

**Voluntary Labor Tribunal**  
**Tammy Brynie, Esq., Arbitrator**

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In the matter between:

United Food and Commercial  
Workers International Union,  
L. 1445, AFL-CIO, CLC

- and -

Gr: Scan & Pay

Macy's, Inc.

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**Decision and Award**

**For the Employer**

Robert H. Morsilli, Esq.

**For the Union**

G. Alexander Robertson, Esq.

**Background**

This matter was heard on December 9, 2020, via video conferencing. The parties stipulated to the following issues:

Did Macy's violate the Commission Rate Procedure in the Boston collective bargaining agreement by not paying commission for sales made through Scan and Pay?

If so, what shall be the remedy?

Did Macy's violate Article IX and Exhibit A of the Branches collective bargaining agreement by not paying commission for sales made through Scan and Pay?

If so, what shall be the remedy?

Did Macy's violate Article 12 of the Saugus collective bargaining agreement by not paying commission for sales made through Scan and Pay?

If so, what shall be the remedy?

The Union represents three bargaining units of Macy's employees, with their respective collective bargaining agreements generally referred to as the Boston Contract, the Branches Contract, and the Saugus Contract. The Boston Contract - as the name implies - applies to the Boston store. The Branches Contract covers employees in the Braintree, Natick, Peabody, and Warwick stores. The Boston and Branches bargaining units are comprised of support and sales staff in a number of departments. The Saugus Contract, however, is applicable only to Cosmetics and Fragrance sales employees.

Each bargaining unit includes employees who are compensated, either in part or wholly, on a commission basis.<sup>1</sup> "Base Plus" employees, for example, receive an hourly base wage plus a percentage of their sales. All Saugus bargaining unit employees receive "Base Plus" compensation, as do Boston and Branches sales associates in the Fine Jewelry and Big Ticket departments, as well as associates in Cosmetics at the Warwick location. "Draw vs. Commission" employees, on the other hand, are paid primarily based on their commissions. "Draw vs.

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<sup>1</sup> Bargaining unit employees who are compensated solely on an hourly basis (and not eligible for commissions) are not at issue in this arbitration.

Commission" employees, under the Boston and Branches contracts, work in the Men's Shoes, Women's Shoes and Men's Clothing departments.

Employees whose compensation is based in whole or part on commissions tend to work in "high touch" areas of the store. According to Jennifer Dietzway, the Senior Director/Store Manager of the Boston store, these are areas that suit sales associates with skill sets that include: salesmanship, forming relationships with customers and discerning customers' needs; special training, including determining garment and/or shoe fit; and "upselling" - the ability to suggest or accomplish further purchases of items that complement, or even exceed, an item originally considered for purchase.

Commissioned employees earn compensation for products sold when they complete an in-store transaction at a point of sale - i.e., by ringing it up at a cash register. A sales employee has an identification number that is used to log onto a register, thus enabling sales to be tracked. A commission sales associate receives credit for a sale by means of the register transaction,

even if the employee did nothing more than ring up the sale.

A 'Draw vs. Commission' employee also receives commissions on products usually sold in other departments if the employee completes - rings up - the sale.<sup>2</sup> On the other hand, even after receiving help from a sales associate in a 'commissioned' department, a customer may complete the sale in another department, where the transaction is finalized by an hourly employee. In that situation, commissioned employees do not receive a commission. Thus, the receipt of in-store sales commission credit is based on completing a transaction at a cash register within a commission department.

It is undisputed that all commissioned employees are expected to perform duties for which they do not receive commissions. Such expected work, Dietzway testified, includes providing a positive customer service experience by, among other factors, greeting customers, answering questions, and helping customers find

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<sup>2</sup> This situation is referred to as "Intersell" within the collective bargaining agreements. Base Plus employees do not receive the benefit of Intersell commissions.

materials. In addition to the expectation that they provide friendly and informative customer service, commissioned employees are expected to perform tasks like: monitoring the appearance of, and ensuring the tidiness of, their departments; stocking sales areas with samples; and, performing merchandise recovery from fitting rooms.

In or about 2018 the Employer launched "Scan and Pay" - a mobile purchase app - in many stores, including the stores with bargaining units represented by the Union. Customers can download the app on their mobile devices that, once enabled, can be used, within the store, to scan the barcodes of selected items and use credit card information to make a purchase. The app design then directs customers to a designated location within a store, to have any security tags removed from purchased items and to have the items bagged. It is undisputed that the Employer expected sales associates, including commissioned employees, to provide appropriate assistance and service to customers who experienced issues or difficulties using the Scan and Pay app.

When implemented, the Employer excluded some commission departments - Big Ticket and Fine Jewelry - from eligibility for purchase via Scan and Pay. Products sold in Cosmetics and Fragrances, Men's Clothing, Men's Shoes and Women's Clothing were not excluded. With respect to the Scan and Pay program, the parties have stipulated: The Employer has not paid commissions for sales made through Scan and Pay in the bargaining units represented by the Union. In addition, the Employer does not maintain policies in stores represented by the Union requiring or permitting associations to prohibit customers from using Scan and Pay if they were assisted by a commission associate, except in departments excluded from Scan and Pay. (Stipulations Nos. 1 and 2).

The Scan and Pay app, it seems, has not been widely adopted by customers shopping in stores represented by the Union. Dietzway testified that since her arrival at the Boston store in March of 2020 (with her arrival coinciding with the local effects of the Covid pandemic and its related reverberations in retail), Scan and Pay has not been a priority. Indeed, Dietzway testified

that she was not aware of the Scan and Pay location with the store where security sensors/features were to be removed. She also indicated that she was unaware of any customer who has asked for the location of the Scan and Pay check-out area. In addition, Dietzway testified that Scan and Pay had also not been a priority at her past employment location - Macy's in Albany, New York.

James Fitzgerald, the Employer's Labor Director since 2017, had oversight responsibility for the collection of data related to Scan and Pay sales in stores with employees represented by the Union. The data indicates that 1,162 Scan and Pay transactions occurred in 2018; 1,324 in 2019; and in 2020, preceding arbitration, there were 349 -- for a total of 2,834 Scan and Pay transactions. Only 38 of these transactions involved items from departments where commissioned employees worked. The total cost of goods purchased through Scan and Pay upon which commission would otherwise have been paid is \$2,137.54. Union Exhibit #12.

The Union filed a grievance challenging the implementation of the Scan and Pay system on September 27, 2018. The grievance provides, in part:

Sale of commission items made through the scan and pay function of the Macy's app where a commission is not earned or credited to a commission member (draw vs commission and base plus) is a violation of the three collective bargaining agreements, as is the company's failure to notify and work with the union on changes in job functions and commission pay practices/procedures . . .

Union Exhibit #7, p. 1

Denying the grievance, the Employer responded:

As per Article V of the Collective Bargaining Agreement, the Company has the right to implement technology to ensure the efficient operation of the business. This technology is needed to remain competitive in an ever changing retail market. Customers who choose to select their merchandise and take advantage of this technology on Macy's Mobile application can have a non-commission colleague complete the transaction by confirming payment and removing sensors.

Commissioned colleagues who continue to prove the customer a full service experience and ring the transaction at the POS will receive commission for merchandise they sell. . .

Union Exhibit #7, p. 2

While the grievance was pending, the parties negotiated and executed new collective bargaining agreements for all three bargaining units. The Union

did not make any proposals concerning Scan and Pay and there is no arbitral evidence that Scan and Pay was otherwise addressed during bargaining.

The unresolved grievance then proceeded to arbitration. At the conclusion of the hearing both parties filed post-arbitration written submissions.

### **Relevant Contract Provisions**

#### **Boston 2016-19 CBA: Commission Rate Procedures**

<b>Department</b>	<b>Commission Rate</b>
Fine Jewelry	Base plus 1% Commission
Mattresses/Floor Covering	Base plus 2% Commission
Women's/Men's Shoes**	9.5%** Draw Vs. Commission

Men's Clothing  (includes Div. 30 and Div.  31)	7.15% Draw Vs. Commission
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\*\* Effective one week after a Shoe Locator (ELS) system is installed under this Agreement, commission on Women's Shoes shall be reduced to 7.75%.

**Intersell for Draw v. Commission**

1. Non-commissioned merchandise sold by Draw vs. Commission employees: 3%

Effective fiscal 2/1/13, Draw vs. Commission colleagues who sell merchandise outside their department shall receive Intersell of 3% on all items except the following: Cosmetics - 0%  
 Fine Jewelry - 0%  
 Food/Water - 0%  
 Alterations- 0%  
 Leased (excluding Rugs)- 0%

Base Plus colleagues are not eligible for Intersell.

(U. Ex. 1 at p.33)

**Branches 2016-19 CBA: Art. IX, Section C (1)**

C. Commission Rates

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

(U. Ex. 3 at p 22)

**Saugus 2018-19 CBA**

Commission—Commission will be paid on net sales of all eligible Cosmetic and Fragrance Merchandise departments.

i. Cosmetics Counter Managers and Cosmetic Beauty Advisors: Base plus 3% Commission on respective Cosmetics vendor lines and 3% Intersell Commission on all other Cosmetic vendor lines.

ii. Fragrance Counter Managers and Fragrance Colleagues: Base plus 3% Commission on respective Fragrance vendor lines and 3% Intersell Commission on all other Fragrance vendor lines.

(U. Ex. 5 at p.8)

**Contentions of the Parties**

The Union asserts that the essence of its grievance is the failure to pay commissions to bargaining unit employees for in-store purchases due to the implementation of the Scan and Pay app. The dispute does not present a question of management rights relating to work assignments or the introduction of new technology. It is a case about compensation.

The relevant contracts determine commission as a percentage of "sales." For the most part, however, they do not specify when a sale, which results in earning a commission, occurs. The Employer, however, has a practice of crediting commission colleagues for a sale when they ring up the transaction at the cash register. The parties have agreed in practice that completing a sale is an adequate shorthand for determining that a colleague deserves commission credit for a transaction. The parties have anticipated that commission would be paid for all sales completed in a commission department, whether for that department's items or for intersell items.

Customers using the Scan and Pay app are physically present in a store. A customer may still benefit from the work of sales staff in maintaining the presentation of departments and providing general customer service. The fact that a customer ultimately completes a transaction through Scan and Pay does not necessarily reduce the likelihood that the customer received assistance. But the Scan and Pay app precludes

employees from taking credit for transactions at the cash register. The Employer's policy of paying no commission on Scan and Pay transaction for commission items violates all three contracts.

As remedy, the Employer should be ordered to refrain from not paying commission for Scan and Pay sales under all three contracts. In addition, actual failures to pay commissions have been demonstrated for the Boston and Branches contracts. Affected employees should be made whole.

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The Employer contends that it maintains the unfettered discretion to introduce new technologies, such as Scan and Pay to sell its wares. The contractual provisions to which the Parties stipulated as being at issue are compensation provisions. Those provisions dictate how employees are paid when they perform certain work. Nothing in the relevant provisions, however, vests commissioned employees with a type of "exclusive sales

jurisdiction" over the merchandise generally located in the departments in which they work.

The Union suggests that there should be an assumption that a commissioned employee assisted in any Scan and Pay purchase involving merchandise generally located in the department in which the commissioned employee works and, consequently, a commission should be earned for the Scan and Pay purchase. That purported assumption, and the related conclusion that the Union asks the Arbitrator to draw, find no support in any of the collective bargaining agreements at issue. The evidence actually establishes that customers need not purchase merchandise on which commissions are usually derived in departments in which commissioned employees actually work. Rather, customers are free to purchase that merchandise wherever they desire within a store. Then, even if a commissioned employee assisted the customer prior to the purchase, a commission is not earned if the sale is completed in a department staffed by hourly employees. Instead, commissioned employees receive a commission only when they complete a sale transaction a point of sale, using their ID number.

A Scan and Pay purchase involving merchandise generally located in a department where commission employees work is analogous to the situation in which a customer completes a transaction involving the same products in a different department. The commissioned employees do not receive commissions on such transactions. Moreover, the Union acknowledged that is not aware of a single instance in any of the stores in which a commissioned employee assisted a customer who then utilized Scan and Pay to purchase items with which the commissioned employee assisted.

Neither the applicable provisions of the collective bargaining agreements, nor the long-standing practice in the stores supports the Union's contention that Macy's has violated the collective bargaining agreements in any manner. The grievances should be denied in their entirety.

### **Opinion**

It is undisputed that the Employer has the ability to introduce new technology, including the Scan and Pay app, into its retail setting. The core dispute is whether by implementing the Scan and Pay system the Employer violated, with respect to in-store sales, the compensation provisions of the Union's three collective bargaining agreements. I determine that the implementation and use of the Scan and Pay app for in-store purchases violated the compensation rates and the underlying in-store sales agreements and practices embodied within the three collective bargaining agreements.

The implementation of the Scan and Pay app upset the parties' commissioned earnings-based paradigm and practice for certain bargaining unit employees by adopting an entirely new point of sale mechanism for in-store transactions. By its design, the Scan and Pay app would permit a customer to browse within a commissioned department, seek assistance and advice from a sales associate, or shop independently, and then have a choice at hand between ringing up a sale through the

cash register, or making the purchase through the app. The Scan and Pay app provided an in-store, alternate payment mechanism that, if selected, deprived commissioned employees of sales credits and related commission earnings.

The commission-based sales structure and paradigm negotiated by the parties, and practiced over time, relied upon commissioned sales associates ringing up their in-store sales, in conjunction with their ID number, in order to earn commission credit. In other words, in-store commission earning sales were recorded by, and credited according to, sales information generated by a point of sale, in-store cash register. Significantly, the point of sale transaction information was the understood method used to document earned commission credit. In other words, besides ringing up a sale, the Employer required no further proof of, or information about, the provision of sales support before crediting commission sales and related compensation to a commissioned sales associate. A point of sale transaction by a commissioned employee led to earning a sales commission. Thus, the use of the Scan and Pay

payment system by in-store customers by-passed the traditional point of sale register-based tracking of sales and commissions mechanism, thereby affecting, and correspondingly reducing, the earnings of commissioned sales employees.

The Employer appeared to acknowledge this change in its October 29, 2018 grievance response. The Employer indicated that customers who take advantage of Scan and Pay "can have a non-commission colleague complete the transaction by confirming payment and removing sensors." On the other hand, "[c]ommissioned employees who continue to provide the full customer service experience and ring the transaction at the POS will receive commission for the merchandise they sell." Union Exhibit #7, p.2. The response reinforces the parties' practice that the 'point of sale' was the determining factor towards earning commission credit and that the use of app could have a non-commissioned employee finalize the process. In effect, the Employer implemented an alternate, parallel in-store transaction option that, in effect, could deprive sales associates of commissions.

The Employer correctly notes that, historically, customers have been free to take their selected items from a commissioned department (assuming, even, that they had received sales assistance and customer service from a commissioned associate) and, eventually, have the items from a commissioned department rung up by a non-commission, hourly employee in another department. In that instance, it is clear that no commission is earned. On the other hand, commission employees receive the benefit of Intersell items - when they ring up a transaction that contains both a customer's items from the commissioned area as well as other goods. The Scan and Pay model, however, provided a completely distinct payment system that overlooked and disrupted the presumptions, practices, and paradigms upon which commissioned sales have been credited.

I am convinced that the implemented Scan and Pay system, by providing an alternate in-store sale option altered, at a minimum, the parties' prevailing practice about what constitutes a "sale." The parties had a long-term understanding that point of sale information,

from cash registers in a commission-based department, would provide the information and basis for calculating commission credit. The impact of the Scan and Pay design and its implementation altered and modified the basis upon which commissioned employees earned commission credit, thereby affecting their compensation/benefits. Macy's, in effect, instituted an app that constituted a parallel, in-store point of sale, without regard to its effect on the compensation of certain commission employees.

I recognize that the lost commissions/compensation owed here is not substantial. I choose to require a monetary remedy, however, to demonstrate that the new app, although, not widely adopted, violated the parties' collective bargaining agreements by failing to recognize the disruption of the parties' in-store point of sales practice and deal with the corresponding impact on sales associates' commission compensation. To the extent that a revised Scan and Pay app, or an alternate version, is considered, the effect on the compensation benefits of commissioned employees is matter appropriate for

discussion and resolution through the collective bargaining process.

In conclusion, I determine that the Employer has violated all three collective bargaining agreements by adopting a new in-store payment model that altered the parties' practice with respect to accounting for and tracking, as well as earning commission credit for, in-store sales. As a result, the compensation of commissioned employees, whose earnings are based in whole or in part on commission credit, was reduced.

As remedy, to the extent that the Employer continues to utilize the Scan and Pay app, all commissioned departments should be excluded from the app – like Fine Jewelry and Big Ticket items have been from the outset. In addition, a make whole remedy, even given the relatively small monetary amount of commission earnings at issue, is appropriate.

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**AWARD**

Macy's violated the Boston Collective Bargaining Agreement, the Branches contact and the Saugus collective bargaining agreement through its implementation of the Scan and Pay app for in-store sales.

As remedy, the Employer shall:

- Exclude all commissioned departments from future purchases through the Scan and Pay app.
- Make affected employees whole for lost commissions.
- I will retain jurisdiction the sole purpose of of resolving remedial disputes, if any, for a period of 45 days, renewable upon request by either party

/x/ Tammy Brynie

Tammy Brynie

Arbitrator

April 22, 2021