BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS UNION LOCAL NO. 695

and

ARAMARK UNIFORM SERVICES

Case 2
No. 61759
A-6037

Appearances**:**

Ms. Naomi Soldon and **Ms. Jill M. Hartley**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, for the labor organization.

Ms. Heather Runnow, Director of Labor and Employee Relations, Aramark Uniform Services, 2300 Warrenville Road, Downers Grove, Illinois, for the employer.

SUPPLEMENTAL ARBITRATION AWARD

Teamsters Union Local No. 695 and Aramark Uniform Services are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. On November 1, 2002 the union made a request, in which the company concurred, for the Wisconsin Employment Relations Commission to initiate grievance arbitration over the meaning and interpretation of the terms of the agreement relating to discipline. In response to the parties' request for a seven-member panel of WERC commissioners and staff arbitrators from which they could choose an arbitrator, the commission on November 5 provided a randomly selected panel. On November 18, the parties informed me that I had been selected to hear and decide the dispute. Hearing in the matter was held on February 7, 2003, in Madison, Wisconsin. A stenographic transcript was made available to the parties by February 27. The company and union submitted briefs on March 24 and March 26, respectively, and waived the filing of reply briefs. On June 24, 2003, I issued an abbreviated arbitration award which sustained the grievance and ordered reinstatement and full restoration of lost wages and benefits, but which included only a preamble of background and conclusory statement of discussion. In my cover letter of that date, I informed the parties I would be issuing a Supplemental Award, which this is, within three days. This Supplemental Award incorporates the abbreviated award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The parties concur that the issue before the arbitrator is:

> Did the employer have just cause to discharge the grievant, Tim Stelse? If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLES OF AGREEMENT

> **THIS AGREEMENT,** made and entered into by and between **ARAMARK UNIFORM SERVICES, INC. – MADISON**, and its successors, 1212 North Stoughton Road, Madison, Wisconsin, a Delaware Corporation, a wholly-owned subsidiary of ARAMARK Corporation, a Delaware Corporation, hereinafter called the Employer and/or the Company, and the **DRIVERS, SALESMEN, WAREHOUSEMEN, MILK PROCESSORS, CANNERY, DAIRY EMPLOYEES AND HELPERS UNION LOCAL NO. 695,** 1314 North Stoughton Road, Madison, Wisconsin, an affiliate of the International Brotherhood of Teamsters, hereinafter called the Union.

ARTICLE 7 – UNION REPRESENTATIVES

> **7.1** The accredited Business Representative of the Union shall be accorded the privilege of being on the property of the Employer, however, the Union Business Representative shall make such presence known to the District Manager or his authorized representative before the start of such visit….

. . .

ARTICLE 10 – UNAUTHORIZED ACTIVITIES

10.1 The Company and the Union mutually agree that in consideration of Article 17, Grievance Procedure and Arbitration, there shall be no authorized strike or slowdown, nor any lockout for the term of this Agreement.

10.2 It is agreed that in all cases of an unauthorized strike, walkout, or any unauthorized cessation of work in violation of this Agreement, the Union shall not be liable for damages resulting from such unauthorized acts of its members .... It is understood that the Secretary-Treasurer or principal Business Agent of Teamsters Union Local No. 695 is the designated officer empowered to authorize strikes, work stoppages, or action which will interfere with the activities required of employees under this Agreement....

. . .

ARTICLE 12 – QUITS AND DISCHARGES

. . .

12.2 No employee shall be discharged or suspended except for just cause. Just cause shall include but not be limited to inefficiency, unsatisfactory route and sales work, or a gross insubordination to customers. At least one warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made, except in cases of dishonesty, drinking or alcoholic beverages or drunkenness on the job, use or possession or narcotics, fighting, willful destruction of the Employer's property. Warning notices shall be effective for a period of not to exceed six (6)months. Written notices of discharge or suspension setting forth cause shall be given to the employee with a copy to the Union.

12.3 Any employee desiring an investigation of his discharge or suspension must file his protest in writing with the Union within five (5) working days of the date of discharge or suspension. The matter shall then be discussed by the Employer and the Union as to the merits of the case. Should it be found that the employee has been unjustly discharged or suspended, he shall be reinstated and compensation for time lost at his regular rate of pay.

. . .

ARTICLE 17 – GRIEVANCE PROCEDURE AND ARBITRATION

17.1 Time Limit: No grievance shall be filed or processed unless it is submitted to the Employer within ten (10) working days after knowledge of the occurrence of the event giving rise to the grievance.

. . .

ARTICLE 19 – ROUTE REPRESENTATIVES' RESPONSIBILITY

19.1 It shall be the responsibility of the Route Representative to solicit new accounts and retain existing accounts. Route Representatives shall make a consistent and reasonable effort towards this responsibility. In the absence of a consistent and reasonable effort, corrective action may be taken. Any such actions shall be in accordance with Article 12 of this Agreement. The Route Representative shall render all reasonable assistance to their respective managers in collecting outstanding accounts on their respective routes.

OTHER RELEVANT PROVISIONS

Memorandum of Understanding
(from the 1995-1999 collective bargaining agreement)

The following agreements were reached during the course of negotiations:

(1) The Company may establish a sales quota for Route Sales Representatives whose prior quarterly sales average is in the bottom one-third of the market center's sales average for all Route Sales Representatives.

Such quote shall be set individually, taking into account the previous month's individual results. In no case shall the quota be greater than the market center average or $4.00, whichever is higher. The Company may implement the following progressive step of discipline for Route Sales Representatives who do not meet their sales quotas.

Any Route Representative who does not meet the sales quota for the next month, but increases his performance, shall not receive the next step of discipline for that month. Any three (3) months where an individual does not receive discipline shall place him at the beginning of the disciplinary process.

Missing quota first month	-	Verbal warning.
Missing quota second month	-	Written warning.
Missing quota third month	-	Final written warning.
Missing quota fourth month	-	Three day suspension.
Missing quota fifth month	-	Subject to discharge.

. . .

ARTICLE 19 – ROUTE REPRESENTATIVES' RESPONSIBILITY (1995-1999 collective bargaining agreement)

19.1 It shall be the responsibility of the Route Representative to solicit new accounts or increases each day. Employees shall make consistent and reasonable efforts to make sales each day. The Route Representative shall render all reasonable assistance to their respective managers in collecting outstanding accounts on their respective routes.

BACKGROUND

Aramark Uniform Services, the employer, provides rental and sale of uniforms and related goods and services. The company's primary customer service personnel are the Route Sales Representatives (RSR's), represented for collective bargaining and contract administration by Teamsters Union Local No. 695. This grievance concerns the company's termination of RSR Tim Stelse, which the union claims was without just cause.

The company has divided its Madison operation, Market Center 614, into four districts of seven or six routes. Stelse's route was part of district 902, where from November, 2001 to January, 2003, the district manager was Sean Hamilton. Due to training and holidays, Hamilton did not begin serving fully as district manager until January, 2002. 1/ Prior to

1/ Unless otherwise indicated, all dates hereafter are 2002.

joining Aramark in Nov. 2001, Hamilton worked as a service manager for a competitor for two years. In January, 2003, Hamilton transferred to a position as an Aramark sales representative.

The company's profitability turns in large part on the initiative and abilities of the RSR to recruit and retain business, and company budgets reflect such expectations. Each week, the company expects each RSR will make a minimum of ten (10) sales calls, issue two written proposals, provide two samples, add three prospects, find one growth opportunity (GO) leads, and sell $10 of new goods and/or services. These standards, which are set by the company and are not the product of negotiations with the union, are routinely communicated to the route representatives. Route representatives receive commission-based compensation, in addition to their hourly wages, for new or "up-sell" business. Route representatives have always had sales and sales activity requirements as a part of their routine responsibilities.

The company also considers contract renewals as a factor of major importance, and seeks to have 90% of accounts under current contract.

The company also regards an RSR's performance in Loss and Ruin as an important measurement of overall performance. The company considers 12.5% to be an acceptable measure of loss and ruin, representing the charges the company is able to impose on customers for replacing faded or damaged garments. Based on national averages, company headquarters sets loss and ruin minimums, with 12.5% being a better number from the company's perspective than 11.2%.

The company tracks RSR activity through a Route Check-In Audit, summaries of which were introduced for the period July to October. Over that period, district 902 was by far the weakest in Market Center 614; out of 84 separate rankings (six categories, 14 weeks), Hamilton's district scored (or tied for) last in 38, third in 22, second in 13 and first in 11.

Hamilton testified that at the quarterly district operations review (DOR) in February, 2002, a company vice president raised Stelse's name as an RSR who was not meeting expectations. Although not given specific instructions, Hamilton left the meeting understanding he should deal with the situation. He thereafter met with Stelse, who he said indicated he also understood the need to address performance issues.

Shortly thereafter the Market Center 614 general manager had left the company, and corporate executive Joe Bachochin directed the second quarter DOR on April 25, 2002. Hamilton testified that the consensus at that meeting was that nothing about Stelse's performance had improved, and so Bachochin issued a Coaching Log to Hamilton, for his use in explaining expectations to Stelse. The record does not include any data as to Stelse's performance, or that of any of RSR, prior to the first week of July.

Hamilton's record of his coaching log for Stelse reads as follows:

4-25 Immediate - Help Tim to achieve an $11 weekly ave thru week 10 of contest, getting him to $100 total sales for the contest.

Long term - To work with Tim on improving 3 areas:

(1) Sales - 2.32 weekly ave to $10 with 10 weeks remaining in the quarter. Continued training and ride-alongs with DM + RM.

(2) Retention - 650 YTD in lost business, Tim needs to communicate with customers and build relationships, asking more problem seeking questions.

(3) Renewals - Continued training on effective tactics in getting accounts renewed.

7-1 Sales @ $52 vs $28 (2nd)
loss @ $281 vs $440 (2nd)
retention @ 75.8%

Tim has slightly improved over last quarter. But needs to continue to work in the 3 areas listed. Tim needs $32/week to achieve a $10/week avg. Lost business needs to be kept at a $6 min wkly avg.

Hamilton did not provide a copy of the coaching log or his notes to Stelse or any union representative. Hamilton testified he read from the coaching log at the meeting of April 25; Stelse testified he had never heard of a coaching log until this hearing.

On July 22, Michael Ross became general manager for Aramark Market Center 614, following a three-month stint as a special projects manager in its Philadelphia office. Prior to that, he had served in a managerial capacity with a competitor for about nine years, where the personnel were unrepresented. At the time of Ross' assignment, the Madison market center was showing a trend of declining revenue.

On September 6, 2002, at Ross's direction, Hamilton and another manager met with Stelse and union steward Pat O'Malley to present a Performance Improvement Plan (PIP). The PIP, which Ross apparently drafted 2/, read as follows:

2/ The authorship of the PIP is somewhat murky. Ross testified on direct that, "I drafted that document. . .I drafted it with Sean Hamilton's input." But he then testified on cross-examination that it was "not correct" to say that he "wrote it," before adding, "I created this from a Word Document." Still on cross, he said, "I helped author it. It was written and administered by Sean Hamilton." Later, on re-direct, he again assumed responsibility for the PIP, testifying that "I like this form. . .I chose this form. . ."

Date: 9/6/2002

Timeline: For the next 30 days

1. Based on YTD route sales average of $2.67 per week, Tim needs to increase sales activity to no less than 20 sales calls per week, 4 written proposals per week, 4 product samples per week, 6 new prospects per week, and 2 GO leads per week. This will help Tim to potentially achieve an $11 per week average in route sales. All sales calls will be verified by a District Manager each week. Written proposals and GO leads must be turned in to District Manager. This is effective 9/9/2002 for the next four weeks minimum.

2. With YTD route losses of $916, it is crucial to obtain contract renewals. At this point, Tim's route is very low in terms of contracts under valid agreement at 68.5%. Therefore, it will be required for Tim to obtain 2 renewals per week, with no more than a 5% reduction combined. This is effective 9/9/2002 for the next four weeks minimum.

3. As part of our commitment to servicing our customers properly, we must achieve a required level of loss and ruin. Market Center 614 averages 12.8% YTD. Tim's YTD average is 13.9%, but has dropped off in the final quarter with an average of 11.2%. Tim must maintain 12.5% minimum loss and ruin for each of the next four weeks.

The PIP, which is a standard Aramark form, also has a pre-printed "Summary of Expectations," as follows:

> I would like to offer you any assistance that you may need. If you have any questions, or if problems develop that might prevent you from meeting these objectives, please let me know immediately. I will make it a priority to help you in any way that I can. Progress towards these requirements will be assessed (daily, weekly, monthly). Obviously this is a serious situation and you should be advised that failure to meet the requirements listed above will result in further corrective action up to and including termination of employment with Aramark Uniform Services. In addition, should it become evident that there is no significant measurable improvement being made prior to the completion of the (30, 60, 90) day Performance Improvement Plan, then we will take immediate action up to and including termination.

Although Hamilton read the text of the PIP to Stelse and O'Malley at their meeting on Sept. 6, and he gave them each copies, the company did not provide a copy of the PIP to the local 695 business representative responsible for the Aramark unit, Wayne Schultz.

The expectations contained in the September 6 PIP, especially the sales and sales activity elements in paragraph 1, were essentially double that required of other RSR personnel. No other RSR was required to meet the "doubled-standard" the company set for Stelse.

Neither Ross nor Hamilton marked the "Summary of Expectations" paragraph to provide further specificity on the time-frame options referenced by the parenthetical elements. Other than the two sentences in the boilerplate quoted above, nothing on the PIP identifies the document as being disciplinary in nature. O'Malley, who has the authority and necessary forms to initiate grievances, did not do so in this instance.

The union and the company disagree about critical elements of the September 6 meeting at which the employer presented the PIP to Stelse and O'Malley. Hamilton testified that he explicitly described the PIP as a disciplinary warning; O'Malley and Stelse denied he had done so, with Stelse testifying affirmatively that he was not told he would be terminated if he failed to meet the standards reflected in the PIP.

The company's standard disciplinary notice has the following form:

DISCIPLINARY NOTICE
CONFIDENTIAL

. . .

Type of Warning (Check one)

{} Verbal Warning
{} First Written
Date of Verbal warning ____________________
{} Final Written (may include disciplinary suspension)
Date of previous written warning(s) ____________

{} Termination
Date of previous written warning(s) ____________

Supervisory Comments:

FAILURE TO CORRECT THE ABOVE CONDUCT WILL LEAD TO FURTHER DISCIPLINARY ACTION UP TO AN INCLUDING TERMINATION.

The company maintains data from each RSR and District through Route Check-In Audits, and has offered summaries covering July to October, 2002. I summarize the relevant data for the period from issuance of the PIP to termination as follows:

(The numbers on the date-line show Stele's raw numbers; the numbers for the six following rows reflect percentage of minimum standards met by the market center overall, Stelse, and the four districts; the next three rows show how many other route representatives had activity better than, worse than, and equal to Stelse)

	# Calls	Written	Samples	#Prosp.	GO lead	$Sold	TOTAL#
9.13.02	18	0	5	4	0	10	
MC 614	117%	103.8%	209.8%	121.5%	38.1%	86.4%	112.5
Stelse	180	0.0	250	133.3	0.0	100	110.5%
Rte. 899	103.4	41.7	233.4	133.4	0.0	80.4	
Rte. 901	106.7	83.4	166.7	83.4	14.3	0.0	
Rte. 902	112.3	76.9	176.9	92.3	57.1	21.0	
Rte. 908	154	240	280	193.3	101.8	283.9	
#>Stelse	1	14	5	6	3	6	35
#<Stelse	24	0	13	15	0	19	71
#=Stelse	0	11	7	4	22	0	44
9.20.02	11	0	2	0	1	12.30	
MC614	103.4%	65.7%	118.7%	72.1%	72.1%	90.1%	87%
Stelse	110	0.0	100	0.0	100	123	70.5%

Rte. 899	98.4	50	141.7	77.8	0.0	99.3	
Rte. 901	78.4	66.7	91.7	61.1	28.6	0.0	
Rte. 902	86.2	46.2	123.1	25.6	85.7	36.6	
Rte. 908	164	110	120	140	229.1	258.3	
#>Stelse	6	13	9	16	4	4	52
#<Stelse	17	0	7	0	19	21	64
#=Stelse	2	12	9	9	2	0	34
9.27.02	9	0	2	0	0	0	
MC614	94.9%	65.7%	137.8%	86.2%	8.5%	207.7%	100%
Stelse	90	0.0	100%	0.0	0.0	0.0	31.7%
Rte. 899	103.4	50.0	133.4	83.4	16.7	73.2	
Rte. 901	85.0	66.7	191.7	116.7	0.0	181.7	
Rte. 902	86.2	53.9	100.0	41.0	14.3	315.4	
Rte. 908	110	100	130	113.3	0.0	264.0	
#>Stelse	18	16	9	18	2	15	78
#<Stelse	6	0	7	0	0	0	13
#=Stelse	1+	9	9	7	23	10	59
10.4.02	20	0	0	0	0	9.10	
MC614	86.5%	55.1%	101.7%	59.3%	0.0%	210.4%	85.3%
Stelse	200	0.0	0.0	0.0	0.0	91	48.5%
Rte. 899	73.4	50	100	55.6	0.0	75.8	
Rte. 901	88.4	66.7	141.7	83.4	0.0	243.9	
Rte. 902	80	46.2	61.5	25.6	0.0	204	
Rte. 908	110	60	110	80	0.0	344	
#>Stelse	0	16	19	16	0	9	60
#<Stelse	25	0	0	0	0	16	41
#=Stelse	0	9	6	9	25	0	49

TOTALS

	# Calls	Written	Samples	Prospects	GO Lead	Sold
# > Stelse	25	59	42	56	9	34
# < Stelse	72	0	27	15	19	56
# = Stelse	3	41	31	29	72	10

Summary (Total)

#>Stelse	225
#<Stelse	189
#=Stelse	186

With the 186 incidents of equivalent performance providing the range, Stelse ranks between 31st and 62nd percentile (189/600 and 375/600, respectively).

Hamilton testified that in reviewing the record book to determine if the sales calls which Stelse claimed were made were also recorded, he determined they were not. Eliminating that column of data leaves the following summary:

Data Excluding # Calls

#>Stelse	200
#<Stelse	117
#=Stelse	183

With the 183 incidents of equivalent performance providing the range, Stelse ranks between the 23rd and 60th percentile (117/500 and 300/500, respectively).

For the period from two weeks prior to the PIP 5 to Stelse's last full week, the loss and ruin data for six districts in Market Centers 614 and 624 were as follows:

Week Ending	8/ 30	9/ 06	9/ 13	9/ 20	9/ 27	10/ 04	10/ 11
Stelse Loss & Ruin YTD (%)	13.7	13.6	13.5	13.4	13.3	10.3	11.8
Dist. 902 Loss & Ruin YTD (%)	11.7	11.7	11.7	11.7	11.6	11.9	11.5
MC 614/624 Loss & Ruin YTD (%) *	11.5	11.5	11.5	11.5	11.5	11.3	11.2
# Rtes > Stelse	6	6	7	7	7	20	13
# Rtes < Stelse	33	33	32	32	32	19	26

* This figure represents the averages for districts 899, 901, 902, 910, 909 and 906, divided by six. The data is found at Ex. ER 1, tab 18. The company, which prepared the exhibit, did not explain why data from district 908, part of Market Center 614, was not included in the statistical summary, nor why data from Market Center 624 (which apparently includes districts 906,909 and 910) was. The data cells "# Rtes. > Stelse" and "# Rtes. < Stelse" show the number of individual route drivers whose statistics were better and worse, respectively, than Stele's, based on company witnesses testifying that 12.5% was the target for loss and ruin, with a higher number being better than a lower one.

The company is also concerned that existing contracts not be allowed to lapse, and tracks RSR and district performance in renewals. The company also set a specific standard for Stelse in the PIP. As of the end of the company's third quarter, June 30, 31.5% of Stelse's contracts had expired, meaning that he was delivering without a current contract. Of the 26 other RSR's, only one had a higher percentage of expired contracts. At the end of the company's fourth quarter, September 30, Stelse again had the second highest percentage of expired contracts, at 25.8%. The district-wide non-renewal percentages during the third and fourth quarter were 22 and 21, respectively.

Toward the end of September, Ross determined that Stelse's performance was failing both the normal RSR standards and the higher standards of his personal PIP, and so the company would have to terminate him. Ross also relied, to a degree he can't quantify, on the coaching log. 5/ In deciding to fire Stelse, Ross did not inquire into the company's recent practice in disciplining employees for sales activity problems. Hamilton, who participated in and supported the decision, held a termination meeting with Stelse, O'Malley and Stelse's direct supervisor, route manager Jeff St. Arnold, on October 14. The company did not inform local 695 of the termination meeting, nor provide a copy of a termination notice until October 29, at an initial grievance meeting. According to Schultz' unrebutted testimony, the notice the company provided him on October 29 was limited to a statement that Stelse had been terminated as of a certain date, and did not include any further explanation of the discharge. The termination notice itself is not part of the record.

5/ Ross' testimony on cross-examination gives insight into the company's decision-making process regarding Stelse's termination:

A: The Coaching Log and the Performance Improvement Plan, that's what I used to make my decision.

Q: Did you advise the Union that you were relying on the Coaching Log?

A: No. The Coaching Log had been created prior to my coming here. My decision was based on the Coaching Log and the Performance Improvement Plan.

. . .

Q: ***What weight did you give the Coaching Log?***

A: ***I'm not sure how to express my answer here. A lot, a little? I can't answer.***

Q: ***You don't know?***

A: ***I'm not sure in what terms to express it.***

Q: ***Well, would you have terminated him if there hadn't been a Coaching Log?***

A: ***I can't speak to that. I can't say.***

Q: ***So it affected you some way, but you just don't know how much?***

A: ***No.***

On August 14, 2001, Ross' predecessor as general manager of Market Center 614, Scott Fish, had written to the district managers as follows:

> Subject: Route Sales/Disciplinary Notices
>
> Guys's I need you to meet with your RSR's this week to inform them that we will as a Market Center, be focusing in on each individual RSR's monthly installed sales results.....Starting with August's results the disciplinary procedure will be put into place (they got a bye for July). The first warning will be a Verbal Written, if the RSR falls below the $7 dollar mark the next month a First Written will be issued, if the RSR misses the mark in the following month a Final Written will be issued with a 3 day suspension (T, W, H). If the RSR falls below the mark again for the next month he will be termed.
>
> I will be reviewing each District's total route sales results each month and for those districts under the $7.00 average per route the DM will be subject to the above mentioned actions.

Sometime later (the email in the record is undated, but refers to a new directive "starting the week of 9/03/02,") Fish wrote to again exhort the district managers to generate greater productivity in all areas from the route representatives. Fish wrote, in part:

. . .

> **40% CREDIT LIMIT**
>
> I will be reviewing these reports each week. For those routes whose credits exceed 40%the RSR will be written up by the DM..... Written warnings will follow the same format we're using for our route sales....

. . .

> **GARMENT UPGRADE ACTIVITY**

. . .

Any routes that do not hit their required allotment of upgrades will follow the written warning process. (emphasis in original).

Other than conversations they might have had with their district managers, there is no indication in the record that route representatives were aware of the details of the Fish correspondence contemporaneously. Schlultz did not learn of the correspondence until he received the material anonymously during his investigation of this grievance.

From September 12 to September 19, 2001, five RSR's, including Stesle, received Verbal Warnings for inadequate route sales performance in August, which warnings were memorialized on disciplinary notices as described above. Two RSR's had weekly averages that month of $0.00; one averaged $1.75; another averaged $4.75; Stelse averaged $6.50. On September 18, 2001, Schultz wrote Fish as follows:

I have been informed of the Company's initiation of discipline to members in regard to sales.

> The Company removed language requiring minimum sales during the last negotiations because they don't discipline for lack of sales anyway. Now, with no reference to sales requirements in the contract, the Company is issuing discipline.
>
> The Union disagrees with the Company's action and requests that all current discipline be removed from the record of the employees involved. Also, the Union requests that this practice be discontinued.
>
> Please consider this letter a grievance on behalf of the bargaining unit for all

On September 27, 2001, Fish replied to Schultz as follows:

> . . .
>
> It has been this Market Center's position, as well as the company's, that Route Sales are a fundamental responsibility of a Route Sales Representative. And that those Route Sales Representatives who do not perform up to a minimum standard will be dealt with accordingly.
>
> If you would like to review any Route in particular, pertaining to their sales and disciplinary notices, please contact me to arrange a meeting.

On October 19, 2001, Schultz replied to Fish, in part, as follows:

> The Union has not change(d) its position regarding the unilateral implementation of a disciplinary policy regarding sales. This is a violation of the contract and the Union does not recognize the Company's policy.
>
> . . .

The union did not file or process any formal grievances on matters referred to in the correspondence quoted above.

Further facts and statistics will be noted in the discussion below, as necessary.

POSITIONS OF THE PARTIES

The Union

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> Because the company did not provide Local 695 with notice of the alleged warning which led to the grievant's termination, the discharge is procedurally defective and must be overturned. The negotiated language in the collective bargaining agreement mandates that at least one written warning notice shall be given to both the union and to the employee prior to any discharge or suspension. Despite this clear language, the company failed to provide the union with a copy of the Performance Improvement Plan it claims constitutes a written warning and which it subsequently relied upon to discharge the grievant. It is not sufficient for the company to claim the spirit of the requirement was satisfied by its having given a copy to union steward O'Malley; arbitrators have consistently held that stewards have no authority to bind the union or modify an

agreement. Nor do stewards have the ability to interpret the collective bargaining agreement on behalf of the unit or in the name of the local. The company was obligated to provide a copy of the discipline to the union business steward, who alone has the authority to bind the union. The company's failure to follow the procedural requirement invalidates the discharge and requires the grievant be reinstated and made whole.

Further, the company failed to provide Stelse with a written warning notice prior to his discharge, in violation of section 12.2 of the collective bargaining agreement, which requires that at least one written warning notice be given to the union and employee before discharge or suspension. Despite the company's arguments, the Performance Improvement Plan was not disciplinary action and did not satisfy the prior notice provision of section 12.2; without such prior written warning, the termination lacked just cause and must be reversed.

There is no indication on its face that the Performance Improvement Plan is formal discipline for the purposes of section 12.2, nor did the company inform Stelse and steward O'Malley as such during their September 6, 2002 meeting. The document does not resemble the traditional disciplinary forms the company had used in the past, contains no identification as a disciplinary notice, and does not include references to progressive discipline as found on true disciplinary notices. Even if the company intended the PIP to serve as written warning, Stelse was clearly not put on notice of such by simply reviewing the written document.

Nor did the company provide such notice during the meeting at which he received the Performance Improvement Plan. Stelse and O'Malley testified credibly that District Manager Hamilton had not referred to the PIP as discipline; while Hamilton testified that he had indeed said so, inconsistencies in his testimony call his credibility into question.

The company portrayed the PIP as guidelines meant to assist Stelse achieve the company's average sales goals; without any of the hallmarks of formal discipline, the company cannot rely on the PIP as the prior written notice necessary before suspension or termination. Because the company thus failed to issue Stelse the written warning notice required under 12.2 of the collective bargaining agreement, his discharge lacked just cause and must be reversed.

Further, the Performance Improvement Plan imposed unreasonable expectations, and cannot be the basis for discharge. It is well-established that an employer cannot unilaterally impose an excessive workload on employees; an employer therefore does not have just cause to discipline an employee for failing to meet an unreasonable workload requirement. The PIP the company relies on would have required Stelse to work far more than 40 hours per week. Not only were the PIP requirements objectively unreasonable on their face, they were clearly out of proportion to the activity that was acceptable from the other Route Sales Representatives. District Manager Hamilton himself admitted that the PIP required Stelse to meet standards above those set for all other employees; in fact, Stelse's requirements under the PIP were double the standards set for the other RSR's. The company clearly lacked just cause for terminating Stelse after he failed to achieve an unreasonable activity level.

Notwithstanding how unreasonable the company's expectations were, Stelse made significant strides toward improving his performance and should not have been terminated. Stelse's primary responsibility was to maintain his existing accounts and sell new accounts, not make sales calls and submit written proposals. And after receiving the PIP, Stelse vastly improved his sales performance, and in fact far outperformed most of his peers in the sales average category. Because the Performance Improvement Plan set expectations that were both excessive and irrelevant, and because Stelse made significant measurable improvement toward the goals set, Stelse's inability to attain the company's unreasonable expectations do not constitute just cause for discharge.

Further, the company violated past practice when it failed to follow progressive discipline and discharged Stelse for failing to meet certain activity levels. The current collective bargaining agreement eliminated a prior memorandum of understanding under which the company could discipline for failure to meet sales quotas, setting a new standard of "consistent and reasonable effort" - yet all of the company's complaints about Stelse relate to alleged performance failures, rather than the effort he gave. Since the company cited sales numbers as the basis for the PIP and subsequent discharge, and failure to meet sales quotas are no longer a basis for discipline, the termination must fail.

Moreover, the company failed to follow its past practice of applying progressive discipline for alleged deficiencies in sales numbers. In 2001, the prior General Manager informed district managers that a system of progressive discipline would be used for employees' failure to meet sales averages. Although the company failed to offer any evidence this practice had been discontinued, the company failed to follow its own disciplinary procedures in disciplining Stelse. The company did not have just cause to discharge Stelse for a second offense when pursuant to its policy of progressive discipline a written warning was the next step.

> Because the discharge was without just cause on several grounds, the grievance must be sustained and Stelse reinstated and made whole for all wages and benefits lost.

The Company

In support of its position that the grievance should be denied, the company asserts and avers as follows:

> A routes sales representative's failure to meet sales expectations constitutes just cause. The sales expectations are clear and unambiguous – route sales representatives are expected to make a reasonable sales effort, and if they do not, they may be subject to discipline. The expectation that the RSR's sell to existing and new customers has been in existence for many years; these clear standards have been communicated not only on sales average, but also on retention and other measures of performance. The parties have specifically recognized that just cause exists to discipline an RSR whose sales work is unsatisfactory against the set standard.
>
> Given the clear and unambiguous language, there is no need to consider practice. Further, given the few occasions of discipline since the new agreement, a contrary practice has not been established. The elimination of the prior letter of understanding regarding discipline for sales-related work does not establish a practice. The suggestion that the prior general manager was considering additional steps in a progressive discipline model, with no indication he ever followed through, does not establish a practice. Even if a progression of several steps were established, this would not survive the plain reading of the agreement nor the arrival of the new general manager. Finally, the arbitrator is limited in defining appropriate discipline, since to impose a progression of discipline would effectively amend the collective bargaining agreement, which the agreement explicitly says the arbitrator cannot do.
>
> The grievant failed to meet long-standing expectations and the terms of his disciplinary notice, and the employer was within its rights to discharge him. When the company required the grievant to meet a higher standard, it did so as an effort to boost him to a point near an acceptable performance level. The grievant knew and understood the expectations. If the union objected to the form of discipline in the PIP or its content, it had an obligation to grieve at that time. Because the grievant and the union failed to grieve the PIP at the time it was imposed, and because neither chose to identify the PIP in the grievance, the arbitrator should not consider whether the PIP could be presented and enforced.

> That the grievant failed to meet expectations does not appear to be in dispute, and his performance levels speak for themselves. The grievant did not appear to even try to reach expectations.
>
> The discipline does not failed for lack of notice. Steward O'Malley has the authority to file grievances, so that notice to him was sufficient.
>
> The company complied with the clear language of the collective bargaining agreement in defining performance failures and disciplining the grievant. The grievant was properly discharged following a full opportunity to improve.

DISCUSSION

On September 6, 2002, company managers issued a Performance Improvement Plan to Route Sales Representative Tim Stelse which required Stelse to perform at twice the standard to which all other company RSR's were held. When Stelse failed to reach those levels within a few weeks, the company determined to terminate him, and did so on October 14. The union grieves, claiming the discharge was without just cause, as required under the parties' collective bargaining agreement.

Just cause for performance-related discipline requires that the employee knew the job performance required, that the requirements were reasonable, that the employee knew the penalties for failure, that the employer provide appropriate training and resources for the employee succeed and that the employee failed to perform adequately.

The union raises four reasons why it believes the discharge was without just cause and thus must be overturned. It asserts the discharge was procedurally defective due to the lack of notice to the union; that the PIP did not constitute a proper written warning; that the PIP imposed unreasonable expectations, and that the company violated past practice when it failed to follow progressive discipline and discharged Stelse for failing to meet certain activity levels.

There should be little question that the company has the right to set reasonable performance standards. Indeed, since the just cause provision, section 12.2, explicitly enumerates "inefficiency" and "unsatisfactory route and sales work" as bases for discipline, it is appropriate, even necessary, for those terms to be well-defined. That is what the company has done by establishing and publicizing the general performance standards. Moreover, under section 19.1, route representatives are required to "make a consistent and reasonable effort" towards soliciting new accounts and retaining existing accounts, so that "(i)n the absence of a consistent and reasonable effort corrective action may be taken." Again, by quantifying what a "consistent and reasonable effort" means, the company has appropriately sought to dispel any confusion or ambiguity about what its expectations were. I leave to later the question of whether those standards were reasonable.

As one of the questions is whether the grievant did indeed fail to perform adequately, I begin my analysis by attempting to put Stelse's work record in context. The company has provided a wealth of data, which I formatted above to highlight the record following issuance of the PIP.

Perhaps the most critical single column is that noting sales data, where the company has set a unit-wide minimum of $10 weekly while requiring $11 from Stelse. There are 25 other RSR's in Market Center 614 whose performance the company monitored on route check-in audits. In the four weeks between issuance of the PIP and October 4 6/, Stelse sold $31.40, a weekly average of $7.85 and thus below both the standard minimum and his own higher requirements from the PIP. That same period, the weekly average per RSR for the market center as a whole was $13.48, and thus well above both the standard minimum and Stelse's PIP.

However, when Stelse's weekly sales are measured individually against the 25 other RSR's, we find there were 34 instances of another RSR selling more than Stelse, 56 instances in which Stelse sold more than another RSR, and ten instances in which Stelse and another RSR sold the same. Ultimately, though, while these isolation snapshots are interesting, they do not ultimately carry the weight of the unit-wide data showing Stelse failed to satisfy the company's reasonable expectation of a $10 weekly average in sales.

As to the other categories, the data shows Stelse to have been exceptional in sales calls, a complete failure in the issuance of written proposals, and generally mediocre in the remaining three categories. Thus, the record as a whole somewhat supports the company's suspicions that Stelse was taking credit for sales calls he didn't make, and its conclusion that he was not performing to its expectations.

Whichever comparisons are used – either with the "sales calls" data or without -- Stelse's performance as measured by the route audit check-ins is mediocre at best, but is obviously not the worst.

6/ The Company did not offer into evidence the route check-in for the week ending October 11.

Next I consider the data concerning loss and ruin, where the company set a 12.5% minimum in Stelse's PIP. Although Stelse's year-to-date percentage of 11.8 as of October 11 was below the standard the company set, his numbers were still higher than Hamilton's district-wide percentage (11.5) or the 11.2% logged by the combination of Market Centers 614 and 624. Further, in the five weeks between issuance of the PIP and Stelse's termination, there were 54 instances of another RSR having a higher Loss and Ruin Year-to-Date percentage than Stelse, and 111 instances in which Stelse's percentage was higher. 7/

7/ The Company did provide the full five weeks' of data on loss and ruin experience.

Finally, the PIP addressed the issue of contract renewals, where Stelse had the second-highest percentage of expired contracts in both the third and fourth quarter. However, Stelse did show comparative improvement, going from a -9.5 deviation (his third-quarter non-renewal percentage of 31.5 compared to the district-wide average of 22) to a deviation of less than -4.8 (his fourth-quarter percentage of 25.8 compared to the district-wide average of 21).

The relevant data, therefore, describes a situation where an employee is certainly under-performing, on a wide range of tasks. While Stelse showed more improvement than the company seems to have acknowledged, both comparatively and measured only against himself, his numbers do provide a basis for concern on the part of the company. And the company has a legitimate, even compelling interest in the performance of the RSR's, whose activities are essential to its success. For the company to prosper, the RSR's must retain and recruit business; as noted, this duty is reflected in the requirement in the collective bargaining agreement that each RSR make a "consistent and reasonable effort" towards the responsibility to "solicit new accounts and retain existing accounts." Thus, contrary to the union's analysis of the bargaining history, the company has the right to evaluate and discipline an RSR not just for sales, but for sales activities as well.

The question I turn to now is whether those numbers, in light of the rest of the record, provided just cause for the company to fire Stelse. As noted above, the union argues just cause is lacking, both procedurally and substantively.

The company has an obligation under Article 12.2 to provide notice of certain disciplinary matters to the union. Specifically, the paragraph provides that "(a)t least one (1) warning notice shall be given in writing to the Union and to the employee before discharge or suspension can be made," except in extraordinary circumstances which the company doesn't claim relevant. The section further provides that "(w)ritten notice of discharge or suspension *setting forth cause* shall be given to the employee of with a copy to the Union." (*emphasis* added) The company does not deny these duties, and acknowledges it did not provide notice of the PIP to union local business representative Schultz, who testified further that he has never received correspondence "setting forth cause," and only received the barest of notice at the initial grievance meeting October 29. The company, which did not rebut Schultz' testimony, contends that its presentation of the PIP to steward O'Malley at the September 6 meeting satisfied all procedural requirements under the agreement.

There are several elements of evidence supporting the union's claim that the right to notice is held by the union local business representative and not the steward.

In interpreting what "the Union" means in Article 12.1, it is instructive to consider how the parties have used that term elsewhere in their collective bargaining agreement. At the outset, of course, it is Teamster Union Local No. 695 which is party to the agreement, not just the bargaining unit. This is made explicit in the Articles of Agreement preamble, which identifies "the Union" as that entity housed at 1314 North Stoughton Road. The plain reading of that provision is that further references to "the Union" are to that office and its personnel, not the Aramark bargaining units. Two further provisions, articles 7.1 and 10 reinforce this understanding by explicitly identifying officers from the Stoughton Road office as having enumerated responsibilities, authority, and privileges.

The union also offered documentary evidence of disciplinary notices being provided to the local 695 office, as well as corroborating testimony from business representative Schultz that the standard practice was to provide disciplinary notices to him, not just the steward. And Schultz of course, was far more qualified to testify as to the administration of Article 12 than were the company witnesses, neither of whom either experienced or investigated what practices there were. When Schultz swore that the contract provides for him to receive copies of discipline, the company could offer no testimony to the contrary.

Finally, my general understanding of contract administration leads me to conclude that notice is due on Stoughton Road, not just to the steward.

There is a mutuality of the relationship between the member and the union, arising out of the Article 3 requirement that employees working under this agreement remain union members in good standing as a condition of their employment. In exchange for that burden of mandatory membership, the employees/members receive the benefits of the collective bargaining agreement. These benefits are not limited to wages and economic matters, but also include contract administration and representation on grievances. This benefit is especially important on matters as serious as a pre-termination written warning or a discharge notice. The underlying principle is that the contract provides for warning notices to be given in writing to the business representative not for the sake of the union, but for the sake of the member/employee; it is the member, remember, whose rights the contract protects.

The mutuality of the relationship between member and union is indicated by two further contractual provisions which support the union's argument. Section 17.1 sets a ten-day limit on the filing of grievances; section 12.3 requires both the employee to file a written protest with the union within five days of discharge or suspension, and for the parties to then meet and discuss the merits of the matter. Given these deadlines, and what is at stake, for the union to meet its obligations of full representation, it *must* know in a timely manner of warning notices and discharges.

Another critical element of 12.2 is its guarantee for both the employee and union of a "written notice ... *setting forth cause"* for discharge or suspension. (emphasis added). As arbitrators routinely hold employers to what they knew and what they said at the time of discipline, this contemporaneous statement is of extreme importance for all that is to follow if the employee or union wishes to challenge the discipline. The employer's failure to comply with this term denies the employee and union the ability to understand and analyze the discipline.

There is nothing in the record to indicate that O'Malley is anything other than a qualified and dedicated steward. But he is essentially a volunteer, as well as a co-worker, and the company effectively made him Stelse's only representative at this critical point in his working life. By denying notice of the warning to Schultz, the company also denied the right to professional representation to Stelse. It is simply not good enough to say, as the company does, that O'Malley's experience in the work-force and as a steward meant that notice solely to him was sufficient. 8/ Nor can the company claim that because the union was able to file a grievance on the termination even though it also failed to provide local 695 with notice of that action as well, experience proves this level of notice to be sufficient. It isn't.

8/ The Company also appears to overstate O'Malley's experience as a steward, implying on page 17 of its brief that he had served in that capacity for over 14 years. While O'Malley has been with the Company for that length of time, he has served as a steward for less than half that period.

Indeed, the need for notice to be given to local 695 is especially acute given the unique nature of the PIP. As noted, because Ross wanted to be more comprehensive, the PIP was not issued on the standard disciplinary notice form. A steward such as O'Malley, used to that form as the pre-termination written warning, could easily have failed to grasp the PIP's use in that way as well.

Thus, the text of the collective bargaining agreement, the testimony of a credible witness, and a sense of the purpose of the provision support a finding that references to "the Union" are to the corporate offices on Stoughton Road. Since Article 12.2 requires that "(a)t least one written notice shall be given in writing to the Union ... before discharge or suspension...." 9/, and the company relies on the September 6 PIP as the warning notice that enabled the October termination if the PIP is popped due to lack of proper notice to the union the discharge could not stand. Similarly, given the further notice requirements of 12.2, directing that "(w)ritten notice of discharge or suspension setting forth cause shall be given to the employee with a copy to the Union," it would be difficult to sustain a discharge it its written notice were not provided to local 695 until after the time limit for filing grievances, and if the union never received an explanation as to cause for termination.

9/ Except in extraordinary circumstances, which the Company doesn't claim.

The union also asserts that even if the PIP had been noticed properly, it would still not satisfy the 12.1 requirement because it was not a proper warning notice as the parties understood the term. Hamilton testified that at the September 6 meeting, "I paraphrased by saying, 'This is a formal written notice and this is very serious,' and just kind of reiterated that last sentance." Stelse and O'Malley remember otherwise, and recall Hamilton referring to the PIP as an instructive tool, more guideline than warning. 10/

10/ The fourth and final witness to the meeting, another district manager, did not testify at hearing.

Because of the documentary evidence, it is unnecessary for me to consider further questions of credibility on this point. Again, the union appears to have better exhibits - the disciplinary notices from 2000-2001, which explicitly use the word "warning" six times, the word "disciplinary" thrice and "termination" twice. This document clearly satisfies the contractual requirement for a written warning notice before discharge or suspension. Having received such a document on Sept. 18, 2001 - a verbal warning for low sales – Stelse would clearly understand its meaning in light of article 12.2, as would O'Malley, who received a written record of a verbal warning relating to loss and ruin in April, 2000.

In contrast, while the PIP does "advise" about "further corrective action" and raise the specter of "immediate action up to and including termination," it nowhere declares itself to be a written warning notice. The PIP refers to objectives, requirements, improvement, but without using the word "warning," it's hard to see how it is one.

I do not discredit Ross's testimony that he thought he was being helpful and comprehensive in issuing the PIP rather than the standard disciplinary notice. But for the PIP to be clearly understand by Stelse as it was understood by the company – a pre-termination written warning – it should have been on the proper form for a disciplinary notice. The fact that Schultz sometimes files a grievance by correspondence rather than a standard document does not establish such a degree of form informality as to excuse the company's conduct.

Nor was the company's claim of the PIP as the written warning notice enhanced by its somewhat casual presentation of the document. The Summary of Expectations paragraph - the paragraph with the only references to discipline in the entire PIP – includes two instances where the supervisor is to circle a time-frame option (requirements being assessed daily, weekly, monthly; measurable improvement being made within 30, 60, 90 days). Neither Ross nor Hamilton circled a specific deadline in either instance. While they may well have believed that the single entry "Timeline: For the next 30 days" on attachment "A" obviated the need for any further indication, this failure to take this easy opportunity to reinforce the disciplinary nature of the document and the urgency of the situation does not help the company's case that Stelse should have understood the PIP as a 12.2 written warning notice.

If not all employees and union officials, used to the standard Disciplinary Notice form, would readily understand this PIP as constituting a 12.2 written warning notice, it would not be one. And absent a proper written warning notice, the further discipline could not stand.

Nor could the discipline stand if the performance standard itself was unreasonable. The company can punish Stelse for failing to meet its expectations only if those expectations are appropriate.

The Madison Market Center General Manager, Michael Ross, testified on direct examination that he considered the standard level of activity, as reflected in the "minimums" noted in the route check-in statistics to be reasonable, in the context of the contractual requirement for RSR's to exert a "reasonable effort" towards soliciting and retaining accounts:

> Q: And how did you interpret the term, "reasonable"? Or I should say the phrase, "reasonable effort"?
>
> A: "Reasonable," for Market Center 614 Madison I defined as the activity that we requested and was known as the standard in Market Center 614 Madison. There are – there are set activity levels that are to be accomplished each and every week by each and every RSR. My definition was not an interpretation. It was just a - a realization that that's what the standard was for defining "reasonable."

As noted above, the PIP which Hamilton presented to Stelse on September 6 contained a series of performance standards essentially twice those of other RSR's. The following excerpts of the union's cross-examination of Hamilton convey this point clearly:

Q: So you were requiring essentially double of him than what the Company requires overall from people?

A: Yes.

Q: Was there anyone else in the Company that was required to meet double the standard?

A: No. Not that I know of anyways.

. . .

Q: Okay. If I understand this correctly, after giving him this form (the PIP) he basically had thirty days, correct?

A: Right.

Q: And during that time the standards that you set were above the minimum standards that the Company requires for all employees, correct?

A: Correct.

Q: So you are assessing him and determining whether or not he's going to maintain his job ... and you are raising the level he has to meet above everyone else. Do you think that's fair?

A: In this case I do. Yes, I do.

Q: In other words you took a guy who was below the standard and told him, "the only way you can keep you job if you, in the next thirty days, exceed the standard, in most cases double," that's what you did?

A: Yes.

That is, the PIP which the company relied upon as a pre-termination warning *doubled* the performance standard that the company general manager considered to be reasonable. By definition, that makes this PIP unreasonable. Failure to satisfy an unreasonable performance standard does not constitute just cause for immediate discharge.

Stelse's consistently mediocre performance justified some level of discipline; even absent the improperly inflated standards of the PIP, he still failed to meet most of the company's legitimate expectations. The company may impose discipline up to termination for precisely this level of performance. But before it may do so, it must satisfy the other terms of just cause – that Stelse could reasonably have been expected to understood both the requirements and the penalty for failure, and that all significant procedural elements were satisfied.

As noted above, the parties' 1995-1999 collective bargaining agreement contained a Memorandum of Understanding regarding the company's right to establish sales quotas, and its right to impose progressive discipline for an RSR's failure to meet quota. During the collective bargaining for a successor agreement, the union proposed to delete the memorandum. On June 9, 1999, the parties tentatively agreed to the company's counter-proposal, by which the memorandum would be deleted and Article 19 would be revised to read as noted above. Subsequently, however, the company continued to practice progressive discipline, as reflected by its continuing use of the Disciplinary Notice form and the messages (presumably related to route representatives) contained in the Fish correspondence. Because the company unilaterally and without notice sought to abrogate its practice of progressive discipline Stelse could not reasonably have been expected to understand the consequences for his failure to the company's expectations.

Therefore, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, I find that the company's failure to provide notice of the Performance Improvement Plan (PIP) and a written explanation of the discharge to the union local business representative, the reliance on the PIP as a written warning notice, and the imposition upon Stelse of performance requirements twice those expected of all other RSR's, all constituted violations of article 12.2 of the agreement. Accordingly, it is my

AWARD

That the discharge of Tim Stelse was without just cause, and the grievance is sustained. The company shall reinstate Stelse and make him whole for lost wages and benefits.

Dated at Madison, Wisconsin, this 30th day of June, 2003.

Stuart Levitan /s/

Stuart Levitan, Arbitrator
SDL/gjc
6539