

DR. DANIEL F. JENNINGS

IMPARTIAL ARBITRATOR

In the Matter of Arbitration between	) Appointed by the Parties
	)
	) Grievance 11-00034
	)
United Food and Commercial Workers	)
Union Local 1564, Chartered by the	) Bargaining Unit Work
United Food and Commercial Workers	)
International Union	) Collective Bargaining Agreement
	) Interpretation
and	)
	)
	)
Smith's Food and Drug Centers, Inc	)
Albuquerque, New Mexico	)

FINAL OPINION AND AWARD OF THE ARBITRATOR

January 16, 2012-- Corrected

THE FINAL ARBITRATION AWARD

In the Matter of:

United Food and Commercial Workers Union Local 1564, Chartered by the  
United Food and Commercial Workers International Union

and

Smith's Food and Drug Centers, Inc  
Albuquerque, New Mexico

FOR THE UNION:            Joseph J. Allotta, Esq.  
   General Counsel,  
   United Food and Commercial Workers Local 1564

FOR THE COMPANY:        Thomas L. Stahl, Esq.  
   Rodey, Dickason, Sloan, Akin & Robb, PA

IMPARTIAL  
ARBITRATOR:                Dr. Daniel F. Jennings  
   Department of Industrial Distribution  
   MS # 3367  
   Texas A&M University  
   College Station, Texas 77843-3367

BACKGROUND

By way of background, this Final Opinion and Award is a continuation of an Earlier Award issued by this Arbitrator on November 12, 2011 pertaining to an arbitration hearing conducted on September 9, 2011 in Albuquerque, New Mexico. Turning to the events of the September 9, 2011 arbitration hearing, the Company announced during that arbitration hearing it had been informed that Mr. Chris Perea (the brother of Grocery Manager Tommy Perea) had performed the duties of a Night Shift Stocker at Company Store 423. While during so, Mr. Chris Perea was neither a member of the Union nor an employee of the Company. This Arbitrator wrote in his November 12, 2011 Opinion and Award that he had

determined that Union members in Company Store 423 were entitled to receive monetary damages as a result of Mr. Chris Perea's actions. This Arbitrator's rationale for awarding monetary damages is that Mr. Chris Perea performed the duties of a Night Shift Stocker. In doing so, either a bargaining unit employee would have been employed to perform those duties or existing bargaining unit employees would be paid overtime to do so. While the Company argues that Night shift Stockers did not lose any of their earnings, they [Night Shift Stockers] had to forego the opportunity to earn additional income because a non bargaining unit individual was performing bargaining unit work. In essence, Mr. Chris Perea was taking work away from bargaining unit individuals.

The Company's position was that monetary damages are not provided in the Parties' Collective bargaining Agreement (CBA) and should not be awarded. For informational purposes, Arbitrator Willard Wertz stated:<sup>1</sup>

An arbitrator has the authority to award money damages to employees for the employer's breach of contract, although the contract does not specifically provide such a remedy. To restrict arbitrators to remedies specifically set forth in the contract would negate arbitration as a method of dispute settlement or result in cluttering contracts with numerous liquidated damages provisions that would invite more trouble than they could prevent.

That same principle has subsequently been upheld by the following arbitrators.<sup>2</sup>

Also, during the September 9, 2011 arbitration hearing and in its post hearing brief, the Company maintained that if monetary damages were to be

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<sup>1</sup> *International Harvester Company*, 9 LA 894 (Arbitrator Wertz)

<sup>2</sup> *Aetna Portland Cement Company*, 41 LA 221 (Arbitrator Dworkin); *Cadillac Gage Company*, 87 LA 853 (Arbitrator Van Pelt); *American Cyanamid Company*, 93 LA 361 (Arbitrator Bernstein); *Georgia Pacific Corporation*, 92 LA 4 (Arbitrator Thornelli) and *Michigan State Police*, 98 LA 572 (Arbitrator Roumell)

awarded by this Arbitrator, then those hours should be based on the actual hours Mr. Chris Perea had performed as a Night Shift Stocker in Company Store 423 and had to be based on the evidence presented and not on conjecture. During the September 9, 2011 arbitration hearing, the Parties did not agree upon the hours alleged to have been performed by Mr. Chris Perea as a Night Shift Stocker at Company Store 423.

In his Opinion and Award for the September 9, 2011 arbitration, this Arbitrator ordered the Parties to meet and confer to determine a lump sum payment for the appropriate damages. On November 29, 2011 the Parties advised they could not reach such an agreement. The Parties requested that this Arbitrator exercise his authority and determine an appropriate remedy.

In the following section this Arbitrator makes such a determination based on the evidence and testimony presented during the September 9, 2011 arbitration hearing.

*Determining the number of hours in which Mr. Chris Perea performed the duties of a Night Shift Stocker in Company Store 423:*

It is undisputed that Mr. Chris Perea began performing the duties of a Night Shift Stocker on January 10, 2011 at the same time his brother, Mr. Tommy Perea, became the Grocery Manager at Company Store 423 and that Mr. Chris Perea ceased performing the duties of a Night Shift Stocker on May 21, 2011. The relevant question is how many hours did Mr. Chris Perea perform the duties of a Night Shift Stocker during the time period from January 10, 2011 until May 21, 2011.

During the September 9, 2011 arbitration hearing, five Company Employees; Anthony Sanchez, Blake Garcia, Sammy Torres, Claudia O'Leary and Sylvania Maldonado testified that they observed Mr. Chris Perea performing Night Shift Stocker duties during the time frame from January 10, 2011 through May 21, 2011. Further, these employees testified that Mr. Chris Perea would (1) wear a black shirt that was part of the Company's Night Stocker's uniform, (2) wear a Company "swipe badge," and (3) perform his duties while working side-by-side with his brother Mr. Tommy Perea. Further, during the September 9, 2011 arbitration hearing, Mr. Tommy Perea testified that he had no reason to believe that the preceding five Company Employees would lie and the employees had a reputation for being truthful.

Following is a summary of the testimony presented by the preceding five Company Employees during the September 9, 2011 arbitration hearing.

**Anthony Sanchez**

25 year Company employee; worked as Product Clerk during the hours of 4 am to 12 noon, five days per week; Testified that when he worked, he observed Chris Perea performing Night Shift Stocker duties at least two days per week starting in January 2011 and continuing through May 2011; Observed Chris Perea dressed as a Night Shift Stocker during the preceding time period.

**Blake Garcia**

27 year Company employee; worked as Dairy Manager on frequent shifts—during the hours of 7am to 3 pm, 8 am to 4 pm, and 10 am to 6 pm, five days per week; Testified that when he worked, he observed Chris Perea performing Night Shift Stocker duties every day per week starting in January 2011 and continuing through May 2011; Observed Chris Perea dressed as a Night Shift Stocker during the preceding time period.

**Sammy Torres**

10 year Company employee; worked as Wall Deli Manager during the hours of 7am to 3 pm, five days per week; Testified that he observed Chris Perea performing Night Shift Stocker duties beginning on January 2011, but could not remember how many days or the specific dates he so observed Chris Perea;

Observed Chris Perea dressed as a Night Shift Stocker during the time period January 2011 through May 2011.

**Claudia O'Leary**

22 year Company employee; worked as Floral Manager during the hours of 8 am to 1 pm, four or five days per week; During the month of January 2011 also worked one day per week (Wednesday) as Assistant Scanning Coordinator (ASC) from 2 am to 10 am; Testified she observed Chris Perea performing Night Shift Stocker duties for every shift she worked as ASC (four weeks) but did not observe Chris Perea performing Night Shift Stocker duties while she worked as Floral Manager. Observed Chris Perea dressed as a Night Shift Stocker during the preceding time period she worked as ASC.

**Silviana Baldonado**

3 year Company employee; worked as Non-Foods Assistant Manager on frequent shifts—during the hours of 12 pm to 8 am, 6 am to 2 pm, and 4 am to 12 am, six days per week; Testified that when she worked, she "frequently" observed Chris Perea performing Night Shift Stocker duties, but could not remember how many days he did so; Observed Chris Perea dressed as a Night Shift Stocker during the time period January 2011 through May 2011.

Mr. Tommy Perea also testified during the September 9, 2011 arbitration hearing that during the time period January 10, 2011 through May 21, 2011, grocery sales "were up double digits and he [Tommy Perea] had accomplished more that had been accomplished before he came to Company Store 423." Thus, the Union maintains that Mr. Tommy Perea was under pressure to perform and used the unpaid services of his brother, Chris Perea for assistance in performing the duties of Night Shift Stocker. It was also undisputed that Mr. Chris Perea was allowed to enter the premises of Company Store 423 after that store was closed to customers so that restocking activities could be performed by Night Shift Stockers and that such entry was a violation of Company Policy. The Company's Advocate, in his opening statement during the September 9, 2011 arbitration hearing, stated that the Company would introduce witnesses who

would refute the Union's allegation that Mr. Chris Perea worked as a Night Shift Stocker. However, those witnesses never testified.

Thus, the Union's position is that Mr. Chris Perea performed the duties of a Night Stocker at Company Store 423 from January 10, 2011 until May 21, 2011 and performed those duties side by side with his brother, Mr. Tommy Perea. Also, while performing those duties, Mr. Chris Perea was dressed as a Night Shift Stocker. Further, during that January 10, 2011 until May 21, 2011 time period, it is undisputed that Grocery Manager Tommy Perea worked 990.5 hours.

The Company's position is that none of the five preceding Company Employees continually observed Mr. Chris Perea performing the duties of a Night Shift Stocker during the January 10, 2011 through May 21, 2011 time period. During cross examination by the Company's Advocate that occurred during the September 9, 2011 arbitration hearing, each of the five Company Employees could not recall the specific times that Mr. Chris Perea allegedly performed the duties of a Night Shift Stocker during the January 10, 2011 through May 21, 2011 time period.

The Company maintains that Company Employees who testified during the September 9, 2011 arbitration hearing were not credible witnesses based on information contained in Union Exhibits 9(a) through 9(d). During the September 9, 2011 arbitration hearing, the Union introduced Union Exhibits 9(a) through 9(d) which contained statements signed by Company Employees Blake Garcia,

Sammy Torres, Claudia O'Leary, and Rozanne Flores.<sup>3</sup> All of those statements, which were signed on February 25, 2011, stated in pertinent part:

"I [name of the employee] worked the week ending February 12, 2011 and on February 10, 2011. I witnessed Chris Perea...stocking shelves and moving boxes with his brother, Tommy Perez, (Night Grocery Manager) closely working with one another. I have also witnessed on several other dates Chris was assisting Tommy stocking shelves. To the best of my knowledge it has been taking place since Tommy transferred to [the Company's Store 423] about 3 months ago."

During the September 9, 2011 arbitration hearing, the Company produced a work schedule indicating that Ms. O' Leary did not work at Company Store 423 on February 10, 2011 while Mr. Garcia testified that he had observed Mr. Chris Perea performing Night Shift Stocker duties more than several times prior to February 25, 2011.<sup>4</sup>

Further, during the September 9, 2011 arbitration hearing, the Company's Advocate stated that from January 10, 2011 through May 21, 2011, Mr. Chris Perea "may have assisted" Mr. Tommy Perea "in moving heavy loads of boxes and "may have replaced items that fallen from shelves onto the floor." Also, on "a couple of occasions" while Mr. Chris Perea waited for his brother, Mr. Tommy

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<sup>3</sup> Ms. Rozanne Flores did not testify during the September 9, 2011 arbitration hearing

<sup>4</sup> The Company's argument was that Mr. Garcia's September 9, 2011 testimony was that he observed Mr. Chris Perea working as a Night Shift Stocker every day that Mr. Garcia worked. Mr. Garcia's statement in Union Exhibit #9 indicates a lower amount of time so observed.



Perea, to complete his work tasks; Mr. Chris Perea would talk with Mr. Tommy Perea and "Chris might straighten out a shelf, walk a couple of carts to the back, and straighten product on a couple of shelves." The Company contends that such activities performed by Mr. Chris Perea required no more than fifteen minutes during the January 10, 2011 through May 21, 2011 time period.

This Umpire now turns to the allegations made by the Union during the September 9, 2011 arbitration case.

- Mr. Chris Perea performed the duties of a Night Shift Stocker from January 10, 2011 through May 21, 2011 and was dressed as a Night Shift Stocker while doing so;
- Mr. Chris Perea worked side-by-side with his brother, Mr. Tommy Perea while performing Night Shift Stocker duties;
- Mr. Chris Perea continued working as a Night Shift Stocker even after the Union filed a grievance on February 14, 2011 protesting Mr. Chris Perea's activities.

The following is a description of events and undisputed testimony that occurred during the September 9, 2011 arbitration hearing pertaining to the February 14, 2011 grievance.

- Human Resource Coordinator Jenny Parr testified that she has responsibility for investigating grievances. After the Company received the February 14, 2011 grievance stating that Mr. Chris Perea was working as a Night Shift Stocker at Company Store 423 as a non-Union member, Ms. Parr asked Mr. Tommy Perea if Mr. Chris Perea had performed such duties for the date of February 10, 2011 as stated in February 14, 2011 grievance. Mr. Tommy Perea testified "No" for the date of February 10, 2011. However, Ms. Parr testified that she did not ask Mr. Tommy Perea if Mr. Chris Perea had ever worked as a Night Shift Stocker at any time other than the date stated in the February 14, 2011 grievance. Ms. Parr testified "No" –she had not asked Mr. Tommy Perea that question.
- Ms. Parr testified that she had received a letter dated March 11, 2011 from Union Representative Camille Schulte which contained statements from

Company Employees that they had observed Mr. Tommy Perea working in Company Store 423 as a Night Shift Stocker. Ms. Parr testified that sometime later in March 2011 she contacted Mr. Tommy Perea and asked him: "Did Chris Perea work in the store?" Mr. Tommy Perea responded "No".

- Later, in May 2011, Ms. Schulte met with Ms. Parr to discuss the status of a number of Grievances. At that time, the February 14, 2011 grievance pertaining to Mr. Chris Perea had not been resolved. During that meeting Ms. Schulte informed Ms. Parr that Mr. Chris Perea was still working as a Night Shift Stocker in Company Store 423 as a non-Union member, despite the February 14, 2011 grievance. Ms. Parr testified that she then contacted Mr. Tommy Perea and informed him of Ms. Schulte's comments that Mr. Chris Perea was still working in Company Store 423. Mr. Tommy Perea informed Ms. Parr that Mr. Chris Perea "hardly comes into the store anymore since the grievance happened because he didn't want any confusion." Ms. Parr was questioned by the Union's Counsel if, during the May 2011 conversation with Mr. Tommy Perea she asked Mr. Tommy Perea if Mr. Chris Perea had worked in Company Store 423. Ms. Parr testified "No," she did not ask that question.

As a result of the preceding testimony, this Arbitrator is convinced that the Company failed to conduct a proper investigation as to whether Mr. Chris Perea performed the duties of Night Shift Stocker as alleged in the February 14, 2011 grievance.

During the September 9, 2011 arbitration hearing, Company Store 423 Director John Carrillo testified that he was not aware that Mr. Chris Perea "had ever" performed the duties of a Night Shift Stocker in Company Store 423. However, Non-Foods Assistant Manager Silviana Baldonado provided the following undisputed testimony.

- On several occasions around 7:00 am, Ms. Baldonado observed Mr. Carrillo, Mr. Tommy Perea and Mr. Chris Perea talking to each other while the three of them were either in the back room of Company Store 423 or at the rear of an aisle. Ms. Baldonado further provided undisputed testimony that Mr. Chris Perea was dressed as a Night Shift Stocker and was performing the duties of a Night Shift Stocker during those conversations with Mr. Tommy Perea and Mr. Carrillo.

During the September 9, 2011 arbitration hearing and in its post-hearing brief, the Company contended that the Union failed to present any video evidence<sup>5</sup> to depict the nature and extent of Mr. Chris Perea's work in Company Store 423 and by doing so, the Union failed to utilize the "best evidence". Both Mr. Carrillo and Ms. Parr testified during the September 9, 2011 arbitration hearing that they had not attempted to obtain any video evidence while Mr. Chris Perea was alleged to have worked in Company Store 423. Ms. Schulte also testified that she had not obtained any such video evidence because of difficulties experienced when she attempted to view the video footage. Interestingly, during the September 9, 2011 arbitration hearing, the Union's Advocate stated that it might be difficult to distinguish Mr. Chris Perea from other Night Shift Stockers depicted in the videos because he was also dressed as a Night Shift Stocker. In summary, this Referee is convinced that Mr. Chris Perea dressed himself as a Night Shift Stocker and did so to prevent being correctly identified by both Employees in Company Store 423 and by any video recordings.

After reviewing the evidence and testimony presented during the September 9, 2011 arbitration hearing, this Neutral is convinced that the preponderance of the evidence shows that Mr. Chris Perea did perform the duties of a Night Shift Stocker for certain times during the January 10, 2011 through May 21, 2011 time period. Based on the preceding evidence and

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<sup>5</sup> Company Store 423 is equipped with video equipment that records activities in the store and parking lot for 24 hours per day, seven days a week.

testimony, the exact number of hours worked by Mr. Chris Perea is difficult to determine. However, the Elkouris state:<sup>6</sup>

**Damages will not be denied merely because the amount is difficult to determine. When difficulty is determined, the simplest fair method available for determining the amount will be used. Where no other method is available the arbitrator "is bound to resort to his own good sense and judgment, and after considering all the pertinent facts and circumstances make a reasonable approximation" [emphasis added].**

As stated earlier, the Union provided undisputed evidence that Mr. Tommy Perea worked for 990.5 hours during the time period January 10, 2011 through May 21, 2011. After reviewing the foregoing evidence and testimony presented in the September 9, 2011 arbitration hearing, this Umpire is convinced that 990.5 hours is a reasonable approximation of the hours that Mr. Chris Perea performed the duties of a Night Shift Stocker in Company Store 423.

*Determining the amount of the remedy:*

The Union contends that the remedy should contain monetary damages as well as pension and health benefits and that interest should be paid on all these monies. Following is this Referee's determination of the amount of the remedy.

*Monetary damages:* It is undisputed that a Night Shift Stocker who is classified as a journeyman food clerk receives a wage rate of \$15.25 per hour.<sup>7</sup> Thus, the Union contends that an appropriate monetary remedy is 990.5

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<sup>6</sup> *Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> ed.* (2003), Washington, DC: BNA Books, pp 1210-1211.

<sup>7</sup> The Union explains that in many instances, Night Shift Stockers worked overtime and would receive an hourly wage rate of \$22.875 per hour. However, the Union has requested only a straight time hourly wage rate of \$15.25.

hours times \$15.25 per hour which equals \$15,105.13. This Arbitrator sustains the determination of \$15,105.13 for monetary damages based on the evidence presented by the Union.

*Pension and health and welfare benefits:* The Union maintains that a bargaining unit employee, in addition to receiving an hourly wage, is entitled to contributions made on his/her behalf to a pension fund and to a health and welfare fund. Thus, an appropriate measure of damages would include the amount of pension and health and welfare contribution that would have been made for the January 10, 2011 through May 21, 2011 time period that Mr. Chris Perea performed the duties of a Night Shift Stocker. Thus, based on the preceding argument, this Umpire orders the Company to include the amount of pension and health and welfare benefits contributions for the January 10, 2011 through May 21, 2011 time period.

*Payment of interest on the awarded monetary damages:* The Union urges this Arbitrator to include a directive that interest be paid on all these monies, calculated for the time period of January 10, 2011 until the monetary payment is paid. As indicated in this Arbitrator's Earlier Award dated November 12, 2011, the payment of interest is a necessary element of make-whole relief and does not depend on a showing of egregious contract violations or procedural delays by employers.<sup>8</sup>

The Union, in its post-hearing brief following the September 9, 2011 arbitration hearing, explains that in three recent arbitration awards involving the

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<sup>8</sup> *Albertson's LLC*, 123 LA 1349 (Arbitrator McCurdy)

present parties, [UFCW Local 1564 and Smith's Food and Drug Centers, Inc.] three different arbitrators awarded back pay along with interest. Two of the awards arose under the Meat CBA, Grievance 09-00164 (Arbitrator Barry Winograd, November 12, 2010) and Grievance 10-00150 (Arbitrator John Criswell, January 6, 2011). The third award arose under the Clerk CBA, Grievance Number 10-00013 (Arbitrator Dr. Daniel Jennings, December 26, 2010). The grievance procedure for the Meat CBA is identical to that of the Clerks CBA. As Arbitrator Jennings pointed out in his prior arbitration award involving the same parties on December 26, 2010:<sup>9</sup>

This Arbitrator's ruling that the Company is to pay interest is not ordered as punishment but because of the time value of money it is necessary to make the Grievant whole.

Likewise, the Union is requesting that interest be computed on the amount of damages assessed, as the time value of money. If the CBA had not been violated, bargaining unit employees would have use of the money from January 10, 2011 to the present. Thus, not only are bargaining unit employees deprived of the money owed to them, they have also been denied the use of the money.

Further, the National Labor Relations Board (NLRB), in Jackson Hospital Corp., not only reaffirmed its longstanding policy that: "[t]he purpose of interest is to compensate the [employee] for the loss of use of his or her money." but ruled that the interest should be compounded daily. The Board specifically stated: "We

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<sup>9</sup> *Smith's Food & Drug Centers and United Food & Commercial Workers Union 1564*, 11-1 ARB 5218 (Arbitrator Jennings)

believe that daily compounding, which will lead to more fully compensatory awards of interest and thus come closest to achieving the make-whole purpose of the remedy, is superior to either annual or quarterly compounding."<sup>10</sup>

*The distribution of the amount of monetary damages including interest payments:*

The Union requests that the total amount of damages [a combination of \$15,105.13 plus the appropriate pension and health and welfare contributions plus the appropriate interest] be distributed equally to all members of the Clerks bargaining unit who were employed at Company Store 423 at the time the incidents giving rise to the grievance pertaining to the September 9, 2011 arbitration hearing and are still employed as of the date the Award is rendered.

The Union makes its request for this remedy based on the following reasons:

*a. The Company's violations of the CBA were blatant and on-going.*

Not only did the Company permit a non-bargaining unit, non-employee person to be in Company Store 423 during times the Store was closed, the Company also allowed that person to wear a Company shirt and perform bargaining unit work from January 10, 2011 until May 21, 2011. Furthermore the Company was violating its own policies prohibiting employees from working "free time".<sup>11</sup> These violations continued for an additional four months after the Store Director was approached in person by Union Representatives Camille Schulte and Billy Quintana on February 10, 2011, and a grievance was filed on February 14, 2011. Not only were the Company employees who worked the hours of 11:00

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<sup>10</sup> *Jackson Hospital Corporation dba Kentucky River Medical Center*, 356 NLRB No. 8

<sup>11</sup> Union Exhibits # 22, #23, #24

pm and 7:00 am aware that the Company was abrogating the CBA, but employees throughout Company Store 423 had knowledge of the Company's actions.

*b. Union members held the Union responsible and were upset.*

Ms. Camille Schulte testified during the present arbitration hearing that Union members at Company Store 423 were upset.<sup>12</sup> Union President Greg Frazier knew the members were mad at the Union because Mr. Chris Perea was working at Company Store 423 and there was a loss of confidence in the Union.<sup>13</sup> The continuing violation by the Company belittled the Union in the eyes of its members at Company Store 423. Many felt their working hours were being reduced while a non-bargaining unit employee was performing bargaining unit work. Thus, unless each Clerk employee receives a portion of the damages, they will not fully appreciate that the Company's violations were properly addressed and the Union is able to enforce the CBA.

*c. The Company demonstrated an Anti-Union animus.*

Camille was subjected to an intentional bumping by Company Store 423 Grocery Manager, Mr. Tommy Perea.<sup>14</sup> Mr. Carrillo spoke very loud to the Union representatives.<sup>15</sup> Mr. Chris Perea was allowed to perform bargaining unit work even after the grievance was filed.<sup>16</sup> There were other violations regarding employees not being paid properly at Company Store 423.<sup>17</sup> The Store Director

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<sup>12</sup> Arbitration Hearing Transcript, p. 176

<sup>13</sup> Ibid, pp. 249 & 264

<sup>14</sup> Ibid, pp. 193-195 & 231

<sup>15</sup> Ibid, pp. 175-176

<sup>16</sup> Joint Exhibit # 2

<sup>17</sup> Arbitration Hearing Transcript, pp. 258-261 & Union Exhibits # 26 & # 27



stated he hated the Union.<sup>18</sup> Company employees who were Union members were aware of the Company's CBA violations and were upset.<sup>19</sup> The Union contends that all of these preceding factors create an anti-union animus and that Company Store 423 Management was on a course and conduct to demonstrate that the CBA is meaningless and the Union is unable to enforce the CBA. One way to rectify this situation is to permit all the Clerk bargaining unit employees to receive a portion of the damages. The Union is not requesting the damages be inflated, merely that the total amount of damages be divided among the employees identified above.

*d. It is fair and equitable for all Clerk employees to receive a portion of the damages*

The Union contends that if Mr. Chris Perea was not performing bargaining unit work, other clerks could have been scheduled to work more hours or a courtesy clerk may have been promoted.<sup>20</sup> The Union's remedy will also allow the Night Stockers to receive compensation. The Union is not asking that the Night Stockers be denied a remedy but that the remedy be shared by all the employees who were harmed. Both Mr. Greg Frazier and Ms. Camille Schulte explained that Company employees were upset over the Company's actions and they were losing confidence in the Union. Granting the Union's remedy will help restore what was lost by the Company's CBA violations.

The Company's position is that the Union would like to turn the situation into a windfall for Union members at Company Store 423 by taking the money

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<sup>18</sup> Ibid, p. 175

<sup>19</sup> Ibid, p. 176

<sup>20</sup> Ibid, p. 264

that Mr. Chris Perea should have been paid and rather than giving it to him, distribute it among bargaining unit members. The Company, by not paying Mr. Chris Perea for working in what is admittedly a bargaining unit position, violated Collective Bargaining Agreement (CBA) Article 11, "Wage Rates and Classifications" which sets the wage rates for all covered positions.<sup>21</sup> The Company contends that the appropriate remedy for such a violation would be to award the worker in question the wages he should have been paid. The Company also maintains that the CBA section on "Union Security" was violated based on the Company's failure to collect and pay Union dues for Mr. Chris Perea.<sup>22</sup> The Company explains that the remedy for such a violation would simply be to order the Company to pay the Union whatever dues and initiation fees it would have received for any new hire to a Night Shift Stocker position. This Arbitrator is convinced that such an argument is misplaced.

The Company argues that the remedy requested by the Union during the September 9, 2011 arbitration hearing was inconsistent with the remedy requested in the February 14, 2011 grievance. The remedy in that grievance requested that all Night Shift Stockers at Company Store 423 be paid for all time worked by Mr. Chris Perea with interest compounded daily. For informational purposes the Company explains that Arbitrator Henner rejected a remedy sought by the union at arbitration that was not included in the written grievance.<sup>23</sup> Thus, the Company's position is that nowhere does the grievance for the September 9,

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<sup>21</sup> Joint Exhibit #1, CBA Section 11

<sup>22</sup> Joint Exhibit #1, CBA Section 2.1

<sup>23</sup> *Matanuska Electrical Association*, 109 LA 508 (Arbitrator Henner)

2011 arbitration hearing seek payment for all bargaining unit employees. Accordingly, the Company contends that it is improper for the Union to change its requested remedy from that of the original February 14, 2011 grievance to the one presented at the September 9, 2011 arbitration.

A careful reading of *Matanuska Electrical Association, 109 LA 508* does not reveal any discussion about the differences in remedies requested by the union. Obviously, the Company's citing information does not match the contents of *Matanuska* which were previously described.

A review of arbitral decisions by this Referee indicates that certain arbitrators have limited themselves to granting remedies that are requested in the grievance while other arbitrators have accepted a change in remedies if the change has merit.<sup>24</sup> Turning to the present matter, the remedy change does not affect the total amount of monetary damages that are requested by the Union. Rather, the proposed damages are spread over a greater number of Union members. In summary, this Arbitrator will not order the Union to discard the remedy proposed during the September 9, 2011 arbitration hearing.

During the September 9, 2011 arbitration hearing and in its post-hearing brief, the Company's position is that the monetary damages sought by the Union are punitive in nature. This Arbitrator now responds to that assertion.

*The monetary award is not punitive:*

While the Company cited an arbitral decision by Arbitrator Allen that the

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<sup>24</sup> See *Elkouri & Elkouri, How Arbitration Works, 6<sup>th</sup> ed.* (2003), pp. 1200-1201; Wolf, "The Power of Arbitrators to Make Monetary Changes," *Proceedings of the 17<sup>th</sup> Annual National Academy of Arbitrators Meeting*

concept of awarding punitive damages "is disruptive to the promotion of amicable continuing relationships that must exist between the employer and the union"; a careful reading of that decision reveals that Arbitrator Allen also stated: "he would sanction the award of punitive damages for situations that cannot be corrected by other remedies, and to ensure that future violations will not occur."<sup>25</sup> Also, the Company cited the following statement of Arbitrator Williams that "one thing that is clear in the developing body of arbitration and labor relations law is that arbitrators will almost universally refuse to award any damages which appear to be punitive,"<sup>26</sup> However, a careful reading of that case indicated that Arbitrator Williams also stated "that arbitrators do issue punitive decisions" and he described four criteria that should be utilized in fashioning a punitive award.<sup>27</sup> Further, the Elkouris describe a number of punitive awards issued by Arbitrators and also review court decisions that have upheld punitive arbitral awards.<sup>28</sup> Finally, the Company argued that if a punitive award were rendered in the present case, it would be legally improper as indicated by the EACC court ruling.<sup>29</sup> However the West Virginia District Court ruled that Arbitrator Pender's award of monetary damages was determined to be punitive because the relevant CBA did not provide for punitive damages and he not provide a rationale for not adhering to that CBA. Further, Arbitrator Pender made a general statement that

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<sup>25</sup> *Morton Salt*, 113 LA 969 (Arbitrator Allen)

<sup>26</sup> *ACF Industries, Inc.*, 62 LA 364 (Arbitrator Williams)

<sup>27</sup> *Ibid*

<sup>28</sup> *Elkouri & Elkouri, How Arbitration Works*, 6<sup>th</sup> ed. (2003), pp. 1216-1217

<sup>29</sup> The Company utilized a decision rendered by the U.S. District Court in West Virginia as the basis for its punitive damages argument. See *Eastern Associated Coal Corp. v. District 17 and Local Union 9177, United Mine Workers of America*, 2006 WL 2819537 (S.D. W.Va.)

the "employees be made whole" which the Court determined to punitive in nature.

After providing the preceding informational material, this Arbitrator does not consider the imposing of monetary damages in the present case to be punitive. Rather, this Umpire has concluded that the Night Shift Stockers should be compensated for the lost earnings that resulted when Mr. Chris Perea performed bargaining unit work tasks. In summary, this Arbitrator has not imposed punitive damages on the Company.

FINAL AWARD

The grievance pertaining to the arbitration hearing of September 9, 2011 is sustained. The Company is directed to provide a total monetary payment which includes 990.5 hours times the journeyperson's wage rate of \$15.25 per hour which equals \$15,105.13 plus Pension and Health and Welfare contributions with interest. Such interest is to be calculated on the total amount of the monetary damages for the time period from January 10, 2011 until the total monetary payment occurs and is to be calculated on a daily basis on the total amount of the monetary payment. The rate of interest to be used is the adjusted prime rate used by the Internal Revenue Service in calculating interest on underpayment or overpayment of taxes.

The Company is directed to divide the total monetary payment equally to all members of the Clerks bargaining unit who were employed at Company Store 423 from January 10, 2011 and are still employed at Company Store 423 as of November 12, 2011, a date referred to in the Earlier Award.



Daniel F. Jennings  
Impartial Arbitrator

Corrected  
College Station, Texas  
January 17, 2012