BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS UNION LOCAL NO. 695 and PEPSI-COLA BOTTLING COMPANY of LA CROSSE.	Case 6 No. 44311 A-4665

Appearances:

Mr. Kurt C. Kobelt, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 788 North Jefferson St., P.O. Box 92099, Milwaukee, WI 53202, appearing on behalf of Teamsters Union Local No. 695.

Mr. Dennis G. Lindner, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, WI 53202, appearing on behalf of PepsiCola Bottling Company of La Crosse.

ARBITRATION AWARD

Teamsters Union Local No. 695 (hereinafter Union) and Pepsi-Cola Bottling Company of La Crosse (hereinafter Company) have been parties to a collective bargaining agreement at all times relevant to this matter. Said agreement provides for arbitration of grievances involving an alleged violation of said agreement by an arbitrator appointed by the Wisconsin Employment Relations Commission (hereinafter Commission). On July 16, 1990, the Union filed a request with the Ccmuission to initiate grievance arbitration. On August 1, 1990, the Company concurred with said request. On August 22, 1990, the Commission appointed James W. Engmam, a member of its staff, as the impartial arbitrator in this matter. A hearing was held on December 11, 1990, in La Crosse, Wisconsin, at which time the Union and the Company were afforded the opportunity to present evidence and to make arguments as they wished. A transcript was made of the hearing and was received on Decenber 20, 1990. The parties filed briefs on February 11, 1991, and they waived the filing of reply briefs on March 19, 1991. Full consideration has been given to the evidence and arguments of the parties in reaching this decision.

STATEMENT OF FACTS

On August 15, 1969, the Union wade a contract proposal to the Company which included the following provision:

> 9. In the event of any route adjustment, the driver salesmen shall be guaranteed the same gross income which he received for the same period of time the previous year. Adjustments shall be calculated over a six (6) nonth period.

In January 1970, the Company made a final proposal to the Union which included the following provision:

> 5. Company agrees to a three month guarantee on route reduction. See letter attached.

The attached letter, dated January 15, 1970, stated as follows:

> In the event of a route reduction (in the number of accounts) instigated by the Company, the route salesmen involved shall receive for the 12--week period following the date of reduction a total gross amount not less than the total gross awount for the comparable period in the preceding calendar year provided the employee is cooperating in all respects and is making a conscientious effort to maintain his sales volume. This provision shall not apply to commission reduction which results from a downturn in business conditions.

The Union agreed to said provision and it was included as Article XI of the parties' 1969-72 collective bargaining agreement. Since that time, the language has been modified to read as stated in the Pertinent Contract Language section below. Said modifications are not germane to this case.

It was not until 1986 that this provision was utilized. In that year, 15 employes received a 19 week guarantee. Of that group, four employes had amounts deducted from their guarantees due to what the Company characterized as a downturn in business conditions. In 1987 one enploye's 19 week guarantee was reduced by what the Company characterized as a downturn in business conditions. No deductions were made in 1988 because the Company determined that no downturn in business conditions had occurred.

In 1989 the Company made deductions for a downturn in business conditions from the 19 week guarantee of approximately 20 employes. On October 25, 1989, the Union filed a class

action grievance on behalf of all employes who had a route reduction, alleging a violation of Article 21.6 of the agreement. In 1990 approximately 15 employes received deductions in their 19 week guarantee based on a downturn in business conditions. On August 24, 1990, the Union filed a class action grievance regarding these deductions.

The grievances were timely process through the grievance procedure and are properly before this arbitrator. Other facts will be included as needed in the Discussion section below.

PERTINENT CONTRACT LANGUAGE

ARTICLE 6 - MAINTENANCE OF STANDARDS

6.1 The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differentials, vacations and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement, and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement.

ARTICLE 12 - STEWARDS CLAUSE

12.1 The Employer recognizes the right of the Union to designate job stewards and alternates. The authority of jobs (sic) stewards and alternates so designated by the Union shall be limited to, and shall not exceed, the following duties and activities:

(a) The investigation and presentation of grievances in accordance with the provisions of the Collective Bargaining Agreement.

. . .

ARTICLE 21 - HOURS OF WORK AND GUARANTEES

. . . .

21.6 In the event of a route reduction in the number of accounts instigated by the Company, the Route Salesman involved shall receive for the nineteen (19) week period following the

date of reduction a total gross amount not less than the total gross amount for the comparable period in the preceding calendar year, plus any negotiated increases, provided the employee is cooperating in all respects and is making a conscientious effort to maintain his sales volume. This provision sball not apply to commission reduction which results from a downturn in business conditions.

ISSUE

On brief, the Union states the Issue as follows:

1. Did the employer improperly calculate the 19 week guarantee for its route salesmen during 1989 and 1990? If so, what is the appropriate remedy?

2. Did the employer retaliate against the union for the filing of the October 25, 1989 grievance?

On brief, the Company states the Issue as follows:

Did the Company violate Section 21.6 of the labor agreement in 1989 and 1990 by not properly paying commission route salesman their appropriate guarantee payments? If not, what is the appropriate remedy?

The Arbitrator frames the Issue as follows:

Did the Company calculate the 19 week guarantee for the years 1989 and 1990 in violation of Article 21.6 of the collective bargaining agreement?

If so, what is the appropriate remedy?

POSITIONS OF THE PARTIES

Union

The Union argues that the Company violated Article 21.6 of the collective bargaining agreement by not providing its employes with the 19 week guaranteed in said agreement; that the question before the arbitrator involves interpreting the phrase "downturn in business conditions" in said article; that the language, which appears as a proviso, must be construed in light of the overall

purpose of the clause providing employes with a 19 week guarantee; that since the Company drafted the clause, any ambiguities in the language must be construed against it; that Article 21.6 must be construed in a manner which avoids a result which works a forfeiture of wages; and that a proper application of these principles requires that the Company's definition of a "downturn in business conditions" be rejected.

Specifically, the Union argues that the overriding purpose of Article 21.6 is to protect an employe's earnings against the effects of the exercise of management's legitimate right to adjust the number of accounts on each employe's route; that the phrase "downturn in business conditions" eludes a ready definition; that the most obvious definition is the decreased demand for the product which accompanies an economic recession; that the clearest indication of such a downturn is the Company's total sales of cases in a given year; that the Company rejects any "macro" definition and, instead, focuses of the "micro" experience of each individual driver; that many of the reasons for such a downturn are within the Company's control, such as price competition, promotions and treatment of customers; and that Article 21.6 does not contemplate that the employe be penalized for these management decisions.

Finally, the Union argues that the Company must bear the burden of proving a downturn in business conditions since it is the exception to the general entitlement of an employe to the 19 week guarantee and because only the Company possesses the information needed to make such a determination; that the Company has not met its burden of showing in 1989 that each of the reduced total dollar amounts for each employe's account results from a downturn in business conditions similar to that employed in 1986 and 1987; that there is no evidence that the employes adversely affected by this determination were given any opportunity to respond to the Company's unilateral definition of "downturn in business conditions"; that the arbitrator should reject the Company's shifting and overly broad definition of the phrase; and that the phrase should be given its natural and ordinary meaning as applying in a "macro" sense to overall business conditions reflected in the Company's sales performance, which improved in 1989.

In regard to its proposed second issue, the Union argues that the Company retaliated for the filing of the October 1989 grievance by further reducing its employes' 19 week guarantee; that the Union never formally requested the Company to change its method of relying on key accounts and,instead, examine every account of an enploye in defining a downturn in business conditions; instead, it nay be inferred that the Company unilaterally decided to change its definition in direct response to the filing of a general class action grievance challenging the propriety of its method of payment; that the change was by no means an attempt to settle the grievance; that the only conclusion which can be drawn from this change is that it was a means of "spiting" the Union for filing the grievance, resulting in ten of the 15 employes eligible for the guarantee receiving absolutely nothing; that such retaliatory action interferes with the rights of stewards to investigate and present grievances in violation of Article 12.1 of the agreement; that once the Company defined a downturn in business conditions in a manner restricted to key accounts, it became bound

by it under the maintenance of standards clause; that the only explanation for its change in definition is the filing of the October 1989 Grievance; and that, even if the 1989 grievance is denied, the 1990 grievance must be sustained as constituting an independent violation of the contract.

Company

The Company argues that the collective bargaining agreement expressly dictates that the 19 week guarantee provision under Section 21.6 shall not apply to commission reduction which results from a downturn in business conditions; that there is not definition as to the meaning of a downturn in business conditions or as to how the exception to the guarantee should be applied; that the arbitrator must, if possible, ascertain and give effect to the mutual intent of the parties; that in doing so, inquiry is made as to what the language meant to the parties when the agreement was written; that it is this meaning that governs, not the meaning that can be possibly read into the language; and that where, as in this case, the term "downturn in business conditions" is not expressly defined and constitutes ambiguous language, the arbitrator must look to bargaining history that served as its genesis.

The Company argues that the company proposed detailed language in a proposal dated January 15, 1970, which identified and dealt with three Company concerns; that, first, the route guarantee would only apply to a route reduction instigated by the Company; that, second, any guarantee payment was conditioned upon the employes' full cooperation and making a conscientious effort to maintain sales volume, that, third, the guarantee was not to apply to a commission reduction resulting from a downturn in business conditions; that it is absolutely clear that a downturn in business conditions applied on a route-by-route basis to the individual enploye and the accounts that he had; that the Company made it clear to the Union through the federal mediator that a downturn in business was evidenced by an account selling less during the current year after route adjustments than during the comparable period in the prior year; and that the Union acquiesced to the Company's position regarding the downturn in business scenario and ratified the 1969-72 agreement containing the Company's guarantee proposal.

In addition the Company argues that its version as to the history and intent of the parties regarding the guarantee as well as the definition and application of a downturn in business is buttressed by past practice during the ensuing years; that there were no business downturn deductions from guarantee payments until 1986; that during 1986, four employes did experience a significant decline in sales on some accounts and downturn in business deductions were wade from their 1986 guarantee payments; that the deductions were made in accord with the definition and application of the original language proposed to and agreed upon by the Union; that the Company continued its same review process in 1987; that based upon the bargaining history which was reinforced by past practices during 1986 and 1987, the Union was clearly bound thereafter by such history and practice unless it changed the scope of downturn in business conditions through negotiations culminating in the 1987-90 agreement; that the Union did not seek any change

whatsoever in language regarding the route guarantee provision; that, therefore, the Union was foreclosed from challenging the Company's application of the critical terminology during the life of the current agreement; and that the grievances should be denied.

DISCUSSION

The issue before this arbitrator is whether the Company violated Article 21.6 of the collective bargaining agreement in calculating the 19 week guarantee for the years 1989 and 1990.

As noted in the Union's brief, this case presents a difficult question of contract interpretation. The difficulty is compounded in that the Union presented only one witness. The Union's only witness testified at length as to his recollection of the bargaining history which resulted in the parties agreeing to the language in dispute. On cross examination this testimony was undeniably refuted. On brief the Union states that it does not rely on the testimony of its only witness regarding the bargaining history. Also on brief the Union argues that the contract language must be interpreted without illumination by any bargaining history. I disagree. The Company presented credible testimony regarding the bargaining history which is part of this record and included in the decision waking process. The case is further complicated in that the discrediting of the Union's only witness in regard to his testimony on the bargaining history raises doubts about the credibility of the witness' memory and accuracy as to other aspects to which he testified.

This case turns on the definition of the phrase "a downturn in business conditions". The Union argues that the phrase should be given its natural and ordinary meaning as applying in a "macro" sense to overall business conditions reflected in the Company's sales performance. Other than argument, the Union offers no evidence to support its proposed definition. It has excluded bargaining history from its analysis. It either overlooks the past practice as shown in the years 1986 and 1987 or it asserts that the procedure used in 1989 and 1990 was wrong because it was different.

In any case, this argument fails for two reasons. First, the Union's definition requires that there be a company wide decrease in sales caused by a recession. Bypassing the question of whether a downturn in business conditions for the Company can occur absent a recession, the guarantee included in this article is personal to each employe. It is the employe's gross income that is protected except for a downturn in business conditions and, therefore, the downturn in business conditions relates to the individual employe, not the Company. Under the Union's interpretation, each employe would receive a reduction if the Company had a decrease in sales even if the individual employe did not. And no employes would receive a reduction if the Company had an increase in sales, no matter how much of a decrease the individual employe had. This does not appear to be what the Union negotiated for and agreed to in 1970.

Second, the Union's definition is based upon a year's sales for the Company. Yet the

contract is specific in that the guarantee is for the comparable 19 week period from the previous year. Nothing in the agreement indicates that the definition for downturn in business conditions should be for anything other than the specified 19 weeks. Under the Union's interpretation, the route salesmen's guarantee could be cut even if during the comparable 19 week period sales increased if, over the course of the year, sales for the Company decreased. This does not appear to be what the Union bargained for and agreed to in 1970. This article is limited in two factors: who and how long. The "who" is the individual employe. The "how long" is 19 weeks. These are the factors that play into the clause.

Specifically, the Union argues that the overall purpose of the clause is to protect employe's earnings against the effects of the Company's right to adjust routes. I do not think that the Company disputes this. In fact, I agree that this is the overall purpose of the clause in question. But the overall purpose of the clause is to protect an employe's earnings only against the effects of the Company's right to adjust routes. The purpose of the clause is not to protect employe's earnings as such. It is meant to protect employe's earnings only when the reduction is instigated by the Company, only when the employe does a good faith job of keeping up sales and only when the reduction is not caused by a downturn in business.

For example, if an employe has routes A, B and C, and the Company does not reduce the routes, the employe is not protected from a loss of earnings if account A buys less Pepsi. If the Company removes account C, however, the employe is protected from the loss of earnings resulting from the removal of account C for a period of 19 weeks by the language of Article 21.6 of the agreement. But, again, the employe is not protected if account A has a downturn in business and buys less Pepsi since that is not part of the effect of the Company removing account A. The same is true if the Company removes account C of 100 cases and replaces it with account D of 50 cases. The language is meant to guarantee the difference between 50 and 100 cases, the effect of the Company's reducing the employe's route. It is not meant to protect the employe from loss of sales of the first 50 cases.

The Company presented credible testimony and evidence that it agreed to the then 12 week guarantee if the route reduction was the result of the Company's action, if the employe was conscientious in maintaining sales volume and if the reduction was not the result of a downturn in business. In essence, the Company said it would guarantee the employe a total gross amount not less than the total gross amount for the comparable period in the proceeding year for any reduction it caused. The comparison would be for the comparable time period from the year before, using the accounts of the employe. If the facts are any different than this, the Union did not prove them.

As to the Union's proposed second Issue, I hesitate to deal with it as it was not presented at hearing as an Issue to be decided in this case. But as it was argued in the Union's brief, and as the Company had a chance to reply but chose not to, I will address it, even though I have not included it in my framing of the Issue.

In essence, the Union argues that by changing its manner of determining downturn in business conditions after the Union filed the first grievance in this namer, the Company retaliated against the Union. Specifically, the Union argues that the Company was barred by the maintenance of standards clause from changing its procedure, and that said change in procedure violated the contractual right of Stewards to investigate and present grievances.

The Union presented no testimony or evidence to support its contention that the action of the Company amounted to retaliation. It relies, instead, on testimony of a Company witness who stated that, in determining whether a downturn in business conditions had occurred in 1990, the Company changed the scope of its review from key accounts to total accounts, and that the Company did so to insure consistency in the application of the 19 week guarantee. This testimony shows no malice, no hostility, to the Union's filing a grievance, nor was this testimony discredited in any way. The Union had brought a concern about the application of the 19 week guarantee to the Company, and the Company took action to eliminate this concern. On this record, I cannot find retaliation.

The Union argues that the Company was barred by the maintenance of standards clause from taking this action. The maintenance of standards clause states that "working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this Agreement." Nothing presented by the Union shows that the highest minimum standards were compromised by the Company's action; indeed, consistency in the determination of the 19 week guarantee has been increased. Certainly, this clause does not lock the Company forever into a procedure that is less consistent than it could be, a situation complained about by the Union itself. In addition, it is unclear how the action taken by the Company limits in any way the Union's ability to investigate and process grievances. Thus, I find no violations here.

For these reasons, I issue the following

AWARD

1. That the Company did not calculate the 19 week guarantee for the years 1989 and 1990 in violation of Article 21.6 of the collective bargaining agreement.

2. That the grievances are hereby denied and dismissed.

Dated at Madison, Wisconsin, this 19th day of June, 1991.

By James W. Engmann /s/
James W. Engmann, Arbitrator