# ARBITRATION AWARD

In the matter of arbitration between

**SAFEWAY, INC.**

**AND**

**UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1564**

FMCS No. 13-50724-1
Grievance No. 12-00062

## APPEARANCES FOR THE COMPANY

Camille Torres, Vanessa Lastrapes, Gary Pickel
Wayne Antensen

## APPEARANCES FOR THE UNION

Shane Youtz, Greg Frazier, Corrina Yazzie
Andrew Schultz, Mary Ann Montoya, Eddy Eyer

## ARBITRATOR
## EDWIN R. RENDER

By the terms of the contract between **SAFEWAY, INC.,** hereinafter referred to as the Company, and the **UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1564,** hereinafter referred to as the Union, there is a grievance procedure including arbitration. Accordingly, the parties selected **EDWIN R. RENDER, LOUISVILLE, KENTUCKY**, as impartial Arbitrator. A hearing was held in **Farmington, NM**, on **August 29, 2013**. Equal opportunity was given the parties for the preparation and presentation of evidence on the issue of liability only. The parties submitted post-hearing briefs on **September 28, 2013.**

## THE ISSUE

During the hearing the parties stated the issue as follows: did the Company violate Section 12.5 of the contract by assigning the three employees in question to work outside their normal job classification during the week of May 12, 2012?

## RELEVANT CONTRACT PROVISIONS

Section 6.1 of the contract provides:

> *The management of the Company and the directions of the working force, including the right to plan, direct and control retail operations, to hire, layoff or relieve employees from duties, to maintain the discipline and efficiency of the employees and to require employees to observe Company rules and regulations, demote or discharge employees for cause, are to be the sole right of and function of the Employer.*

Section 6.2 of the contract provides:

> *The parties agree that the foregoing enumeration of management's rights shall not be deemed to exclude other functions not specifically set forth. The Employer, therefore, retains all rights not specifically covered in this Agreement.*

Section 9.1 of the contract provides, in part:

> *. . . It is understood that the Employer may, from time to time, require employees to work beyond their scheduled ending time. Notwithstanding, the Employer shall not administer this provision in an*

*arbitrary or capricious manner and shall excuse employees from working beyond their scheduled ending times for legitimate and serious reasons, such as, but not limited to, child care obligations.*

Section 10.5 of the contract provides:

*Available Hours. The scheduling of part-time employees (or full-time employees working reduced hours) shall be by seniority within their store, classification and department, up to eight (8) hours per day or forty (40) hours per week. In accordance with the above, the Employer shall maximize the straight-time (including Sundays) daily and weekly work schedule of each employee based upon the available hours as determined weekly by management.*

*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. If an employee is zeroed out, he or she shall have the right to exercise layoff options. However, any bump to another store shall be delayed for one week.*

Section 12.5 of the contract provides:

*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 with such cleaning duties.*
*11. Courtesy Clerks may face shelves in dry grocery only, except for baby foods (no code 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 12.6 of the contract provides:

*When an employee is required to fill the place of another employee receiving a higher rate of pay, he shall receive the higher rate; but if required to fill the place of an employee receiving a lower rate of pay he shall retain his own regular rate except in the case of actual demotion, when the employee shall receive pay according to his classification, after thirty (30) days of work in a higher or lower position, the position shall be considered permanent.*

## THE FACTS

Prior to the hearing, counsel for both parties and the Arbitrator held a conference call. Prior to that conference call the Company submitted a copy of the grievance to the Arbitrator. The grievance states:

> Please be advised that the Company is in violation of, but not limited to, Section 12 (Classifications) of the Safeway Farmington/Aztec Retail CBA. On May 9, 2012 and week-ending May 12, 2012 the Union was advised and witnessed Sandie Johnson and Jaron Shorty working and scheduled in the Floral Department at Store #683. The Union was also advised that Mr Andrew Schultz was working back stock and hanging tags in General Merchandise Department. All three employees are Courtesy Clerks. In the Safeway Retail CAB 12.5, the definitions of a Courtesy Clerk are defined. The duties they shall perform are only as listed in Section 12.5. On may 10, 2012 the Union attempted to address this issue with Mr. Wayne Antonson and Mr. Antonson was unavailable. This is an ongoing issue previously addressed with Mr. Antonson and this issue remains unresolved.
>
> The Union is requesting a copy of the Food Clerk's, Courtesy Clerk's and the Floral Department's work schedule for week-ending May 12, 2012. In addition, the Union is requesting a copy of the above referenced Courtesy Clerks' payroll records for week-ending May 12, 2012.
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> 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 resovled. That management at all Safety Farmington/Aztec stores cease using Courtesy Clerks to do duties out of their classification as outlined in Section 12.5 of the 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 of their classification as outlined in Section 12 of the Safeway Retail CBA until this issue is resolved.

During that conference call the Company took the position that the grievance was limited to work performed by three named employees outside of their job classification of Courtesy Clerk. The Company stated it was not prepared to defend any other alleged contract violations. The Union contended that the grievance covered "all Farmington/Aztec stores for all hours, wages and benefits going forward . . .". This language was contained in the Remedy portion of the grievance. The Arbitrator informed the parties the hearing would be limited to the three individuals named in the grievance. The Arbitrator also informed the parties that he would not hear any proof on remedy during the August 29 hearing. This was acceptable to the parties.

During the hearing on August 29, 2013 the Union presented evidence that the three named employees in the grievance, Sandie Johnson, Jaron Shorty and Andrew Schultz, performed work that was not within the limits of Section 12.5 of the contract. Ms. Yazzie is a cashier at the Farmington store.

She works at a cash register checking out customers. Normally a bagger or courtesy clerk works with her bagging groceries at her work station. She said courtesy clerks normally bag groceries at cash registers, clean up and perform other functions. She said it has been the practice at this store for courtesy clerks not to perform work outside of their defined classification. In very general way she said this took away wages and benefits from other employees.

She testified that Sandie Johnson was classified as a courtesy clerk. She said she witnessed Ms. Johnson working in the floral department on three days during the week ending May 12, 2012. She testified Ms. Johnson set up the table, made floral arrangements and put flowers on the floor. She also testified that Jaron Shorty, a courtesy clerk, also worked outside his classification. He also worked in the floral department that week. She said he brought flowers from the back of the store to the floral display area. She said he did both courtesy clerk and floral department work during this period. Ms. Yazzie said when she needed a courtesy clerk to, for example, bag groceries, he would do that and then go back to the floral department and fill balloons or perform other floral department work. She also testified that Andrew Schultz was a part-time courtesy clerk. She said she witnessed him removing expired tags from shelves and extending tags. These tags are on shelves advertising

that a particular item is on sale. Such sales have an expiration date, necessitating the removal of the tags from the shelves when the sale ends. The parties referred to the process of removing these tags as "pulling tags" and putting up new tags as "hanging tags."

On cross-examination Ms. Yazzie testified that she also saw Mr. Schultz doing courtesy clerk work that week. She indicated when the store gets busy, store employees who are not in the bargaining unit, such as managers and assistant managers, help bag groceries. She also said she worked forty hours during the week ending May 12, 2012.

Mr. Schultz testified for the Union. He has been a courtesy clerk five years. He testified he had been asked to stock shelves, hang tags and pull tags. He said he did some of this type of work during the week ending May 12, 2012. On cross-examination he acknowledged that he really did not have specific memories concerning the week of May 12.

Sandie Johnson is currently classified as a food clerk. She testified that she had previously been a courtesy clerk. She was promoted in November, 2012 to the food clerk classification. She stated that in May, 2012 she worked in the floral department for five days. She also said she did not do any courtesy clerk work during that period. She said she made arrangements, ordered flowers and helped customers. She also testified about other work

outside the courtesy clerk classification she did, such as working in produce and breaking down packages. She said food clerks normally work in produce. She also testified about the wage rates in these two classifications. The courtesy clerk pays $7.50 an hour, and she said she made $8.75 and hour as a food clerk.

Mary Ann Montoya has been a service representative of the Union since 2009. She is the author of the grievance. She testified that during the week ending May 12, 2012, she saw some of the courtesy clerks doing work that did not fall within their job classification. She saw courtesy clerks working in the floral department and was told by someone that Mr. Schultz was hanging tags. She also saw a courtesy clerk shelving non-food items. She said at this time she talked to the store manager. She explained that all of the employees other than the courtesy clerks receive pension and health care benefits as part of their pay. She explained the grievance was filed because people in classifications other than courtesy clerks were deprived of the opportunity to work in their own classification.

On cross-examination she was asked about the filing of two other grievances involving the same issue. She said she did not recall seeing Mr. Schultz hanging tags during the week of May 12. She acknowledged he was not on the schedule to hang tags any time that week. She also stated full-time

employees are guaranteed forty hours per week. If the Company calls an employee to work, it is required to work them at least four hours that day.

Eddy Eyer also testified for the Union. He is a former president of the local and has been a Union official since 1968. He testified about negotiating contracts as far back as 1982. He testified that the description of the limitations on the work a courtesy clerk can do is designed to preserve the integrity of the bargaining unit. He acknowledged that courtesy clerk was not a high-paying job but stated on most occasions these were temporary jobs with a great amount of turnover.

He also testified about the negotiation of the 1998 contract. In these contract negotiations, the Company had as a priority item reducing or minimizing the increase of its labor costs. It was facing competition from other grocers such as Wal-Mart. He testified that the Company made a proposal to modify Section 12.5 of the contract to read, "A courtesy clerk is an employee who may perform any of the following duties." This proposal was rejected by the Union. Another change proposed by the Company in Section 12.5 was that "any other duties not expressly reserved herein to any other classification of employment" could be done by the courtesy clerk. The Union also rejected this proposal.

Mr. Eyer testified about a memorandum he distributed to the employees urging them to vote against a draft of the contract, alleging one of the Company proposals would allow courtesy clerks to perform any duties in the store, including checking, stocking and other "food clerk" duties. His memorandum stated: "The effect of this proposal could be drastically reduced hours for all 'food clerks.'"

Gary Frazier, the Union President, also testified. He said the courtesy clerk is an entry-level position. There is much turnover among the courtesy clerks. He said the word "only" has been in Section 12.5 of the contract since 1998. He testified the Company had never claimed the right to use courtesy clerks to do work other than that specified in Section 12.5. He also emphasized that Section 12.5 contains a "reopener." However, the Company has never asked to reopen the courtesy clerk issue so as to allow them to do other work. It is to the Company's advantage to have the courtesy clerks do as much work as possible because they do not accrue pension benefits, nor are they on the Company's health insurance policy. He noted Mr. Shorty was actually scheduled to work in the floral department, which is a food clerk position. He said courtesy clerks should not be allowed to work in the floral department. He also noted that Section 8.5 of the contract permitted the

Company to schedule overtime. He said Ms. Johnson was scheduled to work outside her classification during the week in question.

Mr. Frazier testified in some detail about Company Exhibit 3, which included the schedule of the courtesy clerks the week ending May 12, 2012. Jaron Shorty was scheduled to work three days in the floral department, and Sandy Johnson was scheduled to work two days in the floral department and four hours in produce. Mr. Frazier testified that Company records indicated some regular employees did not work five eight-hour shifts that week. It was his opinion that it would have been practical for the Company to have had food clerks perform all of the work performed by the courtesy clerks that week.

Vanessa Lastrates testified for the Company. She is the Manager of Labor Relations for the Denver division, which includes the store in question. She has been involved in labor contract administration for many years. She testified that the Company regularly works people out of their classifications. The Company uses courtesy clerks wherever there is an operational need. It is not the practice of the Company to promote an employee to fill a temporary need.

In particular, she testified it was necessary to work the three courtesy clerks outside of their classification during the week of May 12 because of

the increased business resulting from the Mothers Day holiday. The floral department in particular was much busier than usual. When asked about the Union's allegation that courtesy clerks do nothing outside of their classification without being promoted, she said she disagreed. She said the Company can assign courtesy clerk work outside the specific duties listed. She relied on Section 6, the management rights section, and Section 12.6 for management's authority to do this. She said the Union has never negotiated pension and health benefits for employees working out of their classification such as the courtesy clerks do. Courtesy clerks are paid at one rate, while all other classifications have step increases. She explained why Sandy Johnson was paid $8.75 per hour as a food clerk. She acknowledged that two of the courtesy clerks did food clerk work in the floral department during the week ending May 12. She also said that had a senior clerk wanted any of the work the courtesy clerks did during this week, they could have claimed it under Section 10.5 of the contract. She testified she did not recall any settlement of earlier grievances with the Union over this issue, and had it happened, it would have been done on a non-precedent setting basis.

Ms. Lastrates testified the Company does not schedule employees to work overtime. The Company seeks to avoid working employees more than forty hours per week. She said it would have been a bad business to have

worked any employees overtime during the week of May 12. She said many of its employees have other commitments at the ends of their shifts, such as school, childcare and the like, so the Company is reluctant to force employees to work overtime. The Company does post a volunteer list for overtime, but no one volunteered this week. She said on this occasion there was an increased workload in the floral department, as was evidenced by two employees blowing up balloons for substantial periods of time.

She also said the Colorado contract has a provision for "temporary advances," but the New Mexico contract does not. She reiterated that the Mothers Day holiday was the reason the Company worked the courtesy clerks out of their classification. She said this is a recurring event on days leading up to holidays. She said other people who are not in the courtesy clerk classification did not work forty hours the week of May 12.

Mr. Pickel, a retired Labor Relations Division Director, testified that he was a Company representative in the 1998 contract negotiations. He testified that the Company proposed the contract be revised to read "a courtesy clerk is an employee who may perform any of the following duties," as well as "any other duties not expressly reserved herein to any other classification of employment." He agreed that this language was not included in the contract. He also testified the Company did not agree that courtesy clerks could not do

any other work other than the items specified in Section 12.5. He said the Company retained the right to assign courtesy clerks to work outside the duties specified in Section 12.5 of the contract. He said his notes from the bargaining sessions contain no reference to Section 12.5 of the contract. He did not consider the 1998 contract to be a "watershed" development insofar as the courtesy clerks were concerned.

He also said his notes of these contract negotiations do not reflect he was present on December 16. He said the changes to Section 12.5 were not overly important to the Company. He said he would have had notes on any significant changes. He testified Section 12.5 did not change the Company's right to assign courtesy clerks outside of their classification. To so restrict them would have been a major change. The 1998 contract did not result in restrictions being placed on the courtesy clerks to work outside of their classification.

On cross-examination he said the courtesy clerk is the only classification that has any restrictions on what the employees in that classification can do. All of the other job descriptions are worded differently.

Wayne Antenson is the Store Manager of the Farmington store. He testified that just before Mothers Day the floral department became very busy. Normally the department does $700 to $900 per week. The week ending

May 12 it had approximately $2,200 in business. Normally the Company assigns twenty man hours to the floral department. That week it needed 200 man hours to cover the department. He said he put up a notice asking for volunteers to work overtime. He said the Company does not have a policy of forcing employees to work overtime, and most of his employees have other commitments.

He admitted he allowed employee Schultz to hang tags from time to time. He said he schedules hours to hang and remove tags based on the tag counts. The number of tags that need to be put on and taken off shelves varies greatly from week to week, thus necessitating at times the need for more people to do this work. He also said absenteeism creates a domino effect in the store. He said he never assigned Mr. Schultz to stock shelves.

On cross-examination he conceded he scheduled 72 hours in the floral department the week of May 12, not 200. He said it is Company policy to maximize the hours of the full-time employees. This is required by Section 10.5 of the contract. He also said he attempted to accommodate the outside needs of his employees in scheduling work which caused the need to work the courtesy clerks outside of their classification from time to time. On redirect he said on the week ending May 12 he offered the work in the floral

department to all of the food clerks in the store, and apparently they all declined it.

## POSITIONS OF THE PARTIES

### Position of the Union

The Union states that the Company's basic position is that the courtesy clerks should be a substitute for every position in the store. The Union contends the contractual definition of the position of courtesy clerk should be read and applied as it is written, that the courtesy clerk shall perform only designated tasks.

Next, the Union describes the position of courtesy clerk in the grocery industry. It is an entry-level position. It is not a career position. The employer does not provide health insurance or retirement benefits to courtesy clerks. No one remains in this position throughout his career.

According to the Union, the Company and the Union "struck a fair bargain" when they agreed to allow the Company to hire cheap labor with the understanding that the Company would not abuse this concession by allowing those in that classification to perform work outside the defined classification. Today, the Company seeks to circumvent that bargain. Section

12.5 of the contract defines and limits the duties of the courtesy clerk to the following:

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 with such cleaning duties.
11. Courtesy clerks may face shelves in dry grocery only, except for baby foods (no code checking).
12. Fill ice bins.

Section 12.5 also gives the Company the right to bargain about any restrictions on the courtesy clerk during the term of the Agreement.

Next, the Union summarizes the facts testified to by the Union witnesses regarding work done by courtesy clerks during the week of May 12, 2012 that was outside the defined scope of Section 12.5 of the Agreement. The Union quotes the remedy requested in the grievance in its brief.

The Union next notes the Company denied violating the contract and attempted to suggest that the courtesy clerks were the only employees available to perform the disputed work on the week in question. The Union notes that the Company's testimony was neither specific nor credible. The store manager testified the week was unique because it was the week leading up to Mother's Day, and there was extra work in the floral department. It was claimed the Company needed 200 hours of work in the floral department. However, employees of the Company only worked 70 hours in the floral department during that week. The Union President went through the work schedule of the week in question and established that employees who were not courtesy clerks were not scheduled to perform work in the floral department despite the fact that they were available to do the work during the shifts in question.

The Union contends the facts relating to this arbitration are only in dispute in regards to small details and damages. The employer actually conceded that employees classified as courtesy clerks routinely perform work beyond the limitations of their classification. The Union offered testimony of several courtesy clerks who testified that they performed work not included in their job descriptions. The legal argument made by the Union is that "the language chosen by the parties in their collective bargaining agreement demonstrates explicitly that the parties intended to limit the labor costs of courtesy clerks on the condition that employees who are courtesy clerks also be subject to 'courtesy clerk restrictions.'" Section 12 of the contract is the classification article in which the parties outlined and defined the job classifications in this bargaining unit. As regards courtesy clerks, the parties agreed to the following definition: "A courtesy clerk is an employee who shall perform only the following tasks . . .". This sentence is clear. It applies only to courtesy clerks, and it states how their employment is defined. They are an employee who can only perform certain tasks, and that is the scope of their employment. The Company's attempt to use them to perform other work violates this provision of the contract.

The Union also notes the parties did not choose a phrase which simply limits the work to be performed by courtesy clerks. They did not choose

language like, "Courtesy clerks shall perform only . . .". Rather, the parties phrased the language to identify certain employees as courtesy clerks first. This distinction is significant. Parties identified a certain group of employees as employees who should be treated as courtesy clerks in certain important respects. These limitations were intended to benefit both the Company and the Union. The Company now seeks an interpretation of Article 12 which would destroy that mutual benefit in favor of a reading that upsets a delicately negotiated balance.

The Union argues other provisions of the classification article support the theory that the parties did not negotiate courtesy clerks to serve somehow as all-purpose clerks throughout the store at the Company's discretion. The courtesy clerk definition contains a reopener which his not typical of any other classification in the contract. The existence of the reopening language makes it clear the parties were serious about limiting the work performed by courtesy clerks. The Company did not dispute that these limitations were the subject of intensive negotiations. The parties agreed that courtesy clerks worked as employees subject to courtesy clerk restrictions. The Company reserved the right to change these restrictions through negotiation. Furthermore, it is significant that the reopening language contained in the courtesy clerk classification clearly recognizes that employees who are

courtesy clerks are subject to courtesy clerk restrictions. Similar language is not found in any other job classification in the bargaining unit.

The Union's position in this dispute is also supported by the parties' agreement regarding the benefits provided to bargaining unit positions. Every employee in the bargaining unit, except the courtesy clerks, is eligible to participate in the parties' health insurance program. This obligation is substantial. The Company is required to contribute up to $586 per month for every full-time employee except the courtesy clerks. Every employee working in the bargaining unit except the courtesy clerks is eligible to participate in the Company's defined benefit pension plan. This obligation is not insubstantial either. The Company is required to contribute up to $.98 per hour for every full-time employee except courtesy clerks.

Both the fact of the courtesy clerks' exclusion from these benefits and the language chosen by the parties to exclude courtesy clerks demonstrates the parties' intention that employees who are courtesy clerks are treated differently, both in benefits they receive and in the scope of work they may perform. This is why employees who are courtesy clerks are limited only to the duties identified by the parties in the Agreement. The Union contends that the Company argues employees who are courtesy clerks are not really employees who are courtesy clerks, but rather are simply employees who

can fill any position on a given day. However, the contract does not treat courtesy clerks like any other employees in the bargaining unit. If a general merchandise clerk fills the place of a utility clerk for a day pursuant to Section 12.6, the Company is not relieved of its benefit obligations to that employee and must still make health and welfare and pension contributions for those hours worked. This was clearly an accommodation made by the Union to allow the Company to insure operational efficiency.

The parties explicitly refer to certain employees as courtesy clerks in the benefit language, making it clear that these employees are not eligible for benefits. The parties agreed that those employees who are courtesy clerks are subject to a unique set of limitations. The fundamental nature of the bargain is apparent in the balance the parties agreed upon: the employer may use extremely cost-efficient labor (no benefit contributions) on the condition that it limit the use of this labor (the courtesy clerk restriction). The Company is seeking to have the Arbitrator enforce the limitations which aid the Company and at the same time ask that the limitations benefiting employees not be enforced. The Company is asking the Arbitrator to destroy the *quid pro quo* carefully negotiated by the parties to provide the benefit of the bargain only to the Company. The unfairness and contractually absurd nature of the Company's position is ultimately revealed in what it asks the

Arbitrator to do: treat courtesy clerks as courtesy clerks where it helps the Company, but treat them like any other employee where it does not help the Company. This was not the parties' agreement.

Next, the Union argues the parties' bargaining history supports the contractual interpretation limiting courtesy clerks' benefits, as well as the scope of their work. The bargaining history of the parties demonstrates long-time friction and accord on the work limitations of the courtesy clerks. As early as 1984, the parties reached an agreement on the role of the courtesy clerks at the Company's stores in northern New Mexico. The language of that agreement stated, "A courtesy clerk is an employee limited to the following duties." Mr. Eyer presided over the negotiations of successor agreements for nearly 20 years as the Union's President. He testified that the limitations placed on the courtesy clerks were by agreement, and it was understood during his career that the limitations prevented the Company from using courtesy clerks to perform any other work in order to preserve the hours of work for those employees who had chosen to make a career in the grocery industry.

The issue of the courtesy clerks came to a head again in 1998. The language limiting the duties of courtesy clerks was not made more permissible. It was actually made more restrictive. In October, 1998 the

Company proposed significant changes in the courtesy clerk provision of the contract. That proposal removed the language limiting the scope of the work that courtesy clerks could perform. (Union Exhibit 6). Mr. Eyer prepared and distributed a communication to the bargaining unit members. It read in part, "Here is what Safeway is trying to do to you in the 1998 contract negotiations . . . allow courtesy clerks to perform any duties in the store, including checking, stocking and all other 'food clerk' duties. The effect of this proposal could be drastically reduced hours for all food clerks." Company witness Pickel agreed with Mr. Eyer's interpretation of these negotiations.

The Company lost that fight in 1998. The final agreement between the parties contained restrictions on the work that the courtesy clerks could do. The language also stated, "A courtesy clerk is an employee who shall perform only the following duties."

In 2013, the Company proposed contract language that would allow courtesy clerks "to perform any duties in the store." The Union did not agree to this, and the contract language remained as it has been. The Company's interest in controlling its labor costs is governed by the parties' Agreement, and the Arbitrator should enforce it as written.

By way of remedy, the Union requests the Arbitrator enter an order as follows:

*Finding that the Employer violated Section 12.5 of the parties' collective bargaining agreement by directing Sandie Johnson, Jaron Shorty and Andrew Schultz, who were "employees who shall perform only the following duties . . ." to perform work outside of the courtesy clerk restrictions during the week ending May 12, 2012.

*Finding that the Employer's violations of Section 12.5 of the parties' collective bargaining agreement for the week of May 12, 2012 and thereafter to the present are subject to proof as will be shown in a second arbitration to be scheduled at the parties' convenience.

*Directing the Employer to immediately cease and desist such violations and limit the work of employees who are courtesy clerks to the limitations identified in the parties' collective bargaining agreement.

*Whatever other relief the Arbitrator deems appropriate.

**Position of the Company**

According to the Company, the issue is "did the Company violate Article 12.5 by assigning the three named Grievants to work outside their normal job classification during the week ending May 12, 2012?" The Company begins by noting the sole grievance before the Arbitrator is Grievance No. 12-00062 dated May 21, 2012. The grievance identifies three Grievants: Sandie Johnson, Jaron Shorty and Andrew Shultz. It also describes the action complained of, together with the dates on which the alleged violations occurred. The Company contends the Arbitrator must not review or opine on any other issue, as such issue would not be within his jurisdiction.

Safeway Labor Relations Manager Lastrapes testified that the Company does not dispute that Johnson and Shorty normally worked in the courtesy clerk job classification. Likewise, it does not dispute that Johnson and Shorty were assigned to work outside their normal job classifications as food clerks for several shifts during the week of May 12. The Company argues it has long possessed the contractual right to assign an employee to work outside of his normal job classification. According to the Company, the only limitation on this right is the requirement that it not reduce the temporarily assigned employees below their normal wage rate or pay the temporarily reassigned employee the higher rate if assigned to a higher classification.

During the week ending May 12, the Company temporarily assigned courtesy clerks Johnson and Shorty to work as food clerks in store #683. Mr. Antonson, the store manager, explained this was the week preceding Mother's Day. The store experiences its highest sales volume of the year during that week. He has done the same thing in the past. His procedure is to post by the time clock two to four weeks before Mother's Day a notice seeking volunteers to work in the floral department during the week preceding Mother's Day. This posting normally does not produce sufficient volunteers, so he solicits employees who are willing to work extra hours. However, he does not force employees to work overtime. The floral department schedule confirms that Johnson and Shorty were scheduled to work several shifts in the floral department that week.

With regard to Mr. Shultz, the Union charged that during the week ending May 12 he worked outside his classification hanging tags and performing back stock work, both of which are food clerk duties. The Company contends the Union's allegations are not substantiated by credible evidence. The Union called Mr. Shultz, who could not confirm whether he was scheduled to hang tags the week ending May 12. The Union also presented the testimony of Ms. Yazzie, who testified she observed Mr. Shultz pulling expired tags and replacing them with new tags. A review of the schedules for

the week ending May 12 does not support Ms. Yazzie's testimony. The schedules indicated Ms. Yazzie was assigned to hang tags that week. The schedule also shows that "Corrina B Y" was assigned to hang tags on May 6 and 10, and "Marsha L B" was assigned to hang tags on May 9. The schedule shows Mr. Shultz assigned to work as a courtesy clerk on May 7, 9, 10 and 11, but does not show him assigned to hang tags any day that week. Both Yazzie and Shultz testified that employees only hang tags early in the morning. Mr. Shultz worked from 2:30 p.m. until 6:30 p.m. every day he worked that week.

In regard to performing back stock, Mr. Shultz did not testify that he ever performed back stock work, let alone performed back stock work during the week ending May 12. Mr. Antonson testified that while he may schedule Mr. Shultz to stock shelves, he would never assign Mr. Shultz to work back stock. Finally, the schedule does not indicate Mr. Shultz was scheduled to work back stock any time during the week ending May 12.

The Company concedes Johnson and Shorty were temporarily assigned as food clerks in the floral department that week. While Shultz may have hung some tags or stocked shelves at other times, the Union failed to present sufficient evidence that he performed such the week in question.

Article 6 of the contract states that "the management of the company and the directing of the work force . . . are to be the sole right and function of the employer." Section 6.2 expands management's rights to include "all rights not specifically covered in this Agreement," except that "the exercise of the foregoing rights shall not alter any of the specific provisions of this Agreement." At issue in this case is the Company's right to assign an employee to work out of his or her normal classification. Article 6 specifically enumerates management's right to assign work outside an employee's normal classification pursuant to its right to direct the work force. Furthermore, Section 6.2 reserves to the Company all rights not specifically covered in the Agreement.

Section 12.6 of the contract requires that the Company pay an employee his current rate if assigned to a lower classification or to pay the employee the higher rate if assigned to a higher classification. Ms. Lastrapes explained how this provision is applied. All of the Grievants fall within the Schedule of Wage Rates found in Appendix A of the contract. Courtesy clerks are paid $7.50 an hour with no wage progression. Food clerks start at $7.50 per hour and move up to $7.60 per hour after working 1,040 hours as a food clerk, and to $7.70 after another 1,040 hours in that classification and so on. When a courtesy clerk is temporarily assigned to work as a food clerk,

the employee receives credit for food clerk hours worked toward the progression. Thus, when a courtesy clerk has worked 1,040 hours in the food clerk classification, that clerk would begin receiving $7.60 an hour whenever temporarily assigned to the food clerk classification. This is why Ms. Johnson was paid $7.60 per hour when she worked as a food clerk during the week ending May 12.

Next, the Company analyzes Section 12.5(a) of the contract. This section sets forth a list of duties that are part of the regular duties of a courtesy clerk. The Union's argument misses the point, according to the Company. Lastrades explained that Safeway is not taking the position that the Company can add the duties in question to the courtesy clerk job classification. The Company acknowledges that those duties are food clerk duties and cannot be added to the courtesy clerk job classification unless the Company followed the procedure set forth in Section 12.5(a). However, neither Section 12.5 nor any other contractual provision restricts the Company's right to assign employees to work outside their classification. That is exactly what happened with the three Grievants during the week ending May 12.

The Company notes the Union argues that Section 12.5(a) states that courtesy clerks shall perform only the following duties," and then follows a list of twelve duties. The Company agrees that it cannot unilaterally add duties

to the courtesy clerk classification. The Company did not do that in this case. The Union also repeatedly and incorrectly asserted that only the courtesy clerk job classification includes a list of duties. Article 12 defines the various job classifications covered by the Agreement, including courtesy clerk, general merchandise clerk, customer service clerk, bakery clerk, utility clerk and file maintenance clerk. With the exception of the clerk and the file maintenance clerk, every job classification includes a specific list of duties to be performed by that classification.

Next, the Company analyzes the parties' bargaining history. As far back as 1984, the contract contained a list of duties that could be performed by courtesy clerks. Section 11.5 of the 1984 Agreement stated that the courtesy clerks were "limited to the following duties." In the 1984 contract, the management rights clause was the same as the current management rights clause giving the Company the express right to direct the working force and reserving all rights to management except those specifically abridged by the Agreement. That Agreement also required the Company to pay employees assigned out of their classification the higher rate of pay of the classification to which they were assigned.

The Union relies on changes to Section 12.5 resulting from the 1998 contract negotiations. Mr. Pickel testified about the 1998 negotiations. He

was the Company's Manager of Labor Relations. Mr. Pickel testified about the proposed changes to Section 12.5 in 1998. The 1995 Agreement contained a list of duties for the job classifications of junior clerk and general merchandise clerk. The management rights clause was the same as it had been since 1984. So was the language dealing with the rate of pay for employees working out of their classification.

Mr. Pickel stated the Company's initial proposal sought to change the list of eight courtesy clerk duties to eleven. This change did not impact management's right to assign employees to different classifications. The Company summarized the purposes of its proposal as follows:

> (1) to bring old language current to the duties actually being performed by the courtesy clerk job classification; (2) to add a provision allowing Safeway to assign any job duty to the courtesy clerk job classification if said duty was not "expressly reserved herein to any other classification of employment; and (3) to provide Safeway added flexibility in assigning job duties to the courtesy clerk job classification by changing the language from "limited to performing the following duties" to "may perform the following duties."

The Company withdrew its proposal to add duties not reserved to any other classification on November 16, 1998. On December 16, it also withdrew the change to the language from "limited to performing" to "may perform." The

language ultimately agreed to was "a courtesy clerk is an employee who may perform only the following duties . . .".

Mr. Pickel explained the objectives of the Company's proposal. It did not achieve them. This kind of "dance" in contract negotiations is not unusual. That this happened was "nothing to write home about." Both Mr. Pickel and Mr. Eyer testified that the parties never discussed the 1998 changes to Section 12.5(a) and the changes occurred on paper alone. The Company contends the Arbitrator should not take the Union seriously on this point because employers and unions do not make major substantive changes to contractual rights without any discussion whatsoever.

The Union called Mr. Eyer to testify about the bargaining history in 1998. The most significant aspect of his testimony was that Section 12.6 did not apply to employees working in the courtesy clerk classification. Section 6 confirmed the Company's right to assign employees outside their job classification so long as it paid them the proper rate of pay. His testimony that Section 12.6 does not apply to courtesy clerks is simply not supported by any evidence. Furthermore, no additional limitation on management's right to direct the workforce by making temporary assignments is found in that Agreement.

The Company also argues that Union Exhibit 10 introduced by Mr. Eyer is inaccurate in that it suggests the Company made a proposal to change some of the duties of food clerks which it never did. The Company argues this piece of propaganda is not relevant.

The Company argues the most important parts of Mr. Eyer's testimony are those in which he agrees with Mr. Pickel's testimony. For example, Mr. Eyer confirmed that Safeway proposed to increase its flexibility in assigning work to courtesy clerks. They agreed that the 1998 negotiations did not change management's right to run the business.

Mr. Eyer also testified his only concern in 1998 was a Company effort to diminish the food clerk bargaining unit. Ms. Lastrapes testified her investigation into this grievance confirmed that the assignment of the Grievants to the work as food clerks did not reduce the hours of any food clerks. Her testimony was corroborated by Mr. Antonson. Section 10.5 of the contract allows a senior employee to claim any hours of work in his store and classification for which he is qualified as long as that claim does not reduce any employee's schedule below the weekly minimum. This right existed during the week of May 12, 2012. No food clerk claimed the hours worked by any of the Grievants. The Union failed to prove that any food clerk desired to perform the work in dispute.

The Company argues the Union carries a heavy burden of proving that the contract restricts the Company's right to assign employees to work outside their normal job classification. Archer Daniels Midland Coal, 111 LA 518 (Pratle, 1998). The Arbitrator's duty is to interpret the contract to reflect the intent of the parties. The intent of the parties is discerned through "the express language of the contract and, if it is ambiguous, bargaining history and past practice." If the contract language relied on by the Union is ambiguous and each party has submitted equally convincing external evidence, the Union has not met its burden of proof. The Company contends the Union has failed to meet its burden to prove the action taken by management is inconsistent with some limitation in the Agreement. First, the Company argues the Union has not proven a violation of a limitation in the Agreement. It argues a review of the evidence and the collective bargaining history establishes that the Company acted consistent with the negotiated language of the Agreement. The Company does not bear the burden to prove its interpretation of the contract is correct. In construing disputed language, the Arbitrator should first look to the contract for its proper construction. Only if the proper remains unclear after reviewing the four corners of the agreement, the Arbitrator may consider parole evidence, past practice or bargaining history.

> . . . The various rules of contract construction permit arbitrators to construe ambiguous language without resorting to consideration of evidence outside the four corners of the document . . . Parole evidence, on the other hand, is evidence of the parties' action and agreements, whether written or oral, that is not found in the four corners of the labor agreement. Such evidence is only considered when the relevant contract language is ambiguous and the rules of construction fail to provide the necessary guidance. Fairweather, Practice and Procedure in Labor Arbitration, 175 (3rd ed.).

The Company argues the clear and unambiguous language of Section 6 sets forth the Company's right to direct the working forces so long as the direction does not contravene any express provision of the Agreement. In the absence of an express provision in the Agreement prohibiting the Company from temporarily assigning employees outside their classification, the Union's case fails.

Next, the Company argues when all of the provisions of the Agreement are viewed as a whole, it is clear the Company has the right to temporarily assign employees to work outside their classification to meet business demands. Section 6 gives the Company this right. In this case, the Company scheduled Johnson and Shorty to meet heavy demand in the floral department preceding Mother's Day. Neither Section 8 nor 9 of the contract contains any limit on the Company's right to temporarily schedule an employee outside his normal job classification. There is no evidence the Company scheduled the

Grievants to work outside their normal job classification for retaliatory purposes, nor did it act arbitrarily or capriciously. In addition to Section 6, Section 12.6 affirms the Company's right to assign employees to temporarily work outside their normal job classification. The purpose of Section 12.6 is to set the wage rate an employee will receive when he works outside his normal classification. According to the rules of contract interpretation, an Arbitrator must give meaning to all provisions of the Agreement. Section 12.6 must have a purpose, and that purpose is to define what wage rate an employee will receive when working outside his or her normal job classification. Inherent in Section 12.6 is the Company's underlying right to assign employees to work outside their job classifications. Upholding the grievance would make Section 12.6 meaningless.

The Union contends Section 12.5(a) is dispositive of the issue before the Arbitrator. The Company contends the Union seeks to have the Arbitrator interpret this provision to convey far more meaning than is warranted by its plain meaning. The Company contends Section 12.5(a) does not even address the central issue in this case, which is the Company's right to assign courtesy clerks to work outside their normal job classification. What Section 12.5(a) does is prohibit the Company from unilaterally adding

job duties to the courtesy clerk job classification without exercising the reopener provision.

The Union points to Section 12.5(a)'s list of courtesy clerk duties as an implicit indication that the parties intended to treat courtesy clerks differently than other job classifications. The Union's argument is not supported by the current or prior language of the contract. Job classifications include a list of duties assigned to those classifications. (Company Exhibit 2; Section 12.5, pp. 14-16). For example, Section 12.5(c) begins, "The general merchandise clerk shall be defined as employees who," then follows a list of duties. The same thing is true for the customer service clerks and the utility clerks. A list of duties in some job classifications existed in the 1995-1998 Agreement. In addition, there is a list of duties that customer service clerks "shall not perform." A similar list of duties existed in the 1998-2001 contract. (Pages 15-16). Such simplistic formatting issues cannot possibly carry the Union's burden of proving that the Company forfeited a critical management right. The Union's interpretation of Section 12.5(a) seeks to effect a forfeiture of the Company's negotiated right to direct the work forces by temporarily assigning employees to work outside their job classifications. The Union has not approached presenting sufficient evidence to unmistakenly prove the Company intended to forfeit its management right to direct the

working force by temporarily assigning employees outside their normal job classifications to meet business demands.

Next, the Company argues accepting the Union's interpretation of the contract would result in harsh or absurd results. It is a fundamental principle of contract interpretation that courts and arbitrators should avoid harsh, absurd or nonsensical results. Elkouri & Elkouri, How Arbitration Works, states: "When one interpretation of an ambiguous contract would lead to a harsh, absurd or nonsensical result, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used."

Union witness Frazier testified the Company would incur overtime and force employees to work who had other commitments and possibly temporarily hire and then lay off employees. Such results are harsh, absurd and nonsensical. Mr. Antonson testified he works hard to keep good employees and attempts to avoid forcing them to work overtime. It is equally absurd to suggest the company should hire an additional employee for the Mother's Day week. The grocery business is highly competitive, and incurring unnecessary overtime is not a reasonable solution.

The Company also contends the Union has failed to prove a binding past practice is applicable in this case. Elements of a binding past practice are

simply not present here. Ms. Montoya and Mr. Fisher testified they believed a practice existed of not temporarily assigning courtesy clerks outside their classification. However, neither offered a specific example to support their conclusion. The nature and frequency of such a practice was completely unknown, and the Union simply has not carried its burden of establishing a binding past practice.

For the reasons set forth above, the Union's interpretation of Section 12.5(a) is not supported by the contract language itself. The Union's proffered interpretation requires the Arbitrator to modify Section 12.5(a) to add a restriction that does not exist in the language. To do so violates the Arbitrator's obligation under Section 16.6 of the contract. The contract language itself and recognized standards of contract interpretation establish that the Union has failed to carry its burden of proving the Company forfeited its express right to direct the working forces by temporarily assigning the Grievants to work outside their classifications.

The Company also contends the Union has not demonstrated the Company exercised its contractual rights in an arbitrary, capricious or discriminatory manner. The Union relies on Safeway & UFCW Local 7 (Watkins, 2011), for the following standard of determining when a company acts in an arbitrary, capricious or discriminatory manner:

> Over the years, most arbitrators have come to employ a brief, albeit complex, approach to test whether the employer's decision should be disturbed: was the Company's action free of arbitrary, capricious and discriminatory elements? If it was, then, by its nature, the action of the employer is "reasonable" and should not be disturbed unless it is clearly "unwarranted," i.e., that it is patently unfair and a clear abuse of managerial authority. Or, as Arbitrator Spaulding phrased it, " . . . if the decision is such as to shock the sense of justice of ordinary reasonable men . . . arbitrators have a duty to interfere." These are principles widely, though not unanimously, adopted by arbitrators employed by these two parties, including, of course, myself.

The Company argues in this case, the assignment of the Grievants to work outside their normal job classifications cannot be characterized as shocking to the sense of justice of ordinary and reasonable people. Furthermore, the Union failed to prove Mr. Shultz worked outside his normal job classification. Even if he worked outside his normal job classification, the Company presented a legitimate business reason for his doing so.

Finally, the Union noted that the courtesy clerks do not receive health or pension benefits, even though temporarily assigned as food clerks. The reason for this is quite simple. The Union has failed to negotiate such benefits for the courtesy clerks temporarily assigned to the food clerk position. The only contractual "benefit" in such circumstances is the courtesy clerk receives the food clerk rate of pay when temporarily assigned to

perform food clerk work. Further, the Company generously counts such food clerk work hours toward the food clerk wage progression despite the lack of any contractual requirement. Under these circumstances, the Union has failed to prove the Company acted in an arbitrary, capricious or discriminatory manner. For these reasons, the Company requests that the grievance be denied.

## DISCUSSION

Based on the provisions of the contract, the testimony given at the hearing and the arguments of the representatives of the parties, the Arbitrator has concluded that the Company violated the contract by assigning employees Johnson, Shorty and Shultz work outside the courtesy clerk classification during the week ending May 12, 2012. The Arbitrator has concluded that working these individuals outside the duties enumerated in the courtesy clerk job description in the contract (Section 12.5) was a violation of the contract. For the reasons given in detail below, the grievance is sustained insofar as the Union has alleged and proved a violation of the contract. This decision does not deal with the number of hours each employee worked in violation of the contract.

The Company begins its analysis of this dispute by reference to Section 6 of the contract, the management rights article: "Section 6 specifically enumerates Safeway's right to assign employees to work outside their normal classification pursuant to Safeway's right to direct the working force." This is not exactly what Section 6.1 of the contract says. Insofar as is relevant to this dispute, Section 6.1 provides, "The management of the Company and the direction of the work force, including the right to plan, direct and control retail operations . . . are to be the sole right and function of the Employer." Then Section 6.2 of the contract states, "The parties agree that the foregoing enumeration of management's rights shall not be deemed to exclude other functions not specifically set forth. The Employer, therefore, retains all rights not specifically covered by this Agreement." (Emphasis added). As is explained more fully below, the standard interpretation of this language in labor contracts is that management retains all rights to run the business, except as modified or limited elsewhere in the labor agreement. One of the "rights" specifically covered by this Agreement is the right of the Union that courtesy clerks will only perform the duties listed in Section 12.5. Stated slightly differently, one of the rights of management that is specifically limited in the contract is management's right to have courtesy clerks do anything other than the specified types of work listed in Section 12.5. In

Section 12.5(a) of the contract, the Company has agreed that courtesy clerks "shall perform only the following duties," then follows a list of twelve specific duties courtesy clerks may perform. It is clear the Employer asked two of its courtesy clerks to perform duties during the week preceding Mother's Day which are not within the list of duties courtesy clerks may perform under Section 12.5 of the contract. In this case, the Company has a contractual commitment only to allow courtesy clerks to perform the twelve specific types of work listed in Section 12.5 of the contract.

Although the last sentence of Section 6.2 of the contract is not worded precisely the same way many other management rights articles are, the phrase "retains all rights not specifically covered in this Agreement" accomplishes the same thing as an agreement which gives the company the right to manage the company in all respects except as limited by the specific terms of the labor agreement. Another way of saying substantially the same thing is that the Company did not retain the right to have courtesy clerks perform work other than that specifically enumerated in Section 12.5. The work of the courtesy clerks is "specifically covered in this Agreement," and it is covered in considerable detail. Another way to put this is to say all matters specifically covered in the contract are to be dealt with by the terms of the contract and are not within management's solely reserved rights. Arbitrator Roberts in St.

Louis Symphony Soc'y, 70 LA 475, 481-82 (1978), fully explained the matter under consideration:

> It is a well recognized arbitral principle that the Collective Bargaining Agreement imposes limitations on the employer's otherwise unfettered right to manage the enterprise. Except as expressly restricted by the Agreement, the employer retains the right of management. This is known as the Reserved Rights Doctrine; it lies at the foundation of modern arbitration practice.
>
> Collective bargaining agreements, generally, are devised to establish and grant certain rights to employees, which rights they would not otherwise have under common law. It is also a normal and well recognized principle in the interpretation of such Agreements that the rights of management are limited and curtailed only to the degree to which it has yielded specified rights. The right of Management to operate its business and control the working force may be specifically reserved in a labor agreement. However, even in the absence of such a specific reservations clause, as is the case here, those rights are inherent and are nevertheless reserved and maintained by it, and its decisions with respect to the operations of the business and the direction of the working forces may not be denied, rejected, or curtailed unless the same are in clear violation of the terms of the contract, or may be clearly implied, or are so clearly arbitrary or capricious as to reflect an intent to derogate the relationship.
>
> [T]he underlying premise of collective bargaining agreements is that management retains all rights of a common law employer which are not bargained away or limited by the collective bargaining agreement. The parties commenced their

> negotiations from a position where management enjoys all rights of a common law employer. That is, it is free to set the conditions of employment upon those terms. In collective bargaining the employees withhold or threaten to withhold acceptance of employment unless the conditions of employment are modified in the respects successfully bargained for. Where the collective bargaining agreement does not modify or limit management's prerogatives, management retains the prerogatives of a common law employer. The significance of the silence of a collective bargaining agreement upon a subject matter is that management retains its common law rights toward that subject matter which it has not bargained away. The Union argument presupposes the Employer must have contract authority to take a particular action. In fact, the converse is true, and the Union must show that a particular act of management was contrary to contractual limitations placed upon management or obligations imposed upon management by the contract. (*Quoted by* Elkouri & Elkouri, How Arbitration Works, 638-39 (6th ed. 2003).

The Company attempted to avoid the implication of Section 12.5 to this case through Ms. Lastrapes' testimony. The Company argues, "Safeway is not taking the position that the Company can add the duties at issue (working in floral and hanging tags) to the courtesy clerk job classification. Safeway acknowledges those duties are food clerk duties and cannot be added to the courtesy clerk classification unless the Company followed the procedure set forth in Section 12.5(a). However, neither Section 12.5 nor any other contractual provision restricts Safeway's express management right to assign

employees to work outside their job classification." The Arbitrator disagrees. First, this analysis ignores the final sentence in Section 6.2 of the contract. Second, the Company's argument would have more appeal were it not for the fact that Section 12.5(a) contains the word "only." The complete sentence states, "A courtesy clerk is an employee who shall perform only the following duties". The meaning of this sentence is that courtesy clerks shall not perform any duties other than those contained in the list of twelve duties. This is a specific contractual obligation of the Company, and by the generally accepted interpretation of management rights clauses, it is not a discretionary right reserved solely to management. Furthermore, the final sentence in Section 12.5(a) of the contract (no changes may be made in courtesy clerk restrictions until this procedure is followed) clearly indicates the twelve duties referred to in that section are the limits on what courtesy clerks may do.

Several other matters require discussion. First, Company witness Lastrapes stated that courtesy clerks were more or less in the habit of performing work other than the twelve duties listed in the contract whenever a supervisor requested them to do so. Her testimony on this point is weakened, even though she is the Director of Labor Relations for the Denver

Division, simply because she is not in the store on a daily basis as are people like the store manager.

In addition, she indicated that courtesy clerks could perform any activities requested by management, but the limitation on management was that it could not add additional work to their classification without negotiating with the Union. It appears to the Arbitrator that this interpretation of Section 12.5 of the contract simply reads the word "only" out of the contract. The contract clearly states a courtesy clerk is an employee who shall perform "only" the twelve listed duties. As noted earlier, the word "only" refers to the twelve items listed as is a prohibition on doing anything else. Section 12.5 of the contract does not say a courtesy clerk is an employee who shall perform the following duties, and if a courtesy clerk performs other duties, he/she shall be paid at the higher rate.

Company witnesses also testified they frequently had courtesy clerks perform work other than the twelve types listed in Section 12.5 of the contract. If the Company did this, and if it did pay them at a higher rate for work performed outside the twelve items listed, it seems to the Arbitrator the Company would have had documentation to support the fact that it paid these employees at the higher rate whenever they performed duties other than the

twelve listed in Section 12.5 of the contract. It did not produce such documentation.

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.

The Company also denied Mr. Schultz worked out of the courtesy clerk classification. The Company is correct that on cross-examination Mr. Shultz did say something to the effect that he did not recall specifically hanging tags during the week ending May 12. However, Ms. Yazzie did say she saw Mr. Shultz doing work other than the twelve items listed in Section 12.5 of the contract. Moreover, Mr. Shultz could have worked outside of this classification even though he was not scheduled to do so.

The Company relied on its version of the bargaining history of the parties. While the testimony of the two sides regarding the bargaining history of the parties was in considerable conflict, the Arbitrator does not think it necessary to resolve this dispute on the basis of bargaining history. The Arbitrator thinks Section 12.5 of the contract is quite clear. As used in Section 12.5 of the contract, the word "only" indicates courtesy clerks may perform

the twelve types of work therein listed and nothing else. Neither does the Arbitrator think Section 12.6 of the contract has the effect of writing the word "only" out of Section 12.5.

For the foregoing reasons, the Arbitrator finds the three employees named in the grievance were asked and did perform work not within the plain meaning of Section 12.5 of the contract. On the issue of liability, the grievance is sustained. The Arbitrator expresses no opinions on any aspect of the appropriate remedy in this case.

In order to assist the parties in possibly reaching an amicable settlement of this grievance on the issue of damages, the Arbitrator will make one point. In contract interpretation matters in which I have found the Company to have violated a provision of the contract, it is my practice to award damages for whatever period within which the Union could have grieved. The applicable "statute of limitations" in this contract appears to be fifteen days from the date of the discovery of the event giving rise to the grievance. Assuming this grievance was timely filed, the Arbitrator's practice is to award damages for a period beginning fifteen days prior to the date on which the Union filed a grievance. These remarks are only made in the hope of aiding the parties in reaching a settlement of this grievance.

## AWARD

The Company violated Section 12.5 of the contract by allowing and assigning courtesy clerks to perform work other than the twelve duties listed in that provision of the contract.

EDWIN R. RENDER
ARBITRATOR

11/4/13
DATE