

IN THE MATTER OF ARBITRATION BETWEEN

COMMUNICATION WORKERS OF
AMERICA, DISTRICT 9

Case no. CWA 11-08-032

and

OPINION AND AWARD

AT&T MOBILITY

(Chairs in Retail Stores grievance)

ARBITRATOR: Richard C. Solomon, Esq.

DATE OF HEARING: August 27, 2009 and February 9, 2010

APPEARANCES: Judith G. Belsito, Esq.
Communication Workers of America, District 9
12215 Telegraph Rd., Suite 210
Santa Fe Springs, CA 90670-3344

Marilyn Sherron, Esq.
Senior Corporate Counsel, Cingular Wireless
PO Box 97061
Redmond, WA 98073

INTRODUCTION:

The arbitrator was duly selected by mutual agreement of the parties pursuant to their collective bargaining agreement. Arbitrability is not an issue, and the parties have stipulated that the matter is properly before me. All witnesses were sworn and subject to cross-examination. Oral and documentary evidence was received. Upon conclusion of the hearing, the parties agreed to submit post-hearing briefs. Those briefs have been received, and the matter is now deemed submitted for decision.

THE ISSUES

The parties disagree on framing the issue. The Union presents the issues as whether the Company violated the parties' collective bargaining agreement [CBA] and Calif. Code of Regulations, Title 8, Section 11040 when, in 2007, it removed chairs from its retail stores and because it failed to bargain with the Union before removing the chairs. The Company presents the issue as whether it violated the CBA, Articles 7 or 16, by removing the chairs from its retail stores. The parties agreed that I would have the power to frame the issue(s) after hearing and considering the evidence. Pursuant to that authority, I determine the

issues to be:

1. Did the grievance language and its subsequent handling provide sufficient notice to the Company of the “failure to bargain” issue so as to make the merits of that issue arbitrable? If so,

2. Did the Company fail to bargain with the Union over its decision to remove the chairs from the old Cingular stores and not replace them with stools, and, if so, what is the appropriate remedy?

3. Does Article 16, Section 3 preclude arbitration of the grievance claiming that the failure to provide adequate seating for customer service representatives violates the CBA and/or California law? If not,

4. Is the Company violating the collective bargaining agreement and/or applicable California law by not providing seating to its customer service representatives, and, if so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Article 2, “Recognition and Establishment of the Unit,” states in Section 1:

“The Company recognizes the Union as the sole collective bargaining agent for the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment for those covered employees in CWA Districts 1, 2, 4, 7, 9, and 13. . . .”

Article 6 covers Management Rights:

“Subject to applicable law, all rights possessed by the Employer prior to the recognition of the Union, which rights are not governed by the terms of this Agreement, are reserved and retained by the Employer.”

Article 9 covers Arbitration:

* * *

“Section 4. The arbitrator shall be confined to the subjects submitted for decision, and may in no event, as a part of any such decision, impose upon either party any obligation to arbitrate on any subjects which have not been herein agreed upon as subjects for arbitration. The arbitrator shall not have jurisdiction over the rights of Management not specifically restricted by this Agreement and shall not have the power to add to, subtract from, or vary the terms of this Agreement, or to substitute his/her discretion for that of Management, but shall be limited in power and

jurisdiction to determine whether there has been a violation of this Agreement.”

Article 16 covers Safety:

“Section 1. Safety and health is a mutual concern of the Company and the Union. It benefits all parties to have employees work in safe and healthful environments and for employees to perform their work safely and in the interests of their own health. It is also necessary to promote a better understanding and acceptance of the principles of safety and health on the part of all employees, in order to provide for their own safety and health and that of their fellow employees, customers and the general public. *[the parties then agree to establish a national occupational safety and health committee and provide details as to its operation, etc.]*

“Section 2 *[creates local occupational safety and health committees]*

“Section 3. None of the terms of this Agreement shall be applied or interpreted to restrict the Company from taking whatever actions are deemed reasonably necessary to fully comply with laws, rules and regulations regarding safety, and grievance and arbitration provisions of this Agreement shall not apply to any such actions. Discipline for failure to observe safety rules shall be grievable and arbitrable under the terms of this Agreement. Other matters relating to safety may be raised under the Grievance Procedure but not arbitrated.”

Article 26, Section 1, states, in part (4th paragraph):

“Notwithstanding the foregoing waiver *[of the obligation to further bargain during the life of the agreement]*, amendments to this Agreement mutually agreed upon by both parties may be made at any time, provided such amendments are reduced to writing and signed by the parties’ authorized representatives, and any subject or matter may be raised and bargained if both parties mutually agree to enter into such bargaining. In the absence of such an Agreement by both parties, the Company shall not make any changes in the terms and conditions of employment.”

THE PARTIES’ CONTENTIONS

The Union contends that the Company violated the recognition clause of the CBA by refusing to discuss its plans to remove the chairs from the old Cingular stores in spite of a long past practice and that it gave adequate notice of this “failure to bargain” issue to the Company on the grievance form and during subsequent meetings held to discuss it. It also contends that the Company violated the CBA and applicable California health regulations by not providing seating for the sales staff at its retail stores to use while behind the counters servicing customers, and that this issue is arbitrable in spite of the language in Article 16,

Section 3, precluding arbitration of “safety” disputes.

The Company contends that the failure to bargain issue is not arbitrable because the Union failed to present it in the grievance or in any of the many meetings between the parties leading up to the arbitration. It also contends that the health and safety issue is not arbitrable because of the clear language in Article 16, Section 3. Alternatively, if that issue is deemed arbitrable, the Company denies that its removal of seating for sales staff violates the CBA or applicable California law.

JOINT EXHIBITS

- JX 1 2005 Labor Agreement [hereafter, CBA]
- JX 2 2009 Regional Labor Agreement between CWA and AT&T Mobility
- JX 3 Grievance, dated 1/30/07

UNION EXHIBITS

- UX 1 G. Gallardo notes of Step 3 meeting in March, 2007
- UX 2 Excerpt from Calif. Code Regs. Title 8, Section 11040(14)
- UX 3 G. Gallardo notes of grievance meeting in June, 2007
- UX 4 Cal. Code Regs., Title 18, Section 11040
- UX 5 Letter from E. West to T. Conway, dated April 22, 2009 and fax report and email
- UX 6 Letter from E. West to D. Overton, dated June 16, 2008 and email
- UX 7 Arbitration Opinion and Award by R. Berger, dated Nov. 23, 2009
- UX 8 CBA between CWA and Pacific Bell Wireless, effective Sept. 27, 1999
- UX 9 CBA between CWA and Cingular Wireless, effective January 8, 2001
- UX 10 Grievance report
- UX 11 Meeting notes, dated March 9, 2007
- UX 12 Meeting notes, dated June 7, 2007
- UX 13 List of employees compiled by G. Gallardo

COMPANY EXHIBITS

- CX 1 “Productivity at Merger” chart
- CX 2 Color photo of Generation 3 model store
- CX 3 Brochure of “The AT&T Experience Store”
- CX 4 Federal Occupational Safety and Health Guidelines: “Ergonomics for the Prevention of Musculoskeletal Disorders Guidelines for Retail Grocery Stores”
- CX 5 Letter agreement between Cingular Wireless and CWA, dated March 5, 2005
- CX 6 Job Description for Retail Sales Consultant
- CX 7 Letter from T. Conway to L. Darrington, dated June 11, 2007
- CX 8 Letter from T. Conway to E. West, dated April 22, 2009

- CX 9 Letter from L. Alfonso to N. Walker, dated February 25, 2009
- CX 10 Letter from T. Tipping of CWA District 13 to D. Overton, dated March 4, 2009
- CX 11 CBA between CWA, Dist. 3 and Cingular Wireless, effective date March 26, 2010
- CX 12 CBA between CWA and AT&T Mobility, ending date February 24, 2012
- CX 13 “Orange” CBA bargaining session notes, 2009
- CX 14 Photograph of backroom in Pasadena, CA store
- CX 15 ditto
- CX 16 ditto
- CX 17 Letter of Agreement, dated March 4, 2009
- CX 18 Letter of Agreement, dated March 10, 2009
- CX 19 Letter of Agreement, dated March 17, 2009

SUMMARY OF THE EVIDENCE

Before AT&T Mobility merged with Cingular Wireless, the bargaining unit employees represented by the CWA were employees of Cingular or Pacific Bell Wireless, its predecessor. Sales representatives would show customers merchandise, explain calling plans, and so forth, while amidst the display cases and handled customers’ business while both sales rep and customer were seated in chairs across from each other. Conducting some of the necessary business from a seated position had been in place at least since 1999.

After the merger, some stores continued as Cingular stores (the so-called “Orange” stores) with the bargaining unit, and new AT&T stores (“Blue” stores) were created with no Union contract. By subsequent agreement in 2005, the CWA was recognized as the AT&T employees’ bargaining agent. The Union was primarily concerned with the merger resulting in layoffs, and a number of side agreements were reached dealing with this and a host of related issues. E.g., CX 5 and 17-19.

At the same time, management began remodeling the Orange stores so all AT&T stores would then be readily recognizable. As part of this redesign, the desks and desk chairs were removed and the sales people [“customer service representatives” or CSRs] had to stand during their working hours at newly designed counters. This grievance challenges the Company’s unilateral decision to remove the chairs from the old Cingular retail stores and not provide stools for the sales staff to use while servicing customers at the counters.

The grievance [JX 3] refers to an alleged violation of the California Labor Code “Section 1174A Number 14” and Article 16, Section 1 of the CBA. The pre-printed “boilerplate” on the grievance form refers to “violation of Article 1, 2, 3, and any others that may apply” and “violation of any applicable state or federal law.” Union witnesses claim that both the alleged “failure to bargain” issue and the Labor Code issue were adequately raised in the grievance itself and in two subsequent meetings called to discuss the grievance. Mr. Gallardo’s notes from those meetings refer to the Union’s question to Mr. Conway, who was representing the Company at the grievance meetings, whether the decision to remove the chairs had been “discussed with District 9.” UX 1. Those notes also refer to the claim that removal of the chairs violated the “labor code.” UX 1, 3. Ms. Mims’ handwritten notes also reflect this question. UX 11 and 12. She also helped prepare a report of one of the grievance

meetings, for internal Union use, contemporaneously with the meeting, and she noted in that report that the seating issue was “never discussed with District 9.” UX 10. It is undisputed that the Company did not discuss the seating issue with the Union before removing the seating from the old Cingular stores.

The specific “labor code” referred to is Cal. Code Regulations, Title 8, Section 11040(14)(a) which states: “(A) All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats.” Mr. Conway, the Company representative present at one of the post-grievance meetings, according to Gallardo’s notes, specifically pointed out that the work in question “does not permit” the use of seats. UX 1. If he, in fact, used that phrase, the Company was well aware of the specific regulatory basis for the Union’s claim. I find Mr. Gallardo to be a credible witness and he prepared his notes contemporaneous with the meeting; thus, more likely than not, they reflect what was actually said.

The work stations or counters (referred to as “cash ramps”) at which Retail Sales Consultants service customers¹ are forty inches high, substantially taller than traditional desks. Thus, although this grievance is dubbed “chairs in retail stores,” the parties are really talking about providing stools on which the Sales Consultants could lean or sit while servicing customers from behind the cash ramps. Mr. Gallardo testified for the Union that the sales work is “much harder” without being able to sit. For example, the Company allowed local stores to offer a “4/10” scheduling option by which employees would work four ten-hour days a week instead of the traditional eight hour shift over five days. Gallardo testified that where it was offered most employees tried it but most found it too hard for that long a shift, even though the Company’s sales staff is predominantly “young.” The Union tried to offer a list of employees prepared by Mr. Gallardo who had allegedly suffered adverse health effects from having to stand [UX 13], but the Company’s objection on hearsay grounds was sustained. I have no doubt that having to stand is less comfortable than being able to sit or lean back on a stool while servicing customers from behind the cash ramps.

The Company performed a productivity study of sales staff at the old blue and orange stores and found that gross receipts were 24% higher per store in the legacy blue stores where sales staff stood, as opposed to working at traditional desks. CX 1. It is undisputed that fatigue mats and foot rails are provided behind the counters on which Sales Consultants stand, and, in most stores, an area is provided with chairs where employees can take their breaks.² The Company’s Director of Sales Operations, R. Williams, testified that before consolidating the blue and orange stores into a single design, he and his staff looked at other retailers, such as Apple, Best Buy, Nordstrom, etc. – at which sales staff must stand while

¹ I use this phrase mindful of the fact that Sales Consultants also “service” customers at the many display stands scattered throughout the stores. If a customer ends up buying one or more of the Company’s products or services, he or she is escorted to a “cash ramp” where necessary paperwork is completed, payments are handled, and so forth. Thus, a good portion of a sales consultant’s time is spend behind the “cash ramp” or counter.

² Evidence was presented regarding the adequacy of seating for employee break periods, but this issue is not before and I express no opinion on it.

working with customers – and selected that format for the new design. Since the merger, productivity has doubled, although no evidence was presented relating this to the fact that Sales Consultants stand while behind the counters. A Senior Manager in the Company’s Environmental Health and Safety Division, C. Dalphy, testified that the design used in all stores was based on federal OSHA Guidelines for retail grocery stores. CX 4. He claimed that his Division, which would normally receive complaints regarding the absence of chairs or stools, received none.

The Company also introduced evidence that District 13 of the CWA grieved the Company’s “no chairs” policy but withdrew it “after further review.” CX 9, 10. Mr. Bates testified, for the Union, that District 13 withdrew its arbitration demand because it duplicated the grievance in this case and because officials thought that District 9 had a better case under California law.

OPINION

I. FAILURE TO BARGAIN

A. Arbitrability

The CBA requires that “Grievances shall be reduced to writing, setting forth, if applicable, specifically the substance of the grievance and the provision or provisions of the Agreement allegedly violated. . . .” Article 7, Section 2 (2nd para.). The grievance [JX 3] clearly sets out the claim that failure to provide suitable seating violates the labor code and the CBA, but does not explicitly claim a violation of the failure to bargain. Pre-printed language on the grievance form does, however, refer to Articles “1, 2, 3, and any others that may apply.” Two meetings were held to discuss the grievance and, at both, Union representatives asked Company representatives whether the removal of the seating from the old Cingular stores had been discussed with the Union.

The specific issue here is whether the general, boilerplate reference to Article 2 (the recognition clause) and the question asked in the meetings about whether the removal of the seating had been discussed with the Union constitutes substantial compliance with the contractual requirement of fair notice. For three reasons, it does, and the issue is arbitrable.

First, grievances are typically drawn up by lay people, not trained in the law and legal niceties, and they are typically not vetted by lawyers. The meetings held to discuss grievances, especially ones involving contract interpretation, are not only geared toward possible settlement, but also to clarify the issues. Here, the evidence convinces me that the Union representatives asked whether the Company had discussed its plan to remove seating for the sales staff with the Union, thus expressing its concern to Company representatives about not being part of the decision to eliminate the previously supplied seating. The Company, therefore, was on notice that its failure to discuss the issue with the Union could be raised in the subsequent arbitration proceeding.

It is true that Ms. West did not refer to the failure to bargain issue in her letter of April 22, 2009 [UX 5], and this could certainly have lulled the Company into the belief that failure to bargain was no longer part of the Union’s case. But her letter appears to be in

response to the Company's argument about the arbitrability of the seating issue under Article 16, Section 3. It is not a pre-hearing brief or statement of the Union's entire case.

Second, there is no factual dispute as to whether the Company discussed its seating plans with the Union before implementing the change. It is undisputed that the Company made the decision unilaterally because it believed it could do so pursuant to its reserved management rights. Therefore, even if it did not have fair notice of the claim by the time of the arbitration hearing, it could not have presented any fact-based evidence to counter it and it has not been prejudiced in its ability to present its case on the merits. The Company has made a "legal" argument, based on contract language, which I reach below, that it did not have to negotiate the seating issue with the Union. Even if we assume inadequate notice, the Company has not been impaired at all in making its contract interpretation arguments on the merits.

Finally, in close cases, the parties benefit by erring on the side of having the merits heard and decided. The grievance and arbitration processes are not just about resolving a specific dispute. Rather, they are part of an on-going "discussion" about which side gets to decide a given issue or on what terms. After all, any given decision on a contract issue by an arbitrator can be undone or expanded upon in subsequent negotiations. Therefore, the overwhelming weight of arbitral authority accepts the proposition that, if in doubt, the merits should be heard and decided because to do so benefits the parties and their many constituents.

B. The Merits

Did having chairs for CSRs to use while conducting business for some seven years constitute a binding past practice that could not be unilaterally changed by the Company during the life of the collective agreement? Or, from the Company's perspective, was the provision of chairs at the old Cingular stores done at management's prerogative, and did the Company retain the management right to remove them as a basic management function?

Collective bargaining agreements, regardless of how detailed the negotiations and how detailed the written text, can never capture all of the mutual understandings between the parties which build up over time. "There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing a community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of the collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless stated a contrary rule in plain words." Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. LAW REV. 1482, 1498-99 (1959). Nothing about chairs appeared in the pre-2005 Agreements, so the inquiry becomes whether their presence in the Company's predecessors' stores became a binding "condition of employment" within the meaning of Article 26, Section 1 (4th para.).

The distinction between basic management functions – which the Company would

have the reserved right to implement, modify or terminate without negotiating with the Union – and past practices involving a benefit of peculiar personal value to the employees is impossible to define for all cases and in all circumstances. Yet the distinction exists and must be reckoned with. Both parties have provided numerous arbitration awards that fall in the category which supports their view of the case. I have read and carefully considered all of them and conclude that the provision of suitable seating under the circumstances at issue here³ is of sufficient duration, well-established, a benefit of great value to employees and a binding past practice. Is not, therefore, a basic management function that can be unilaterally withdrawn mid-contract.

The Company's predecessors provided seating for CSRs for at least six years and AT&T continued that practice pending the merger and eventual redesign of all retail stores. This is of sufficient duration to establish a past practice. There is no dispute that this occurred, so the practice is well established. Being able to sit from time to time while servicing customers at the cash ramps is significantly less tiring than standing, so it is a benefit of peculiar value to employees. These elements persuade me that the parties had an implied understanding that seating, as described, was a condition of employment and thus binding.

In the Union's favor, arbitrators have ruled that the use of a radio in a nuclear power plant control room (*Northern States Power Co.*, 87 LA 1077 (Fogelberg, 1986)), access to a preferred meeting room (*Michigan Education Association*, 1992 WL 717115 (House, arb., 1992)), five-minute washing up times before lunch and end of shift (*Kobelco Steward Bolling, Inc.*, 108 LA 1093 (Curry, 1997)), location of vending machines on shop floor (*Tecumseh Products Co.*, 80 LA 568 (May, 1983)), layoff scheduling practices (*American Spirit Graphics Corp.*, 126 LA 802 (Befort, 2009)), eight-hour work day for mine inspectors (*Mine Health and Safety Administration, Dept. of Labor*, 75 LA 369 (Cantor, 1980)), providing taxi service for switchboard operators on midnight to 5:00 a.m. shift (*GTE Hawaiian Telephone Co.*, 98 LA 832 (Najita, 1991)), and reinstatement of dress code for shipping department employees (*Beatrice Foods Co.*, 77 LA 44 (Kulkis, 1981)) were binding past practices and could not be unilaterally changed mid-contract over the unions' objections. The Elkouri text adds to the list: paid work breaks, free coffee or free meals, utilities at discount or nominal charge, bonuses, maternity leaves of absence, and others. Elkouri & Elkouri, *HOW ARBITRATION WORKS* 616 (6th ed., 2003).

All of these practices were well established, from five to over forty years in duration, and were held to be benefits of peculiar value to the employees affected. All were found to be fundamentally distinct from basic management functions such as deciding which products or services to offer, pricing, marketing strategies, and so forth. Although management had the right to make the original decision in each case (such as to ban the radio in the control room, to not provide taxi service, and so forth), because the practice was of peculiar value to the

³ I want to make what is at stake clear: as I understand the Union's position, the issue is not seating in general or at all times when working or on breaks. The only seating issue before me is the ability of CSRs to sit or lean on a stool while working behind the counter with a customer in front of the counter conducting the Company's business. The Company had the right to eliminate the desks and desk chairs and go to a counter design for all of its stores.

employees and proposed changes were never raised during intervening contract negotiations, an implied agreement to continue the practice had been reached which limited management's right to unilaterally change the practice mid-contract.

One decision cited by the Company, also involving stools, reaches a contrary result. *Ohio Precision Castings, Inc.*, 82 LA 117 (Murphy, 1983). There, certain inspectors had been able to sit on stools while inspecting manufactured parts for some ten years, and the employer unilaterally decided to remove the stools. This change was motivated by the facts that the employer started doing significantly more business for the aerospace industry which insisted on more stringent quality control and that the past practice caused the inspectors to miss quality issues at too high a rate for the newer work. Because the employer established a relationship between the number of errors made and whether the inspectors were sitting or standing (and that less errors were made if the inspectors stood), Arbitrator Murphy concluded that the change was economically justified and that the past practice was not therefore binding on the employer. He also concluded that the use stools "did not develop as a result of any joint determination by the Union and the Employer; rather the use or absence of a stool appeared to be a method that developed as a result of the Employer's discretion as to the convenient method by which tasks being performed at a work station could be accomplished." *Id.* at 119-120.

I do not find Arbitrator Murphy's award persuasive because it is not clear on what ground he basis his decision. If the past practice in that case did not reflect an implied agreement between the parties, then the past practice rule is simply inapplicable and the employer's reason or reasons for the unilateral change are irrelevant. If there is no binding past practice, the change, if not prohibited by some other contractual provision, falls within management's right to operate the business and need not be justified to the Union or anyone else. Yet Arbitrator Murphy supported his award by referring to the employer's economic justification for removing the stools. It is not clear, therefore, whether he based his award on the lack of an implied agreement to maintain the seating or on economic justification. He also did not apply the "employee benefit" approach, which most arbitrators apply. This is an important focus, because, in addition to proof of duration and a well established practice, the more significant the practice is to the employees the more likely they developed the expectation that it would continue, an expectation that became reinforced when the subject was not raised during contract negotiations.

In contrast, here, the provision of seating under the circumstances did become part of the overall bargain struck by the parties and could not be unilaterally eliminated. Under Article 26, Section 1, that they do not have to bargain over any subject during the life of the CBA, although they can mutually agree to do so. "In the absence of such an Agreement by both parties, the Company shall not make any changes in the terms and conditions of employment." The Company's failure to bargain with the Union over this issue violates the recognition clause in Article 2. The appropriate remedy for this breach of the CBA is discussed in the "Award" section below.

///

II. REMOVAL OF SEATING AS VIOLATION OF CBA AND/OR STATE LAW

A. Arbitrability

The Company argues that grievances alleging safety violations are not arbitrable under Section 3 of Article 16. The arbitrator's job is to interpret the parties' Agreement and, where the language used is clear, apply that language as written. Specifically, I do "not have the power to add to, subtract from, or vary the terms of this Agreement, or to substitute his/her discretion for that of Management, but shall be limited in power and jurisdiction to determine whether there has been a violation of this Agreement." Article 9, Section 4.

Section 3 of Article 16 uses the word "safety" and not "health and safety." That phrase appears in Sections 1 and 2. Whether employees can sit while doing some of their job tasks is a health issue, and not one of safety as that term is commonly used. The American Heritage Dictionary (3rd ed., Houghton Mifflin, 1996), for example, defines "safety" as "the condition of being safe; freedom from danger, risk, or injury" and "a device designed to prevent accidents. . . ." Except for someone prone to fall, standing for long periods is primarily a health issue and not one of safety. Because the grievance entails a health issue, on its terms, it is not subject to the non-arbitrability language of Section 3.

This interpretation is reinforced by the apparent purpose of Section 3 as reflected in the first sentence of that section. The Company has committed itself to comply with applicable safety regulations, but, in many instances, compliance entails an exercise in judgment. And those judgments may have to be continually reviewed in light of scientific and technological developments. The parties have agreed that the Company does not have to justify its attempts (some which might be disliked by bargaining unit members) to comply with these safety standards or rules in the arbitration process. In light of that apparent purpose, the limitation on arbitrability applies only to grievances challenging implementation of a particular safety feature. Certainly, the seating was not removed in order to comply with a safety rule; rather, it was removed to enhance production. Therefore, the issue presented in the grievance is arbitrable.

B. The Merits

First, removal of seating for CSRs does not violate the terms of the CBA. That Agreement recognizes "safety and health" as a "mutual concern" and the importance of a "safe and healthful" work environment. Article 16, Section 1. But there is nothing specific in the CBA about the provision of seating or any other language which states or implies that seating for CSRs while servicing customers at the cash ramps is a health requirement. I would be violating Article 9, Section 4 by grafting on to this general and vague language a specific requirement that seating is required.

Second, I am not persuaded that the Company's decision regarding seating violates IWC Rules, section 11040(14). Subdivision (A) states that "All working employees shall be provided with suitable seats when the nature of the work reasonably permits the use of seats." The fundamental issue is whether the employer or the arbitrator gets to determine "the nature of the work." Here, the Company has decided to have its sales staff on their feet

while working to convey a particular image and message to customers. It wants and expects the CSRs to actively greet customers at the door, rather than wait passively behind the counters for the customers to approach them, and, if work at the counter is required, to stand, as the customers are standing, to reflect the same image of attentiveness. I agree with the Chief Deputy Labor Commissioner's opinion that Section 14 of the IWC order "was not intended to cover those positions where the duties require employees to be on their feet, such as salespersons in the mercantile industry." Reyff letter attached as tab 25 to Appendix in Support of Company's Post-Hearing Brief.

Implicit in that opinion is the premise that the employer gets to determine whether the nature of the work permits seating as opposed to standing. The Union correctly points out that Section 14 expresses the Commission's view that employees be allowed to sit while working when feasible out of "humane considerations." *California Manufacturers Association v. Industrial Welfare Commission*, 109 Cal. App. 3d 95, 116 (1980). However, no authorities are provided, nor could I find any based on my independent research, that interprets Section 14 to have made the fundamental decision that all employees must be allowed to sit while working if they can do the job while sitting regardless of the impact that might have on productivity or the image the employer wishes to convey to customers.

It is common, for example, for retail sales establishments to insist that their sales staff stand during working hours, and, for better or worse, such a decision is an aspect of defining the "nature of the work." I am not persuaded that the IWC was substituting its judgment for the many employers whose employees must stand while working in enacting Section 14.

The parties have informed me that several lawsuits are pending which involve the legal impact of Section 14. One brought by Guest Service Agents employed by the San Francisco Hilton Hotel, and the Superior Court judge granted summary judgment for the Hotel; that judgment was apparently not appealed. *Hamilton v. San Francisco Hilton, Inc.*, Case no.04-431312 (attached as tab 23 to Appendix in Support of Company's Post-Hearing Brief). This is the only opinion on the merits, so far. Needless to say, as this plays out in the courts, the law will be clarified and this Award may become moot.

AWARD

For the above reasons, the grievance is sustained in part. The parties are directed to begin negotiating the use of seating for CSRs while working behind the cash ramps forthwith. In furtherance of this Award, Article 26 of the CBA is suspended until a mutually acceptable agreement is reached but only to the extent necessary to reach acceptable quid pro quos on the seating issue.

The Union has asked, as a remedy, that the Company be directed to immediately provide appropriate seating. I do not do so because that would, in effect, have me dictating the outcome of the negotiations. It is true that had the Company bargained with the Union over this issue when its plans were being formulated, as it should have, the employees would have had the benefit of continuing to sit on appropriately designed stools while behind the cash ramps, or received some other benefit in exchange, or the parties could have bargained

to impasse over the issue. Regardless, numerous outcomes would have been possible, and I do not have the power to substitute my judgment as to what constitutes an acceptable outcome for that of the parties.

Nevertheless, the bargaining unit employees have been deprived of a significant benefit for many years. Were this a loss of pay issue, arbitrators commonly award back pay to make the employees whole. The parties are also directed to discuss the “compensatory” issue that will either be waived or incorporated into their ultimate agreement. If agreement is not reached, I invite the parties to submit their views on an equitable compensatory measure (whether in the form of money or another benefit).

Jurisdiction is retained for the sole and limited purposes of resolving any disputes that arise over the interpretation or implementation of this Award and to determine an appropriate measure and amount of compensation for the Company’s breach of the CBA in the event the parties do not reach agreement on these issues.

Dated: March 31, 2010

Respectfully submitted,

RICHARD C. SOLOMON
Arbitrator