ARBITRATION PURSUANT TO APPOINTMENT BY
FEDERAL MEDIATION AND CONCILIATION SERVICE

In the Matter of the Arbitration Between:
U.S. FOODSERVICE, INC.

and

TEAMSTERS LOCAL UNION NO. 355

Class Action Grievance:
Edwin Mulford, et al.
Hours of Service Policy

Before M. David Vaughn, Arbitrator
FMCS Case No. 110406-02220-6

OPINION AND AWARD

This proceeding takes place pursuant to Article 24 of the 2009-2012 Collective Bargaining Agreement (the "Agreement") between U.S. Foodservice, Inc. Baltimore/Washington ("U.S. Foodservice," the "Company" or the "Employer") and Teamsters Local Union No. 355 ("Teamsters" or the "Union") (collectively, the Company and the Union are the "Parties" to the proceeding) to resolve a class action grievance brought by Edwin Mulford, *et al.* ("Grievants"), protesting the Employer's Hours of Service Policy. The Parties were unable to resolve the dispute through the steps of the negotiated grievance procedure; and the Union invoked arbitration. Pursuant to the procedures of the Parties, I was selected to hear and decide the dispute.

A hearing was convened in Baltimore, Maryland, on October 28, 2011, and continued and concluded on December 7, 2011. The Union was represented by H. Victoria Hedian, Esq., and the Employer by Director of Labor Relations Kathleen A. McCabe, Esq. The Parties stipulated at the outset of the proceeding that the matter is properly in arbitration and before me, there being no challenge to arbitrability. The Parties were then afforded full opportunity to present witnesses and documents and to cross-examine witnesses and challenge documents offered by the other. Local 355 Business Agent James Deene, Truck Driver (and Shop Steward) Edwin Mulford, Truck Driver (and Shop Steward) Joseph J. Schwabline, Sr., Truck Driver Anthony L. Perry, Tractor and Trailer Delivery Driver Anthony L. Bellamy and Delivery Driver (and Shop Steward) Lou S. Lough testified for the Union. At the call of the Employer testified

Vice President of Operations Charles Spink, Jr., and Detroit Division Vice President of Operations Daniel Bailey. All Witnesses were sworn and, except as agreed, sequestered. Joint Exhibits ("J. Ex. __") 1-4, Union Exhibits ("U. Ex. __") 1-24 and Company Exhibits ("Co. Ex. __") 1-7 were offered and received into the record. A court reporter was present at the hearing; by agreement of the Parties, the verbatim transcript (page references to which are designated "Tr. __") which she caused to be prepared constitutes the official record.

At the conclusion of the hearing the evidentiary record was completed. The Parties submitted written post-hearing briefs ("PHB"s). Upon receipt of both briefs on January 13, 2012, the record of proceeding was closed.

This Opinion and Award is issued following review of the record and consideration of the arguments of the Parties. It interprets and applies the Agreement.

ISSUES FOR DETERMINATION

The Parties agreed at hearing that the issues for determination are:

> Did the Company violate the Agreement and/or the National Labor Relations Act when it implemented its new Hours of Service Policy in November 2010? Was the Hours of Service Policy a reasonable policy? If not, in either case, what should be the remedy?

RELEVANT CONTRACTUAL PROVISIONS

Article 26 (Suspension and Discharge) of the Agreement (J. Ex. 1), in relevant parts, provides:

> Section 3: Warning letters will not remain active in an employee's file after twelve (12) months from date of issuance. Warning notices older than twelve (12) months

will not be used as a basis for progressive discipline, if an employee has a clean record on similar conduct for twelve (12) continuous months. In these cases progressive discipline will start over.

Section 4: It is understood and agreed that any warning notices, suspensions or termination shall be for just cause and shall be issued within thirty (30) days following the Company's knowledge of the occurrence of the violation upon which the warning is based. For any type of paperwork error (D.O.T. logs, C.O.D. paperwork, etc.) the Company shall be considered to have knowledge from the time they received the paperwork. This shall not include attendance, tardiness or early departures which shall be given to the employee on the first scheduled day after the incident occurred.

Article 31 (Management Rights) of the Agreement provides:

Section 1: It is recognized that the well-being of both parties is directly dependent upon the skill and efficiency with which the business of the Employer is conducted, and that any assumption of the functions of management by the Union is contrary to the intent and purposes of this Agreement. The authority and responsibility for the management of the business shall repose exclusively in the Employer and its appointed representatives, and the Union or its representatives shall not interfere with the exercise of such authority and responsibility, subject to the provisions of this Agreement.

Section 2: Management retains all rights not specifically limited elsewhere in this Agreement, including but not limited to the rights to manage the business of the Employer and to direct the work force,

the rights to plan, modify, direct, and control all operations; to schedule and assign work to employees, to determine the methods, means, processes, materials, schedules, and locations of operations; to determine the products to be sold; to choose the location of its plant and distribution branches; to transfer work outside the Union's jurisdiction after bargaining with the Union; to continue or discontinue its operating departments; to determine where and by whom and the processes by which items are manufactured, facility and equipment maintenance or service work shall be performed; to establish production standards and to maintain the efficiency of its employees; to establish and require employees to observe Employer rules and regulation; to transfer, promote, hire, lay-off or relieve employees from duties, discipline, and discharge for cause.

Section 3: The foregoing enumeration of rights reserved to the Employer shall not be deemed to exclude or limit other Employer rights not specifically mentioned herein or specifically limited elsewhere by this Agreement.

RELEVANT STATUTORY PROVISIONS

The National Labor Relations Act (the "Act"), 29 U.S.C. §§ 151-169, in relevant parts, provides:

Sec. 8. [§ 158. Unfair Labor Practices]

(a) It shall be an unfair labor practice for an employer-

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [§ 157 of this title];

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

RELEVANT REGULATORY PROVISIONS

Subchapter B (Federal Motor Carrier Safety Regulations) ("FMCSR") of Chapter III (Federal Motor Carrier Safety Administration, Department of Transportation) of Title 49 (Transportation) of the Code of Federal Regulations ("C.F.R."), in relevant parts, provides:

§ 385.5 Safety fitness standard.

A motor carrier must meet the safety fitness standard set forth in this section. Intrastate motor carriers subject to the hazardous materials safety permit requirements of subpart E of this part must meet the equivalent State requirements. To meet the safety fitness standard, the motor carrier must demonstrate the following:

(a) It has adequate safety management controls in place, which function effectively to ensure acceptable compliance with applicable safety requirements to reduce the risk associated with:

(1) Commercial driver's license standard violations (part 383) of this chapter,

(2) Inadequate levels of financial responsibility (part 387) of this chapter,

(3) The use of unqualified drivers (part 391) of this chapter,

(4) Improper use and driving of motor vehicles (part 392) of this chapter,

(5) Unsafe vehicles operating on the highways (part 393) of this chapter,

(6) Failure to maintain accident registers and copies of accident reports (part 390) of this chapter,

(7) The use of fatigued drivers (part 395) of this chapter,

(8) Inadequate inspection, repair, and maintenance of vehicles (part 396) of this chapter,

(9) Transportation of hazardous materials, driving and parking rule violations (part 397) of this chapter,

(10) Violation of hazardous materials regulations (parts 170 through 177 of this title), and

(11) Motor vehicle accidents, as defined in §390.5 of this chapter, and hazardous materials incidents.

(b) The motor carrier has complied with all requirements contained in any remedial directive issued under subpart J of this part.

* * *

§ 395.1 Scope of rules in this part.

* * *

(o) *Property-carrying driver.* A property-carrying driver is exempt from the requirements of § 395.3(a)(2) if:

(1) The driver has returned to the driver's normal work reporting location and the carrier released the driver from duty at that location for the previous five duty tours the driver has worked;

(2) The driver has returned to the normal work reporting location and the carrier releases the driver from duty within 16 hours after coming on duty following 10 consecutive hours off duty; and

(3) The driver has not taken this exemption within the previous 6 consecutive days, except when the driver has begun a new 7- or 8-consecutive day period with the beginning of any off-duty period of 34 or more consecutive hours as allowed by § 395.3©.

* * *

§ 395.3 Maximum driving time for property-carrying vehicles

Subject to the exceptions and exemptions in §395.1:

(a) No motor carrier shall permit or require any driver used by it to drive a property-carrying commercial motor vehicle, nor shall any such driver drive a property-carrying commercial motor vehicle:

(1) More than 11 cumulative hours following 10 consecutive hours off-duty;

(2) For any period after the end of the 14th hour after coming on duty following 10 consecutive hours off duty, except when a property-carrying driver complies with the provisions of §395.1(o) or §395.1(e)(2).

(b) No motor carrier shall permit or require a driver of a property-carrying commercial motor vehicle to drive, nor shall any driver drive a property-carrying commercial motor vehicle, regardless of the number of motor carriers using the driver's services, for any period after-

(1) Having been on duty 60 hours in any period of 7 consecutive days if the employing motor carrier does not operate commercial motor vehicles every day of the week; or

(2) Having been on duty 70 hours in any period of 8 consecutive days if the employing motor carrier operates commercial motor vehicles every day of the week.

(c)(1) Any period of 7 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours; or

(2) Any period of 8 consecutive days may end with the beginning of any off-duty period of 34 or more consecutive hours.

FACTUAL BACKGROUND AND FINDINGS

The Parties

U.S. Foodservice, Inc., now named U.S. Foods, Inc.,[1] is one of the largest food service distributors in the United States, with approximately $19 billion in revenues. It operates 64 divisions, including the Baltimore-Washington division, located in Severn, Maryland. (Tr. 20 and 186) The Union represents a bargaining unit of the Company's Baltimore-Washington Division's 110-115 drivers (Tr. 102 and 185), as well as its jockeys, fuelers, loaders, mechanics and helpers. As indicated, the Company and Union are the Parties to the Agreement.

DOT Hours of Service Regulations

The Company's operations are regulated by the Department of Transportation's ("DOT"'s) Federal Motor Carrier Safety Administration ("FMCSA" or the "Administration"), which has issued FMCSRs limiting the number of hours commercial motor vehicle operators are permitted to drive, in the interest of safety. These regulations (*supra*), commonly known as "hours of service" regulations (also "HOS"), are at the heart of this dispute. FMCSAs limit the number of hours a driver may drive a property-carrying commercial motor vehicle. Drivers are limited to driving no more than 11 hours per day - although they may work up to three additional hours (for a total of 14 hours in a day) doing other tasks, such as loading and delivering - and, before being allowed to drive again, must be off the clock for ten hours. § 395.3.

The FMCSRs permit other limited exceptions to these rules. For instance, the "16-hour rule" [§ 395.1(o)] permits a driver to work up to 16 hours if he or she cannot return to the home domicile within 14 hours. The Company must permit invocation of the "16-

[1]The parent company, formerly known as U.S. Foodservice, Inc., was renamed in September 2011.

hour rule," which may only be used if the driver has operated outside of the home domicile for the previous five shifts, *i.e.*, once within a week. Carriers may also choose, based on their operations, to follow the "60-hour rule," which prohibits drivers from working more than 60 hours in a seven-day period, or the "70-hour rule," which prohibits drivers from working more than 70 hours in an eight-day period. § 395.3. (Tr. 24-28)

In interpretive guidance to the FMCSR (Co. Ex. 1), the FMCSA states that a carrier is liable for violations of the hours of service regulations "if it had or should have had the means by which to detect the violations." In addition, the Administration's FMCSR guidance states that a carrier is liable for the actions of their employees even where the carrier did not require or permit the violations to occur:

> Neither intent to commit nor actual knowledge of a violation is a necessary element of that liability. Carriers "permit" violations of the hours of service regulations by their employees if they fail to have in place management systems that effectively prevent such violations.

The FMCSAs summarize the statutory penalties for violating the hours of service regulations:

- Drivers may be placed out-of-service (shut down) at roadside until the driver has accumulated enough off-duty time to be back in compliance;
- State and local enforcement officials may assess fines;
- FMCSA may levy civil penalties on the driver or carrier, ranging from $1,000 to $11,000 per violation, depending on severity;
- The carrier's safety rating can be downgraded for a pattern of violations; and
- Federal criminal penalties can be brought against carriers who knowingly and willfully allow or

require HOS violations, or drivers who knowingly and willfully violate the HOS regulations.

The most serious penalty which may be imposed, from the Company's perspective is "cease and desist" authority to force violating trucking companies to shut down operations. There is no requirement in the FMCSRs for any particular system of discipline for drivers who incur DOT violations, and no apparent DOT expectation with respect to the number of disciplinary steps to be included in any disciplinary system. (U. Ex. 8)

Company's Disciplinary Procedures

The Company utilizes progressive discipline. It developed a pre-printed Employee Disciplinary Report to be used when an employee is to be disciplined. The Employee Disciplinary Report contains a list of 24 types of violations, including absenteeism, insubordination, possession of illegal drugs on duty, fighting, vehicle accidents, violation of safety rules and DOT violations. The Employee Disciplinary Report lists four possible disciplinary actions: verbal warning, written warning, suspension and discharge. Mr. Deene testified that, for at least the 20 years that he has been employed by the Company, the Parties have, in practice, used a five-step disciplinary process, inserting a final written warning - by adding the typed word "final" above the word "written" - to occur after the written warning but before the suspension. (U. Ex. 1; Tr. 30-32)

The disciplinary process, including the disciplinary form and steps, has been used for violations including breaches of Department of Transportation ("DOT") log and hours of service requirements. Mr. Spink acknowledged that U.S. Foodservice disciplined a number of employees for DOT hours of service violations under its five-step disciplinary process. (U. Ex. 1; Tr. 227) He testified, however, that the Company did not regularly and consistently issue discipline to drivers who violated the HOS requirements. (Tr. 193)

Mr. Spink testified that, prior to November 2010, the Company's Baltimore Division did not have a disciplinary policy that specifically addressed hours of service. (Tr. 192) Mr. Deene acknowledged that the Company did not have a separate stand-alone hours of service policy prior to November 2010. (Tr. 84)

FMCSA Compliance Review

In 2009, the DOT's FMCSA conducted an audit of Trans-porte Inc., dba U.S. Foodservice ("Trans-porte"), a subsidiary of U.S. Foodservice based in Rosemont, Illinois, which operates more than a dozen of its 64 divisions. (198-99) The Baltimore-Washington Division of the Company is not a part of Trans-porte. The FMCSA audit resulted in Trans-porte receiving an "unsatisfactory" safety rating, the lowest possible rating. By a letter to Trans-porte dated November 6, 2009 (Co. Ex. 3), FMCSA Midwestern Service Center Field Administrator Darin G. Jones issued Trans-porte an "Order to Cease All Transportation in Interstate and Intrastate Commerce and Revocation of Registration," effective November 21, 2009. The Order stated:

> This **Order** is the result of a compliance review of [Trans-Porte]'s operations completed on October 6, 2009. The review disclosed serious violations of the [FMCSR]s and/or the Hazardous Materials Regulations.
>
> [Trans-porte] was issued a proposed "unsatisfactory" safety rating on October 6, 2009. [Trans-porte] was notified to take certain actions within 45 days from the date of that proposed rating to improve its safety rating to "conditional" or "satisfactory." [Trans-porte] was further advised that it would be ordered to cease any and all operation of any commercial motor vehicle(s) in interstate and intrastate commerce and its registration would be revoked unless its safety rating was improved to "conditional" or "satisfactory."
>
> [Trans-porte] has failed to take the necessary steps required to improve its safety rating to "conditional" or "satisfactory" within the required timeframe.
>
> * * *

> [Trans-porte]'s continued operation of commercial motor vehicles . . . after the effective date and time of this Order . . . will be considered a serious safety violation. Each day the transportation continues constitutes a separate offense.
>
> Violation(s) of this Order may result in penalties of not more than $11,000 for each separate violation and may result in criminal prosecution leading to imprisonment for up to one (1) year or a fine of up to $25,000, or both, and other actions as deemed necessary by the United States Department of Justice. (49 USC § 521(b)). . . . [Emphasis in original.]

Soon after receiving the FMCSA letter, Trans-porte took certain - unidentified - corrective actions. By a letter dated November 20, 2009, FMCSA, "[b]ased upon review of the evidence of corrective action submitted on November 20, 2009, granted Trans-porte's request to change its safety rating from "unsatisfactory" to "conditional." (Co. Ex. 4) By a letter dated November 23, 2009 (Co. Ex. 5), FMCSA confirmed the upgrade, stating that a conditional rating

> indicates that your company does not have adequate safety management controls in place to ensure compliance with the safety fitness standard that could result in occurrences of violations listed in [§ 385.5].
>
> Immediate action must be taken to correct any deficiencies or violations discovered during the compliance review. Your operation was found to be deficient with respect to the applicable safety regulations in [Part 395 Hours of Service of Drivers].[2]

[2]Other areas which FMCSA deemed Trans-porte to be deficient included Part 391 - Qualifications of Drivers; Part 172 - Hazardous Materials Table; Part 396 - Inspection, Repair and Maintenance; Part 382 - Controlled Substance and Alcohol Use and Testing; and Part 383 - Commercial Drivers License.

The Company's Hours of Service Policy

Mr. Spink testified that, in response to the DOT's audit and unsatisfactory rating of Trans-porte, U.S. Foodservice determined to "come out and implement an Hours of Service Policy ["HOS Policy"] for the entire company." (Tr. 203) Mr. Deene testified that, by an e-mail dated August 13, 2010, he received from the Company an "'Hours of Service' Violations Corrective Action Policy." The HOS Policy, which was to be effective September 15, 2010, stated:

> **I. Purpose**
>
> A core value at U.S. Foodservice (the Company) is our commitment to safety. This commitment extends to our employees as well as to the general public. Accordingly, we take our obligation to the federal Department of Transportation (DOT) very seriously, and expect that our associates who are governed by DOT regulations fully comply with those regulations. Among these regulations are those related to "hours of service" (HOS), which place limits on when and how long commercial motor vehicle operators may drive. Your role as a professional driver makes knowledge of these regulations a professional obligation, and U.S. Foodservice cannot treat claims of ignorance or misunderstanding of the regulations as an excuse. This Policy is designed to address situations in which a driver fails to comply with HOS regulations.
>
> **II. Examples of HOS Violations**
>
> The following are examples of situations in which violations of HOS regulations can occur. Note that this is not an exhaustive list, and only includes examples.
>
> - *A driver logs in and begins his/her route prior to accruing 10 hours of off-duty time.*
> - *A driver exceeds the 11, 14, 16, or 60/70 hour rules.*

III. <u>Corrective Action</u>

All HOS violations will be considered for a rolling twelve (12) month period.

- First HOS violation in a rolling twelve (12) month period will result in a *Final Written Warning.*
- Second HOS violation in a rolling twelve (12) month period will result in *termination of employment.*

Mr. Spink testified that, although it was the expectation that the HOS Policy would be the same throughout the Company, it was *not* "the expectation that the steps for discipline would be the same throughout the company." (Tr. 203-204) He acknowledged that the Company's HOS Policy is not uniform nationwide, with some using a 12-month period and others using an 11-month period and some having a three-step progressive discipline process and others having a two-step process. For example, after U.S. Foodservice instituted HOS Policies in divisions based in Plymouth, Minnesota, and Detroit, Michigan, some bargaining unit employees in those divisions were disciplined. In response, the Teamster locals in those divisions (120 and 337, respectively) filed grievances, objecting to the disciplinary actions and the HOS Policies. Eventually, the parties reached Settlement Agreements in the Plymouth and Detroit Divisions. In Plymouth, the parties agreed to a three-step disciplinary process in a rolling 11-month period; in Detroit, they agreed to a three-step process in a rolling 12-month period. (Co. Exs. 6-7; Tr. 207-211) Mr. Bailey testified about the Settlement Agreement in Detroit. (Tr. 243-49)

Mr. Deene testified that, when he received the HOS Policy, he contacted the Company and asked to bargain over the Policy because it involved discipline. On August 25, 2010, the Parties met to discuss the HOS Policy. The Union was represented by Mr. Deene and its three shop stewards - Messrs. Mulford, Schwabline and Lough; the Company was represented by then Director of Human Resources Josie Smith, Director of Transportation Clayton Murch, John Reedy and someone named Kelly. (U. Ex. 23) Mr. Deene testified that, at

the meeting, the Union expressed concern about the triggers for and consequences of the HOS Policy violations. He posed a number of questions to the Company, including a problem with time discrepancies between the two XATA[3] terminals employees use to log in, the possibility of employees being written up for one-minute violations and the problems with managers telling drivers to keep on going when they are close to running out of hours. (Tr. 36-37) Mr. Deene further testified that, although Company representatives at the meeting stated that they would look into the Union's concerns and get back to the Union with answers, they stated that the Policy was "coming from corporate." (Tr. 37) The reasonable implication of that statement is that Division-level (Management) lacked authority to modify the Policy.

The HOS Policy was not implemented on September 15, 2010. Mr. Deene testified that, on October 20, 2010, as he was on his way to a local union shop stewards' seminar in Gettysburg, Pennsylvania (with prior notice to and time off from the Company), he received a phone call from Ms. Smith, telling him "We need to talk about this [HOS] Policy because we are going to implement it November 15th," and asking if he had a few minutes to talk about it. Mr. Deene further testified that he told Ms. Smith that he "would not talk to her about it over the phone" because he was driving, that he would set up a meeting when he returned and that she knew that he and all of the stewards would be away that day. (Tr. 37-40)

Messrs. Lough, Mulford and Deene testified that, while they were attending the shop stewards' seminar in Gettysburg, they received phone calls from drivers who told them that the HOS Policy was being handed out and that they were being brought into Mr. Murch's office and asked to sign to acknowledge its receipt. (Tr. 40, 116 and 156) Mr. Mulford testified that the shop stewards advised the drivers either not to sign it or to sign it under

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[3]XATA is an electronic log record keeping system for drivers which uses a computer touch screen. According to Mr. Deene, the two touch screens where drivers log on and off are out of sync, often showing times that are two or three minutes different. (Tr. 36)

protest. (Tr. 116-17) Mr. Deene testified that, as of November 5, 2010, the Company had not provided answers to any of the questions the Union raised at the meeting on August 25, 2010.

The Grievance and Subsequent Events

By a Record of Grievance form dated November 5, 2010 (J. Ex. 2), Shop Steward Mulford, on behalf of all affected employees, protested the Company's unilateral implementation of the HOS Policy.

On November 11, 2010, the Parties met again to discuss the HOS Policy. (U. Exs. 21, 22 and 24) Mr. Deene testified that, at that meeting, the Union raised many of the same questions that it had raised at the August meeting, pointing out to Company representatives that the Union had not received answers to those questions. (Tr. 43) Mr. Deene further testified that, when he asked what a driver would be supposed to do when a "manager instructs you to do something illegal under the DOT Policy," Mr. Spink responded that the driver should contact him or Regina Lindsay, the new Director of Human Resources, and that "We will fire that person." (Tr. 42) Mr. Deene testified that, given how difficult it was for him to reach either Mr. Spink or Ms. Lindsay, both of whom are very busy, it would be nearly impossible for a driver "who is sitting out there with a potential violation right this minute, the likelihood of [drivers] getting ahold of them is not good." (Tr. 44) He testified that, in any case, the Company did not inform drivers to contact Lindsay or Spink if the had problems with their hours or with getting back in time. (Tr. 45) Mr. Spink acknowledged that he told the Union that, if the drivers were concerned about managers causing hours of service violations, they could inform him or Ms. Lindsay. (Tr. 216)

Mr. Deene testified that, when he said at the meeting that the two-step Policy (that is, subjecting employees to discharge for a second DOT violation) is too severe, the Company stated that it had changed the HOS Policy to three steps. He further testified that,

until that time, the Union had not received a copy of a revised HOS Policy containing a three-step disciplinary process. (Tr. 42-43) The revised "'Hours of Service' Violations Corrective Action Policy," effective November 15, 2010 ("revised HOS Policy") (J. Ex. 4), was identical to the earlier e-mailed version, except for the effective date and the inclusion of an initial "written warning" for the first HOS violation in a rolling 12-month period, and the requisite delay of a Final Written Warning after the second HOS violation and termination after the third HOS violation.

Mr. Deene further testified that the Union "wanted to negotiate back to the five-step disciplinary process and wanted a solution for the situation with drivers being only a few minutes over their hours and being terminated for it. (Tr. 94) Mr. Deene testified that, when he told Company representatives that the Union wanted to negotiate the revised HOS Policy, the Company's response was that "Corporate has imposed it and we have to implement it" or "we cannot negotiate it, it is Corporate driven, and mandated down from Corporate." (Tr. 44 and 95) Mr. Deene further testified that, during the meeting, the Company did not rely on the Agreement's Management Rights Clause. (Tr. 96)

Mr. Spink acknowledged that he told the Union representatives at this meeting that his "hands were tied."[4] (Tr. 218-19) He further testified that, even if he were disinclined to implement the HOS Policy, he "couldn't stop it if I wanted to . . . [b]ecause of the DOT's unsatisfactory rating." (Tr. 219) The record contains no evidence linking the absence of a three-step disciplinary process to the Trans-porte unsatisfactory rating. Mr. Spink testified, however, that the Company had the right to implement the HOS Policy under the Management Rights Clause. (Tr. 215) Mr. Spink further acknowledged that he never told the Union that an impasse had been reached. (Tr. 238)

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[4]Mr. Spink placed this meeting in October 2010. However, based on the context of the conversation Mr. Spink described, it is evident that he made this statement during the meeting on November 11, 2010.

A Step 1 grievance meeting took place on December 2, 2010, attended by Shop Stewards Mulford and Lough and Transportation Supervisor Lee Owens. (J. Ex. 2; Tr. 45-46) A Step 2 grievance meeting was held on December 14, 2010, attended by, among others, Mr. Deene and Mr. Spink. (Tr. 45-46) Mr. Deene testified that, at the Step 2 meeting, the Union noted that the Parties had reached recent grievance settlements involving cases where Management had skipped one or more of the five steps of the disciplinary process, arguing that the settlements demonstrated that the Company continued to recognize the five-step disciplinary process for HOS violations. (U. Exs. 3, 4 and 19; Tr. 47-56) Mr. Deene further testified that Mr. Spink said during the grievance discussions that he could not do anything because "his hands were tied." (Tr. 100)

Between December 14, 2010, and January 12, 2011, the Parties had a number of telephone conversations regarding the HOS Policy and the grievance.[5] (Tr. 88-89) By a facsimile copy of the Record of Grievance form dated January 12, 2011, the Company officially denied the Union's grievance. (J. Ex. 2) Mr. Spink testified that, thereafter, he had two to four additional conversations with Mr. Deene, some by telephone and others face-to-face. He testified that the most recent conversation occurred shortly before the first day of hearing in the instant matter. (Tr. 223) Some time in 2011, the Company prepared an alternate version of the Employee Disciplinary Report, entitled the revision "DOT Disciplinary Report" and began to use it for DOT violations. (U. Ex. 5)

The Parties were unable to resolve the dispute through the steps of the negotiated grievance process; and the Union invoked arbitration. This proceeding followed.

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[5]The Company contended, citing Mr. Deene's testimony (Tr. 88-89), that the Parties had "approximately six telephone conversations" between December 14, 2010, and January 12, 2011. (Post-Hearing Brief, p. 7) Mr. Deene's testimony was that there were "several" - "[p]robably half a dozen" - telephone conversations but that he did *not* know if they were all between those dates. He testified that the conversations were "ongoing, basically, asking, where is the answers to our questions?" (Tr. 90)

By a Charge Against Employer dated May 9, 2011 (U. Ex. 9), the Union filed an unfair labor practice charge with the National Labor Relations Board ("NLRB" or the "Board") over the HOS Policy. (Tr. 82) By a letter dated July 29, 2011 (U. Ex. 10), Region 5 Regional Director Wayne R. Gold deferred the unfair labor practice charge to the instant arbitration. (Tr. 82)

POSITIONS OF THE PARTIES

The positions of the Parties were set forth at the hearing and in their post-hearing briefs. They are briefly summarized as follows:

The Union argues that it met its burden to prove that U.S. Foodservice violated the Agreement and/or the NLRA when it unilaterally implemented its HOS Policy in November 2010. It maintains, in addition, that it proved that the Company's HOS Policy is not reasonable.

With respect to the Company's implementation of the HOS Policy, Teamsters argues that the Parties had a long-established five-step disciplinary process, that disciplinary rules are mandatory subjects for bargaining, that the Company did not have the right unilaterally to implement a change in the disciplinary process and that the Company did not bargain to impasse before implementing the HOS Policy. Additionally, it contends that the Agreement's Management Rights Clause does not permit the Employer to impose the new HOS Policy on employees.

Although the Union concedes that the Agreement does not explicitly refer to the number of steps in the disciplinary process, it contends that the evidence is that the Parties have used a five-step disciplinary process for the last 20 years. It points out that Article 26 mentions that any warning notices, suspensions or terminations shall be for just cause, and that for "any type of paperwork error (D.O.T. logs, C.O.D. paperwork, etc.) the Company shall be considered to have knowledge [of the

occurrence] from the time they received the paperwork." Citing authority, it asserts that a long-standing practice which has been accepted by the parties "become[s] an integral part of the agreement with just as much force as any of its written provisions."[6] It contends that a legitimate, binding past practice has four elements - a reasonably uniform response, to a recurring situation, over a substantial period of time, which has been recognized by both parties as the proper response - and that the Parties' past practice of using five steps for relatively minor infractions, including DOT violations, meets all four elements.

Teamsters further argues, citing authority, that a binding past practice based on mutual agreement may be changed only by mutual agreement.[7] It maintains, that, depending on the type of practice, discontinuing it may take only an announcement in negotiations or it may have to be bargained. The Union contends that, if the practice concerns a subject on which the contract is silent, *i.e.*, not ambiguous language, clear notice given during negotiations that one party intends to discontinue the practice is generally enough to terminate it. It asserts, however, that, where the binding past practice has served to interpret ambiguous or general contract language, the past practice is treated as an integral part of the negotiated language itself and, therefore, a party that desires to discontinue a past practice related to such ambiguous or general contract language must negotiate any change to it.[8] It maintains that, in the instant case, the past practice of using a five-step disciplinary process has served to interpret general contract language on just cause and, therefore, the Company could not change the practice without negotiating the change.

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[6]Richard Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," *Proceedings of the 14th Annual Meeting of the National Academy of Arbitrators*, 30, 44 (BNA 1961) ("*Mittenthal*").

[7]*Ford Motor Co.*, 19 LA 237, 241 (Harry Shulman, Arb.) (1952).

[8]Ira F. Jaffe, "Past Practice, Maintenance of Benefits, and Zipper Clauses," 1 *Labor and Employment Arbitration* § 10.03[1, 2] (Bornstein and Gosline, eds., 1997).

The Union further argues, citing authorities, that work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining and that an employer may make a unilateral change to such a policy only after good-faith bargaining has resulted in impasse.[9] It contends that, in *Toledo Blade*, the Board found that the Company's unilateral changes, which included abandoning a four-step progressive discipline system and assessing discipline case by case, as well as other actions that increased the number of employees subject to discipline, had a material, substantial and significant impact on the employees' terms and conditions of employment and, therefore, violated §§ 8(a)(5) and (1) of the Act.

Teamsters further argues that, by abandoning the five-step progressive discipline system and reducing it to three steps, the Company in the instant case, like in *Toledo Blade*, made a unilateral change to a mandatory subject of bargaining which had a material, substantial and significant impact on the employees' terms and conditions of employment. It asserts that having fewer steps prior to discharge will inevitably result in increasing the number of employees subject to discharge and in discharging them for fewer infractions than would have been required under the old system it will, therefore, have violated §§ 8(a)(5) and (1) of the Act.

The Union further argues that the Company did not bargain to impasse before implementing the HOS Policy. It maintains that the Board, in *Taft Broadcasting*, set forth the factors to be weighed in determining whether an impasse exists.[10] It contends that a genuine

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[9]*The Toledo Blade Co. Inc.*, 343 NLRB 385, 387-88 (2004) ("*Toledo Blade*"), where the employer made a unilateral change to the way it imposed discipline on its employees, in contravention of past practice; see also *Taft Broadcasting Co.*, 163 NLRB 475 (1967) ("*Taft Broadcasting*").

[10]In *Taft Broadcasting* (p. 478), the Board stated:

> Whether a bargaining impasse exists is a matter of judgment. The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or

impasse exists only where, despite the parties' best efforts to achieve agreement, neither party is willing to move from their respective positions.[11]

Teamsters further argues that, by unilaterally changing a discipline policy, a mandatory subject of bargaining, prior to reaching impasse in negotiations violated §§ 8(a)(5) and (1) of the Act. Citing authority, it asserts that, as the party claiming the impasse, it was the Company's burden to show impasse on a particular date.[12] The Union maintains that, although the Parties met several times, twice on the HOS Policy and twice on the grievance over the Policy, and had additional conversations on the subject, neither Party declared impasse. Although the Union acknowledges that the Company moved from a two-step to a three-step process, it contends that the Company refused to budge on anything else saying that its "hands [were] tied." (Tr. 91 and 100) It points out, in addition, that Teamsters raised a number of concerns that the Company initially promised to answer but that the Company never delivered any responses.

The Union further argues that, contrary to the Employer's contention, it was U.S. Foodservice that failed and refused to negotiate. It asserts that local management insisted that it could do nothing because the HOS Policy was being driven by "corporate."

> issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed.

[11] *Dust-Tex Service, Inc.*, 214 NLRB 398, 405 (1974). See also *Pillowtex Corp.*, 241 NLRB 40, 46 (1979), which stated that impasse is that moment in negotiations when the parties are warranted in assuming that further bargaining would be futile; *Richmond Recording Corp., d/b/a PRC Recording Co.*, 280 NLRB 615, 635 (1986), citing *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir. 1982), which stated, "Both parties must believe that they are at the end of their rope"; and *Blue Grass Provision Co. v. NLRB*, 636 F.2d 1127, 1130 (6th Cir. 1980), which stated that, for an impasse to exist, the parties must make more than a "perfunctory" attempt to reach resolution.

[12] *PRC Recording Co.*, 280 NLRB 615, 635 (1986), citing *Southern Newspapers, Inc., d/b/a the Baytown Sun*, 255 NLRB 154, 157 (1981).

Teamsters maintains that an employer cannot hide behind the corporate entity and claim that it is powerless to do anything. It contends that, had it wanted to do so, U.S. Foodservice could have agreed to other changes in the Policy, including a five-step process or four as a compromise, but did not. It asserts that is not bargaining in good faith.

Teamsters further argues that the Parties were not at the end of their rope. It maintains that, even if the Company was at the end of its rope, it cannot rely solely on its own position to support the existence of an impasse. In any case, the Union contends that any claim by the Company of impasse is belied by the fact that the Parties continued to discuss the matter. It asserts, citing authority,[13] that, when parties continue to meet and negotiate after implementation of a new work rule, they are not at impasse. The Union points out that, in the instant matter, the Company implemented the Policy and then met with the Union afterward to discuss it. It maintains, therefore, that there was no impasse at the time of implementation.

The Union further argues that the Company made only a perfunctory attempt to reach resolution and did not make a sincere attempt to address the Union's questions and concerns. It contends, citing authority,[14] that, for an impasse to exist, the parties must make more than a perfunctory attempt to reach resolution. The Union points out that the Employer rolled out the Policy to the drivers and started making them sign it on the very day when it knew the three stewards and Mr. Deene were on their way out of town for a seminar. In addition, it points out that, while Ms. Smith was forcing the HOS Policy on the employees, she called Mr. Deene to tell him that they needed "to talk" about the Policy. (Tr. 38) Although Teamsters acknowledges that the Company improved the proposed HOS Policy's two-step disciplinary process to a three-

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[13] *Duffy Tool & Stamping, LLC*, 330 NLRB 298, 302 (1999).

[14] *Blue Grass Provision Co. v. NLRB*, 636 F.2d 1127, 1130 (6th Cir. 1980).

step process, it asserts that the change was made unilaterally by the Company and not as a result of real negotiations or after reaching impasse.

Teamsters further argues, despite the Company's contention to the contrary, that the Management Rights Clause does not permit the Employer to impose the new HOS Policy on its employees. Citing authority,[15] it maintains that a broad, generally worded management rights clause is not construed as a waiver of statutory bargaining rights. The Union contends, citing *Johnson-Bateman*, that a management rights clause only constitutes a waiver of statutory bargaining rights if it made a "clear, unmistakable waiver" of such rights. It asserts that the Agreement's Management Rights Clause does not clearly and unmistakably waive its rights to bargain over disciplinary matters, especially because there is extensive other contractual language concerning discipline and just cause.

The Union further argues that the HOS Policy was not a reasonable Policy. It maintains that DOT regulations do not require the Company to adopt this particular Policy and that the Company's DOT problems did not arise from the Baltimore Division. It contends, in addition, that the Company, notwithstanding its desire to make its HOS policy "consistent" across its divisions, actually adopted inconsistent policies and, in any case, the Policy is unreasonably strict, permitting minor violations to trigger major punishment that can result in termination.

Although Teamsters acknowledges that the Company wanted to demonstrate to DOT that it was serious about correcting hours-of-service violations, it argues that DOT regulations do not require any particular system of discipline or number of steps. It asserts, in addition, that there is no evidence that the Company's five-step disciplinary process was unacceptable to DOT, that the Company had to reduce the number of steps in the process in order

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[15] *Johnson-Bateman Co.*, 295 NLRB 180, 185 (1989) ("*Johnson-Bateman*"), citing *Suffolk Child Development Center*, 277 NLRB 1345, 1350 (1985) and others.

to satisfy DOT or even that a three-step process was acceptable. The Union maintains that, although the Company's unilateral decision to impose a tighter, more stringent HOS Policy might make it look good, such consideration is not a sufficient reason to change the current system, especially without considering the adoption of better management controls.

The Union further argues that, since the Company's unsatisfactory DOT rating arose with Trans-Porte, Inc., there was no reason to crack down on bargaining unit drivers in Severn, where there was no DOT audit or apparent problem. It contends that the Company's attempt to apply a blanket solution, regardless of whether there was a local problem, is unreasonable. In any case, Teamsters asserts that the number of disciplinary steps in the Company's HOS Policy did not wind up being uniform or consistent nationwide and, according to Mr. Spink (Tr. 204 and 228), were not expected to be so. It maintains that the means used to achieve the purported goal of a uniform and consistent policy nationwide were antithetical to it, made it impossible to achieve and demonstrate that the policies adopted were not rationally related to the claimed objective.

Teamsters further argues that the Policy - that three violations in a rolling 12-month period will lead to termination - is unreasonably strict. It contends that, although "three strikes and you're out" may not be too severe if the violations were each culpable, deliberate or serious, it is possible under the HOS Policy to lose employment for a total of fewer than five minutes of violations, *i.e.*, receiving three violations for being one minute over. It points to evidence that two long-serving employees are both in jeopardy of losing their jobs because of alleged violations totaling only a few minutes.

The Union further argues that the HOS Policy is also unreasonable because of how easy it is to inadvertently incur a violation, *i.e.*, if the driver forgets the exact time when he logged off the day before and logs in too early. It asserts,

similarly, that the process of bringing back returns, unloading, checking out, turning in the cash and reconciling the paperwork can take an hour or more at the end of the work day - a time when many other employees are doing the same thing - can result in a driver running out of time through no fault of his/her own. It maintains, in addition, that it can take three or four minutes to get through the Xata screens, that the two Xata units can be as much as three minutes out of sync, but that being only one minute over is a violation for which discipline is imposed.

Finally, Teamsters argues that, if drivers are to be held responsible for complying with such a strict policy, then the standards by which their compliance is measured should be precise and reliable. It contends that it is unfair to hold employees to a strict standard when the Xata system is flawed and unreliable and may not record accurately. The Union asserts, therefore, that subjecting employees to discipline based on such arbitrary results would itself be arbitrary. It maintains that the HOS Policy is unreasonable because, while the consequences of violating it are severe, the accuracy of the records indicating violations cannot be trusted.

For all of these reasons, the Union urges that I sustain the grievance, declare the HOS Policy violative of the Agreement and Act and unreasonable and that I order that the Employer return to the *status quo ante*, whereby DOT violations were handled through the five-step disciplinary process, until such time as it negotiates in good faith a change in that procedure.

The Employer argues that the Union failed to meet its burden to prove that U.S. Foodservice violated the Agreement and/or the NLRA when it unilaterally implemented its HOS Policy in November 2010. It maintains, in addition, that the Union failed to meet its burden to prove that its HOS Policy is unreasonable.

U.S. Foodservice further argues, citing authority, that management has the fundamental right to unilaterally establish

reasonable work rules.[16] It contends that, although this right holds true even where a collective bargaining agreement is silent on the subject, the Agreement in the instant case is not silent. The Company points out that Section 1 of the Management Rights Clause (Article 31) recognizes that "the well-being of both parties is directly dependent upon the skill and efficiency with which the business of the Employer is conducted" and specifically precludes the Union from interfering with the Company when it exercises such authority and responsibility. It points out, in addition, that Section 2 of the Management Rights Clause expressly provides the Company with the right "to establish and require employees to observe Employer rules and regulation."

The Company further argues that, even though, based on the express terms of the Management Rights Clause, it was *not* obligated to negotiate the HOS Policy with the Union, it modified its original position with respect to the number of steps in the progressive disciplinary process of the HOS Policy. The Employer asserts, in addition, that it met numerous times with the Union - both in person and over the telephone - to discuss the HOS Policy. It points out that, in each meeting, both Parties reiterated their positions - the Union that the HOS Policy have a five-step progressive disciplinary process and U.S. Foodservice that five steps were too many. It maintains that this demonstrates that continued discussions would not have been fruitful.

The Employer further argues that the Union did not grieve that the HOS Policy is unreasonable and, in any case, there is no evidence that it is unreasonable. It contends that, even if the "spirit" of the grievance incorporates such an allegation, the grievance must be read to object to the reasonableness of the HOS Policy as it was drafted at the time the grievance was filed. The Company points out that the grievance was filed before the HOS Policy was implemented and cannot be interpreted to include facts

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[16]Elkouri and Elkouri, *How Arbitration Works*, Sixth Ed. (BNA, Washington, D.C., 2003) ("*Elkouri*").

and circumstances that occurred after the date the grievance was filed, *i.e.*, the number of steps in the process was changed from two to three.

Citing Mr. Deene's testimony, U.S. Foodservice argues that the Union's primary objection to the HOS Policy is not the fact that the Policy requires drivers to comply with HOS rules but that the Policy contained a three-step rather than a five-step progressive disciplinary process. It asserts, citing *Elkouri*, that the test for whether a work rule is reasonable is "whether or not the rule is reasonably related to a legitimate objective of management." (p. 772) The Employer maintains that its HOS Policy was created to allow it to comply with DOT rules and regulations which require motor carriers to have in place management systems that effectively prevent violations of DOT rules and regulations. It contends that the fact that the Union does not like the HOS Policy does not render the Policy, or the three-step disciplinary process, unreasonable.

The Company further argues that, prior to implementation of the HOS Policy, it had no management systems in place to prevent violations of DOT rules and regulations and, therefore, the HOS Policy merely "shadows" them. The Employer asserts that its lack of such management systems was so significant that DOT threatened to require it to cease all operations. It maintains that it needed to take steps to demonstrate to the DOT that it was serious about complying with HOS regulations and points out that it developed and issued HOS Policies across all of its 64 divisions.

The Employer further argues that, through the HOS Policy and its three-step progressive disciplinary process, it sought to balance the need to comply with DOT rules and regulations with the need to issue reasonable levels of discipline to drivers for DOT violations. Although U.S. Foodservice acknowledges that DOT rules and regulations did not require it to implement a three-step disciplinary process, it contends that does not make its HOS

Policy, that adopted a three-step process, unreasonable, pointing out that DOT may cite a company for a single violation.

U.S. Foodservice further argues that the fact that the Baltimore Division was not covered by DOT's 2009 audit does not make its HOS Policy, with the three-step disciplinary process, unreasonable. It asserts that the Baltimore Division acted both reasonably and prudently when it proactively took steps to put in place an HOS Policy that would effectively prevent DOT violations, rather than to wait for a DOT audit to issue specific adverse findings. It maintains that the penalties are too great for it not to put in place adequate safety management controls to ensure compliance with safety requirements.

The Company further argues that the Union provided no evidence to rebut the fact that two other Teamster-represented local unions have found an HOS Policy with a three-step progressive disciplinary process to be reasonable. It contends that the identical HOS Policy was implemented in its Detroit and Plymouth Divisions and that the local unions expressly agreed that the HOS Policy, including the three-step process contained in it, was reasonable. The Employer asserts that the situation in the Detroit division was virtually identical to the instant case. It points out that the Detroit Division, like Baltimore, did not regularly and consistently discipline drivers for HOS violations, did not have an HOS policy prior to 2010 and used a generic form to discipline drivers for HOS violations which contained a five-step progressive disciplinary process.

Finally, U.S. Foodservice argues that the Union's evidence of hypothetical ways that the HOS Policy *could* be unreasonably applied is beyond the scope of the grievance. It maintains that, if it were to apply the HOS Policy unreasonably in the future, then the Union will have the right to grieve that action. It contends that, to attempt to use the instant grievance to arbitrate such hypothetical events is inappropriate. In any case, the Company asserts that the Union failed to introduce any evidence that any

driver has been wrongfully disciplined under the HOS Policy for any of the possible or hypothetical infractions. Citing Mr. Spink's testimony, however, it maintains that the purpose of its HOS Policy is to discipline drivers when they are at fault and not for circumstances beyond their control.

For these reasons, the Employer urges that the grievance be denied.

DISCUSSION AND ANALYSIS

It was the burden of the Union to prove by a preponderance of the evidence that the Employer violated the Agreement and/or the NLRA when it implemented its new Hours of Service Policy in November 2010. For the reasons which follow, I am persuaded that the Union met its burdens.

Contract Interpretation

My job in contract interpretation disputes is to ascertain and apply the mutual intent of the parties. That intent is best determined by looking to the language to which they agreed. The Parties are assumed to have intended the normal and customary meaning of the language they negotiate and to have intended the consequences of that language. If the words contained in contract language are clear and unambiguous, there is no need to go outside the four corners of the document. Agreement language is clear and unambiguous if its meaning can be determined without reference to anything other than a knowledge of the simple facts on which, from the nature of language in general, its meaning depends. In situations where contractual language is ambiguous or incomplete, resort to extraneous means to ascertain meaning may be necessary, including the origin and history of the contract language at issue, the manner in which the Parties have themselves interpreted and applied the language and practices which have developed to fill in gaps in the language.

I am persuaded that, in the instant case, the contractual language is clear and unambiguous; it is, however, incomplete. The Agreement contains two provisions that refer to the Employer's right to discipline its employees - Articles 26 and 31. Article 26 specifically extends to the Company the right to issue "warning notices, suspensions or termination" but limits that right to situations where there exists "just cause." Although Section 4 refers to various types of possible discipline, suggesting a multi-level disciplinary process, it does not, itself, *require* that Management follow any particular sequence or number of steps of progressive disciplinary actions. Article 31 merely provides to Management the right, among many others, "to . . . discipline, and discharge for cause." Thus, the Agreement between the Parties contains no specific language that requires the Employer to impose any particular disciplinary action. Application of progressive discipline is not explicit, but is implied by the just cause requirement. The Agreement lists available discipline,but is silent as to the number of disciplinary steps available.

Amendment to the Grievance

The Company protests that the grievance pre-dates its adoption of the amended, three-step process and cannot reach the later-adopted Policy. I am not convinced. The handling of the grievance clearly establishes that the grievance was effectively amended to include a protest of the amended Policy.

Past Practice

The Union contends that, although the Parties' Agreement does not require the steps and sequence to be used for discipline, there exists a binding past practice between the Parties that effectuates the Agreement's general contract language and requires that the Employer use a five-step progressive disciplinary process. It maintains, therefore, that the Company's unilateral imposition of a three-step disciplinary process violated the Agreement and the Act. The Employer, essentially, made no argument with respect to

past practice. For purposes of this discussion, I assume that the Company would contend that no binding past practice has been established.

It is well established that, to be binding on the Parties as an interpretation or application of contract language, a past practice must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties.[17] The mutual acceptance may be *expliator tacit* - an implied mutual agreement - arising by inference from the circumstances. *Elkouri*, pp. 632-33. The Union contends that all the requirements/ prerequisites exist in the instant case.

It was the burden of the Union, as the Party asserting the past practice, to prove the elements required to create it and I am convinced that the Union met its burden. In support of its assertions claiming the existence of a past practice requiring a five-step disciplinary process, the Union presented material and convincing evidence, none of which was refuted or contradicted by U.S. Foodservice.

It is undisputed that the Company, for at least the last 20 years, has used the five-step process, including as available steps, a verbal warning, a written warning, a final written warning, suspension and then termination. Mr. Deene testified to this; the Employer's witnesses - one of whom has been employed by the Baltimore Division for barely a year and the other being from U.S. Foodservice's Detroit Division - did not, or could not, refute Mr. Deene's claim. Recently, according to the evidence, the Parties have settled discipline cases by applying the five-step process, where Management initially skipped one or more of them. In addition to Mr. Deene's testimony, the Company's pre-printed Employee Disciplinary Report, as adjusted when necessary to include

[17]I note that the Union refers to four elements but find no practical distinction.

a "final written warning," contains the five-step process. Similarly, it is undisputed that Management continues to use the Employee Disciplinary Report, and its five-step disciplinary process, for employees who are disciplined for violating all rules other than DOT's hours of service rules. (U. Ex. 6) In addition, I take note that, although Management designed a revised disciplinary report exclusively for DOT violations - entitled DOT Disciplinary Report - the regular Employee Disciplinary Report, used for non-DOT violations - continues to show "DOT violation[s]" in its list of applicable violations.

Having examined the three-pronged test, I determine that the Parties' practice was unequivocal, clearly enunciated and acted upon and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties. The evidence discussed above persuades me that there was a past practice, rising to bind the Parties as if through an express provision of the Agreement.

Consequences of the Past Practice

Disciplinary rules constitute a mandatory subject of bargaining. Article 26 of the Agreement states the Parties' general rule that "warning notices, suspensions or termination shall be for just cause." At some time, the Parties developed a five-step disciplinary process to implement that general rule. The evidence is that, over time - more than 20 years - the Parties' use of the disciplinary process allowing for up to five-steps, became a binding past practice. As language that clarified and implemented general contractual language, the Parties' past practice became a distinct and binding condition of employment that became a separate enforceable condition of employment. Such language - even if based on past practice - cannot be changed without good-faith bargaining that has resulted in impasse. The failure to do so constitutes both a contractual breach and a violation of the Act.

It is undisputed that the Company, prior to implementation of its HOS Policy on November 15, 2010, met with the Union only twice, on August 25 and November 11, 2010, to discuss it. I note that only one of these meetings occurred *before* the Company began to distribute the revised HOS Policy, imposing a three-step disciplinary process, to drivers.

It is also undisputed that, at the August 25 meeting, the Union asked the Company a number of questions and that Company representatives promised to obtain and provide answers. The Company does not dispute that it never provided answers to the Union's questions but merely changed the initial HOS Policy's two-step disciplinary process to a three-step process and then issued the revised HOS Policy. I further note that the Company apparently did not formally provide the Union with a copy of the revised HOS Policy prior to distributing it to bargaining unit members.

The Company points out, and the Union acknowledges, that additional face-to-face meetings and phone conversations took place during which the Parties discussed the revised HOS Policy and the three-step disciplinary process. However, at the August meeting, Company representatives told the Union that the Policy was "coming from corporate" and, at the November meeting, they stated "Corporate has imposed it and we have to implement it" or "we cannot negotiate it, it is Corporate driven, and mandated down from Corporate." Mr. Spink acknowledged that he told the Union that his "hands were tied" and that he "couldn't stop it if [he] wanted to . . ." "Corporate policy" is not a defense to failure to bargain. I am persuaded that the Company's implementation of the HOS Policy without bargaining to impasse constituted an impermissible, unilateral change.

The Company's Rationales

I have already concluded that the Company was required, but failed, to engage in good-faith bargaining to impasse. Nonetheless, U.S. Foodservice provided a number of rationales to support its

unilateral implementation of an HOS Policy with fewer than five disciplinary steps. A brief review of them is appropriate.

First, the Company contends that, prior to November 2010, it had no management systems in place to effectively prevent HOS violations and was, thus, violating § 385.5 of the FMCSA, which requires a motor carrier to "demonstrate it has adequate safety management controls in place." I am not persuaded. By unilaterally implementing the HOS Policy in November 2010, the Company did not change any management systems to effectively prevent HOS violations. Employees were already obligated to abide by HOS regulations. This is evident by the fact that the Employee Disciplinary Report listed "DOT violation[s]" among the violations for which it could discipline employees. Indeed, the evidence is that the Company had disciplined employees in the past for such violations, using the five-step procedure.

The only change in November 2010 was that employees became subject to a three-step, rather than a five-step, progressive disciplinary process. However, the concerns that the Union repeatedly raised to the Employer - that XATA units which are not always in sync and do not always process exceptions properly, delays in drivers checking in or checking out, inaccurate Company records, managers instructing drivers not to record their time, no guidance or instructions to drivers on the HOS Policy, etc. - also constitute "management systems" that the HOS Policy did not affect. There is nothing in the record to indicate that requested information was provided or that any of the Union's concerns have been addressed. Indeed, I am not persuaded that the Company may claim impasse when it had failed to provide the germane information and, notwithstanding the Union's requests, failed to discuss the issues raised thereby.

The Company also contends that FMCSA's audit of Trans-porte, which resulted in an order, subsequently abrogated, for it to cease operations, required it to take aggressive action Company-wide. I am not convinced that the circumstances required the particular

actions challenged herein. The issue of drivers' hours of service was only one of numerous causes for Trans-porte's conditional rating. Other safety deficiencies of Trans-porte included how it implemented FMCSRs related to the qualifications of its drivers; inspection, repair and maintenance of its vehicles, controlled substance and alcohol use and testing, etc. There is nothing in the evidentiary record to indicate that the Baltimore Division, or any U.S. Foodservice Division other than Trans-porte, was deficient in any of these other areas.

However strong the Company's desire to protect itself against any potential audit of the Baltimore Division and however strong its belief that such compliance required the unilateral abrogation of the Parties' five-step disciplinary process, U.S. Foodservice did not have the authority to ignore its past practice unilaterally and without giving the Union a *bona fide* opportunity to negotiate and, in the negotiations, to bargain to impasse.

The practice was, to be sure, the product of the circumstances giving rise to it and was subject to modification or termination based on changes to those circumstances. However DOT's increased attention to Trans-Porte is not a change warranting extinguishment of the five-step disciplinary process. Furthermore, there is no evidence that the Company was required by DOT to implement an HOS Policy according to any particular number of disciplinary steps or that DOT was pressuring it to do so. Thus, I do not find reasonable the Company's argument that the Trans-porte audit made it incumbent on the Company to implement promptly and without exhaustion of its bargaining obligation an HOS Policy containing a three-step disciplinary process in Baltimore.

U.S. Foodservice contends, as well, that Teamster locals at two Divisions with represented drivers - Plymouth and Detroit - have "expressly agreed" to the same three-step progressive disciplinary process that it implemented in the instant case. I am not persuaded that this fact has any bearing to this matter. In any case, I note, as does the Employer, that these "express

agreements" resulted from Settlement Agreements that were negotiated between the Parties. Although the Employer, ultimately, did not implement in Baltimore its initial HOS Policy with two steps, it is undisputed that the revised HOS Policy at issue herein was unilaterally imposed and not fully negotiated.

Finally, the Company contends, citing *Elkouri* and the Management Rights provision of the Agreement, that it had the fundamental right to unilaterally establish reasonable work rules. I am convinced that it possesses such a right. However, the Company's HOS Policy is not a "work rule." It is a Policy that fundamentally changes a condition of employment, *i.e.*, the disciplinary process. I am not persuaded that the Company, by virtue of its right to establish reasonable rules, had the right to ignore its duty to bargain in good faith and to impasse over a mandatory subject of bargaining. The duty to bargain in good faith does not mean that agreement must be reached. However, before taking unilateral action, an employer is obligated to bargain to impasse. In the instant case, the Company certainly failed to engage in good-faith bargaining to impasse. Indeed, Mr. Spink acknowledged that the Company never told the Union that an impasse had been reached. (Tr. 238)

Conclusion

it is important to understand the issues I do not reach: the Union protests only the Company's unilateral reduction in the number of disciplinary steps. There is no challenge in this grievance to the remainder of the HOS Policy. Moreover, my conclusions that the Company violated a binding practice and the Act by unilaterally reducing the number of disciplinary steps is not based on a conclusion that the Company always used all five steps to address misconduct or that it always started - or was obligated to start - at Step 1. Just cause in the facts of any particular situation might be established at any level of discipline up to and including discharge. Moreover, my conclusions that violations were committed in reducing the number of

disciplinary steps to three is not premised on evidence or belief that the Company must (or will) discharge all (or any) employees for a third DOT violation. Just cause is still required; the HOS Policy does not compel a maximum penalty.

While the Company's sentiments, as expressed in the purpose for the HOS Policy, are laudable, the Company's failure to negotiate the revised HOS Policy - a mandatory subject of bargaining - to impasse violated the Agreement and the National Labor Relations Act. As the Company violated the Agreement by unilaterally imposing the revised HOS Policy, I reach no conclusion on whether it is otherwise reasonable. The Award so reflects.

The Union also raised a number of technical "system" concerns as indicating that the Policy might be unfairly applied to particular situations not the fault of employees. Determinations whether the Company might misapply the Policy are appropriately challenged and determined in the context of particular discipline and factual circumstances.

A W A R D

The Union proved that the Employer violated the Agreement and the National Labor Relations Act. The grievance is sustained.

The Employer shall return to the *status quo ante* and handle DOT violations through the same five-step process that it handles other disciplinary actions, until such time as it negotiates in good faith a change in that procedure.

Dated this 24th day of January, 2012, at Clarksville, Maryland.

M. David Vaughn
Arbitrator