In the Matter of Arbitration Between

LOCAL 1445, UNITED FOOD & COMMERCIAL WORKERS INT'L UNION, AFL-CIO, CLC

-and-

MACY'S, INC.

Consolidated Grievances: Fulfillment Assignments for Commission Associates

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AWARD OF THE ARBITRATOR

The grievances are substantively arbitrable.

The Union has not waived its right to bring these grievances to arbitration.

The Company violated the Boston and Branches CBAs when it failed to credit the applicable commissions to straight commission employees who were assigned to perform the fulfillment of online orders.

(1) Going forward, the Company shall pay commission associates, at their regular commission rates, for all fulfillment orders that they complete.

(2) The Company shall make the commission associates whole by the payment of back commissions for all orders they have fulfilled since July 2015.

(3) The Company shall recalculate the draw/benefit rates of the commission associates to reflect the added commissions mandated above, and shall make the associates whole for any losses they suffered as a consequence of the improper calculation of their draw/benefit rates.

The arbitrator reserves jurisdiction for ninety days for the sole purpose of addressing any disputes that may remain regarding the back payments due to the commission associates pursuant to this remedial order.

Philip Dunn, Arbitrator

Date: October 13, 2016

Appearances: Alfred Gordon O'Connell, Esq., PYLE ROME EHRENBERG PC, for the Union
William F. Joy, Esq., MORGAN, BROWN & JOY LLP, for the Company

STIPULATED ISSUES

(1) Are the grievances substantively arbitrable?

(2) Did the Union waive its right to seek commission payments on fulfillment picks by proposing in contract negotiations such payments and failing to achieve it?

(3) Did the company violate the collective bargaining agreements with respect to the fulfillment assignments for straight commission employees?

RELEVANT CONTRACT LANGUAGE

Downtown Boston CBA

ARTICLE XII – MANAGEMENT RIGHTS

1. Except as otherwise provided in this Agreement the management of the business and the direction of the working forces including the right to plan, direct, and control store operations is vested exclusively in the Company.

2. Without limiting the generality of the foregoing it shall be within the Company's sole discretion to open new departments, stock new lines of merchandise, to discontinue departments for lines of merchandise, to study or introduce new or improved systems, methods or facilities, to maintain and enforce rules and regulations, to revise, eliminate, consolidate, or add job classifications, … to determine the hourly, daily, and weekly schedules of employment, to assign employees to jobs and to determine their duties and to decide to what extent it may have functions performed by other companies or individuals….

4. Practices and working conditions which are not referenced to in this Agreement shall not restrict management's function to any extent beyond the specific provisions of this agreement.

ARTICLE XIII – MAINTENANCE OF STANDARDS

1. Nothing in this Agreement shall be interpreted as to diminish or eliminate any privilege, which employees now enjoy. The Employer, however, reserves the right to discontinue or diminish any practice, provided the Employer in so doing shall not discriminate against employees covered by this Agreement.

2. This provision does not give the Employer the right to impose or continue wages, hours and working conditions less than those contained in this Agreement….

COMMISSION RATE PROCEDURES….

Non-Sell Duties….

4. Straight Commission Associates who are required to attend department … meetings during their scheduled working hours, will be compensated for such time at a rate based on their hourly draw rate….

Straight Commission Associates who are pulled off the floor to perform non-selling work during their scheduled working hours for one (1) hour or more in a day shall be compensated for such time at a rate based on their hourly benefit rate….

8. Mail order sales will go to the appropriate Commission Associates who are doing the clerical orders or pulling the stock to fill these orders….

Braintree, Natick, Peabody, Warwick ("Branch") Stores CBA

ARTICLE V – COMPANY-RIGHTS

It shall be the exclusive right and responsibility of the Company, subject to and in conformity with the provisions of the agreement, to operate the business under the established policies and rules: to open new departments, stock new lines of merchandise, … or to discontinue departments or lines of merchandise….

It shall be within the Company's sole discretion to revise, eliminate, consolidate, or add job classifications; temporarily to transfer employees from selling to non-selling duties and viceversa; to add non-selling or selling duties to an established job classification on a permanent or temporary basis, without additional compensation and without a reduction in compensation….

ARTICLE IX – WAGES….
C. COMMISSION RATES

1. A straight commission plan is one, which pays an employee a stated percentage of the net amount of sales made or services performed by the employee….

2. Commissions shall be paid to employees in the departments and at the rates provided in … this Section….

ARTICLE XXIII – GRIEVANCE PROCEDURE

A. With reference to this agreement a grievance is defined as any dispute between the parties … as to any matter involving the interpretation or application of this agreement.

B. Changes in general business practice, the opening and closing, transferring or leasing of departments, the stocking of new lines of merchandise and other matters of similar nature not relating primarily and directly to the day today working conditions of employees and their relations with supervisors, the selection of employees for promotion to positions outside the jurisdiction of the Union and all matters involving Company rights as set forth in Article V, shall not be subject to grievance procedure and shall not be arbitrable….

EVIDENCE PRESENTED

Within the five Macy's stores where Local 1445 is the bargaining agent, the sales associates in four departments – women's shoes, men's shoes, clothing and furniture – are paid on a "draw vs. commission" basis. The entirety of the compensation received by these employees is commission-based, correlating to their sales of the Company's wares. Slightly oversimplified, each employee in these departments receives the greater of either a weekly paycheck calculated by taking the sales he or she completed in the preceding week multiplied by a contractually established percentage commission, or a weekly "draw" based upon a percentage of the gross sales by that associate in the preceding year. For this reason, they may also be referred to as straight commission associates.[1]

Up until about 2010, there were four ways for a Macy's customer to make a purchase. First, the customer could transact an in-person purchase of an item immediately available in the store, with the assistance of a sales associate. Second, the customer at the store could participate in a search and send transaction, whereby the customer at the store would work with the sales associate to search online and purchase an item not currently available in that store. Third, the customer could telephone into the store and be assisted by a sales associate to purchase an item and have it mailed to the customer. Fourth, but primarily many years back, a customer could make a mail order purchase by finding the desired item in a catalogue which had been mailed to the customer's home, and by mailing in an order form; that order would be filled by a store associate and the purchased item would be sent to the customer's home. In the first three of these sales methods, the straight commission associate would receive the specified percentage commission for the sale effectuated by that salesperson. For mail order purchases, the commission associate processing the mailed-in order, pulling the item, and delivering it to shipping would receive the commission.

In around 2010, the Company as a matter of economic survival entered into the new world of internet sales, because Macy's was losing customers to on-line retailers. To meet this competition, Macy's set up a website whereby customers could search online for items they

[1] Even the compensation for certain specified, "non-selling" activities is commission based, looking back at the prior year of sales by that straight commission associate.

wished to purchase, and could place their orders and pay online either for in-store pickup or to have the purchased items mailed to their homes.

Unlike some other online retailers, Macy's does not have a warehouse dedicated to processing customers' online orders and shipping out the items sold. Rather, Macy's fills online sales from its brick and mortar retail stores, either for in-store pick-up or for mailing to the customer's home.

In July 2015, the Company announced to all its employees and managers that effective immediately, all store personnel would be required to share in the "fulfillment" of online orders. To accomplish this duty, the employee prints from a computer a list of ten online orders that are awaiting fulfillment. He/she then goes onto the sales floor and/or into the stockroom and attempts to find the item being ordered. This searching process can go quickly for a well-stocked item in the stockroom, but can go slowly for such things as residual items on a sales rack out on the sales floor. Once (if) the item is found, the employee or manager prints out a shipping label, affixes it to the item's packaging, and delivers the item either to the store's location for customer pickup or to the shipping department.

This did not constitute a significant change for hourly paid associates, because they are still getting paid their hourly rate while performing the fulfillment work. But for straight commission associates, the Union argues, the time they have spent during open store hours on fulfillment duties has been entirely uncompensated. That is so, that union contends, because the only way that straight commission associates earn income is through working with customers on the sales floor to effectuate sales of the Company's wares, thus generating sales commissions based upon those sales. Accordingly, the Union asserts, whenever the straight commission associates are pulled away from the floor to perform fulfillment duties, they are being denied compensation via the lost opportunity during that time period to be in their departments effectuating sales and generating commissions.

The Union in July 2015 filed two grievances, one for the Boston store and one for the Branch stores, alleging that the Company was violating the CBAs by requiring the commission associates to perform fulfillment duties without compensation during open store hours.

In December 2015, during negotiations for successors to the CBAs which were set to expire on February 6, 2016, the Union submitted to the Company the following proposals:

> Boston Store – Add:
> Schedule F – Fulfillment.
> Associates will not be required to retrieve any merchandise outside of their departments to complete sales/transactions for fulfillment, BBOPS, or any online sale. Commission associates will receive a 3% Commission on all such completed sales/fulfillments.
>
> Branch Stores – Add:
> EXHIBIT F – FULFILLMENT, BUY ONLINE PICKUP in STORE, and all online sales.
> Associates will not be required to retrieve any merchandise outside of their department to complete sales/transactions for fulfillment, BOPS or any online sales. Commission associates will receive a 3% commission on all such completed sales.

When no agreement was reached on these proposals at the contract negotiations, the Union withdrew these proposals and informed the Company that it would instead proceed with its pending grievances to arbitration. Those fulfillment grievances which the Union submitted back in July 2015 remained unresolved through the grievance procedure, resulting in this arbitration proceeding.

The Company placed into the record data which suggests that the average amount of time spent by straight commission associates on fulfillment duties has been relatively small. In the Boston store, in the 28 weeks from August 1, 2015 through February 15, 2016, each of the 23 straight commission associates on average performed 8.2 fulfillments per week. Parker Bennett (women's shoes associate in Boston) testified that each fulfillment on average took him off the sales floor for 4 to 6 minutes. Taking that figure, that then averages out to 8.2 fulfillments per week x 5 minutes per fulfillment = about 41 minutes per week per straight commission associate spent off the floor doing fulfillment tasks.

For the "Branch" stores, the averages are as follows: North Shore, 9.3 fulfillments per week on average, at 5 minutes each, for about 45 minutes per week per commission associate; South Shore, 7.14 fulfillments/week/associate x 5 min. = about 35 minutes per week per associate; Natick, 4.2 fulfillments/week/associate x 5 = about 21 minutes per week per associate; Warwick, 4.1 fulfillments/week/associate x 5 = about 20 minutes per week per associate, on average.

Moreover, as the Company points out, it is difficult to determine what amount of sales any specific, straight commission associate may have lost because that associate has been off the floor for brief periods of time attending to fulfillment duties. There is reason to believe that the gross sales lost may be relatively slight. That is so because the straight commission associates for the most part are performing their fulfillment tasks off the sales floor before the stores open, or right after the stores first open when there are relatively fewer customers in the store and looking for the assistance of a sales associate.

On the other hand, looking only at averages ignores the important consideration that there are large fluctuations in online sales, so that the volume of fulfillment work performed by commission associates varies considerably from week to week. For example, online sales and the resultant fulfillment work spike up in the weeks before Christmas, and also in the days immediately following special sales of merchandise in one department or another.[2] The data submitted by the Company demonstrates the spikes in the amounts of online orders and the resultant spikes in the amount of fulfillment work being performed by commission associates. A spike up in the online sales from one of the commission departments will mean that the commission associates likely will be performing their assigned fulfillment duties deeper into the busier times of day on the sales floor.

DISCUSSION

Branch Stores Grievance

1. Substantive Arbitrability

The Company cites the following language from the Branches CBA:

> **ARTICLE V – COMPANY-RIGHTS**
>
> It shall be within the Company's sole discretion … to add non-selling or selling duties to an established job classification on a permanent or temporary basis, without additional compensation and without a reduction in compensation….
>
> **ARTICLE XXIII – GRIEVANCE PROCEDURE….**
>
> B…. all matters involving Company rights as set forth in Article V, shall not be subject to grievance procedure and shall not be arbitrable….

[2] On the other hand, the Company hires seasonal workers during the pre-holiday rush, and some of them are assigned in particular to performing fulfillment work. Even with that, however, the Company's own data shows that the amount of fulfillment work done by commission employees did spike up in December 2015.

The Company argues that it was exercising an explicitly reserved, Article V management right "to add ... non-selling duties to an established job classification" when it added to the duties of the commission associates the performance of fulfillment tasks. Thus, the Company concludes, this exercise of its express, Article V management rights is not an arbitrable matter, citing Article XXIII.

The Union responds that while the Company does have the right to add non-selling or selling duties to an existing job classification, that right is subject to the express proviso that the Company can do so only "without a reduction in compensation." The Union argues that the Company in this case has in fact reduced the compensation of straight commission associates by assigning them additional duties for which they go unpaid, and which reduce their ability to earn commissions by taking them off the sales floor during open store hours.

The Company does not dispute that its management right to add duties to a job classification is subject to the proviso that the addition of those duties cannot have the effect of reducing the compensation paid to the employees in that classification. The Company argues that in this case, however, the Union has presented no substantiated evidence of any reduction in earnings by commission associates, nor any causal link between the performance of fulfillment duties and any reduction in earnings that some straight commission associates may have experienced in 2015. The Company notes that Union Witness Bennett saw his earnings increase from 2014 to 2015, and argues that the fulfillment duties he performed in the second half of 2015 thus obviously had no adverse effect on his earnings. The other Union witness, Commission Associate Accardi, did suffer some reduction in earnings from 2014 to 2015, but in 2015 Company sales were down, so poor business conditions rather than time spent on fulfillment duties may have been the reason for Mr. Accardi's 2015 reduction in commission earnings, the Company suggests.

In agreement with the Union, I conclude that the record evidence amply supports – indeed compels – the inference that the 93 straight commission associates in the Branch Stores as a group suffered some reduction in compensation as a consequence of their collective performance of some 17,442 fulfillments over the course of the 28 weeks from August 1, 2015 through February 15, 2016. The undisputed evidence establishes that each fulfillment takes the commission associate off the sales floor for about five minutes on average. That means that the 93 straight sales associates spent about 17,442 fulfillments x 5 minutes/fulfillment = about 87,210 minutes of time off the sales floor doing fulfillments. That 87,210 minutes calculates out to 1,453.5 hours of work time off the sales floor, thus losing that amount of opportunity to greet and attend to customers so as to effectuate sales of merchandise and earn commissions on those sales.

It is true that it is difficult if not impossible to quantify with any precision what actual dollar amounts of commission earnings were lost by any given straight commission associate as a result of the fulfillment duties performed by that individual. The record evidence does not contain data of the exact number of fulfillments performed by any specific commission associate, of the dates and times of day they were performed, of customer traffic levels on those times and dates, nor even of gross sales by department on the days worked by any given associate.

However, while these deficiencies in proof of specific loss of compensation per employee might well impact the issue of remedy, the record evidence amply supports the inference that the assignment of fulfillment duties to the straight sales associates in the Branch stores in the congregate did indeed cause this group as a whole to suffer a reduction in their compensation. That necessary inference of a reduction in their overall compensation means that the Company was not exercising an Article V, reserved management right when it assigned to the straight sales associates the new fulfillment duties. Accordingly, the Branches grievance claiming a contract violation is substantively arbitrable.

2. The Company's Waiver Argument

The Company cites the proposals that the Union made at the contract negotiations in December 2015, which if accepted by the Company would have established a commission rate of 3% of the sales price to be given to straight commission associates for their performance of fulfillment duties. The Company notes that after it rejected these proposals, the Union withdrew them, and no new language about fulfillments was added to the parties' successor CBA. The Company argues that the Union should not be allowed to gain through arbitration a benefit which it sought but did not obtain at the negotiating table.

The Union acknowledges the correctness of the principle of contract interpretation which the Company has cited. However, the Union is correct that what happened in this case was entirely different from the scenario that the Company has suggested. What happened in this case was more akin to settlement discussions during the processing of the grievances, but which settlement efforts were unsuccessful in resolving the matter being grieved. In this case, the settlement efforts at resolving the pending grievances were made at the negotiating table rather than in a separate grievance meeting. That does not change the essential fact that the Union was exploring with the Company proposals that might have resolved the controversy that had already been grieved pursuant to the language already included in the expiring CBA; but when those proposals were not accepted, the Union withdrew them while advising the Company that it would proceed to arbitration with the grievances which had been filed prior to the commencement of the contract negotiations. By those actions, the Union did not waive its right to pursue its claim in this arbitration proceeding that the Company in July 2015 violated the then-existing (and still unchanged) terms of the CBA when it assigned the performance of fulfillment duties to the straight commission associates.

3. The Merits, Branches Labor Agreement

The Union cites the following language from the Branches CBA:

> **ARTICLE IX – WAGES**….
> C. COMMISSION RATES
> 1. A straight commission plan is one which pays an employee a stated percentage of the net amount of sales made **or services performed** by the employee … (emphasis added).

Because the fulfillment work constitutes "services performed" by the straight commission associate, the CBA mandates that the company must pay the applicable commission for each fulfillment that a Commission associate performs, the Union contends.

The Union's contention is correct. In the case of online orders, no associate is directly involved in selling the item to the customer. Rather, the customer on his or her own goes to the Macy's website, selects the item desired, specifies product details such as size and color, places the order, and makes payment, all without the involvement of a sales associate. However, the Commission associate who then fulfills that order performs the essential services to complete that sale. The associate takes the customer's order, searches through the store's inventory to locate the item ordered with attention to all the specifications such as size and color, pulls the correct item out of stock, affixes a label with the customer's name and address, and delivers the purchased item either to shipping or to the designated location in the store for customer pickup. It is the performance of those services by the assigned commission associate, which services are essential to the effectuation of the sale, which entitles that associate to the receipt of the commission pursuant to Article IX.

For this reason, the Company violated the Branches CBA, specifically Article IX, when it failed to credit the applicable commissions to straight commission employees who were assigned to perform the fulfillment of online orders.

Boston/Jordon Marsh Grievance

1. **The Company's Waiver Argument**

The Company's waiver argument fails for the same reason under the Boston CBA as with the Branches grievance. As discussed above, the Union acted in a manner at the bargaining table which preserved its right to bring this grievance to arbitration.

2. **Substantive Arbitrability and the Merits**

Article XII of the Boston CBA contains a listing of rights which are reserved exclusively to management, "Except as otherwise provided in this Agreement…." As discussed in detail below, there is in the Boston CBA express contract language which mandates that the Company must pay the standard commission rates to the straight commission associates who fulfill online orders. Because this issue is regulated by express contract language, the Boston grievance is substantively arbitrable.

It is the following language from the Boston CBA which mandates these commission payments to commission associates who perform the fulfillment duties for online sales:

> **COMMISSION RATE PROCEDURES**….
> 8. Mail order sales will go to the appropriate Commission Associates who are doing the clerical orders or pulling the stock to fill these orders….

Quite simply, online sales are the new age version of mail order sales. In both online and mail order sales, the customer looks through a Macy's catalogue and chooses the item, color and size desired. Functionally, it makes no difference whether the catalogue utilized by the customer is in print form or online; in either case, no sales associate has any role whatsoever in selling the piece of merchandise selected by the customer. Once the customer has selected the item, he/she places the order by filling out a form and sending it to the Company, either by U.S. mail (mail order sales) or electronically (online sales).

The role of the associate fulfilling that order is then identical for both mail order sales and online sales. The associate takes the customer's order, searches through the store's inventory to locate the item ordered with attention to all the specifications such as size and color, pulls the correct item out of stock, affixes a label with the customer's name and address, and delivers the purchased item either to shipping or to the designated location in the store for customer pickup.

In determining the parties' rights and obligations with regard to online transactions, it is helpful to carefully dissect the online transactions to see if they are simply the new age, electronic equal of transactions that the parties have already addressed in their CBA. That analysis in this case confirms that online sales are "mail order sales" within the meaning of the

Commission Rate Procedures language contained in the parties' Boston CBA. For this reason, the Company violated the Boston CBA, specifically Paragraph 8 of the Commission Rate Procedures language, when it failed to credit the applicable commissions to straight commission employees who were assigned to perform the fulfillment of online orders.

REMEDY

(1) Going forward, the Company shall pay commission associates, at their regular commission rates, for all fulfillment orders that they complete.

(2) The Company shall make the commission associates whole by the payment of back commissions for all orders they have fulfilled since July 2015.

(3) The Company shall recalculate the draw/benefit rates of the commission associates to reflect the added commissions mandated above, and shall make the associates whole for any losses they suffered as a consequence of the improper calculation of their draw/benefit rates.

The arbitrator reserves jurisdiction for ninety days for the sole purpose of addressing any disputes that may remain regarding the back payments due to the commission associates pursuant to this remedial order.

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