IN THE MATTER OF ARBITRATION BETWEEN

International Brotherhood of Teamsters, Local No. 120	)	**FMCS Case No. 09-0860351-3**
"Union" or "Teamsters"	)	**Issue: Engineering Compliance Standards**
and	)	**Hearing Date: 02-08-10**
SYSCO Minnesota, Inc.	)	**Hearing Site: Shoreview, MN**
"Company" or "Employer"	)	**Award Date: 05-22-10**
	)	**Mario F. Bognanno, Arbitrator**

JURISDICTION

The Company, SYSCO Minnesota, Inc., is a food service warehousing and distribution business with a facility located in Mounds View, MN. (Union Exhibit 3) The Union, the International Brotherhood of Teamsters, Local No. 120, represents the Company's drivers, highlift operators, warehousemen and other blue collar job classifications and its principal offices are located in Blaine, MN. (Union Exhibit 4) The Company and Union are parties to a Collective Bargaining Agreement ("CBA") with the effective dates of August 7, 2005 to August 7, 2010. (Union Exhibit 1)

Pursuant to Article 22.1 E in the CBA, the above-captioned matter was heard on February 8, 2010 in Shoreview, Minnesota. (Union Exhibit 1) The parties, appearing through their designated representatives, were afforded a full and fair opportunity to present their respective cases. A verbatim transcription of the hearing was prepared; witness testimony was sworn; and said testimony was the subject of cross-examination. Exhibits were introduced into the record. Post-

hearing briefs were exchanged on or about April 9, 2010 and, thereafter, the matter was taken under advisement.

APPEARANCES

For the Union:

Martin J. Costello	Attorney-at-Law
Bryan Scott Rademacher	Recording Secretary/Business Agent
Andy Trimbo	Steward
Andy Overton	Steward

For the Employer:

Jonathan O. Levine	Attorney-at-Law
Dale L. Deitchler	Attorney-at-Law
Mark W. Schneider	Attorney-at-Law & Employer's Chief Negotiator
Michael J. Cunningham	Senior Vice President
Brian Shipe	Director, Warehouse Operations

I. RELEVANT 2005–2010 CBA LANGUAGE

ARTICLE 1 RECOGNITION AND UNION SECURITY

1.1. Recognition. The Union shall be the sole representative of those classifications of employees covered by this Agreement in collective bargaining with the Employer. There shall be no discrimination against any employee because of Union affiliation.

ARTICLE 21 DISCIPLINE

21.4. Employees shall comply with all reasonable Work Rules, which the Employer shall have the right to implement and to make changes to those rules. Employees may be disciplined for violations thereof under the terms of this Agreement, but only for just cause. In any dispute of the propriety of any disciplinary action taken against an employee, or the reasonableness of any Rule, it shall be subject to the provisions of the grievance procedure and arbitration, as well as the application or enforcement of any such Rule.

ARTICLE 30 MANAGEMENT RIGHTS CLAUSE

The right to manage the business shall remain solely vested in the Employer, except as limited by the express provisions of this Agreement and then only to the extent of such limitation.

* * *

(Union Exhibit 1)

II. BACKGROUND

The Employer's warehouse workers have multiple responsibilities, one of which is to meet the Company's production standards, which indexes the time required to produce a unit of work. Employee failure to meet these standards can result in discipline. Prior to the events leading to the instant dispute, the Company's Engineering Labor Standards Policy ("ELSP") was based on the so-called "Gagnon" standards. In mid-2008, Brian Shipe, Director, Warehouse Operations, informed Bryan Rademacher, Recording-Secretary and Business Agent, that the Company was considering a change from the Gagnon system to the new "LxLi" standards because of the latter's superior accuracy. (Tr. 71-82) In a letter dated November 11, 2008, Mr. Shipe formally informed Mr. Rademacher that the LxLi system was in place and would become effective on November 16, 2008. (Company Exhibit 1) And in a second letter dated November 11, 2008, Mr. Shipe advised Mr. Rademacher that "Beginning the week of November 30, 2008, we will resume monthly discipline at 95%." (Company Exhibit 2, p. 2)

In a November 17, 2008 letter from Mr. Rademacher to Mr. Shipe, the former indicated that he would be bringing in an industrial engineer to determine whether the new standards are "fair, reasonable and attainable." Pending said

audit, Mr. Rademacher requested that the Company not issue discipline based on the new work standards. (Company Exhibit 2, p. 1) In a letter dated November 20, 2008, Mr. Shipe denied Mr. Rademacher's request for a discipline waiver, indicating that the Union's audit should be completed before the relevant discipline period ended on December 27, 2008. (Company Exhibit 3) On January 1, 2009, Mr. Rademacher filed a grievance, alleging that the LxLi standards were not "fair, reasonable and attainable," and discipline ought not to be based on said system. (Company Exhibit 4) In a letter dated January 7, 2009, Mr. Shipe denied the grievance.

Between January 26 and January 29, 2009, the Union's industrial engineer, Ms. Shari Cahill, gathered the requisite auditing data, and shortly thereafter she informally advised the parties that the LxLi standards were "reasonable." (Tr. 80-81) On March 26, 2009, she released her audit report. Said report, formally concluded that the LxLi standards were "fair and attainable." Further, Ms. Cahill made a number of recommendations, unrelated to the issue in dispute. (Company Exhibit 6) On April 21, 2009, the parties met and discussed audit-related matters and the Employer's intention to change from 95% to 100% the work rule governing the level at which monthly discipline would be imposed under the LxLi system.

In a letter dated June 3, 2009, the Company formally informed the Union to the above-referenced work rule change. Said letter stated, in part:

> The purpose of this letter is to formally inform you that SYSCO Minnesota is implementing changes in its Engineered Standards Policy. Based upon the discreet nature of the new LxLi work standard system we have implemented, the disciplinary level is being moved from 95% to 100%.

> Despite the fact that this Standard's accuracy is far superior to our former Standard, we will be keeping our existing "buyback" policy as well as maintaining four-step monthly discipline policy. Additionally, we'll be adding an 85% daily minimum. See the attached work rule for exact wording.
>
> * * *

(Union Exhibit 16) The Union filed a grievance on June 9, 2009, protesting the Company's June 3, 2009 plans to unilaterally change the Engineering Standards Policy. Specifically, the Union charges:

> * * *
>
> This is a unilateral change in the terms and condition of employment and [a] violation of the Collective Bargaining Agreement as well as a long standing past practice. Claiming that the company bargain these changes with the Union, cease and desist and make all affected members whole, remove any and all discipline issued due to the change from the affected member's file. Article 1, 21, 22 and any/all other applicable articles and/or pertinent information.
>
> * * *

(Union Exhibit 17) In response, the Employer demurred, arguing that its actions were within the Company's contractual rights and that it was not obligated to bargain same even though, it asserts, that it had done so. Unable to resolve this grievance, the matter was processed to arbitration for resolution.

III. ISSUE

In so many words, the parties agreed to the following statement of the issue:

> Whether the Employer violated the CBA by changing the compliance rate from 95% to 100% under the new LxLi system? If so, what is an appropriate remedy?

IV. COLLECTIVE BARGAINING HISTORY

The parties' institutional relationship began at least two decades ago. The

record evidence in this case includes a copy of the 1990–1993, 1993–1997, 1997–2001, 2001–2005 & 2005–2010 CBAs.[1] (Employer Exhibits 17, 18 & 19; Union Exhibits 1 & 2) In addition, the record includes a copy of Company work rules, covering warehouse workers that date back to 1992. (Employer Exhibit 10)

The record suggests that "work rule" language first appearing in the parties' 1993–1997 CBA, as Article 14.4. Said language states the following:

> Employees shall comply with all reasonable work rules which the company shall have the right to implement and to make changes to those rules. Employees may be disciplined for violations thereof under the terms of this agreement but only for just cause. In any dispute of the propriety of any disciplinary action taken against an employee or the reasonableness of any rule, it shall be subject to the provisions of the grievance procedure and arbitration as well as the application or enforcement of any such rule.

(Employer Exhibit 18) This language is replicated as Article 21.4 in the 1997–2001 CBA. Further, it appears in the 2001–2005 CBA and 2005–2010 CBA, except that the word "employer" is substituted for the word "company." (Employer Exhibit 19; Union Exhibits 1 & 2)

In addition to the contractual work rule language, work rules have been the subject of several communiqués exchanged between the parties over the years, as suggested by the following enumeration of relevant events.

1. Dated February 4, 1992, the Employer directed a memorandum to the attention of all warehouse workers entitled "Mispick Policy." Said memo stated in parts:

* * *

SYSCO Minnesota's current policy regarding mispick frequency is as

[1]The Union's predecessor, Teamsters Local No. 544, was the Company's counter-party in the negotiation of the 1990-1993, 1993-1997 and 1997-2001 CBA negotiations.

follows:

The minimum allowable requirement for mispicks is a frequency of 1 mispick per 1000 cases selected each month.

If your rate is below this frequency your error performance will be reviewed.

However, if your 4 month average exceeds 1/1250 you will not be reviewed for that month.

(Employer Exhibit 10)

2. Dated July 27, 1994, the SYSCO MINNESOTA WORK RULES stated in part:

* * *

PICKING ERRORS

At the end of each accounting period each employee's error record will be reviewed. The following guidelines will be used in establishing discipline:

First Occurrence	– Letter of Concern
Second Occurrence	– Warning Letter
Third Occurrence	– Suspension
Fourth Occurrence	– Termination

At the end of each accounting each employee's record is updated for total pieces picked and the number of picking errors associated with those cases. The first review process identifies any employee who has had more than 1 error per 1250 cases. The second review process eliminates any employee who has not completed 45 working days from this group. The third review process reviews the average 4 month mispick rate (current month and preceding 3) and if it is not less than 1 per 1500 the employee will be removed from the group. In all cases, if a pattern of abuse is noted stricter discipline may be applied at any time.

Definition of Mispick: Labels applied to the wrong product. In the case of "multiple picks" all cases will be counted as 1 mispick each.

PRODUCTIVITY

After each accounting period each employee's productivity record will be reviewed. The following guidelines will be used in establishing discipline:

First Occurrence	– Letter of Concern
Second Occurrence	– Final Letter of Concern
Third Occurrence	– Warning Letter
Fourth Occurrence	– Suspension
Fifth Occurrence	–Termination

Any employee who performs at less than the standard could be subject to discipline. Results will be posted daily and reviewed weekly with each employee. Any employee who has not completed 45 work days will not be subject to discipline. In all cases if a pattern of abuse is noted stricter discipline may be applied at any time.

Definition of Productivity Standard: Time required to produce a unit of work for an employee possessing average skills and working a normal pace under normal working conditions.

These work rules are not all inclusive and are subject to change. The Employees and Local 544 will be notified, in writing, of any changes prior to implementation.

(Employer Exhibit 11)

3. Dated February 20, 1995, the Employer directed a letter to Don Huemoeller, President, Teamsters, Local Union No. 544. Said letter stated:

Attached is a copy of part of SYSCO Management Minnesota's work rules.

While there are no changes to absenteeism, tardiness, vehicle accidents, picking errors or productivity, we have added a "misload" work rule.

A misload, as defined, …This procedure will take effect on Sunday, February 26, 1995. We will go over this with our employees prior to that time.

(Employer Exhibit 13)

4. Dated December 19, 1995, the Employer directed a letter to Mr. Don Huemoeller. Said letter stated:

Attached you will find a revised copy of SYSCO Minnesota's work rules. These will go into effect Sunday, December 31, 1995. Changes that occurred:

Picking Errors

Under "guidelines for discipline" the First Occurrence will be a **Verbal**

Review compared to the previous Letter of Concern.

Also the third review process will take the four (4) month mispick rate (current month and preceding three (3)) to see if they exceed a **1/1,250** four month average (compared to a 1/1,500 previous rate) to determine if discipline will be issued.

Productivity

Under "guidelines for discipline" the First Occurrence will be a **Verbal Review** compared to the previous Letter of Concern. The Second Occurrence will now be a **Written Letter**, Third Occurrence will be a **Suspension** and Fourth Occurrence will be **Termination**.

Misloads

Under "guidelines for discipline" the First Occurrence will be a **Verbal Review** compared to a Letter of Concern previously.

Also the third review process will take the four (4) month misload rate (current month and preceding three (3)) to see if they exceed a **1/5,000** four month average (compared to a 1/7,500 previous rate) to determine if discipline will be issued.

* * *

(Employer Exhibit 12)

5. The record does not address whether the Company's February 4, 1992 memo, July 27, 1994 issue of SYSCO MINNESOTA WORK RULES and February 20, 1995 issue of SYSCO MINNESOTA WORK RULES evoked Union objection. However, on January 5, 1996, the Union filed a grievance protesting the work rules implemented on December 31, 1995 and addressed in the Employer's December 19, 1995 letter to Mr. Huemoeller. (Employer Exhibit 20) The grievance alleged in pertinent part, that the rules had not been negotiated and, therefore, violated the CBA**.** It is unclear how this specific grievance was resolved. However, the subsequently negotiated 1997–2001 CBA included a Letter of Agreement

that, in part, stated:[2]

> 1) The suspended work productivity standard arbitration shall be withdrawn with prejudice to its refiling.
>
> 2) The company will continue to have the right to have productivity standards, and to make reasonable changes to those standards.
>
> 3) The Union shall have the right to review the companies [sic] productivity system on an as needed basis. Information requests shall be completed, whenever possible, within 10 days.
>
> 4) The company will currently reduce the mispick policy to 1/1,000 with the existing earn-back policy.
>
> 5) The company will include in its work productivity policy an earn-back provision providing that an employee will be able to earn back discipline on the same basis as on the mispick policy.
>
> 6) The company recognizes that the union has the right to grieve any future changes to the productivity policy and to grieve the implementation of any discipline under the policy. Such grievances may only challenge the appropriateness of the specific discipline issued and not the implementation or appropriateness of the policy or underlying productivity system.
>
> 7) The Company and Union agree to meet periodically during the six (6) month period following ratification to review specific legitimate issues relating to the productivity system. Union and Company engineers may be involved with the systems.

(Union Exhibit 2)

6. The SYSCO MINNESOTA WORK RULES as issued on September 16, 2003 differ from those issued on December 31, 1995 as follows:

(a) **Picking Errors**. Under the December 1995 discipline guidelines, the First Occurrence level of discipline was a Verbal Review. Under the September 2003 the First Occurrence level of discipline was a Letter of Concern. In addition,

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[2] The notation, "Revised 9/20/01," appears in the bottom right hand corner of the document.

whereas the December 1995 threshold for mispick discipline was 1 per 1,250 cases, the September 2003 threshold for mispick discipline was 1 per 4,000.

(b) **Productivity**. The December 1995 and September 2003 productivity guidelines for disciplining poor performers differed as follows:

Occurrence	December 1995	September 2003
First Occurrence	Verbal Review	Letter of Concern
Second Occurrence	Warning Letter	Final Letter of Concern
Third Occurrence	Suspension	Warning Letter
Fourth Occurrence	Termination	Suspension
Fifth Occurrence	----------	Termination

(Employer Exhibits 12 & 14)

The record's next reference inter-party deliberations over work rules pertains to a November 21, 2007 memorandum sent to Mr. Rademacher. Said memo stated in relevant part:

> Please be advised that SYSCO has established a policy of no cell phones or personal electronic devices to be used in the Warehouse.

(Employer Exhibit 15) Attached to this letter was a copy of the Company's work rules, which set forth the new cell phone policy and disciplinary guidelines:

> **CELL PHONE AND PERSONAL ELECTRONICS**
>
> The use of personal electronic equipment (cell phones, mp3 players, radios, etc) by warehouse employees in the warehouse is not allowed. They may only be used in the employee break area or outside. The following guidelines will be used in establishing discipline:
>
> | | | |
> |---|---|---|
> | First Occurrence | = | Verbal Review |
> | Second Occurrence | = | Warning Letter |
> | Third Occurrence | = | Suspension |
> | Fourth Occurrence | = | Termination |

(Employer Exhibit 15)[3]

7. Dated March 24, 2008, the Company informed Mr. Rademacher to the following:

> The purpose of this letter is to inform you that SYSCO Minnesota has added a section to the work rules on Preferred Work Methods.
>
> I have enclosed a copy of the most current work rules and have posted it in the warehouse.

The attached rule change stated:

* * *

Preferred Work Methods

> Employees are required to follow the engineered standard's preferred work methods for each job function they perform. The following guidelines will be used in establishing discipline for failure to follow such methods:
>
> | | | |
> |---|---|---|
> | First Occurrence | = | Verbal Review |
> | Second Occurrence | = | Warning Letter |
> | Third Occurrence | = | Suspension |
> | Fourth Occurrence | = | Termination |

* * *

(Employer Exhibit 16)

8. The case record does not include a Union response to either the November 21, 2007 or the March 24, 2008 letters. However, pre-dating these letters, the parties entered into their current 2005–2010 CBA. Relevant provisions are quoted above in part **I. RELEVANT 2005–2010 CBA LANGUAGE** of this award.

[3] Warranting notice is that under the Company's November 2007 work rules the threshold for mispick discipline had been changed to 1 mispick per 4,500 cases and that, as was the case in December 1995, poor productivity performers were once again disciplined under a 4-step system of progressive discipline. (Employer Exhibit 15)

9. As discussed in part **II. BACKGROUND** of this award, the instant grievance and arbitration arose out of events that unfolded after the release of Ms. Cahill's March 26, 2009 audit report. On April 21, 2009, Union and Company representatives met and discussed the audit's recommendations and as well as the Company's plan to increase from 95% to 100% the level at which discipline would be imposed under the LxLi system. (Tr. 82-85) In gearing up for this meeting, the Union prepared a "List of Demands" for discussion. Said list is set forth below:

> 1) Purge all production standards related discipline from each employee's file;
>
> 2) Back pay for straight time will be given to individuals who perform at 80 % or above and receive suspensions and/or terminations (review all outstanding grievances);
>
> 3) For every full hour in excess of 10 hours of daily order selection, 6 minutes will be credited to the time allowed during that hour for fatigue (10% reduction).
>
> 4) **Labor Standards Training:** The company will allocate $5,000.00 per year to provide labor standards training to select union employees as chosen by the union.
>
> 5) **Progressive Discipline:**
>
> | | |
> |---|---|
> | 1st Step: | Verbal |
> | 2nd Step: | Verbal |
> | 3rd Step: | Written Warning |
> | 4th Step: | One day suspension |
> | 5th Step: | 3 day Suspension |
> | 6th Step: | Termination |
>
> The company and the Union agree that no grievance will be filed until the 4th step of discipline with the Union's right to review and argue all discipline prior to the 4th step.
>
> 6) **Delay Sheets:** A carbon copy of delay forms must be used and the company must either grant or deny the delay by the end of the shift in which the delay was requested.

* * *

7) **Daily/Weekly Production Reports:** Company must make available to all employees upon his/her request a daily production report by the start of his/her next shift. The company must also make available a weekly production report at the end of each week upon request by the employee.

8) **Buyback Incentive:** Employees must maintain 95% average for one month to buyback previous discipline.

9) **Communication Program:**

a) Training Programs:

* * *

b) Union Access to Information:

* * *

10) **Employees will maintain a daily minimum of 85%:**

Crew average less than 95%—Any employee below 95% will be subject to discipline.
Crew Average of 95% to 100%—Any employee below 85% will be subject to discipline.
Crew average over100%—One step of discipline will be removed from all employee's [sic] files related to production standards.

(Employer Exhibit 7; Union Exhibit 15, pp. 4-5) Likewise, in advance of the meeting, the Company prepared two documents or "options" bearing on its changed engineering standards and their implementation. The first option stated:

- 100% discipline from 95%
- No buy back provisions
  Will stay at monthly discipline but will review weekly performance with employees to allow time to improve performance by month end (buy back philosophy)
- Wipe slate clean on all discipline
- Bring Percy Wade back as resolution of all outstanding grievances

(Union Exhibit 15, p.2) The Company's second alternative was:

- Move to 100% discipline from current 95% level
- 100% accountability by job function (loading, receiving, putaway, replenishment and selection, etc.)
- Weekly discipline vs. monthly
- Daily minimum requirement
- All current discipline of employees stands
- Percy Wade termination stands
- No buy back on performance levels

(Union Exhibit 15, p. 3) Both Company proposals called for disciplining employees who fail to achieve 100% of the productivity standard rather than the 95% compliance level. At the April 21st meeting, the Union rejected this change.[4] With respect to the meeting's deliberations, under cross-examination, Mr. Rademacher testified as follows:

> Q. Let…let me see if I'm not asking my question correctly. You were unable to accept what the company put before you as its option for moving the discipline level from 95 percent to 100 percent, is that correct?
>
> *A.* That's correct.
>
> Q. And there was no circumstance under which you were prepared to agree to that?
>
> A. For individual discipline?
>
> Q. Yeah
>
> A. Yes. If there…if…again, if there was a…a crew average concept built into this.
>
> Q. That wasn't, again, my question. My question was: As laid out for you by the company, was there any circumstance under which you were prepared to agree to that?

[4] The record evidence indicates that the Company explained to the Union that the 95%-to-100% change was motivated by the fact that the discrete LxLi engineering standard was more accurate than old Gagnon system and that the change in question was on par with SYSCO's other operating companies. (Tr. 85-86) The Union rejected the 95-to-100 percent change. (Tr. 88)

A. No.

Q. Thank you. So the meeting broke up after 45 minutes, right, roughly speaking?

A. Yes.

Q. In between April 29 and June 3 did the union make any other proposals to the company?

A. I don't believe so.

Q. Did the Company make any other proposals to the union?

A. No, I don't believe so.

Q. Did the union request that the company engage in bargaining?

A. The company … the company made it very clear, this is what they were going to do.

Q. Did the union make any request to engage in bargaining?

A. No.

Q. Did the union assert that the company had a contractual obligation to bargain before it implemented the standards?

A. Yes.

Q. At what point in time?

A. I believe that that came from our principal officer…

Q. So that …

A. …Brad Slawsen, Senior.

Q. Let me ask you if you personally know, did the union send anything or talk to anyone at the company where they asserted that there was a contractual duty to bargain before the company implemented the change that was discussed in April…at the April 29 or April 21 meeting?

A. I…I guess I…I can't speak for anybody else, other than myself.

Q. So you don't have any personal knowledge of that?

A. No.

Q. Thank you.

(Tr. 87-89) In a June 3, 2009 letter, as previously noted, Mr. Shipe formally alerted Mr. Rademacher that, among other things, the discipline level under the LxLi system would be moved from 95% to 100%. That same letter also stated:

> To accompany this change SYSCO is making the following accommodations for our current warehouse employees, in an effort to ensure a smooth transition as well as ongoing training and information sharing, all of which we hope will alleviate major disciplinary issues before they arise.
>
> 1) All production standard related discipline issues for work completed through May 23, 2009 will be purged from each employee's file. Everyone currently employed, starts with a clean slate.
>
> 2) The week of May 17, 2009 SYSCO provides selection labor standard methods training through LxLi to three union employees who will in turn be used to train selection employees along with SYSCO management.
>
> 3) A down time delay request log will be implemented prior to June 20, 2009 for order selectors. All other job functions will continue to record such requests on their daily activity sheets as in the past.
>
> 4) Each selection employee that is currently running under 100% of the labor standard will receive additional work standard training. Training for non selection functions will be issued upon request/need.
>
> 5) Daily production will be posted the following day. Weekly production will be reviewed the following week. Upon request employees work standard detail reports will be made available for review.
>
> Please feel free to give me a call if you have any question concerning this matter.

(Union Exhibit 16)

On June 9, 2009, the Union filed the grievance challenging implementation of the ELSP changes outlined in the Company's June 3, 2009 letter. (Employer

Exhibit 9; Union Exhibit 17)

V. THE UNION'S POSITION

The Union challenges the Company's *unilateral* change in the work standard compliance rate—from 95% to 100%—contending that it violates relevant provisions in the CBA and past practice.[5] The Union further contends that through its disciplinary effects, the change in question impacts the terms and conditions of employment of affected workers and, as such, is a mandatory subject of bargaining. As such, the Union argues, since the Union has never waived the Company's statutory duty to bargain change the ELSP's production compliance rate level, the Employer, by law, was required to do so. For this reason, the Union urges the Employer's unilateral action was also a violation of the National Labor Relations Act ("NLRA"). More to the point, the Union maintains that the language in the CBA supports the conclusion that the parties have never *intended* to permit the Employer act as it did in this instance and, thus, absence the Union's concurrence, the *status quo* should have continued to apply.

The Union acknowledges that Article 21.4 permits the Employer "…to implement and to make changes…" to the work rules. However, the Union argues that this wording is not a grant of "unilateral" authority. (Tr. 67) Clearly, the Union argues, this language neither states expressly nor implies that joint negotiations need not *precede* implementation of the ELSP change in question, and there is no other indication in the record that the Union had previously waived the

[5] The word "unilateral" is used repeatedly in the record. One source defines "unilateral" as "done or undertaken by one person or party." (See: Webster's New Collegiate Dictionary (1979). p.1270)) Herein, the word "unilateral" is defined to mean "…implementing changes without [first] discussions and negotiations with the union." (Tr. 138)

Company's statutory duty to bargain, simply because a "clear and unmistakable" waiver was never granted. (See: NLRB v. Katz, 369 U.S. 736 (1962); 25 A.B.A. J. of Lab. & Emp. Law 57, 66 (Wagner, 2009); Johnson-Bateman Co. and Int'l Ass'n of Machinists & Aeorspace Workers, Local Lodge 1047, 295 NLRB 180, 184 (1989))

In this regard, the Union urges that it had never ceded to the Company the unilateral discretion to change work standard compliance rates; and, if it had, said grant of unilateral authority should have and would have been expressly memorialized in the CBA. Yet, the Union maintains, the whole of the CBA is *silent* on this point, which, by definition, means it lacks the *specificity* required by the courts, board and arbitral precedent to confer upon the Employer the right to act *unilaterally.* The Union variously cites court, NLRB and arbitration orders/awards in support of its contention that the "waiver doctrine" is applicable in this case.

Next, the Union argues that by implementing the revised compliance rate the Employer presented it with a *fait accompli* and no opportunity to bargain. It contends that such action violates an Employer's obligation to bargain regardless of whether the Union had demanded bargaining. It avers that bargaining would have given the Union an opportunity to present possible solutions and might have produced a negotiated solution. Further, the Union argues that if the undersigned concludes that the words in Article 21.4 are ambiguous, he should interpret them in light of and consistent with applicable law and precedence.

Finally, for the reasons discussed above, the Union seeks the remedy it

spelled out in its grievance statement.

VI. THE EMPLOYER'S POSITION

The Employer begins its argument by pointing out that the Union bears the burden of proving that the Company violated one or more expressed provisions of the CBA—a burden, the Employer urges, the Union failed to meet. First, citing Article 30, Management Rights Clause, the Employer observes that the Company is "solely" vested with the right to manage the business "…except as limited by the express provisions of this Agreement and then only to the extent of such limitation." Second, as provided conjointly by Articles 21.4 and 30, the Employer argues that the Company is permitted to "unilaterally" implement changes to its work rules, including production standards and related compliance levels that are deemed to be "reasonable." Third, the Employer contends that Article 1, Recognition and Union Security, neither incorporates the NLRA nor requires that the Company must first meet with the Union to negotiate proposed work rule changes, the Union's protestations notwithstanding. In support of these three lines of argument, the Employer cites numerous arbitral rulings on point.

Next, the Employer acknowledges that the word "unilateral" does not appear in that part of Article 21.4 that states "…the Employer shall have the right to implement and to make changes to these rules." However, the Employer argues, for two reasons, the absence of this word in Article 21.4 does not prove that the parties intended to preclude the Company from unilaterally changing/implementing work rules, as the Union contends. First, the Union's contention simply ignores the language appearing in Articles 30 and 21.4.

Specifically, Article 30 provides in part that, managing the business is vested *solely in the Company* and Article 21.4 provides that "…the *Employer shall have the right* to implement and to make [work rule] changes …" The Employer argues that these two italicized phrases are analogous to or equivalent to usage to the term "unilateral" and they certainly connote that the Company may act "unilaterally." Second, the Union's contention ignores "decades" of practice during which the Company has promulgated and changed work rules, without first meeting and negotiating said changes with the Union, and the Union's contention ignores the parties' bargaining history.

With respect to past practice, the Employer notes that since at least 1992, the Company has promulgated and published a document entitled, "SYSCO Minnesota Work Rules," which incorporates its ELSP. (Company Exhibits 10 through 16) And, over this time frame, the Employer argues that the Company has unilaterally modified various work rules, including the 95% compliance level that was used under the old Gagnon standard: A compliance rule that was not negotiated.

As for bargaining history, the Employer argues that the Union is attempting to obtain through arbitration what it failed to obtain through negotiations. To support its argument, the Employer makes reference to Union proposal No. 46, which was discussed during the parties' 2005–2010 contract negotiations. Characterized by Mark Schneider, Attorney and the Company's Chief Negotiator, as an "all-encompassing" illustration of similar (and rejected) Union proposals that were made at the time, Union proposal No. 46 stated:

> [The] company will not implement any new policies without first meeting with the Local Union and negotiating effects.

(Union Exhibit 7; Tr. 151) The Employer contends that the following exchange with Mr. Rademacher proves that Union proposal No. 46 was designed to prevent the Company from implementing changes in its policies without bargaining first and, further, the fact that this proposal does not include the word "unilateral" demonstrates that the Union's reliance on this term is immaterial:

> Q. Mr. Rademacher, is that a proposal [with reference to No. 46] the Union made?
>
> A. Yes.
>
> Q. And is it a proposal that the Union made because the Company's practice was to implement new policies without first meeting with the Local Union and negotiating the effects?
>
> A. Yes.
>
> Q. And the Union wound up withdrawing the proposal, correct?
>
> A. Yes.
>
> Q. In exchange for other things that the Company granted to the union in negotiations, is that correct.
>
> A. Yes.
>
> Q. Thank you.

(Tr. 121-122)

The Employer contends that the Union's ultimate capitulation of its "bargain-first" proposals (e.g., proposal No. 46) is documented in the parties' August 4, 2005 list of "Tentative Agreements," which stated, in part:

> 18. Delete All Charts and Letters of Agreement: The parties agree that it is management's right to implement work rules and productivity standards subject to the union's right to grieve the reasonableness of the work rules

and productivity standards.

(Union Exhibit 9, p. 2) For agreeing to withdraw Union proposal No. 46, the Company asserts that it modified, at the Union's behest, the "mispick" policy. (Union Exhibit 9, p. 3) The Employer also maintains when it agreed to delete all charts and letters of agreement, it was with the understanding that, *per* Article 21.4, the Company would retain the right to have and make unilateral changes to the ELSP during the contract's term, as expressly stated in number 18 as quoted above and as stated in the Union's PowerPoint presentation of the tentative agreement to its members. (Union Exhibit 10, slide 23)

The Employer also points out that subsequent to the ratification of the 2005–2010 CBA, the parties exchanged memoranda aimed at clarifying their above-quoted number 18 agreement. (Union Exhibits 12, 14A and 14B) The Employer maintains that these documents plus Mr. Radamacher's testimony bearing on same establish that during the 2005 negotiations the Company re-confirmed its right to act unilaterally with respect to production standards. (Tr. 133-134 & Tr. 154)

Moreover, *in arguendo*, the Employer muses that if the Company had an obligation to bargain the compliance level at which discipline was imposed under its ELSP, the Company satisfied that obligation. To support this conclusion the Employer points to the inter-party negotiating events of April 21, 2009, at which the parties reach an *impasse* over the ELSP change in question but not over all of the accommodations the Union sought on its "List of Demands." The Employer refers to its June 3, 2009 letter to affirm the latter assertion. (Employer Exhibits 7

& 8; Union Exhibit 15)

Finally, for these reasons the Employer urges the undersigned to reject the Union's grievance and to uphold the Company's right to manage the business without first winning the approval of the Union to do so.

VII. DISCUSSION

The fighting issue in this case is whether the Employer violated the CBA when it changed from 95% to 100% the compliance level at which discipline may be imposed under the Company's ULSP or work rules. The Union claimed a contractual violation because the Company did not first negotiate the new rule's implementation. The Employer demurred, arguing that the Union's claim was both unproven and defeated by plain contract language, past practice and the parties' bargaining history.

Resolving the aforementioned issue begins with an interpretation of the language of Articles 30 and 21.4, which bear directly on the matter in dispute—language that the parties interpret differently. Pointing to the NLRA and related Board and federal case law, the Union correctly pointed out that mandatory subjects of bargaining—such as the employee discipline effect that the 95% to 100% change in the ELSP's compliance level will likely trigger—may be changed by the Employer, but only after first bargaining same with the Union; provided, that the Union had not clearly, directly and specifically waived the Company's statutory bargaining duty. Continuing, the Union maintained that said waiver has never been negotiated and, had it, Article 21.4 might well read, "Employees shall comply with all reasonable work rules, which the employer shall have the right to

UNILATERALLY implement and to make changes to those rules." However, the Union pointed out, the capitalized and bold-font word **UNILATERALLY** or its equivalent is not in Article 21.4, as negotiated, even though the Employer's actions in this case presumed that it was.

The Employer's response to the Union's construction of Article 21.4 was quite pointed. The Employer argued that the word "unilateral" does not have to be presumed or read into Article 21.4, as the Union maintains, in order to justify its actions in this case. The Employer argued that the plain language of Article 21.4's relevant part speaks for itself: "…the employer shall have the right to implement and to make changes to those work rules." (Emphasis added.) What could be a clearer grant of unilateral authority, the Employer queried?

This construction of Article 21.4's language is persuasive. The verb "shall" is defined to mean "will have to: must," "will be able to: can," "used in law, regulations or directives to express what is mandatory," and "used to express what is inevitable or seems likely to happen in the future," and so forth. (Webster's New Collegiate Dictionary (1979), p. 1056) In the Arbitrator's opinion, this syntax would seem to affirm a grant of "unilateral" authority.

A reasonable person reading of Article 21.4 probably would conclude that it is a clear, unambiguous and bargained grant of authority to the Employer to implement unilaterally and to make changes in its work rules; provided, said changes were "reasonable."[6] On the surface, a reasonable person certainly would

[6] The Union did not raise the "reasonableness" challenge in the instant matter.

not interpret the *absence* of the word “unilateral” from Article 21.4 as an implicit requirement that the Employer must first bargain before making the work rule change in question. On the other hand, a reasonable person might not appreciate how deeply rooted the “duty to bargain” obligation is in contemporary U.S. labor relationships. This caveat prompts the undersigned to go beyond the plain reading of Article 12.4 in order to concretely establish how the parties’ intended Article 12.4 to be interpreted.

Fortunately, we have a fairly extensive bargaining and past practice history upon which to rely. Since at least 1992, the Employer has promulgated work rules that the uncontroverted evidence show, (1) were variously changed from time-to-time over nearly two decades; (2) said changes were made at the Employer’s unilateral initiative; and (3) said changes impacted NLRA-mandatory terms and conditions of employment for warehouse and other workers. This combination of findings tends to suggest the conclusion that Article 21.4 was intended to be a NLRB-type bargaining waiver, as Article 21.4 had been a contractual term since 1993 and since that time the Employer has repeatedly exercised its right to change work rules ever since.

In part **IV. Collective Bargaining History** above, the undersigned includes evidence that the Employer’s unilateral implementation of work rule changes dates back to February, 1992, at which time the Company unilaterally changed it’s “mispick” policy. Thereafter, the unilateral changes were made in July, 1994 (“mispick” and “productivity” policies); February, 1995 (“misload” policy);

December, 1995 ("picking errors," "productivity," and "misload" policies);[7] September, 2000 ("picking errors" and "production" policies); November, 2007 ("cell phone and personal electronics" policy) and March, 2008 ("preferred work methods" policy). To the extent that Article 21.4 is deemed to be ambiguous, this historical review suggests that Article 21.4 was intended to be a NLRA-type waiver not the converse. Again this conclusion suggests that Article 21.4 grants to the Employer the right to promulgate "reasonable" work rules and to make changes to same as business and technological conditions warrant.

In addition, Article 30 states: "The right to manage the business shall remain solely vested in the Employer, except as limited by the express provisions of the Agreement and then only to the extent of such limitation . . ." (Emphasis added.) That managing the business is vested solely in the Employer, *per* Article 30, is consistent with the undersigned's findings and conclusions reached in his analysis of Article 21.4, which serves to further add to the persuasiveness of the Employer's overall case and to the conclusion that Article 21.4 constitutes clear and unmistakable waiver of the Employer's duty to bargain work rules changes.

The record evidence also shows that during the 2005–2010 CBA negotiations, the Union unsuccessfully sought to revoke the Employer's right to unilaterally implement and change work rules. Specifically, as previously discussed in regard to Union proposal No. 46, the Union sought to affirm:

[7] The Union objected to the Employer's December 2005 work rule changes. Yet Article 21.4 remained unchanged. Further, the 1997–2001 CBA incorporates a Letter of Agreement in which the Union withdrew a pending "…work productivity standard arbitration," and in which the Union agreed that the Employer will "…continue to have the right to have productivity standards and to make reasonable changes to those standards." (Company Exhibit 19)

> [That the] Company will not implement any new policies without first meeting with the Local Union and negotiating affects [sic].

(Union Exhibit 7; emphasis added.) The Employer rejected this proposal and, ultimately, the Union withdrew it, as confirmed by number 18 in the parties' "Tentative Agreement" document, which stated in part:

> …The parties agree that it is management's right to implement work rules and productivity standards subject to the union's right to grieve the reasonableness of the work rules and productivity standards.

(Union Exhibit 9)

Finally, the Arbitrator sees merit in the Employer-proffered argument that even assuming that the Company was required to bargain the work rule change in question under NLRB standards, the Company satisfied this obligation. There was bargaining at April 21, 2009 meeting between Union and Company representatives that dealt with several subjects, including the compliance rate change in dispute: A change that the Union adamantly rejected and a change that the Company adamantly insisted upon—clearly a bargaining impasse. Even after the Employer implemented the new LxLi, system, the Company made concessions to some of the Union's earlier demands related thereto, while leaving in place its new 100% compliance standard. Again, like the Union, the Company refused to budge. But, in the Company's case, it refused to budge from its long-standing contractual right to unilaterally implement and change its work rules. Under these circumstances, notwithstanding the Union's argument that further bargaining may have produced beneficial results, the Employer rightly concluded that a bargaining *impasse* had been reached and that its contractual right to

unilaterally change the work rule in question remained undisturbed.

VIII. AWARD

Based on the foregoing and the entire record of the case, the Grievance is denied.

Issued and ordered from
Tucson, Arizona on this
22nd day of May, 2010.

_____
Mario F. Bognanno,
Labor Arbitrator