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May 14, 2020

Scott D. Soldon
soldonmcoy Layers, LLC
3934 Harcourt Place
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Laurie A. Petersen
Lindner & Marsack
411 E. Wisconsin Ave., Suite 1800
Milwaukee, WI 53202-4498

Re: Roundy's Supermarkets, Inc. and General Teamsters Local Union No. 200
Case Audits Grievance; Grievance No. 44204; FMCS No. 190604-07744

Mr. Soldon and Ms. Petersen:

Please find enclosed, a signed copy of my Opinion and Award in the subject case, along with a copy of my bill for fees and expenses.

Very truly yours

George R. Fleischli
Arbitrator

Enclosures
cc: Jay Couturier (With Enclosures)

GEORGE R. FLEISCHLI
ARBITRATOR
131 W. Wilson St., Suite 1100
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BILL FOR ARBITRATOR'S FEES AND EXPENSES

BILLING DATE: May 14, 2020

PARTIES: ROUNDY'S SUPERMARKETS, INC. & GENERAL TEAMSTERS LOCAL NO. 200
c/o Laurie Petersen c/o Scott Soldon

CASE: Case Audits Grievance; Grievance No. 44204; FMCS No. 190604-07744

MEETING/HEARING DATE(S): January 14, 2020

FEES: Cancellation Charge: $ -

Per Diem Charges:				
	Meetings	-		
	Hearings	1.0		
	Travel	Included		
	Study/Writing	3.0		
	Total No. Days	4.0	x Rate $1400 =	$5,600.00

EXPENSES:

Transportation	92.00	
Meals	20.73	
Lodging	-	
Total Expenses		= $ 112.73

TOTAL OF FEES AND EXPENSES: $5,712.73

Portion payable by Employer $5,712.73

Portion payable by Union $ -0-

ARBITRATOR'S TIN # FOR IRS PURPOSES: 39-1258078

Before the Arbitrator

In the matter of the Arbitration between

ROUNDY'S SUPERMARKETS, INC.,
OCONOMOWOC DIVISION

and

GENERAL TEAMSTERS LOCAL UNION NO. 200

Grievance No. 44204
Case Audits Grievance
FMCS No. 190604-07744

APPEARANCES: SCOTT D. SOLDON of Soldon McCoy, Attorneys at Law, appearing on behalf of the Union.

LAURIE A. PETERSEN and SAMANTHA J. WOOD of Lindner & Marsack, S.C., Attorneys at Law, appearing on behalf of the Employer.

OPINION AND AWARD

Roundy's Supermarket's, Inc., [1] Oconomowoc Division, hereinafter referred to as Roundy's, the Company or the Employer, and General Teamsters Local Union No. 200 hereinafter referred to as the Union or Local 200, are parties to a Collective Bargaining Agreement (Agreement) that covers drivers, warehouse employees, and plant maintenance employees employed at its warehouse in Oconomowoc, Wisconsin. The Agreement provides for arbitration of grievances involving differences, disputes or complaints that arise over the interpretation or application of the contents of the Agreement, that cannot be resolved in the grievance procedure. The parties were unable to resolve a grievance arising out of the Company's implementation of a new "Case Audit Program," and selected the undersigned from a panel of arbitrators provided by the Federal Mediation and Conciliation Service (FMCS), to arbitrate the dispute. A hearing was held in Milwaukee, Wisconsin, on January 14, 2020. A verbatim transcript was prepared and received by the Arbitrator on January 23, 2020. Written arguments were filed and received by the Arbitrator as of April 6, 2020. Full consideration has been given to the evidence and arguments in rendering this Opinion and Award.

ISSUE

The parties did not agree on a joint statement of the issue. Their proposed statements are as follows:

UNION: Did the Employer violate the Collective Bargaining Agreement by improperly adopting and enforcing a defective Case Audit Program; and, if so what is the appropriate remedy?

COMPANY: Was the Company within its inherent right in implementing an audit selection process to maintain quality control; and, if not, what is the appropriate remedy?

1 In late 2015, Roundy's was acquired by the Kroger Co. Kroger agreed to recognize the Union and honor the terms of the 2013-2016 CBA. The successor, 2016-2019 CBA, has been extended pending further negotiations.

RELEVANT PROVISONS OF THE AGREEMENT

WITNESSETH:

The Employer and the Union each represents that the purpose and the intent of this Agreement is to promote cooperation and harmony, to recognize mutual interests, to provide a channel through which information and problems may be transferred from one to the other, to formulate rules to govern the relationship between the Union and Employer, to promote efficiency and service and to set forth herein the complete agreements covering rates of pay, hours of work and conditions of employment.

This agreement shall constitute the complete and only statement of the contractual relationship between the Employer and the Union and nothing will be applied inconsistent with it. The Employer and the Union accept the provisions of this Agreement as commitments which they will cooperatively and in good faith honor, support and seek to fulfill.

ARTICLE I – RECOGNITION

1.1 The Employer recognizes the Union as the exclusive bargaining agent for the following groups of employees who shall form a single bargaining unit:

All regular full-time and casual drivers, warehouse employees and plant maintenance employees employed at 1111 E. Delafield Road, Oconomowoc, Wisconsin, excluding all other employees, including office clerical, confidential, call investigators, security, professional and supervisory employees, as defined in the National Labor Relations Act.

* * *

ARTICLE V-DISCHAGE OR SUSPENSION

5.1 Discipline. The Employer shall not discharge or discipline any regular full-time employee without just cause. Just cause for suspension or discharge without a prior warning shall include, but is not limited to, the following: proven dishonesty....

* * *

ARTICLE VI – MANAGEMENT RIGHTS

6.1 Operate Business and Direct Work Force. The operation of the Employer's business and the direction of the working forces, including but not limited to: the establishment of starting and quitting times; the right to modify and change work schedules including the number of shifts; the right to hire, transfer, suspend, layoff, recall, promote, discharge for just cause, assign or discipline employees, to relieve employees from duty because of lack of work; and to transfer employees from one location or classification to another; the right to plan, direct and control warehouse and transportation operations; the determination of the layout of the warehouse; the determination of processes and techniques employed in the warehouse; the right to introduce new equipment, methods, processes and jobs; the right to cross dock product between Roundy's warehouse facilities (but not for deliveries to customers) and the right to have loading and unloading performed by other than unit personnel: the determination of policies affecting the training of employees; the right to implement qualitative standards of performance; and the right to establish reasonable designated routes for drivers and to require these employees to perform their duties in a diligent manner; are vested exclusively in the Employer, subject, however, to the provisions of this Agreement.

6.2 Reasonable Rules. The Employer shall have the right to make and change, from time to time, reasonable rules and regulations in connection with its business, subject to the provisions of this Agreement. Prior to implementing a new rule or amending an existing rule, the Employer will provide the Union with a copy of the same and afford the Union an opportunity to discuss the change. However, such discussion shall not unreasonably delay the Employer's implementation of the rule. The Employer shall provide each employee with a copy of the work rules and/or any changes thereto. The Employer also retains the right to implement a reasonable substance abuse program which shall include employee testing subject to the other restrictions in this subsection.

6.3 Productivity.

(a) The Employer and the Union recognize the rights of management including, but not limited to, the right of the Employer to a fair day's work for a fair day's pay and the efficient operation of its business. The Union and the Employer agree to cooperate in obtaining and maintaining the highest level of efficiency and productivity. The right of the Employer to require productivity and that employees perform in a proper manner is, therefore, specifically recognized.

(b) The Employer may implement qualitative performance standards for Drivers and Warehouse Employees which may be enforced in a reasonable manner through progressive disciplinary action including discharge. Non-engineered standards shall not be applied to selection jobs. Prior to implementation of any standard, the Employer shall meet and discuss with the Union the standards, the underlying engineering study, and the papers, documents and records constituting the study. In addition, the Union shall be afforded a reasonable opportunity to conduct its own study with experts or consultants of its own choice and shall be provided with access to all papers, documents and records establishing the study.

(c) The following progressive disciplinary measures will apply in all cases of discipline of regular employees for substandard productivity. All discipline must be in compliance with Article V, Discharge or Suspension.

1. First offense – verbal warning
2. Second offense – written warning
3. Third offense – second written warning
4. Fourth offense – three (3) day suspension without pay.
5. fifth offense - discharge

Each case of discipline shall be judged on its own merits. The Employer shall give full consideration in any discipline case where, in the exercise of reasonable judgment, legitimate factors beyond the reasonable control of the employee resulted in substandard productivity.

An employee will not be disciplined more than once in any workweek for substandard productivity. However, employees remain subject to discipline for any other violation of work rules or misconduct in compliance with Article V, Discharge or Suspension.

An employee earns back one Step in the disciplinary progression for each thirty (30) days worked during which the employee's personal productivity meets or exceeds the productivity standards.

A minimum time or standard of six(6) hours for regular employees in their home department must be achieved before an employee is to be held on standard. (Applies to regular full-time employees).

(d) An employee shall be required to attain the minimum acceptable level of performance in his respective department as established by the Employer, or be subject to discipline in accordance with

the provisions of this Article. The minimum acceptable levels established by the Employer shall not exceed the following:

(i)	All Casual Employees	100% of Standard
(ii)	Full-time Employees Hired after July 1, 1991	100% of Standard
(iii)	Full-time Employees Hired Prior to July 1, 1991	95% of Standard

(e) Employees returning to work after an injury of more than thirty (30) work days shall be afforded a work hardening productivity progression starting at 85% week one (1), 90% week two (2), 95% week three (3) and 100% week four and thereafter except for those full time regular employees hired prior to July 1, 1991 which shall be 95%.

(f) Once a year all power equipment shall be tested and inspected for proper speed, loaded and unloaded, in a predetermined course.

BACKGROUND

The dispute in this case involves changes the Employer made in the procedure it follows when conducting a physical audit (Case Audit) of the items (generally in boxes and uniformly referred to as "cases") of product placed on pallets by Order Selectors (Selectors) working at its Oconomowoc Distribution Center. Selectors place the cases on pallets when filling orders for product from approximately 150 Company-owned and independently-owned retail grocery stores. The purpose of the audit is to determine if the order has been accurately filled.

The Oconomowoc Distribution Center is a huge, modern facility, which replaced the Company's old Milwaukee warehouse on Burleigh Street, in 2004. According to Senior Supply Chain Manager Richard Bridwell, it covers approximately 1.1 million square feet. If it were square shaped, its dimensions would be approximately 1,050' x 1050' or the length of "3.5 football fields" in each direction. It is divided into three main departments—Grocery, Perishable and Frozen. Those departments are further broken down into sub-departments. For example the Perishable Department includes a Meat Room, a Dairy Room, a Produce Area, and a Floral Area. Bridwell testified that, at any given time, the Distribution Center houses approximately $125 million worth of product, which turns over every 3 to 3.5 days. The Center operates seven days per week and ships approximately 1.720 million cases holding $38,149,600 worth of product per week, to the retail grocery stores.

Bridwell explained that the Distribution Center is treated as a "cost center" for accounting purposes. It is not intended to generate a profit. Instead, it delivers product to the retail stores at "cost." The retail stores operate on a thin profit-margin of approximately 2-3%.

The Order Selector's Job

According to Bridwell, approximately 357 of the Company's Warehouse Employees work as Order Selectors. If they exceed the established norm while functioning as a Selector, they receive

incentive pay in addition to their hourly rate. On a typical day, approximately 175 Selectors are scheduled to work. The work they perform can be described generally as follows:

An electronic system is used to organize the work that needs to be performed in filling an order and notifies one of the Selectors, over a Vocollect headset, that they should proceed to a particular aisle and "pick slot" from which they are to select product, typically in stored in boxes or "cases." The Selector takes a "power jack" and pallet to the designated slot, which should be filled with cases of the product in question. If there are a sufficient number of cases of product in the slot, the Selector physically places them on the pallet and notifies the system that the "pick" has been completed, and then proceeds to the next slot.

The Selector continues this process, "building" the pallet, until the order is filled or the pallet cannot safely hold any additional cases. It can take as little as two minutes or as many as 80 minutes to fill a pallet. A pallet that has been filled with product typically stands around seven feet tall and can weigh anywhere from 100 to 2,000 pounds.

Once the Selector notifies the system that the process of filling an order is complete, the Selector is told to proceed to one of the printers to print labels to be attached to the pallets . The labels indicate (by number) the retail store where the pallets are to be delivered and contain information about each pallet, including the number of cases on the pallet and the weight of the pallet. The labels also have a bar code that permits the Selector and others to pull up the records for the order. The Selector then wraps the pallets with shrink wrap, places the labels on the pallets, and takes them to a designated staging area near the loading dock. At that point, the Selector relinquishes responsibility for the order and proceeds to call up the next assignment.

After the pallets have been placed in the staging area by the Selector, a "Loader," who may be a Company employee or an employee of an outside carrier, loads the order onto a truck. Before placing the order on a truck, the Loader may choose to level, consolidate, or combine the product on the pallets, for safe transport and efficient delivery.

Things Can Go Wrong

This description of the job of a Selector assumes that all goes well with the process of selecting product needed to fill an order. Things can happen that require a modification of the normal selection procedure and possibly the order itself.

For example, sometimes there is no product or insufficient product in the pick slot. When that happens, the Selector can call in an "exception" to the order. The system will then make an adjustment to the order, eliminating the missing product from the inventory of products being picked by the Selector, and a fork lift driver will be dispatched to the slot in order to "let down" additional product from above the slot, and refill it.

Once the system is notified that an empty pick slot has been refilled, a different Selector is dispatched to the slot to pick up the missing items. This is called a "scratch trip." If the system is

notified that there is no product available in the warehouse, that part of the order is modified, so that the missing product can be deleted from the invoice sent to the retail store.

If a Selector encounters an empty pick slot, or one that does not have the required amount of product, and does not call in an "exception" to the order, the pallet will end up being short that amount of product and the retail store will be charged for product not received. In addition, the process for refilling the pick slot will not be timely followed.

The Prior Case Audit System—Union's Description

Prior to the changes that were made in the audit system in 2019, Case Audits were conducted by non-bargaining unit employees, typically supervisors, known as Loss Prevention (LP) Associates. Tom Bennett, who had worked in Roundy's warehouse operations before becoming Local 200 President and Business Agent in January 2007 and then Local 200 Secretary-Treasurer in January 2018, and Jay Couturier, who had worked in Roundy's Burleigh Street warehouse and then its Oconomowoc warehouse from 1991 until February 2019, when he became a full-time Business Agent for Local 200, testified that for at least 30 years the LP Associates followed a protocol that required the presence and participation of the Selector who built the pallet and a Union Steward.

After an LP Associate selected a pallet to be audited, it would be broken down to count the number of cases of each product that had been recorded as being present on the pallet. Any relocation of the pallet, and the break-down and rebuild would be carried out by the Selector and/or Union Steward. A typical break down of a pallet involves the removal of the shrink wrap and removal of the cases of product from the pallet in order to conduct the count. Pursuant to this arrangement, the Selector and Union Steward were in a position to observe and verify the chain of custody of the pallet and the accuracy of the count and immediately investigate if necessary and seek to explain any shortages, overages, or other "mis-picks." If the Company determined that the Selector was at fault in causing the error, progressive discipline would be imposed, as provided in the Agreement, and a grievance would be filed if the Selector wished to dispute the finding of fault.

The Union contends that this protocol served to preserve a basic Union principle it has strongly and universally defended over the years, that the moving or physical movement of cases or pallets of product is bargaining unit work and should not be performed by any non-bargaining unit person. It also helped avoid the imposition of unjust disciplinary actions.

According to the Union, the new protocol involves a violation of an established and binding past practices under the terms of the Agreement. It excludes the Selectors and Union Stewards from the audit process and the Case Auditors are now performing the bargaining unit work that was formerly performed by the Selector and Union Steward. [2] Under the new protocol, numerous grievances have

2 In the introduction to its brief, the Union asserts, but does not elaborate upon, an claim that the new procedure also amounts to the imposition of a new work rule that violates the Agreement, because it was not properly distributed to the bargaining unit members and is unreasonable, both on its face and in its application.

been filed. Couturier estimated that, at the time of the hearing, more than a dozen employees had been disciplined but none had yet been terminated.

The Prior Audit System—Bridwell's Description

Bridwell began working for Roundy's in April 2017. Before that, he worked for Kroger in its distribution centers located in Houston and Memphis, for approximately six years.

Bridwell described the audit process based on what he heard and saw in the months prior to the change that was implemented. In giving that description, he acknowledged that he did not participate in the process and that he never actually witnessed the process unless he happened to be on the floor of the warehouse when an audit took place and was in a position to observe what was happening.

According to Bridwell, it was his understanding that the audits were carried out periodically in what were referred to as "LP blitz audits." LP Associates, mostly supervisors, would show up on a scheduled day and "spend a couple of hours" auditing orders. It was his understanding that both Selectors and Shop Stewards were involved in the process, but on those few occasions where he happened to witness what was happening, he only recalled seeing the Shop Steward present. From what he saw, the Shop Steward would "stand there" while the LP Associate would be "touching cases and moving cases around." He stated that he never received a grievance objecting to that conduct.

Bridwell described the LP blitz audits as occurring "far and few between." Prior to the decision to implement the new system, he reviewed company records to determine how often they occurred. Based on the documents he pulled, he found that Case Audits were conducted on 37,000 pallets in the five years prior to the change. If so, that would average a little over 100 pallets per week. Under the new program, the Company audits 25,000 pallets per week.

Development of the New Audit Program

Shortly after assuming his position as Senior Supply Chain Manager, Bridwell concluded that the existing auditing process was failing to prevent thousands of errors and shortages that were then occurring, resulting in significant costs attributable to the Distribution Center, and financial losses and other negative consequences at the retail level. According to Bridwell, retail stores were filing in excess of 40,000 claims of shortages per year, with a value of $25 Million. In addition, they reported receiving numerous customer complaints about empty shelves.

Sometime after Thanksgiving in 2017, Bridwell discussed the situation with Bennett. Bridwell told Bennett that he wanted to establish a new audit program. Bennett told Bridwell that he needed to put the proposed program in writing for review by the Union. On January 29, 2018, Bridwell sent Bennett a memorandum outlining a proposed new "audit program" that read as follows:

"The following audit program will be performed to validate order accuracy:

1. Orders will be staged in a designated area
2. Auditors will check accuracy by breaking down, Auditing and reassembling the pallets

3. Supervisors, Stewarts and Selector will verify any errors before reassembly of the pallet
4. Supervisors will conduct spot audits
5. Stewarts or Selectors will correct any errors found

"Breakdown Audits

"A break down audit is performed by one of the Auditing staff. They will break down the pallets typically ranging from 100 to 300 cases. Any mis-picks or overages will be placed to the side as an error. Each case mis-picked is one (1) error. Any shortages that are not scratches will each count as one (1) error. Error rates equal to or greater than 2% are subject to progressive discipline. Any mis-picks, overages and/or shortages, will be tallied as total errors; total errors divided by the total amount of cases audited will equal the error rate.

"Spot Audits

"A typical spot audit is a 25-30 case accuracy check performed by a supervisor. The supervisor will walk alongside the selector verifying the cases that have been selected. If two or more errors are found while performing a spot audit it will constitute a warning letter, 3 day suspension letter, 5 day suspension letter or termination letter. (In the event excessive errors are found during a spot audit it should be moved to the breakdown area to determine for dishonesty)."

According to Bridwell, Bennett responded to Bridwell's memorandum by asking him to include the discipline components. Bridwell did not get back to Bennett until August 16, 2018. On that date, he prepared a second version of the memorandum that added the following two sentences at the end of the description of the program: "Excessive errors will fall under dishonesty. Will follow the same disciplinary steps as performance."

Bridwell sent a copy of the modified memorandum to Bennett and Bennett responded by telling him that his addition was too vague, and that he needed to see some examples of the discipline that might be meted out. Bridwell agreed to modify the memorandum to provide some examples

Before doing so, Bridwell had a conversation or conversations with Bennett wherein Bennett expressed the Union's belief that the Selector and Shop Steward both had to be present during the audit; that the Union wanted the procedure to provide "transparency;" and that, generally speaking, the Union wanted to ensure that the process would not cause "undue harm" to the employees.

According to Bridwell, it was during this same period of time, that he an Bennett also discussed whether it would be sufficient to just have the Shop Steward be present during the audit. He states that Bennett recognized that the Distribution Center was short on Selectors, and that way the Selector whose pallet was being audited could be "out there picking cases." They talked about the possibility of conducting a "pilot" program, only applicable to Selectors who were not yet "full-time Associates" and, therefore, not in the bargaining unit.

On September 27, 2018, Bridwell prepared a third iteration of the memorandum that made numerous changes. It indicated that the memorandum was being sent to "All Warehouse Associates"

and that it dealt with "**Pilot** Selection Case Audits." [Emphasis in original.] It included a more detailed description of the audit program, including a delineation of the work that the AP Auditors and the Dock Fork Workers would perform. It indicated that only one Shop Steward would be present in the designated area during audits in a particular department; it omitted the section dealing with Spot Audits; and it included several examples and explanations of the discipline that could be imposed under differing circumstances, including use of the progressive discipline provisions in the Agreement for low productivity.

According to Bridwell, after he sent the Union the third iteration of the memorandum, he spoke to Bennett and was told "the Union came back and disagreed about...the Selectors not being involved in the audit process. They wanted them there." At that point, Bridwell states, discussions of the proposed program were put in a "holding pattern" for several months. Then, as certain events unfolded, he began to discuss it with Jay Couturier, in February or March of 2019 (about the time Couturier became a Union Business Representative).

Written Objections and Grievance

Bridwell prepared a new iteration of the memorandum during this period. It was dated March 6, 2019 and indicated among other things, that Shop Stewards would be used to deliver the pallets selected to be audited and (like earlier versions) that the auditors would break down, audit and reassemble the pallets. 4It also provided that only one Shop Steward would be present to observe audits in each department. Unlike earlier versions, it did not indicate that the program was a "pilot" program.

Couturier learned of the existence of this iteration and, in the apparent belief that the Company intended to implement the new procedure, and not as a "pilot" plan only applicable to non-bargaining unit employees, Couturier filed the first of two written objections, followed by a formal grievance, with HR Manager Beth Robinson. His first objection, dated March 11, 2019, read in relevant part as follows:

> "The Union has reviewed this unnamed or titled document dated 3/6/19. This 3/6/19 document directly violates the signed Agreement between the parties. If the Employer states this is a right of the Employer under Articles 6.1 or 6.2, please recognize the Union's consistent position related to previous submissions of Selection Audit Policies, from either Management Team of Roundy's or Kroger, over several years. The Employer has withdrawn each attempt understanding that the Union's request to bargain has merit.
>
> "The Union demands to bargain with the Employer prior to any implementation of this document dated 3/6/19. The Union shall be forwarding a Request for Information in the near future related to this matter."

Couturier filed the second objection with Robinson on March 21, 2019. It read in relevant part as follows:

"Today, Thursday March 21, 2019, at approximately 2:00 pm a discussion was led by Richard Bridwell related to the Employer's notification of proceeding with an unknown program related to Selection Audit.

"As you are aware, or should be, the Union has been consistently steadfast with the position that the handling of product in the Oconomowoc DC is strictly bargaining unit work, to include an unwavering position for a decade to any portion of a policy or program related to Selection Audit.

"The contract is clear in several provisions within Article IV– Management Rights, Section 6.2 – Reasonable Rules. The Employer is obligated **prior** to the implementation to provide each employee with a copy of the work rules and/or any changes thereto. [Emphasis in original.]

"The Union demands complete follow through of the Contract in all respects.

"The Union demands a copy of the "unknown" Selection Audit program immediately.

"The Union shall review the documents to determine the necessary action(s) to ensure compliance with the CBA is adhered to by the Employer.

"The Union clearly made notice to the Employer of todays meeting, Thursday, March 21, 2019, was not a Bargaining Session, nor did the Employer present a written document at today's meeting to fully disclose the Selection Audit policy."

Email records indicate that Bridwell met with Couturier on April 4, 2019 and discussed another iteration of the memorandum, dated March 22, 2019. It referred to the program as a "pilot" program and in most respects it was the same as the third iteration, dated September 27, 2018. However, the procedure outlined contemplated the possible use of pallet jacks equipped with scales to determine weight before deciding if a pallet would be broken down. On April 10, 2019, at Bridwell's request, HR Manager Robinson sent a copy of the March 22, 2019 version to Couturier, pursuant to the request Couturier had made at the meeting on April 4, 2019.

On that same date, Couturier filed the grievance in this case. It is addressed to Robinson and reads as follows:

"On April 10, 2019 Teamsters Local 200 was notified via Email of a Roundy's Oconomowoc 'Case Audit Pilot Program' (the 'Program') dated 3-22-2019. We are not presently aware of any implementation of, or adverse effects upon bargaining unit members as a result of the use of, the Program.

"As you are aware from prior conversations and events, Local 200 has consistently taken the position that any handling of product in the Oconomowoc DC is strictly bargaining unit work, which must only be performed by bargaining unit members. This has been Local 200's unwavering position for more than a decade, and it applies to any portion of a policy or program related to selection audit programs or policies of all types and descriptions, including the latest Program.

"Local 200 demands to bargain with the Employer prior to any implementation of use of the Select Audit Pilot Program. Any discipline or other action which is inconsistent with

the terms of the Union contract including, but not limited to Articles 5.1, 6.2 or 6.3, must be the subject of bargaining. Local 200 demands to bargain about the implementation of the Program (as well as any attendant disciplinary action) and the effects of the Program upon bargaining unit members and their working conditions. We also demand that the Employer cease and desist from taking any further steps to roll out or implement the Program (as well as any attendant disciplinary action) until we have bargained in good faith about these topics.

"Please advise whether there has been any implementation or use of this Program. If so, please specifically describe the steps taken in detail and you may take this letter as an official Grievance (No. 44204) protesting the implementation and use of the Program, which violates the Union contract as a whole for the reasons outlined in this letter. We may amplify and expand upon those reasons once we have had an opportunity to review the Program and its use in greater detail, as applied to Bargaining Unit Personnel. All bargaining unit members should be made whole for all losses sustained as a result of the implementation and use of this Program."

Reference to Prior Disputes

In his objection dated March 11, 2019, Couturier made reference to "the Union's consistent position related to previous submissions of Selection Audit Policies, from either Management Team of Roundy's or Kroger, over several years." According to Couturier, "The Employer has withdrawn each attempt understanding that the Union's request to bargain has merit." Bennett and Couturier testified about those events at the hearing.

Bennett was Principal Business Agent (BA) for Roundy's from 2009 until February 2019,when he was elected Secretary-Treasurer of the Local and Couturier took over that role. In his role as Principal BA, Bennett would discuss and attempt to resolve grievances and other problems with Roundy's Operations Manager, Ed Kapitz.

According to Bennett, there was one occasion during his tenure when the Company adopted a practice of scheduling Shop Stewards to cover three Case Audits at one time. Bennett contacted Kapitz and told him that the Union felt strongly that, due to the need for transparency of the disciplinary process, Stewards should only be required to cover one Case Audit at a time. Kapitz agreed and the Company returned to the practice of scheduling Stewards to be present for Case Audits on a one-for-one basis.

Bennett testified that it was and remains the Union's position that, under the Recognition clause of the Agreement, the handling and movement of cases in the warehouse is "bargaining unit work." He states that he had "many" discussions with management regarding that position over the years and acknowledged that management didn't always agree with him. He recalled an example, occurring in 2010, where in his view, management did agree, even though the grievance was denied.

According to Kapitz's answer, the grievance (#29810) alleged that an LP Auditor was observed "breaking down a pallet during an audit in Perishables." (Bennett was unable to find a copy of the original grievance in his files.) Bennett was present at the meeting held to discuss the grievance, and

Kapitz sent Bennett a response to the grievance (with copies to the Union Stewards), dated June 20, 2010, that read as follows:

> "This letter is in response to the grievance meeting held on June 10, 2010.
>
> "The Company has reviewed all the facts regarding an employee of Loss Prevention observed breaking down a pallet in Perishables. The auditors will touch cases to verify the right case and assist in all audits. The Company has the Union employee break down and rebuild a pallet to verify the correct case is going to the store.
>
> "The Company's position is that it followed appropriate Company policies and procedures and applicable contractual language. Therefore, this grievance is denied.
>
> "If you have any questions, please call me at 262-560-3501."

Bennett testified that he considered Kapitz's letter to be a satisfactory resolution of the grievance, because it supported the Union's position that "only bargaining unit members should breakdown and rebuild pallets." He noted that copies of the letter also went to Roundy's Vice-President of Operations, two supervisors and the person then handling HR He testified that after this response, and continuing until the new Case Audit procedure was implemented, "The Selector would breakdown. The Union steward would be present to witness the process in full."

Further Events Prior to Implementation

The record does not indicate what further discussions, if any, occurred before the Company answered the grievance and proceeded to implement the new policy. Robinson answered Couturier's grievance on May 24, 2019. Her answer read as follows:

> "The company notified the union multiple times over the last year and a half regarding the implementation of the audit pilot. The company has made amendments to the audit process based off of conversations during those meetings.
>
> "As for performing work typically performed by the bargaining unit, the auditing of product has not been performed by Local 200 members. In addition, the associate performing the audits are not selecting product, they are simply auditing pallets of the already completed selection work for the purpose of checking the accuracy of the selectors work. this could entail moving products off the pallet and putting it back on the pallet once the verification is complete. There is not anything in the agreement that defines the exclusivity of touching, picking up or moving a case as being the sole responsibility of the union. In addition, there is nothing that provides the union with exclusive rights to operate material handling equipment at the site.
>
> "At the time of the filing of this grievance, the audit pilot had not expanded to 'regular full-time associates' as defined in the CBA. The audit pilot is not designed to fault but to test the process and create a baseline to create processes to operate effectively and accurately."

In his testimony, Bridwell, noted that more than a year had passed since he first contacted the Union about the proposed change. He states that he concluded, sometime in May or June 2019, that the Company had made all of the changes it was willing to make in an effort to accommodate Union objections. On June 19, 2019, he prepared a final version of the memorandum that he had sent to Couturier on April 10, 2019. It omitted the reference to it being a "pilot" program from the subject line and actual description of the program. An edited version was prepared on June 24, 2019, to correct some "typos," including the use of the word "pilot" in the description of the program.

One significant change that Bridwell made in the final version, that differed from the version he had sent to Couturier on April 10, 2019, can be found in item 2 of the description of the program. He eliminated the reference to Shop Stewards, thereby implying that they would not be present during the audit. The two versions read as follows:

> April 10, 2019 version: "Kroger Asset Protection auditors will check accuracy by breaking down, Auditing and reassembling the pallets, or by using pallet jacks equipped with scales. Pallets will be delivered to the appropriate staging lane by union shop stewards after audit is performed." [Emphasis added.]
>
> Final Version: "Kroger Asset Protection auditors will check accuracy by breaking down, Auditing and reassembling the pallets, or by using pallet jacks equipped with scales. Pallets will be delivered to the appropriate staging lane by loaders, selectors, or reach truck drivers after audit is performed." [Emphasis added.]

Asked to explain why this change was made, Bridwell stated "the stewards weren't providing any value at the...actual time of the audit. The selector wasn't involved, but the stewards...never even tried to get involved as far as breaking down cases." He added, "they never said, 'Hey, let me do that,' none of that. They didn't want to be involved in breaking down cases. So they just wanted to stand there and observe the audit." [This testimony was apparently based what Bridwell claims to have observed during the pilot phase of the new program.]

According to Bridwell, under the new procedure, if an error is found in the audit that could potentially lead to discipline, the AP Auditor will get the Selector and Shop Steward involved. He acknowledged that "things happen" that might serve to clear the Selector of fault. "Receivers receive pallets wrong. Forklifts let pallets down in the wrong slots. So that can create mis-picks." "If there are cases missing off the top, it's possible what Jay [Couturier] said could happen, a loader levels it out, for whatever reason. You can tell on the last pick documentation if...it was the last cases picked."

The New Audit Program is Implemented

It is undisputed that the Company implemented the new audit program without the Union's agreement and over its objections. Eventually, bargaining unit employees were given a copy of the policy and asked to sign for it. The Company introduced a copy of the policy, dated "June 24, 2019,"

that was signed by the employee on July 29, 2019. It is entitled "Roundy's Oconomowoc Case Audit Program," and reads as follows:

> "One of the Kroger Co. Four Keys is 'I get the product I want plus a little.' The Oconomowoc Distribution Center supports this goal. By shipping every order accurately we will support in stock position at store level. This supports one of our four priorities of 2019' in stocks'. Our customers expect the items they want to be on the shelves.
>
> "The following program will be performed to validate order accuracy:
>
> 1. Completed pallets will be staged in staging area as directed by a supervisor through the WIN/EXE system.
> 2. Kroger Asset Protection auditors will check accuracy by breaking down, Auditing and reassembling the pallets, or by using pallet jacks equipped with scales. Pallets will be delivered to the appropriate staging lane by loaders, selectors, or reach truck drivers after audit is performed."
> 3. If scales are used and weight of pallet falls outside of an acceptable range, then a full breakdown audit will be performed.
> 4. Stewards and/or selectors will only be involved in the audit process if there is reason to believe errors that exist may lead to discipline.
> 5. Stewards or Selectors will correct any errors found during the audit process before the order is shipped to the store.
>
> "Breakdown Audits
>
> "A break down audit is performed by one of the Auditing staff. They will break down the pallets typically ranging from 100 to 300 cases. Any mis-picks or overages will be placed to the side as an error. Each case mis-picked is one (1) error. Any shortages that are not scratches will each count as one (1) error. Error rates equal to or greater than 2% are subject to progressive discipline. Any mis-picks, overages and/or shortages, will be tallied as total errors; total errors divided by the total amount of cases audited will equal the error rate.
>
> "Examples:
>
> "100 cases audited 2 errors one over one short = 98% accuracy level subject to discipline
> 70 cases audited 1 short = 98.6% error rate not subject to discipline
>
> "Multiple cases short and/or slots called and not picked could result in termination under proven dishonesty, if intent was to inflate or deceive the company.
>
> "Excessive errors will fall under proven dishonesty as outlined in article 5.1. All other errors follow the same disciplinary steps outline in Article 6.3 Productivity and will be administered in the Quality of Work category.
>
> "'*The shopping experience makes me want to return*' is another Kroger Co. four Keys. Let's make sure we ship every order accurately to insure we support customer expectations. Thanks for your support." [Emphasis in original.]

Under the new program, the Company employs five AP Auditors, who audit approximately 1.5% of the pallets that leave the Center. That amounts to 25,000 pallets per week, compared to the total of 37,000 that were audited in a five year period under the old program. The Auditor audits pallets that

have already been shrink-wrapped and labeled by the Selector. They remove the shrink wrap; remove and confirm the number of cases of product that are on the pallet; and reassemble the order on another pallet. The AP Auditors select the pallets for audit based on factors such as claims and visual assessments; they do not select pallets that are being actively loaded or pallets that have been rebuilt or modified by a Loader.

UNION'S POSITION

- For more than 30 years a Union Steward and the Selector have always participated in the Case Audit process. They have broken down the pallets; reassembled the pallets; investigated and resolved the discrepancies discovered; and generally assisted in achieving the twin goals of accuracy and accountability, while simultaneously assuring transparency and fairness in the review/disciplinary process.

- In 2010 Roundy's attempted to deviate from the protocol of one steward and one selector per Case Audit. The Union grieved and the Company acknowledged the Union's position. Kapitz wrote, "The Company has the Union employee break down and rebuild a pallet to verify the correct case is going to the store."

- In 2019, newcomers to management decided to unilaterally deviate from the protocol endorsed by Kapitz and consistently-applied thereafter by creating a new protocol. Under that protocol, the Company decides who performs Case Audits, which are done without transparency or participation by the Union Steward or Selector.

- The new protocol was implemented without the Union's agreement, over its explicit objections, and in derogation of the Company's prior commitments to accept and maintain the protocol.

- Even if the Company had not explicitly agreed to follow the protocol, there exists a binding past practice requiring it to do so. The evidence establishes that there was a decades-long, accepted practice of following the protocol. In fact the protocol was explicitly adopted by the Company in the 2010 grievance settlement and followed ever since.

- In an effort to defend its conduct, the Company offers a mass of statistics about warehouse size, volume of business, error rates and costs. Those statistics are immaterial in view of the Company's contractual obligations.

- The Company's reliance on the cited statistics also ignores several critical facts. First, the Union does not object to its use of a Case Audit program, together with proper disciplinary procedures. Second, there is nothing in the Agreement or the principles of past practice theory that gives it the right to unilaterally alter the protocol that it has accepted and explicitly embraced for decades. Third, the proper place for making such a change is at the bargaining table, not through unilateral action in mid-contract.

- The parties are large organizations and experienced bargainers. In the Union's view, the changes the Company seeks to make are motivated by a desire to save money while expanding the audit process. While that is understandable, the Company does not have the right to disregard its commitments under the existing Agreement. Cost saving is not a reason to reject the application of the agreed protocol and violate the contract. If necessary, a deviation from or amendment to the protocol should be the subject of collective bargaining, not unilateral action.

- For these reasons, and based on the record as a whole, the Union asks the Arbitrator to sustain the grievance and: (1) find that the Company has violated the Agreement by unilaterally implementing

and enforcing, by discipline, a new Case Audit program that eliminates the full participation of a Union Steward and Selector in each Case Audit; (2) require the Company to rescind the current Case Audit program and all disciplinary action taken pursuant to it; (3) make all employees whole for any losses sustained due to disciplinary actions taken pursuant to the program; and (4) order the Company to follow the terms of the Agreement and lengthy past practice by following the accepted Case Audit protocol unless and until changed in bargaining. Finally, the Union asks the Arbitrator to retain jurisdiction for at least 60 days to resolve disputes, if any, over implementing the Award.

EMPLOYER'S POSITION

This being a contract enforcement grievance, the Union has the burden of proving, by a preponderance of the evidence, that the Company has violated the Agreement. It has failed to meet that burden. There is nothing in the Agreement that prohibits the Company from modifying and implementing an audit review process. Nor is there anything in the Agreement that requires the Company to use bargaining unit members to handle product, incident to an audit. On the contrary, the Company has expressly retained the right to develop and implement qualitative standards of performance and reasonable rules related to those standards.

Lack of any Contractual Limitation

- It is well established principle in the interpretation and application of a collective bargaining agreement, that management retains the right to unilaterally manage its business, unless restricted by the terms of the agreement or by law.

- Managerial rights are only given up to the extent set forth in the agreement. That principle is especially important with regard to the establishment and enforcement of productivity and quality control standards. In today's competitive market place, any reduction in the quality of a Company's product or service can affect sales and profits, which is harmful to both the employer and employees. [Citations omitted.]

- When determining whether an agreement restricts an employer's right to implement and enforce quality control standards, arbitrators are obligated to honor and apply the clear and unambiguous language in the agreement. Where language is clear and unambiguous, the arbitrator is bound to enforce the language without consideration of extrinsic evidence, such as bargaining history or past practices. That expectation is even more compelling when the agreement contains an admonition to that effect. [Citations omitted.]

- A labor agreement should be interpreted as a whole. No negotiated provision should be ignored. When interpreting and enforcing the terms of a collective bargaining agreement that are ambiguous or in apparent conflict, the arbitrator should favor the interpretation that would give meaning and effect to all provisions, and avoid an interpretation that would render another provision meaningless or ineffective. [Citations omitted.]

- Applying these principles, it is clear that the Company did not violate the terms of the Agreement by implementing an audit review process to ensue the quality and accuracy of its Order Selection processes. The Company not only has retained right to control its productivity and quality standards, the Agreement expressly states that it has the "right to implement qualitative standards of performance." It also states that it has the right "to the efficient operation of its business" and the "right to require productivity." See §6.1 and §6.2 (a) of the Agreement. Provided that the Company meets and discusses its standards and reasonable work rules with the Union in advance, it "may implement qualitative and quantitative performance standards for...Warehouse Employees which may be enforced in a reasonable manner through progressive disciplinary action including discharge." See §6.3 of the Agreement.

- Beginning in 2017, the Company met with and discussed its Selection Case Audit program with the Union. However, when the parties could not mutually agree on a program, after months of discussions, the Company implemented the program, as expressly allowed in the Agreement. Section 6.2 states, "such discussion shall not unreasonably delay the Employer's implementation of the rule."

The Audit Process Does Not Violate the Recognition Clause

- The Union seeks to defeat the Company's inherent and contractual right to implement productivity and qualitative standards by contending that the program violated the Recognition clause by awarding bargaining unit work to non-bargaining unit employees. However, the auditing work in question is not bargaining unit work.

The Recognition Clause Expressly Excludes Auditing Work.

- The Recognition Clause states that the employees within the bargaining unit includes "all regular full-time and casual...warehouse employees." It explicitly excludes "all other employees including office clerical, confidential, call investigators, security, professional, and supervisory employees." Inventory control personnel, auditors, ASP and supervisors are expressly excluded from the bargaining unit. Thus, by its plain language, the Recognition Clause established that auditing work is not bargaining unit work.

- In *Olin Mathieson Chemical Corp.*, 42 LA 1025 (1964), the arbitrator comprehensively analyzed arbitral precedent dealing with the relevance of recognition clauses in cases dealing with the assignment of bargaining unit work to non bargaining unit employees and concluded, at page 1040, that the recognition clause there "does not include or imply any restriction, express or implied on the right of management to assign work." Here, as in that case, the Recognition Clause contains no restrictions on the Company's assignment of auditing work. Auditing is a check on work already performed by the Oder Selector, in order to ensure quality control standards.

Auditing Work is Inherently a Function of Management.

- Even if the Agreement did not explicitly exclude auditing work from coverage under the Agreement, it is not bargaining unit work, because it is an inherent function of management. [Citations omitted.] The auditing work at issue here is limited to the review of an already built pallet of selected product in order to ensure that it meets quality control standards. It does not entail "picking" of products. The pallet is already shrink-wrapped and ready to ship when the audit is conducted. If an error is detected, the Auditor involves the Selector and the Steward to review the situation and fix the error. The Auditor does not enter the warehouse to fix the error.

- Since the auditing process is limited to inspecting completed pallets, it has no adverse impact on the bargaining unit's work. No Union members have been laid off and the number of Order Selectors has increased since 2018. In fact, the new procedure has had a beneficial impact on the Order Selectors. By eliminating the Selector and Union Steward from the process, except when an error is found, bargaining unit members are better able to maximize their incentive pay.

The Agreement Should be Interpreted to Avoid Harsh, Absurd, and Nonsensical Results

- It is a well-settled principle in labor arbitration that, given a choice of two possible interpretations, an agreement should be interpreted to avoid a harsh, absurd or nonsensical result. The Union's interpretation would lead to harsh and nonsensical results for both the Company and Union employees. The Company loses production when the Selectors and Union Stewards are taken away from their regular duties. The Selectors can only earn incentive pay when they are performing

Selector work. At the time that Company introduced the new procedure, it was operating short of production workers. If it is required to have a Selector and Union Steward present to provide "oversight" for each of the five auditors at every audit, it will need to hire ten more employees. Bridwell estimated that the additional cost, including healthcare costs, pension payments and other benefits, would exceed a million dollars.

The Parties' Past Practice Does Not Prohibit the Company from Modifying the Process

- The Union contends that there are binding past practices with regard to the performance of bargaining unit work during an audit, and with regard to having the Selector and a Union Steward present at every audit. In order for a practice to be a binding past practice, it must be shown that the practice was unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time. The Union's evidence in this case falls short of that level of proof.

There is no Binding Past Practice Regarding the Performance of Bargaining Unit Work During an Audit.

- The Union claims that the "touching" of pallets or products is considered bargaining unit work and, therefore, the breaking down and rebuilding of a pallet by an auditor is impermissible. While Couturier testified that grievances have been filed when non-bargaining unit Clerks moved cases from one slot to another and when supervisors picked up and carried cases, he admitted that those grievances had nothing to do with auditing work.

- On the other hand, Bridwell testified that he had observed examples of "blitz" auditing where the Selector was not present, but the Union Steward was present, and the LP Auditor was actually "touching" the cases and "moving them around." In fact, the Union's own evidence (Kapitz's answer to Grievance #29810) establishes that "auditors will touch cases to verify the right case and assist in all audits."

- Bridwell also testified that when Inventory Control personnel do "cycle counting" in the warehouse, they will move products in order to level off the pallets and get an accurate count, and that non-bargaining unit personnel will handle cases to help Selectors when pallets fall over, to assist for training purposes and to fix and clean up cases in the aisles. When grievances are filed the Company has at times denied the grievance (as it did with Grievance #29810) and at times settled them on a non-precedent setting basis, as it did in the "spilled cantaloupes" case cited by Couturier (Grievance #21473). Thus, it cannot be said that the Company has ever agreed that all work involving the "touching" of pallets or products constitutes bargaining unit work.

There is no Binding Past Practice Requiring the Presence of the Selector and Steward During an Audit.

- The Union claims that in the past the Selector and a Union Steward were always present during an audit. That is not true. In his own testimony, Couturier acknowledged that to be the case. He said, "for the most part...we tried to maintain...one Union steward per audit." There have been variances from this practice "from time to time." While the Company may have allowed a Steward to be present, it did not clearly agree to create a binding past practice.

- In an effort to support its claim that the Selector and a Union Steward must be involved in the auditing process, the Union cited two grievances. In one case, the Union grieved when the Company started scheduling three audits with only one Steward present and the Company returned to the practice of one Steward per audit. In the other case, a grievance was filed alleging that an LP employee was observed breaking down a pallet during an audit in Perishables, which was denied. The grievance was not introduced in the record, so the basis of the Company's response is unknown. The Union did not provide any specific information pertaining to either of these grievances. Thus, it is not known whether they were resolved in arbitration, or resolved on a non-precedent basis.

- In fact, the Company denied the second grievance and stated that auditors "will touch cases to verify the right case and assist in all audits." While the letter mentioned that the Company did, at that time, allow Union members to breakdown and rebuild the pallets, the letter by no means conceded that it is a requirement under the Agreement. Arbitrators have recognized that management's offer to handle work assignments in a certain way, in order to resolve a grievance, does not create a binding past practice. [Citations omitted.]

For all of the foregoing reasons, the Company respectfully requests that the grievance be denied.

DISCUSSION

The Issue

It is helpful at the outset, to clarify my understanding of the scope of the issue presented in this proceeding. The Union's proposed statement is deemed to be more appropriate than the Company's proposed statement, which focuses its wording on the Company's principle defense rather than the violations alleged. However, the wording of the Union's proposed statement is imprecise. It questions whether the Employer has "improperly" adopted and enforced a "defective" Case Audit program.

In its pre-grievance and grievance correspondence and in its brief, the Union contends, in effect, that the Employer has violated the Agreement by unilaterally implementing and enforcing the new Case Auditing protocol, over the Union's objection, i.e., without first bargaining and reaching agreement with the Union, and by assigning bargaining unit work to Auditors.[3] It is those contentions, along with the Company defenses, that need to be addressed.

In the final analysis, the only Union contention that needs to be addressed is the first one, i.e., whether the Employer has violated the Agreement by unilaterally implementing and enforcing the new Case Auditing protocol, over the Union's objection, i.e., without bargaining and reaching agreement with the Union. I find that it did, because there was a binding past practice and agreement on the protocol that would be followed in Case Audits. A part of that agreed protocol was the expectation that the Selector or Union Steward would perform the breakdown and reassembly work, and otherwise assist the Auditor with the physical aspects of the audit. In reaching this conclusion, I have considered the Company's arguments and find them unpersuasive on the facts in this case.

The Evidence Supports a Finding of a Binding Past Practice

The evidence of the existence of a binding past practice of following the protocol is very compelling. It meets the classic definition cited by the Employer. The testimony of Bennett and Couturier is essentially undisputed. For many years, probably exceeding thirty, the parties had an agreement and understanding that when the Company wants to conduct a Case Audit, the established protocol would be followed. The Selector who built the pallet would be present to help the Auditor with the physical aspects of the audit, and afforded the right to offer an explanation for any apparent

3 In the Introduction to its brief, the Union also states: "This new protocol, which amounts to a new company work rule, was never distributed to the bargaining unit as required by the Union contract (See Section 6.2) and is unreasonable on its face and as applied." Those allegations are not deemed to be covered by the grievance in this case, and need not be addressed.

discrepancies found. In most instances a Union Steward would also be present from the start of the Audit, and available to help with the physical aspects of the Audit. In either case, a Steward would be made available in order ensure that the facts surrounding any apparent inconsistencies were properly developed and considered before deciding if any discipline would be imposed.

Granted, the agreed protocol was more time-consuming and labor intensive than the new procedure, but there were benefits for the Company, the Selector, and the Union. It helped ensure that the facts surrounding the alleged discrepancy were fully and accurately developed and witnessed, while they were fresh and available for viewing. Undoubtedly, it helped avoid mistakes in deciding whether to discipline the Selector and produced results that discouraged the filing of grievances and the pursuit of grievances that lacked merit.

The Company notes that that the Union's evidence included only a couple of grievances dealing with the details of the protocol—the Company's attempted use of one Union Steward to cover three audits at a time, and a dispute over the division of labor between the Auditor and the bargaining unit members present—and argues that the paperwork in those cases was lacking and unpersuasive. That argument would carry more weight if the Union had to rely on those two grievances to establish knowledge and agreement. In both cases the Company's response merely confirmed the existence of the protocol practice and served to assure the Union that its existence was not in jeopardy.

More importantly, knowledge and agreement on the Company's part was inherent in the protocol practice itself. Such a practice does not develop and continue for thirty years by accident or happenstance. It required the knowledge and acceptance of all those involved. On thousands of occasions over the years (37,000 times in a recent five-year period according to Bridwell) audits were conducted in the presence of the Selector and (in most cases) a Union Steward. Discrepancies were dealt with on the spot, with the understanding that a Steward could be requested, if not already present.

Company Defenses

The Company argues that the Agreement is "silent" as to existence of the protocol, and therefore it must be found that the managerial rights it has retained must prevail. The existence of the protocol does not conflict with or nullify the Company's right to direct and control warehouse operations or to implement qualitative or production standards. It still has the right to make and change reasonable rules, provided it meets its obligations under Section 6.2.

The protocol is not an unimportant practice or one that constitutes a mere way of doing business. It is an integral component of the parties' relationship.[4] The Agreement contains several provisions that

[4] I realize that the "Witnesseth" provision states that the Agreement is the "complete agreement," and constitutes the "only statement of the contractual relationship...and nothing will be applied inconsistent with it." The existence of the protocol practice, while not specifically mentioned in the Agreement, served as an underlying premise and supportive of certain of its significant terms, and its continued application until changed by agreement is consistent with the goals mentioned. So concluding, certainly does not produce an absurd or nonsensical result.

are implicated by the protocol practice. It was continued under numerous collective bargaining agreements and constituted an underlying premise for agreement on their provisions.

Under the Agreement, Selectors are subjected to conflicting pressures. On the one hand, they are entitled to incentive pay if their productivity exceeds the norms expected of them. On the other hand, the Company has retained the right to establish and enforce standards of production. Selectors can be disciplined and even discharged if they don't meet the minimum standards. And, the Agreement provides that they can be disciplined and possibly even discharged for making mistakes. The protocol amounts to an important underlying condition of employment and, as such, a benefit that is not subject to change mid-term, absent agreement. [5]

The Employer disputes the existence of a binding practice and therefore has not advanced a claim of "changed circumstances" as a basis for changing the practice. However, it has made a strong case for the need to address the problems the retail operations are experiencing. Like the practice in dispute, jointly addressing that problem has the potential to benefit all concerned and is grist for the mill of collective bargaining. The practice has existed for decades, and the opportunity to bargain over its modification presently exists. The parties are working under an extension of the Agreement that can be terminated upon appropriate notice.

For the above-stated reasons, I find that the Company violated the Agreement by unilaterally implementing and enforcing, by discipline, the new Case Audit program and that the remedy requested should be granted, as follows:

AWARD

1. The Employer shall immediately rescind the current Case Audit program and all disciplinary actions taken pursuant to it, and make whole any employees for any wage and benefit losses they have sustained due to disciplinary action taken pursuant to the program.

2. So long as the current Agreement remains in effect, the Employer shall reinstate and maintain the prior practice of arranging for the presence of the Selector and, if possible, a Union Steward during Case Audits and, if a discrepancy is found and no Union Steward is present, not taking any further action in connection with the results of the audit until the Selector has been afforded an opportunity to consult with and seek the assistance of a Union Steward.

3. I retain jurisdiction in this case for the sole purpose of resolving any disputes that may arise over the meaning or intent of the remedy provided or its implementation. If either party seeks to invoke this retained jurisdiction, they shall do so by written notice, to be sent within 60 days of the date of this Award.

George R. Fleischli 5/4/20

George R. Fleischli, Arbitrator Date

[5] It is noted that the Employer did attempt to reach agreement with the Union. In fact, it could be argued that its efforts amounted to "bargaining to an impasse." However, the plan that was implemented included a significant change in its "final offer." More importantly, given the binding nature of the protocol practice, the Employer had no right to unilaterally change it mid-term, absent agreement.