.3 No grievance may be considered unless the procedure provided herein has been followed....

* * * *

16.6 Arbitration Decision. …The decision of the arbitrator shall be final and binding on both parties; however, the arbitrator shall not have the power to add to, subtract from or in any way modify the terms of this Agreement and shall limit his decision strictly to the interpretation of the language of the Agreement.

SECTION 17
HEALTH AND WELFARE

17.1 Trust Fund. The Employer shall make a contribution on behalf of each of its eligible employees into a fund known as New Mexico UFCW Unions and Employers Health and Welfare Trust Fund … .

17.2 Employer Contribution.

- **The Employer will contribute the following amounts per month for each employee covered** … .

	November 2009
Plan A	**$586.00**

* * * *

17.4 Current employees (hired before June 1, 2005)

* * * *

- Courtesy Clerks and Fuel Station employees shall not be covered for health and welfare benefits … .

* * * *

SECTION 22
PENSION

22.1 …Effective January 1, 2009, the Employer agrees to make pension contributions of ninety-eight cents ($0.98) per straight-time hour worked (including Sunday hours) for eligible employees. Though no contributions are required on Courtesy Clerks…

SUMMARY OF UNION'S POSITION

As presented at the hearing and as summarized in its Post-Hearing Brief, the Union proffers the following testimony of witnesses, evidence, and arguments in support of what it believes is the appropriate remedy.

The Union characterizes Courtesy Clerks as an entry-level and unique position whose members are being assessed by the employer to determine whether they are suitable for a career in the retail food industry. As such, the parties through the CBA have sought to limit the labor costs of Courtesy Clerks by placing a strict limit on the work tasks a Courtesy Clerk

may perform and by exempting them from receiving retirement benefits and healthcare benefits, except for vision coverage. By using Courtesy Clerks to perform the work of other bargaining unit employees, the Union contends the Company was saving money.

The remedy the Union is seeking in this case is the one called for in Grievance 12-00062. In it, the Union requested the following:

> REMEDY: That the most senior Food Clerks are paid wages for all work performed by the three Courtesy Clerks working out of their classification, including, but not limited to, any interest calculated and compounded on a daily basis for wages and benefits for all hours the Courtesy Clerks worked out of classification until this issue is resolved. That management at all Farmington/Aztec stores ceases using Courtesy Clerks to do duties out of their classification as outlined in Section 12.5 of the Safeway Farmington/Aztec CBA. This Grievance is intended to cover all Farmington/Aztec stores for all hours, wages and benefits going forward in the event a Courtesy Clerk is used by management to do duties out their classification as outlined in Section 12 of the Safeway Retail CBA until this issue is resolved.

(*Jt. Ex. 3.)*

To implement the requested remedy, the Union asks the Arbitrator to consider these three questions:

1. Should Safeway be ordered to cease and desist in its use of Courtesy Clerks outside the scope of the contractual limitations?

2. What is the appropriate remedy for the violations which had occurred at the filing of the grievance, namely when during the week of May 12, 2012, Sandie Johnson, Jaron Shorty and Andrew Shultz worked outside of their classification as Courtesy Clerks?

3. What is the appropriate remedy for violations which occurred after the filing of the grievance?

<u>With Regard to a Cease and Desist Order</u>

The Union asks the Arbitrator to enforce the expressed meaning of Article 12.3, as recognized by Arbitrator Render, and order the Company to cease and desist from

using Courtesy Clerks to perform work outside of their classification.

With Regard to the Monetary Remedy

The work performed by Sandie Johnson, Jaron Shorty and Andrew Schultz on the week in question, the Union maintains, consisted of two types of contractual violations – both of which were identified by Arbitrator Render's decision. One type of violation was a "scheduling violation," that is, instances in which a Courtesy Clerk was pre-scheduled to perform work outside his/her classification. Scheduling violations involving Courtesy Clerks Jaron Shorty and Sandie Johnson, the Union contends, amounted to 36 hours during the week of May 6 to May 12, 2012.

The second violation was an "assignment violation," that is, instances when a Courtesy Clerk working a Courtesy Clerk's shift was directed to perform tasks not part of this/her classification. Based on the testimony of Corrina Yazzie, Courtesy Clerk Andrew Schultz performed work outside of his Courtesy Clerk classification for four hours on May 11, 2012. While the Company disputed this claim, Store Director Wayne Antonson stated he had no evidentiary basis to dispute Ms. Yazzie's testimony.

It is the Union's position that the appropriate remedy for these assignment violations is the back pay requested in the grievance. Specifically, the most senior food clerks who did not receive 40 hours for the work week in question should be made whole for the Company's violation.

The payment of wages and benefits paid to Food Clerks for assignment violations should also be adjusted by the addition of interest paid on a compounded daily rate, according to the Union.

It is the Union's position that without a back pay remedy the Company will have

received a tremendous economic benefit due to the lower cost of Courtesy Clerks performing the duties of Food Clerks and will have no consequence for the risk the Company took for violating the explicit provisions of the CBA.

The monetary incentive and financial benefits are substantial when the Company improperly uses Courtesy Clerks for work not specifically identified in Section 12.5 of the CBA, stemming from the fact Courtesy Clerks do not receive the $586 per month contribution from the Company for health benefits (as per Section 17.2 of the CBA) and a $.58 per hour contribution toward a pension (pursuant to Appendix B of the CBA) that other employees received.

Additionally, back pay should be part of the remedy because, during the work week at issue, when Courtesy Clerks were performing the work of Food Clerks, several Food Clerks were not scheduled to receive 40 hours of straight time work and therefore could have worked additional hours, according to Company work schedules. (*Un. Ex. 2*.) Under Section 8.1, according to the Union, a full-time employee is entitled to work 40 hours in a work week where that work is available. Moreover, the CBA in Section 10.7 states the Parties desire to provide full-time employment for as many employees as is practical within the range of sound employment practices. Towards this end, Section 10.5 allows full-time employees to achieve a 40 hour work by claiming the hours of work, in his/her store and classification for which he is qualified. In light of these contractual provisions, Food Clerks are entitled to a monetary remedy.

To buttress its claim that a financial remedy is appropriate, the Union cites the findings of Elkouri and Elkouri who point out that:

> [i]n some cases, the arbitrator is asked to decide only whether the agreement was violated by the assignment of bargaining-unit work to persons outside the unit.

> Where the arbitrator also is called on to remedy the improper assignment of bargaining-unit work to outsiders, a frequently utilized remedy is a monetary award of damages to unit employees for lost work.

(Elkouri and Elkouri, How Arbitration Works, 6th Ed., 2003 at 1244.)

The Union asks the current Arbitrator to reject the Company's claim that no other clerks were available to perform the work improperly done by the three Courtesy Clerks in question. This argument, the Union points out, was specifically rejected by Arbitrator Render in his decision on liability, when he stated:

> Another defense raised by the Company was that there were no non-courtesy clerks available that week who could have done the work in the floral department. However, the Union president testified there were several employees in the food clerk classification who would have been available to work in the floral department on a straight-time basis.

(*Jt. Ex. 2* at 50.)

Additionally, Store Manager Antonson did not do enough to obtain a Food Clerk to work the necessary extra hours. While Mr. Antonson testified he asked Food Clerks if they would volunteer, he did not testify that he offered the work to every Food Clerk and that they had refused. While he testified that he posted a volunteer list, his testimony did not show that the list contained details on any shift times or specific requests for work; nor was the posting provided for the record. Last, while he testified he had the authority to assign the work to the Food Clerks, he also testified he chose to assign the work to Courtesy Clerks at great savings to the Company.

The Union disputes the Company's claim that no Food Clerk was interested in working additional hours, because no Food Clerk claimed the hours of the reclassified Courtesy Clerks. This, the Union insists, is a misreading of Section 10.5 that gives workers in a classification the right to claim the hours of less senior employees in their

store and classification. The Courtesy Clerks, given a schedule of Food Clerk duties, were still Courtesy Clerks, in the opinion of the Union, and hence barred from claiming the hours of employees in another classification. This interpretation of Section 10.5 was supported by Mary Ann Montoya and Corrina Yassie, who testified to this being the practice they had observed in their time as employees in the stores they had worked at.

With Regard to Continued-Violations

It is the Union's position that the grievance was written to cover all violations of Section 12 by the Company in all Farmington/Aztec stores for all hours, wages and benefits going forward until the grievance was resolved. The Union claims it wrote the grievance in this way in anticipation of the Company's continued use of Courtesy Clerks to perform duties outside of their classification, a practice the Union says the Company has admitted to doing. The Union says it has tried to identify instances of continued violations but has been hampered by the lack of information made available to the Union; nonetheless, the Union believes that there have been 27 such violations in the period after it filed its grievance and Arbitrator Render's Award was issued.

In seeking a remedy for continued violations, the Union is rejecting the Company's claim that the Union has an obligation to file grievances for each violation from the date of the original filing in May, 2012, until the date of Arbitrator Render's decision in November, 2013. The Union's rejection is based upon the following.

1. From a legal perspective, the Company's position is inconsistent with normal practice in contract litigation and pleadings in federal and state courts and in litigation before the National Labor Relations Board. "[W]hen a party files a lawsuit to remedy

an ongoing contract violation, the filing of that lawsuit does not cut off damages on a going forward basis nor does it limit the petitioner to violations identified in the complaint which have not yet occurred." (*Un. Post-Hearing Brief* at 12-13.)

2. The Company's position on continuing-violations would render unmanageable and make a mockery of Parties' grievance process. If the Arbitrator were to accept the Company's position, under the CBA's grievance process, the Union would have to file a new but identical grievance every fifteen days, which in this case would require filing separate grievances and then be forced to arbitrate each grievance separately.

3. A continuing-violation remedy, as Union President Greg Frazier testified, is the custom and practice in the grocery industry in New Mexico. In support of this position, the Union has entered into evidence grievances and arbitration decisions from both Smith's and Albertson's, two other retail food companies in New Mexico with which the Union has collective bargaining agreements. Both of those agreements have grievance provisions that are nearly identical to the those in the CBA insofar as neither explicitly precludes an ongoing remedy for contract violations and both prescribe nearly the same requirements for the elements of a grievance.

In a 2010 grievance between the Union and Albertson's, in which six employees claimed that they did not receive Health and Welfare contributions by the Company, the Union asked that the contributions be made for the six grievants "as well as for any bargaining unit employees… until this matter is resolved." (*Co. Ex. 7.*) When the case went to arbitration, Arbitrator DiFalco agreed with the Union in the determination that a class action, *continuing* grievances must be sustained. (*Albertsons, LLC*. (DiFalco 2010) at 29 introduced as *Co. Ex. 7.*)

Similarly, Arbitrator Winograd adopted a continuing-violation theory advocated by the Union in a case between the Union and Smith's. (*Smith's Food & Drug Centers, Inc.* (Winograd, 2010) introduced as *Co. Ex. 6*). In that case involving one meat worker's claim for appropriate vacation time pay for the Labor Day holiday, Arbitrator Winograd ordered that the grievant should be made whole for any underpayment and for any holiday not mentioned in the grievance in which Smith's had committed a similar violation; and any meat workers not paid accordingly should be made whole. Additionally, he ordered Smith's to determine whether other employees should be made whole with interest inappropriately denied holiday pay for Labor Day, 2009 and subsequent holidays. (*Id*. at 17.)

4. The continuing-violation theory is a common and accepted means for remedy in labor arbitration in general. "Many arbitrators have held that continuing-violations of the agreement (as opposed to a single isolated and completed transaction) give rise to 'continuing' grievances in the sense that the act complained of may be said to be repeated from day to day, with each day treated as a new 'occurrence.' (Elkouri and Elkouri, *supra*, at 218.)

5. The CBA contains no provision precluding continuing-violation grievances.

Requested Remedy

For the reasons specified above, the Union requests that the Arbitrator enter an order as follows:

A. Direct the Employer to immediately cease and desist the above described contract violations and limit the work of employees who are Courtesy Clerks to the limitations identified in the Parties' collective bargaining agreement.

B. Order that the most senior Food Clerks be paid wages for all work performed by the three Courtesy Clerks working out of their classification, including, but not limited to, any interest calculated and compounded on a daily basis for wages and benefits for all hours the Courtesy Clerks worked out of classification.

C. Order the Company to produce work schedules for all departments in all Farmington/Aztec stores from the date of the filing of the original grievance to the date of Arbitrator Render's Award so that scheduling violations may be determined. Further, these additional scheduling violations, that the Company be ordered to pay the most senior Food Clerks wages for all scheduled work performed by Courtesy Clerks working out of their classification, including, but not limited to, any interest calculated and compounded on a daily basis for wages and benefits during the time period identified.

D. Order a third hearing in which the issue is limited to the single factual question of allowing the Union to make an offer of proof establishing violations of assigned (as opposed to scheduled) work by Courtesy clerks which violated section 12.5 of the Parties' collective bargaining agreement.

E. Retain jurisdiction to effectuate the remedies identified.

F. Whatever other relief the arbitrator deems appropriate.

SUMMARY OF COMPANY'S POSITION

As presented at the hearing and as summarized in its Post-Hearing Brief, the Company proffers the following testimony of witnesses, evidence, and arguments in support of what it believes is the appropriate remedy.

For its part, the Company accepts only one of the remedies requested by the Union, namely a cease and desist order. A monetary remedy to senior Food Clerks, as sought by the Union, is not appropriate given arbitral case law and the Union's failure to prove any Food Clerk was denied work hours. And the Union's attempt to seek a remedy for possible contractual violations after the grievance was filed is prohibited by the clear and unambiguous language of the CBA, as well as arbitral case law.

Cease and Desist as a Remedy

There are two reasons why a cease and desist order is the appropriate and sufficient remedy in this case. First, following receipt of Arbitrator Render's Award, the Company voluntarily ceased temporarily advancing Courtesy Clerks to a higher classification. This fact is

supported by the testimony of Labor Relations Manager Vanessa Lastrapes and other evidence in the record that show that no additional grievances alleging continuing-violations was ever filed, although one similar incident of a Courtesy Clerk performing Food Clerk work was brought to the attention of Ms. Lastrapes by Union Representative Mary Ann Montoya. However, upon investigation, that one case was found to involve an employee who had been promised but failed to receive a promotion to Food Clerk due to the departure of a store manager. That employee was promoted to Food Clerk effective the date he began performing Food Clerk duties, according to the testimony of Ms. Lastrapes, the person who corrected the oversight.

The Company points out that the Union has been able to identify only two other instances of Courtesy Clerks working out of their classification to bolster their case that a cease and desist order would be insufficient remedy. Both of these cases, the Company claims are not pertinent to the instance grievance. One of the cases involved a former Courtesy Clerk working in the dairy department after being promoted to Food Clerk by the Store Manager and is therefore not relevant to the instant case; the second of the cases, which the Company learned of only a day before the hearing, involved another employee who had been promised promotion from Courtesy Clerk to Food Clerk but failed to receive the promotion from the store manager before he left the Company. The Company contends that if this is another instance of failure-to-promote the issue will be resolved similarly.

The second reason a cease and desist order is the proper and only appropriate remedy, according to the Company, is that primary purpose of the grievance was to stop the Company from working Courtesy Clerks out of their classification. This was the sole topic during grievance the discussions between Ms. Montoya and Ms. Lastrapes, as documented in their testimony involving the processing of the instant grievance as well two similar grievances

numbered 12-00045 and 12-00027. (*Jt. Ex. 3; and Co. Exs. 8 & 9.*) In response to a question from the Arbitrator, Ms. Montoya confirmed she never raised with Ms. Lastrapes the prospect of a monetary remedy or the scope of the grievance – two remedies the Union is now seeking. Additionally, the Company directs the Arbitrator's attention to the grievance itself, which demands "[t]hat management at all Farmington/Aztec stores ceases [*sic*] using Courtesy Clerks to do duties out of their classification as outlined in Section 12.5 of the Safeway Farmington/Aztec CBA." (*Jt. Ex. 3.*) Last, the Union's own witness, Union President Frazier, explained that the Union wanted "a going forward remedy" to stop the Company from assigning Courtesy Clerks to work outside their classification.

Monetary Awards as a Remedy

Concerning the Union's request for monetary awards be paid to senior Food Clerks, the Company takes the following positions. First, no Food Clerk desired to work additional hours the during the workweek ending May 12, 2012; second, no Food Clerk invoked the provision of the CBA that allows any senior Food Clerk to work the disputed hours; and third, arbitral law does not support a monetary remedial award for time not worked.

No Food Clerk Desired Additional Hours. While the grievance makes general claims about Sandie Johnson and Jaron Shorty working and being scheduled in the Floral Department and Andrew Schultz working back stock and hanging tags in the General Merchandise Department, the Company seeks to give greater precision to these claims by reviewing the evidence presented at the hearing. As stated in the Company's Post-Hearing Brief, based on workweek schedules for store #683 (*Un. Ex. 2* at 7), "The Company does not dispute Sandie Johnson worked in the Floral Department performing Food Clerk work on Thursday, May 10, 2012 from 10:00 a.m. – 7:00 p.m. and Friday, May 11, 2012 from 1:00 p.m. – 7:00 p.m.

(including breaks and lunches)." (*Company Post-Hearing Brief.*) However, the Union presented no evidence that Sandie Johnson worked in the Produce Department that day, even though the work schedules reflects Sandie Johnson was supposed to work there on May 6.

With regard to Jaron Shorty, also based on workweek schedules for store #683 (U*n. Ex. 2* at 7), " the Company also does not dispute Jaron Shorty worked in the Floral Department performing Food Clerk work on Tuesday, May 8, 2012 from 10:00 a.m. – 2:00 p.m. and Thursday, May 10, 2012 from 10:00 a.m. – 7:00 p.m. (including breaks and lunches)." But while the schedule reflects that Mr. Shorty was scheduled to work in the Floral Department on Saturday, May 12, 2012, the time and attendance report proves Mr. Shorty did not work at all on Saturday, May 12, 2012. (*Co. Ex. 12*), according to the Company.

In regards to Andrew Schultz, the evidence showing his working as Food Clerk on the workweek in question is conflicted. On one hand, Ms. Montoya testified she was advised by Corrina Yazzie that she observed Mr. Schultz working at least four hours every day during that workweek; but according to the scheduled work shifts, Ms. Yazzie's and Mr. Schultz' work schedule overlapped for four hours only on Friday of that week. Moreover, Ms. Yazzie claims she observed Mr. Schultz assisting in stocking the General Merchandise Department, but she supposedly observed Mr. Schultz while she was checking out customers on a Friday afternoon -- one of the busiest times in the store. Last, as Store Manager Antonson stated in his testimony, he never assigned Mr. Schultz to stock shelves in that department nor was informed he was performing this task. Mr. Antonson testified Mr. Schultz is a highly special needs individual who has a tendency to wander during the work day and enjoys the company, and sometimes assists, a fellow employee identified as Marsha L. B. who works in the General Merchandise Department. Marsha, according to the work assignments, was assigned to "day stock" on the Friday, May 11, a

time when Mr. Schultz was allegedly observed stocking shelves as well. If Mr. Schultz was, in fact, stocking shelves on May 11, he was neither assigned to perform this task, nor acting with the knowledge or permission of supervision.

No Food Clerk Desired the Hours. It is the Company's position that no Food Clerk has been named who desired the hours worked by the three Grievants. Nor has the Union presented any evidence to show that Food Clerks were interested in the work. This is the case despite the Company's request in March 2013 for the Union to:

> …identify (by name) any employee who either requested or desired to work the Food Clerk Hours at issue (Floral department hours worked by Mr. Shorty and Ms. Johnson and back stock and tag work performed by Mr. Schultz the work week ending May 12, 2012)

(*Company Exhibit 13* at 6)

Indeed, the unrefuted testimony of Store Manager Antonson proves no Food Clerk desired additional work hours during the week at issue. Mr. Antonson testified that the week in question included Mother's Day and was one of the busiest weeks of the year for the Floral Department as the department got ready with extra deliveries, preparation of floral arrangements, and other activities. In recognition of the need for additional staff, he tried to fill his staffing needs by: (a) offering the work hours to all employees including Food Clerks; (b) posting a sign-up sheet near the time clock that offered additional hours to all employee; and (c) speaking with employees to solicit their participation. Sandie Johnson and Jaron Shorty volunteered and were given a schedule to work in the Floral Department, according to Mr. Antonson's testimony.

Moreover, no Food Clerk availed himself/herself of the right given by the CBA in Section 10.5 to claim those hours given to Sandie Johnson and Jaron Shorty. Consequently, the Company contends, no Food Clerk is entitled to any other remedy.

The Union's argument that a Food Clerk could not claim the hours assigned to the

Courtesy Clerks is misplaced, the Company claims. Having been advanced temporarily to the Food Clerk classification, the grievants' hours met the requirements of Section 10.5 as being within the same classification and store.

The Company rejects the Union's claim that the store manager should have assigned the extra work hours in dispute to Food Clerks not scheduled to work forty hours during the workweek in question. Mr. Antonson testified he identified three Food Clerks not scheduled for forty hours but, because of his familiarity with his employees, he knew that each had other responsibilities – other jobs, child care, educational responsibilities, personal or health reasons and alike– that would keep them from volunteering for the extra time. As Mr. Antonson stated in his testimony, "I didn't want them to have to make a decision between their other jobs, child care and education for a one week spike [in floral business.]" Forcing employees to make such a choice was not a good management practice, he testified.

Similarly, the Company takes exception with the Union's claim that a monetary award was necessary as a penalty for not immediately capitulating to the Union's grievance demands. The Company did not "roll the dice" as the Union has characterized the incidents that led to the grievance. Instead, the Company and the Union had a legitimate, good faith contract dispute that was resolved by Arbitrator Render's Award. The Company of its own volition took immediate steps to comply with the Award even though it makes it more difficult to create work schedules that meet short-term business fluctuations and address employee scheduling preferences.

Arbitral Case Law Disfavors Payment for Hours Not Worked. In addition to the reasons cited above, the Company believes arbitral case law does not support paying employees for time not worked. As expressed by Arbitrator Feldman:

> Arbitrators are not prone to rule in favor of forfeiture. The union in this particular matter is attempting to have the company forfeit compensation for hours not

> worked . . .. Such is not the case in grievance arbitration involving issues of this matter. I am not prone to change such general rule [*sic*]. Benefits, fringes and wages are creatures of the contract. Wages without work are not automatic unless there is language creating it. Such is not the case here.

(*US Tsubaki*, 125 LA 1556, 1558 (Feldman, 2008).)

Expanding the Scope of the Grievance

The Union's attempt to expand the grievance to allegedly include 27 unidentified, additional incidents occurring after the workweek ending on May 12, 2012 is clearly prohibited by the CBA, aribitral case law and the Parties' past practice in administering the grievance process.

The Company argues that such an expansion of the grievance violates the express qualification of a grievance found in Sections 16.2 and 16.3 of the CBA. These sections unambiguously and clearly require that "no grievance may be considered unless," the grievance specifies, "the dates, places and persons involved . . ." (*Jt. Ex. 1*.) The grievance in this case as filed has a date (the workweek ending May 12, 2012), contains a place (store #683) and identifies three persons involved in the incident. No mention is made in the grievance of other incidents, involving other employees at this or any other store. Instead, in the opinion of the Company, the Union is trying to "bootstrap" the remedy to include 27 unidentified violations.

In comparison, the Company opines, the Union has not cited a single contractual provision permitting the number of violations or the number of Grievants to be increased after the grievance was filed. If there were such violations, the Union has under the CBA the right to seek their resolution through specified processes of the grievance procedure by providing a written description of the specific dates, places and persons involved. Moreover, the Company points out the Union has acted inconsistently on this point, having filed an additional grievance (Gr.13-00114) on the same issue prior to Arbitrator Render's decision. (*Co. Ex. 10*.) This grievance

meets the requirements of Section 16, according to the Company.

Because Sections 16.2 and 16.3 are clear and unambiguous, the Company believes, arbitral tradition requires the current Arbitrator enforce those sections and ignore evidence outside the four corners of the CBA. (*Sanyo Manufacturing Corp*., 109 LA 184 (Howell, 1997).) Therefore, the Union's claim a custom exists in the retail grocery industry to permit the Union to file a "continuing-violation" or "class" grievances should not, along with the two arbitration decisions from other labor agreements, be considered by the Arbitrator. If there is a past practice in the handling of grievances, it is the one testified to by Ms. Lastrapes, namely, that in the five years preceding this remedial hearing, she was unable to identify a single grievance that did not meet the requirements of Section 16.2. Additional testimony of Gary Pickel, the Company's retired labor relations manager, shows that the Company refused to accept a class action grievance during the 25 years of his tenure in that position.

The Company disputes the Union's contention, expressed in the testimony of Union President Frazier, that the requirement to file separate grievances for each incident uncovered after the instant grievance was filed, was administratively burdensome, as each alleged violation would require only that the Union type a single page. Rather than being burdensome, as Ms. Lastrapes testified, the Union's desired remedy would prevent the Company from conducting a timely and thorough investigation, since store managers and other potential witnesses may be unavailable or unable to recall which employee did what and when.

The Company disputes the Union's characterization of the grievance as a "continuing-violation" grievance. This is a mischaracterization because it more accurately is a "class action" grievance, purporting to cover all future potential grievants and all future alleged violations, even if the alleged facts of the violation differ completely.

Last, it is the Company's position that arbitral case law does not support giving monetary payments to employees not identified in the actual grievance. The decision of Arbitrator Howell makes this point clearly:

> The Union requests that the Arbitrator make "all aggrieved and affected employees whole for all losses suffered." Both of the subject grievances do have the words "class action" written on the top of the grievance forms, and the Davis grievance has "class action" by her signature. However, each respective grievance only lists the name of that one Grievant and addresses his/her complaint. Many arbitrators declare that no jurisdiction exists to extend a remedy to an employee not named as a grievant. (See *Delmarva Power & Light Co.,* 72 LA 501; *United Tel. System,* 64 LA 525; *Colorpac*, *Inc.,* 62 LA 1029). Where some form of "class action or "group" benefit has been included in an award, it is the prevailing view that the agreement must be construed to permit such an award for all affected employees though not identified in the grievance. (See *Huron Rd. Hosp.,* 93 LA 98; *Greer Steel Co.,* 50 LA 340; *St. Louis Newspaper Publishers' Ass'n.,* 33 LA 471.) The Agreement in this case specifically states in Article 6, Section B, Step 2: "The grievance will be reduced to writing on forms provided by the Company, signed by the aggrieved employee" . . . in this case the Arbitrator has authority under the contract and/or widely accepted arbitral practice to grant back pay only to the Grievants – Guthrie and Davis.

(Sanyo Manufacturing Corp., 109 LA 184, 193-94 (Howell, 1997).)

For the reasons detailed above, the Company asks the Arbitrator to limit the remedy in the case to a cease and desist order as the only appropriate remedy in the case and to deny the Union's request for a monetary remedy as well as its request to consider 27 other alleged violations of the grievance.

OPINION

It is difficult enough in arbitration for one arbitrator to draw inspiration from the decision of another. Facts, circumstances and contract language are never a perfect fit from case to case. The evaluation of evidence, especially testimony, likewise requires the personal and direct involvement of the trier of fact.

This case presents the Arbitrator with an even greater challenge: I am being asked to complete the work started by one arbitrator in a dispute that has been going on for a long time. This is made even more complicated by the fact that no transcript or official record exists of the pre-hearing discussions and the actual hearing in the case. No one knows how Arbitrator Render would have approached the remedy in the case; the only thing that is certain is that the Parties agreed to separate the liability phase of the hearing from the remedy phase. In the spirit of that agreement, I believe that this hearing on remedy should be treated as a separate matter, and the decision based, to the extent it is possible, upon its independent record and presented evidence.

Based on the documentary evidence presented, the testimony of witnesses, the hearing and the arguments presented in the Pre- and Post-Hearing Briefs, I have determined the appropriate remedy for Grievance 12-100062 consists of: (a) the issuance of a cease and desist order; (b) the denial of monetary damages for the violations involving the improper scheduling of the two Courtesy Clerks named in the grievance; and (c) the payment of monetary damages limited to the assignment incident involving Mr. Shultz. With regard to the scope of the grievance, I have determined that repeat occurrences after the grievance was filed of scheduling and misassignment violations, could warrant compensatory damages, if shown to have taken place under specific circumstances.

In theory, when a contract is breached, the non-breaching party is entitled to some form of relief to enforce its rights under the agreement. Such relief is considered compensatory and functions to place the harmed party in the position it would have been in had there been no breach of the contract. By comparison, punitive damages are awarded to deter future violations of the agreement.

In labor-management relations, punitive damages are seen as being disruptive to the promotion of amicable relations between a union and an employer. For this reason, arbitrators have reserved punitive damages for those instances in which the breaching party has acted knowingly or repeatedly in bad faith.

The instant case also presents us with two varieties of the same contract violation. One type of violation in this case, as identified by the Union, grew out of "improper scheduling" of Courtesy Clerks. The incidents involving Sandie Johnson and Jaron Shorty, are cases in which Courtesy Clerks were temporarily promoted to the Food Clerk classification and were scheduled to work shifts as Food Clerks. The case of Andrew Schultz, on the other hand, involves an employee who did not work a predetermined schedule performing Food Clerk duties but allegedly was assigned improper tasks during his scheduled time as a Courtesy Clerk. This is an unscheduled "assignment" and the second improper use of Courtesy Clerks alleged by the Union.

A Cease and Desist Order

To begin with, there is the request for a cease and desist order. Fortuitously, there is no dispute on the appropriateness of an order, and no prohibition of such an order in the CBA, that would memorialize Arbitrator Render's Award. This order would prohibit the Company from both temporarily promoting Courtesy Clerks to work schedules for the performance of tasks outside their classification as well as assigning Courtesy Clerks, without scheduling them, to perform specific tasks not listed in Section 12.5(a) of the CBA.

The effective date of this order is November 4, 2012, the date of Arbitrator Render's award.

Monetary Remedies

On the question of appropriate monetary remedies, the Parties are far apart. The Union's grievance requests that money be paid to the most senior Food Clerks pursuant to Section 12.5 of the CBA, because Courtesy Clerks improperly performed work contractually assigned to Food Clerks. The Union further claims that the appropriate amount of the payment should consist of the "...paid wages for all work performed by the three Courtesy Clerks working out of their classifications" plus any interest calculated and compounded on a daily basis for wages and benefits. The Company, for its part, counters with the claim that no monetary remedy is required because payments presumably intended to make employees whole would be paid to employees who in fact did not work and did not want to work. Thus, the Company implies there are no appropriate monetary damages.

Although some arbitrators in cases involving improper work assignments have awarded monetary damages to workers who have been slighted but would not actually perform the work (*Celanese Fibers Co.*, 72 LA 271, 275 (Forster, 1079) as cited in M. Hill and A. Sinicropi, Remedies in Arbitration (1981) at 129-30), mainstream arbitral opinion is that monetary payments are primarily compensation for actual damages experienced by employees who were ready, willing and able to perform the work that was denied to them. This case, in my opinion, falls in the mainstream.

The Company's position that no monetary payment is due to Food Clerks rests heavily on the unwillingness of Food Clerks to work the shifts and hours, or to claim available hours in Section 10.5, needed to staff the Floral Department in the period leading up to and including Mothers' Day. Faced with their refusal, and the Company's desire not to grant overtime, it was impelled to turn to the reclassification of those Courtesy Clerks who volunteered. This defense

was briefly mentioned in the previous arbitration on liability but not discussed by Arbitrator Render.

To prove that Food Clerks were actually harmed by the Company's improper action, the Union has the burden to show convincingly that Food Clerks were, in fact, available to work the extra hours and wanted to work the extra hours needed by the Company. The record shows, however, that the Union did not meet that burden with regard to Courtesy Clerks Johnson and Shorty affected by the improper scheduling of Courtesy Clerks. However, that burden was met in the case of Mr. Schultz who was assigned to perform improper duties. The two types of cases, therefore, are addressed separately.

Scheduled Violations. The claim that the Food Clerks were unwilling to work the extra scheduled hours rests heavily on the testimony of Store Manager Antonson. He testified he failed to obtain volunteers among the Food Clerks, after approaching the Food Clerks individually and by posting a sign-up sheet for volunteers. He further testified that, because of his personal relationships with Food Clerks, and knowledge of their outside responsibilities, he felt he had no choice but to accept the offer of Courtesy Clerks to work. Moreover, there is no evidence that he sought in any way to influence Food Clerks from expressing their true preferences for hours that week. All in all, I find his actions were reasonable under the circumstances.

The Union attempted unsuccessfully on cross-examination to show that Mr. Antonson did not try hard enough to recruit volunteers among the Food Clerks. No other documentary evidence or testimony from Food Clerks was presented to show that Food Clerks wanted but were denied the opportunity to work a full schedule of 40 hours.

The Union also relies upon a portion of Arbitrator Render's Decision in which he

notes the opinion of the Union president that "there were several employees in the Food Clerk classification who would have been available to work in the floral department on a straight-time basis." (*Jt. Ex. 2* at 50.) The president's statement is accurate insofar as it describes the fact that several Food Clerks were scheduled to work less than 40 hours for the week, but is insufficient to show that any Food Clerk actually desired to perform the extra work. The testimony of Food Clerks declaring their willingness to perform the work is conspicuously absent from the record.

There is the sub-issue as to whether or not a Food Clerk could have claimed the hours of a temporarily promoted Courtesy Clerk. In one sense that issue is moot for no Food Clerk desired the hours. But in an attempt to return the situation to what it should have been but for the infraction, I have concluded the Food Clerks **desiring additional hours** could have claimed the scheduled hours of the temporarily promoted Courtesy Clerks. At that point, the practice of reclassifying Courtesy Clerks had not yet been ruled a violation of the CBA and the reclassified Courtesy Clerks met the requirements to have their hours claimed by more senior Food Clerks.

Another sub-issue is whether compensatory damages for a scheduling violation should be adjusted to reflect the actual number of hours the Courtesy Clerk performed the duties. Admittedly, the Company has presented evidence documenting that there are differences between the times Courtesy Clerks were scheduled to work out of their classification as per printed schedules and the number of hours during the workweek they actually performed those duties as per time sheets. (*Co. Ex. 12*). But the violation is one of improper scheduling, not improper assigning. Food Clerks were asked to work a particular schedule in the coming week with no way of knowing what might develop

during that week requiring a change to their schedule.

Next, there is nothing in the record to justify imposing punitive damages on the Company for this violation. For punitive damages to be justified, it must be shown that the violating party has acted in bad faith. While the Union refers to the Company's decision to use Clerks improperly as a "roll of the dice," implying that somehow the Company was acting opportunistically, hoping to get away with something, this characterization falls far short of the standard used by Arbitrators when bad faith is alleged. Because of the seriousness of the charge, bad faith must be shown through clear evidence that the Company acted either (a) knowingly and willfully to improperly utilize Courtesy Clerks; (b) unreasonably delayed the processing or adjudication of the grievance; or (c) acted in an arbitrary, capricious or discriminatory manner.

The record shows that the Company believed it acted out of business necessity with a good faith belief that it had the authority to reclassify Courtesy Clerks and to assign them temporarily to perform the duties of Food Clerks based on the Company's reading of the CBA and business necessities. The willingness of the Company on its own volition to direct store managers to obey Render's Award before being told to do so by an arbitrator in a second arbitration should be taken as evidence of the Company's good faith. The charge of bad faith behavior against the Company is not sustained by the record.

Assignment Cases. The case of Andrew Schultz is different with regard to the circumstances of the violation and, therefore, requires separate consideration.

Mr. Schultz was not scheduled to perform Food Clerk duties; as the Union says, he was assigned to do them at the store during a specific work day. Assigned duties are

by their nature *ad hoc*, are not anticipated, do not leave a paper trail, and may or may not entail the temporary promotion of a Courtesy Clerk. More importantly, there is no way to prove that a Food Clerk wanted or did not want to perform the task given to Mr. Schultz. In all likelihood, Food Clerks were never consulted prior to the assignment of this Courtesy Clerk. In such a situation, if credible evidence convincingly establishes that a Courtesy Clerk has been assigned to perform Food Clerk duties, then it is reasonable to assume that the work performed was at the expense of employees in another classification which, given the duties involved, means the Food Clerks'.

In assignment cases, the Union once again has the burden to prove that misassignment of work took place. Arbitrator Render in the first arbitration, who had the benefits of testimony from the grievant, concluded Mr. Schultz had in fact worked outside the duties enumerated in the contract but did not indicate the number of hours involved. (*Jt. Ex. 2* at 43 and 50.) Ms. Yazzie, at the second hearing, testified she was able to observe Mr. Schultz' activities and had observed him working at back-stocking and hanging tags for four hours on May 11, 2012.

The Company, in an effort to rebut Ms. Yazzie, seeks to deny responsibility for Mr. Schultz's behavior by claiming he had a habit of wandering the store, often stopping to assist a friend with her work. With the same objective, the Company points out that Ms. Yazzie, who claims to have witnessed Mr. Schultz hanging tags and back stocking, was herself preoccupied operating a checkout station at a busy time of the day. The store manager also testified whatever improper tasks Mr. Schultz may have performed that day were without his supervisor's knowledge or permission.

I find Ms. Yazzie's testimony more credible. It is based on direct observation,

while Mr. Antonson, as Mr. Schultz' supervisor, claims he did not personally observe Mr. Shultz working tasks that day, nor can he refute what Ms. Yazzie claimed she observed. But four hours is a long time for an employee in a grocery store to work at an improper task, neglecting his legitimate tasks as a Courtesy Clerk, without coming to the attention of management.

Some might see the four hours Mr. Schultz performed tasks outside of his classification as a *de minimis* violation of the CBA, too inconsequential to require a monetary remedy. But in the context of this collective bargaining relationship, and the history of this issue, the four hours (or one-half day's schedule) take on disproportionate significance in the minds of union members. The use of Courtesy Clerks has been an important issue in prior negotiations and the subject of several grievances involving ardent discussions. From the testimony of Company witnesses, it is reasonable to believe that this controversy will continue, since Arbitrator Render's Decision is seen as making it more difficult for the Company to utilize its staff flexibly and efficiently, according to Company witnesses.

Compensating Food Clerks after paying Mr. Schultz for doing the same work does not constitute awarding the Union punitive damages. Rather, this payment is in the spirit of making Food Clerks whole for the hours of work lost due to misassignment and is not intended as punishment or as a deterrent.

Accordingly, pursuant to the remedy requested in the grievance, Food Clerks on the basis of their seniority during the workweek in question should receive the appropriate additional wages and benefits for the four hours. The Union's request to augment the wage and benefit payments by an appropriate interest rate compounded

daily is denied. Interest is not usually included in make-whole payments, unless specifically required by the labor agreement or the unusual circumstances of the case. Neither is present in this case. As stated previously, punitive damages are not appropriate for this violation of the agreement.

Scope of the Grievance

It is undisputed that the Company continued the practice of using Courtesy Clerks to perform the duties of Food Clerks after Grievance 12-00062 until Arbitrator Render issued his Decision approximately 18 months later. The prospect of repeated occurrences raises the question of whether a monetary remedy is appropriate for repeated violations and, if it is appropriate, what should that remedy be. Another way of stating this is whether the scope of Grievance 12-00062 extends to include subsequent violations.

On that question, the Union states Grievance 12-00062 (seen as the original grievance) was intended "to cover all Farmington/Aztec stores for all hours wages and benefits going forward in the event a Courtesy Clerk is used by management to do duties out of their classification...until this issue is resolved." (*Jt. Ex. 1*.) Thus, from the Union's perspective, Grievance 12-00062 under the CBA was a valid grievance and a legitimate means of seeking monetary damages for future violations the Company was likely to commit. For its part, the Company claims the CBA requires that each future disputed act by the Company involving the misassignment of Courtesy Clerk duties must be addressed by filing a separate grievance.

Because labor arbitration is not meant to be as formal as a court of law, the technical requirements of grievances are usually less complicated than the rules

governing pleadings in a court of law. Yet, reasonable adherence to the technical requirements of a grievance process is important. Clarity and precision in grievances, it is believed, facilitates the voluntary settlement of workplace disputes. It is for this reason, arbitrators have generally enforced the technical requirements of the collective bargaining agreement unless there are strong mitigating reasons. (Elkouri and Elkouri, 7ed. *supra* at 5-11.) After reviewing the record, I conclude there are such mitigating reasons in this case, as discussed below.

To begin with, it is necessary to identify the variety of grievance represented by Grievance 12-00062. While the three individuals named in the grievance have been labeled at various times as the grievants, in fact, they are not the complainants in the case. The grievance was filed by the Union on behalf of Food Clerks – a group of bargaining unit members – who are seeking an end to practices they claim are costing them work. Therefore, Grievance 12-00062 meets the commonly accepted definition of a class action grievance. At the same time, because it seeks to cover future violations, the grievance is properly seen as a continuing-violation case, as well.

As a class grievance, the right of the Union to file such grievances is widely accepted by arbitrators (*Id*. at 5-19) and well within the meaning of Section 16.1's definition of a grievance as "Any and all matters of controversy, dispute or disagreement of any kind or character whatsoever existing between the Employer and the Union or Members of the Bargaining Unit...." (*Jt. Ex. 1* at 19.) The Company's reference to the decision in *Sanyo Manufacturing Corp*. denying class status because all potential grievants failed to sign the grievance is not relevant here, because there is no such requirement in the CBA concerning the initial grievance. The critical question is

whether, under the definition of Section 16.1, the Union can expand the class by claiming that the grievance applies to those bargaining unit members affected by future, similar violations.

A problem arises in Section 16.2 (b) which requires a grievance to specify certain technical requirements, including "the date, places and persons involved." If taken literally, this section bars the Union from filing a single grievance on any alleged violation that was discovered on a specific date but was likely to continue or be repeated until rectified. A new grievance would be required to be filed and processed every 15 days.

There is, then, a conflict between these two sections of the grievance procedure, of such significance that it is reasonable to believe that the Parties most likely never anticipated applying Section 16.2 (b) to cases in which the Company engaged in frequent use of a controversial practice over an extended period of time. The fact that one interpretation of Section 16.2 (b) was used by the Parties in prior years does not change the fact that more than one interpretation is possible as to how these two clauses are properly harmonized, when faced with the extraordinary facts presented here. A literal interpretation of Section 16.2 (b) could have served its original intention for years, if cases never arose involving a possible on-going violation, but that same interpretation may be inappropriate when faced with a different set of facts. In such situations, arbitrators look beyond the plain meaning of the words and the "four corners of the agreement" to resolve the ambiguity.

My analysis starts from the foundation that the ability to file a grievance is an important term and condition of employment in all labor-management agreements.

Essentially, it is the internal guarantee that the Parties will adhere to the rights and obligations contained in the CBA. Where there is a disagreement over the scope of the grievance process, the party asserting the narrower scope has the burden to prove by substantial evidence that theirs is the correct interpretation. Under the facts of this case, that burden falls upon the Company.

Typically, bargaining history is used to untangle an ambiguity. Unfortunately, neither party has included bargaining history of the grievance-arbitration provisions as part of its case. This leaves the Arbitrator free to use other extrinsic evidence and criteria.

Where bargaining history is not provided in a case, arbitrators look for evidence as to whether a past practice or custom exists in the way the Parties have interpreted the CBA. Custom and past practice have long been recognized by arbitrators as part of the whole agreement, under certain conditions. If such a practice existed requiring the Union to file each valid grievance by specifying the date, place and person, it would mean that the ambiguity in Section 16 would be resolved in the Company's favor. However, the party asserting the past practice or custom, according to established arbitral case law, must provide substantial proof that the custom or practice is (a) unequivocal, (b) clearly enunciated and acted upon, and (c) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. (Elkouri and Elkouri, *supra* at 12-2 – 12-5.)

There is the claim expressed by both Ms. Lastrapes and Mr. Pickel (the current and former Labor Relations Managers, respectively) that the Company "does not accept," and for more than 25 years, "never accepted" continuing-violation and class

grievances. By the words "never accepted," I interpret Ms. Lastrapes' and Mr. Pickel's testimony to mean that they are claiming the existence of an established custom or past practice that specifically excludes continuing-violation and class action grievances. But it also could mean that the Union never attempted to file such a grievance, or that no alleged violation of the CBA ever required the filing of such a grievance. Whatever the true situation has been, it falls upon the Company to convince the Arbitrator through the presentation of clear and convincing evidence that a practice or custom has existed to interpret Section 16.2 (b) in a particular way.

However, in the instant case, all the evidence dealing with the existence or nonexistence of a practice or custom concerning continuing-violation and class grievances comes from conclusory statements in the testimony of Company and Union witnesses. As indicated Ms. Lastrapes and Mr. Pickel testified the Company does not accept these classes of grievances and that the Union accepted this fact in its previous willingness to file a new grievance with each infraction; Union President Fraiser, who also speaks from many years of experience, answered "No" when asked, "Has the Company ever taken a position you (*the Union*) couldn't file continuing grievances?"

Also, while the Company claims the Union in similar cases previously had accepted the need to file multiple grievances to deal with on-going infractions, no documentary evidence of this history is presented by the Company. Ms. Lastrapes testified that in preparation for the hearing she had reviewed the Parties' grievance history and was basing her testimony in part upon this review. But she never presented any document summarizing the nature of this review or its findings so that it could be part of the Company's proof and subjected to examination by the Union.

The Union implies that there is an acceptance of continuing-violation and class grievances among bargaining units involving other Northern New Mexican retail grocery stores and the Union, all of which share similar technical requirements in their grievance processes, including the requirement a grievance identify the date, place and persons involved. Two Awards are introduced by the Union to show that arbitrators, operating under this requirement, have issued decisions supporting continuing-violation and class grievance claims by the Union against other Northern New Mexican retail grocery stores. (*Smith's Food & Drug Centers* and *Albertsons, LLC*. (*Co. Exs. 6* & *7*).)

Nonetheless, two awards dealing with the denial of pay or benefits are not similar enough to the case at bar to convince me that the Parties have consistently followed an area-wide/industry practice with regard to continuing-violations or class grievances.

Perhaps the strongest evidence of the way in which the Parties treat a continuing-violation grievance is the instant grievance itself. This case would not have been accepted by the Company, processed through the grievance procedure and brought before either Arbitrator Render or myself, if the Company adhered to the past practice it claims existed of not accepting either group or continuing-violation grievances. Both Ms. Montoya and Ms. Lastrapes state that neither the Union nor the Company discussed the remedy portion of Grievance 12-00062 during the pre-arbitration phase of the process, which is customarily the time a party raises objections to a grievance on either substantive or procedural grounds. No exchanged memoranda, nor exchanged notes of grievance meetings, nor other evidence indicates the Company objected to the Union's desired remedy before the grievance was brought to the first arbitrator.[1]

[1] The Company's Pre-Hearing Brief (*Co. Ex. 1* at 1) claims that "Shortly before the [*liability*] hearing, the Union attempted to expand the scope of the grievance by including unidentified allegations not contained in the grievance

Also, there is no evidence in the record that the Company has formerly raised the issue of arbitrability, or filed suit to obtain enforcement of its views about class action or continuing-violations grievances, in this or other similar cases, pursuant to its rights under the law.

The Company's explanation for the failure of the Parties to discuss the remedy during the processing of this and similar grievances was that the Union was primarily interested in stopping the practice and did not express concern about the remedy in those discussions. But the purpose of grievance meetings is to discuss the grievance as it has been written which, in this case, included a clear statement of the requested remedy. If it was concerned about the appropriateness of the requested remedy, the Company had the opportunity to put the Union on notice as to its opposition to a continuing-violation/group grievance.

Consequently, I must conclude the Company has failed to show by substantial evidence that its preference to "not accept" continuing-violation and class grievances did not reach the level of an unequivocal, clearly enunciated and readily ascertainable past practice.

Faced with the absence of bargaining history and inadequate proof of past practices, arbitrators have turned to other means for giving meaning to the terms of the CBA.

One approach is to favor that interpretation that is the most reasonable and sensible alternative, in light of the purpose of the contract provision in dispute and the facts of the case. The Company's argument that Grievance 12-00062 does not apply to future incidents because it fails to specify the date, places and persons involved, is useful for grievances dealing with current incidents but is an unreasonable and overly

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submitted to arbitration" and "the Company immediately objected." This is the only documented mention of this objection in the history of the grievance as it moved towards arbitration. It is not clear whether the Company is referring to the remedy specified in the original grievance or some other attempt by the Union to expand the scope of the grievance.

technical requirement for incidents that haven't yet occurred -- although are likely to. Requirements like those in Section 16.2 (b) are used in grievance processes to alert the employer of the union's complaint and to present sufficient facts so that the employer can mount a response. The identification of date, place, and persons involved makes sense when the Union is protesting a recent or current event, for which such information is available. By their nature, future incidents, were they to occur, cannot be described before they take place. Having been told of the Company's intent to continue the disputed practices until directed to do otherwise, it is reasonable for the Union to put the Company on notice of the Union's intent to redress reoccurrences of similar violations.

Moreover, requiring the Union to file a new grievance each time Courtesy Clerks worked outside of their classification, places the burden on the Union to document infractions. The Union has only limited ability and resources to identify violations going forward, relying as it does on the reports and observations of bargaining unit members. Company scheduling and time sheet/payroll records are indispensible in the effort to document the date, place, and persons involved in the alleged infraction. These are best acquired after the practice has ceased.

Requiring a new grievance for each alleged incident also would overburden and harm the grievance-arbitration system. The Company unfairly characterizes this added burden by claiming that all the Union had to do was type up a single sheet of paper for each grievance. This belies the amount of work that would have gone into the identification and investigation of each infraction, as well as the administrative time and expense of processing and possibly arbitrating each grievance individually – in 27 cases, according to the Union's preliminary estimate, or in as many as 40 cases, as estimated

by the Company – for practices taking place over 18 months. The number of new grievances could be considerably greater if the Union was obligated to file a new grievance every 15 days in order to keep its filings timely. The situation would be made harsher and less workable due to the Company's practice of never consolidating grievances, a practice Ms. Lastrapes, the Labor Relations Manager, confirmed on cross-examination. The upshot, I have concluded, would be a distressed grievance-arbitration system -- a condition that would make it more difficult for the Union to properly enforce the CBA and represent its members, while harming the amicable relationship that is the goal of all grievance processes.[2]

There remains the question as to whether the violations that took place after Grievance 12-00062 was filed are still timely under the CBA's 15-day statute of limitations from the time of discovery. Because the Union was not in a position to identify each of these infractions within that period and was relying upon having notified the Company of its objection to all future infractions, I am invoking the *doctrine of continuing-violations* in this case.

This doctrine states that time limitations on grievance filing can be waived where the same or similar violation has reoccurred but a grievance was not filed in a timely fashion because, among other reasons, the violations were not known to the Union. (See, Elkouri and Elkouri, 7ed, *supra* at 5-28 – 29.) The infraction in question, following Arbitrator Render's Award, is allowing and assigning Courtesy Clerks to perform work other than the 12 duties listed in the CBA.

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[2] Union witnesses testified to seeing Grievance 12-00062 as a new level of frustration in dealing with the Company's practice of improperly utilizing Courtesy Clerks out of classification. Whereas in the past the Company committed the infraction from time to time, they stated, it was now regularizing the problem by scheduling the Courtesy Clerks to do the work.

Each side has implied the other acted in bad faith with regard to extending the scope of the instant grievance. The Union claims the Company "rolled the dice" when it continued to reclassifying Courtesy Clerks or use them to perform duties outside of the Courtesy Clerk job classification. The Company accuses the Union of trying to "bootstrap" a complaint of violations in the week of May 12, 2012 into something much bigger. As stated earlier, because of the serious nature of the charge, substantial evidence is required to prove a charge of bad faith behavior. Neither the Union's nor the Company's accusations meets this standard.

Last, while the decision of the Company to continue the controversial practice was made in good faith, for approximately 18 months before Arbitrator Render's Decision, the Company received benefits not envisioned by the CBA from utilizing less expensive employees. The purpose of monetary damages, therefore, is to return the parties to the position they would have been in were it not for the proven infraction. Accordingly, the scope of Grievance 12-00062 covers possible infractions during the period beginning 15 days prior to the date the Union filed this grievance (as Arbitrator Render suggested (*Jt. Ex. 2* at 51)) and ending on the day of Arbitrator Render's Award.

In order to identify the specifics of each infraction, the Company is directed to provide to the Union, within 30 calendar days of this Award, a copy of all available paper and/or electronic work schedules and time/payroll sheets for all Courtesy Clerks and employees in all departments at the stores covered by the CBA for above-specified period.

Using these data and other information, the Parties will, to the extent possible, meet and confer to identify and agree on the instances in which Courtesy Clerks worked

out of their classification either by improper scheduling or misassignment of duties. For *scheduling infractions* payments, when justified, will be paid on the basis of seniority to the affected employees who were scheduled to work less than 40 hours during the week of the infraction and were able and willing to either accept a longer schedule or claim the additional hours. Compensatory damages for infractions involving *assignment violations* will be calculated only for those cases it can be shown through clear and convincing evidence that Courtesy Clerks improperly performed duties outside their classification; it should be assumed that employees in the affected classification could have performed the task performed by the Courtesy Clerk had the other employees been asked to do the work.

In framing the above remedy for the on-going violation, I have tried to make the Parties aware of the burdens that they will face in their offer of proof, should it be necessary to hold yet another hearing to adjudicate the Union's claims and the Company's defenses. Given the likely difficulty in identifying the number of infractions, the unavailability of witnesses and other evidence, as well as turnover among store managers, and in the spirit of ending this dispute quickly but fairly, the Arbitrator encourages the Parties to make every effort to reach a settlement once the records are made available without another hearing.

As Arbitrator, I retain jurisdiction in the event the Parties require clarification of this Award and should they encounter disagreements.

I have reached the above findings and conclusion based upon accepted standards of contract interpretations in arbitration and not the standards of equity. Considerations of equity are generally considered to be inapplicable in arbitration and are beyond my

authority to employ, according to Section 16.6. Furthermore, my findings and conclusions are based upon the evidence as presented with attention paid to all aspects of the case deemed relevant.

AWARD

Based on the findings and conclusions above, the appropriate remedy in this grievance consists of:

1. A cease and desist order prohibiting the Company from continuing to use Courtesy Clerks to perform work other than the 12 duties listed in Section 12.5 of the CBA.

2. With regard to the violations of the agreement during the week ending May 12, 2012, no compensatory damages are due Food Clerks for the improper scheduling of Courtesy Clerks to perform the work of Food Clerks, because the Food Clerks were not willing to work the schedules given to the Courtesy Clerks or claim the additional hours from the Courtesy Clerks.

3. Compensatory damages of four hours' pay plus benefits, but without adjustments for interests, are due the most senior Food Clerk or Clerks who were working at the time Mr. Schultz performed Food Clerk duties during the work ending May 12, 2012.

4. This grievance is a continuing-violation grievance whose scope includes all improper scheduling and assigning of Courtesy Clerks to perform duties other than the 12 listed in Section 12.5 of the CBA.

5. The coverage of this Award is for the period beginning 15 days before May 21, 2012, and ending the workweek containing November 4, 2013, in all stores covered by the CBA.

To implement this award, the Arbitrator orders the parties to perform the following:

1. Unless and until modified through future negotiations, the Company will adhere to its direction to store managers issued following Arbitrator Render's decision that the Courtesy Clerks are allowed to perform only the 12 duties listed in Section 12.5 of the agreement. Forthwith, the Company will re-communicate

this cease and desist order to store managers in writing either on paper or electronically and provide the Union with a copy.

2. Four hours' wages and benefits (without interest) will be allocated by seniority among the most senior Food Clerks or Clerks who had not worked 40 hours or more during the workweek ending May 12, 2012, as compensation for the improper assignment of Mr. Schultz.

3. Within 30 calendar days, the Company will provide the Union with all available records of Courtesy Clerk and other employees' weekly work schedules and time cards/payroll records, in all departments and in all stores covered by the CBA, for the period beginning 15 days before May 21, 2011 and ending with the workweek containing November 4, 2013.

4. The Parties are directed to meet and confer in order to identify instances of scheduling and misassignment of Courtesy Clerks to perform duties outside of that classification during the period of the continuing-violation, to calculate the dollar value of the compensatory damages, and to identify the employees who would receive extra compensation should the contract violation be proven.

5. The Arbitrator retains jurisdiction in this case to assist the parties with its interpretation and implementation of this Award, including an additional hearing, if needed.

Signed this 13th day of November, 2014, in the County of Santa Fe, New Mexico.

Myron Roomkin, Arbitrator