BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between COCA-COLA BOTTLING COMPANY of CHICAGO (KENOSHA FACILITY) and TEAMSTERS, CHAUFFEURS and HELPERS LOCAL UNION NO. 43	Case 43 No. 45680 A-4780 (Suspension of M. Monday)

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North River Center Drive, Suite 202, Milwaukee WI 53212 by Ms. Naomi E. Eisman, appearing on behalf of Local 43, Teamsters, Chauffeurs and Helpers, IBT, AFL-CIO.

Mr. James Sollenberger, Manager of Human Resources, Coca Cola Bottling Company of Chicago, 7400 North Oak Park Avenue, Niles, IL 60648-3818 appearing on behalf of the Company.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Local 43, Teamsters, Chauffeurs and Helpers, IBT, AFL-CIO (hereinafter referred to as the Union) and the Coca Cola Bottling Company of Chicago (hereinafter referred to as the Employer or the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the disciplinary suspension of Mike Monday. The undersigned was so designated. A hearing was held on July 15, 1991 in Kenosha, Wisconsin at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. No stenographic record was made of the proceedings. The parties submitted post-hearing briefs. The record was closed with the transmittal of the Company's post hearing brief to the Union on August 12, 1991.

Now, having considered the evidence, the arguments of the parties, the contract language and the record as a whole, the undersigned makes the following Award.

ISSUE

The parties were unable to stipulate to an issue and agreed that the undersigned should frame the issue in his Award.

The Company proposes that the issue should be:

"Did the suspension of the grievant violate the Labor Agreement? If so, what is the appropriate remedy?"

The Union would frame the issue as:

"Was the grievant's penalty for having an on the job accident proper and, if not, what shall the remedy be?"

The difference between the parties' positions involves the Union's claim that the penalty is improper because the Company failed to respond to the grievance in a timely fashion, failed to issue the warning letter within the ten days specified by the labor agreement and because the penalty was clearly excessive. The Company does not agree that the procedural issues are present in this case because the grievance was filed before the final decision was made on discipline.

The issues may be fairly framed as follows:

1. Did the Company comply with the provisions of the Labor Agreement for responding to the grievance? If not, what is the remedy? and

2. Did the suspension of the grievant violate the Labor Agreement? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

ARTICLE 11. DISCHARGE OR SUSPENSION

Section 1. Non-probationary employees shall not be suspended or discharged without a prior written warning except for dishonesty, unauthorized passengers, conduct which seriously endangers employees or others, failure to perform assigned work unless the employee feels the assigned work is unsafe, use and/or possession of intoxicating beverages or illegal drugs while at work or on Company property. If the Employer has good cause to believe that an employee is under the influence of intoxicating beverages or illegal drugs, said employee shall be subjected to an alcohol or drug test for the purpose of determining if he is under the influence of intoxicating beverages or illegal drugs. Said test shall be paid for by

the Employer. It is expressly understood between the parties that if an employee suspected of being under the influence of intoxicating beverages or illegal drugs as set forth above refuses to take the alcohol or drug test, said employee shall be admitting guilt and his employment shall be terminated and he shall have no recourse under this Labor Agreement.

Section 2. For purposes of Section 1 above only, a written warning or suspension shall remain in effect for no longer than six (6) months. All warning notices must be given to the disciplined employee within ten (10) working days of the date of the Company's knowledge of the infraction.

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ARTICLE 12. MANAGEMENT RIGHTS

Section 1. The Union recognizes the right and responsibility belonging solely to the Company, prominent among it but by no means wholly exclusive are the rights:

A. to hire,
B. to promote,
C. To discharge or discipline for just cause and to maintain discipline and efficiency of employees,
D. To decide the products to be distributed, the locations of the plants, the schedule of distribution, the methods, process and means of distribution, and the control and selection of employees, including the right to require employees to observe reasonable Company rules.

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ARTICLE 18. GRIEVANCE PROCEDURE

Section 1. A grievance is defined to be any matter involving an alleged violation of this Agreement by the Company as a result of which the aggrieved employee maintains that his rights or privileges have been violated by reason of the Company's interpretation or application of the provisions of this Agreement.
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Section 3. The Company and the Union agree to the following system of presenting and adjusting grievances which must be presented and processed in accord with the following steps, time limits and conditions:

STEP 1: The aggrieved employee, with his union steward, if he desires, shall

discuss the matter with his immediate supervisor. If the grievance is not settled within three (3) working days following this discussion, the grievance shall, within such time, be reduced to writing and submitted to the grievant's immediate supervisor. The grievance shall be signed by the grievant and his union steward and shall set forth the nature of the dispute, the relief sought and shall refer to the specific provision or provisions of the contract alleged to have been violated. Within three (3) working days after receipt of a written grievance, the supervisor shall answer the grievance in writing.

If, however, the supervisor fails to write his decision of the issue within three (3) working days of the date the grievances were submitted in writing, then the grievance shall be in favor of the grievant and considered settled.

STEP 2: Such answer shall be final unless the grievance is appealed by written notice of appeal given to the Company's designated representative within three (3) working days after the supervisor has given his written answer in Step 1. The Company's designated representative shall discuss the grievance with the union representative at a time scheduled mutually by the Employer and Union.

STEP 3: If the grievance is not settled in the preceding step, the Union may appeal the grievance to arbitration by giving written notice of its desire to arbitrate to the Company within ten (10) working days after the date of the Company's final answer in the above step….

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The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement. He shall consider and decide only the particular issue(s) presented to him in writing by the Company and the Union, and his decision and award shall be based solely upon his interpretation of the meaning or applications of the terms of the Agreement to the grievance presented. If the matter sought to be arbitrated does not involve an interpretation of the terms or provisions of this Agreement, the arbitrator shall so rule in his award. The award of the arbitrator shall be final and binding on the Company, the Union and the employee or employees involved. The expenses of the arbitrator, including his fee, shall be shared equally by the Company and the Union.

Section 4. The parties agree to follow each of the foregoing steps in the processing

of a grievance. Any grievance not moved to the next step within the time limits provided will be considered settled.

Section 5. Extension of days to answer or move a grievance may be extended by mutual agreement.

Section 6. The foregoing procedure shall govern any claim by an employee that he has been disciplined without just cause.

Section 7. Employees shall comply with all reasonable work rules. Employees may be disciplined for violations thereof but only for just cause and in a fair and impartial manner.***

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BACKGROUND FACTS

There is little dispute over the facts of this case. The Company distributes beverages in the Racine-Kenosha area of southeastern Wisconsin. In so doing, it employs Route Salesmen who are represented by the Union. The grievant, Michael Monday, is a Route Salesman.

On January 28, 1991, the grievant left the Company's Kenosha facility with a fully loaded truck, about 45 feet long and weighing approximately 8,000 pounds. While the grievant was maneuvering down a side street shortly after leaving the plant, he hit a bump and his hand-held inventory computer slid off the front seat and onto the floor. The grievant felt the computer was blocking his right leg from the brake, so he reached down for it. As he reached down, he swerved his truck and hit a parked car, pushing it into another parked car. Both cars were damaged, with the one he hit directly later being declared a total loss for insurance purposes. The Company and its insurer paid out approximately $6,000 in settling the claims arising from the accident. The grievant was ticketed for inattentive driving, but the charge was reduced to improper parking by a plea agreement when it got to court.

The Company immediately served the grievant with an "EMPLOYEE DISCIPLINARY NOTICE". Under the heading titled "IDENTIFY PROBLEM REQUIRING CORRECTIVE ACTION" the Notice stated:

"SUSPENSION PENDING UNTIL FURTHER INVESTIGATION. 1/28/91"

Under the entry entitled "DISCIPLINARY ACTION", the Notice contains three lines of entires. It was marked with an "X" in front of two lines:

___ VERBAL WARNING ___WRITTEN WARNING __DISCHARGE EFF: _____.
_X_ SUSPENDED FOR _____WORKING DAYS _____BEGIN _____RETURN

X SUSPENDED INDEFINITELY PENDING INVESTIGATION EFF: 1/28/91

Two days later, on January 30th, he filed the instant grievance, contending that the suspension was inconsistent with past practice:

> "On Monday 1-28-91 I was suspended indefinitely because of a Accident that I had Monday morning. It has not been the practice of Coca Cola to suspend a driver for a accident in the past unless there was a series of them in a short period of time. This has been my first accident in 5 years, so therefore I am asking compensation for all lost time out of work."

Mark Stroinski, the Company's manager, signed the grievance form, but made no response to it. On February 5th, Union business agent Tom Berger sent a certified letter to Stroinski, informing him that, due to his failure to respond to the grievance, the Union was proceeding to arbitration. He asked that Stroinski schedule a meeting with him to select an arbitrator.

Berger and Stroinski met on February 11th and Berger told Stroinski that the failure to respond should lead to a settlement in favor of the grievant. The parties exchanged several settlement offers but were unable to resolve their differences. The Company indicated that it had still not made a firm decision as to whether the grievant would be terminated, suspended or reinstated. Stroinski said he would contact the Union regarding the selection of an arbitrator.

When Berger did not hear from Stroinski the next day, he sent another certified letter, enclosing a form requesting arbitrators from the FMCS. On the form, Berger indicated that the subject of the grievance was a discharge. The Company contacted Berger, telling him that it was not a discharge case. Berger crossed out "discharge" on the form and wrote in "suspension", but the Company refused to sign the request, saying they wouldn't sign onto a form containing a handwritten change.

On February 14th Berger and Stroinski met again and attempted to settle the grievance. The Company told the grievant that the matter had been decided and that he was reinstated, without backpay for the period between January 28th and February 13th which would constitute a disciplinary suspension. The Union stated that it was dissatisfied with the discipline and that the suspension was not an acceptable settlement.

On February 18th, the Company sent the grievant a letter summarizing its disposition of the case:

> TO: Mike Monday
> FROM: Mark Stroinski
> DATE: February 18, 1991

RE: Suspension

On Monday, January 28, 1991, you were suspended without pay pending an investigation of a motor vehicle accident you were involved in on January 28, 1991. At this time, you were told that a determination regarding your employment status with Coca-Cola Bottling Company would be communicated to you.

On January 28, 1991, your truck struck two parked automobiles. This resulted from your carelessness and inattention to your responsibilities as a driver. This is a direct violation of the following Rules of Personal Conduct:

18) Poor work performance, including carelessness, inefficiency, inattention to duties and violation of safety rules.

31) Recklessness resulting in a serious accident while on duty or on Company property.

33) Negligence causing damage or injury to property or person.

Such performance and conduct seriously endangered you as an employee as well as others.

Your past record also reflects a history of similar carelessness and inattention to your duties.

Consequently, please be advised that from January 28 through February 13, inclusive, you are being placed on suspension without pay. Furthermore, be advised that any further violations of Company policies, procedures, or practices could result in further disciplinary action up to and including termination.

The parties ultimately agreed to proceed to arbitration before the Wisconsin Employment Relations Commission, rather than the FMCS. Additional facts, as necessary, will be set forth below.

THE POSITIONS OF THE PARTIES

The Position of the Company

The Company takes the position that the grievant was properly suspended and that the grievance should be denied. Article 11.1 states, in relevant part, that: "Non-probationary employees shall not be suspended or discharged without a prior written warning except for … conduct which seriously endangers employees or others". This describes precisely the accident in

which the grievant was involved. The Union has not contested this point, and the contract on its face would have allowed discharge in this case. The Company chose the least restrictive practical option in disciplining the grievant.

Even if the arbitrator concluded that the grievant's conduct did not endanger anyone, it is clear that driving unsafely involves poor performance of one of the basic duties of the job. The grievant had received a written warning in November of 1990 for violating the "Inattention to Duty - Work Performance" rule. Thus he had been previously warned for the same type of offense and could be suspended under the contract.

The Company notes that an employee was terminated in January of 1988 for his first accident. The letter of discipline cited his violation of Rules of Personal Conduct relating to "poor work performance, including carelessness, inefficiency, inattention to duties and violation of safety rules." The letter also noted that the Company's accident review program called for termination in any instance of hitting a viaduct. Although the accident review program is no longer in effect at the Employer's Wisconsin facility, the Rules of Personal Conduct continue in force. Thus the suspension is consistent with past acts of discipline.

The accident, the Company argues, was solely the fault of the grievant and there were no mitigating circumstances. The Union argued at the hearing that Company was somehow responsible because drivers at the Milwaukee facility have a box built in to hold the computer, while drivers in Racine and Kenosha don't have any safe place to put their computer. The grievant, however, admitted that he was responsible for the safe operation of his vehicle under all circumstances. He ignored this duty by inexplicably taking his eyes off the road on a residential street when he reached down for his computer, rather than simply kicking the computer off to the side.

At the hearing the Company responded to allegations of the Union that the Company's answer to the grievance was untimely by noting that the actual penalty to be imposed was not determined until February 14th, and thus there was no grievable issue until that time. While Stroinski understood that he had to respond to grievances within the contractual time limits, the period of indefinite suspension prior to the 14th was imposed to allow an investigation, not as a penalty. Thus there was no need to respond to the grievance, since the grievance itself was premature.

In conclusion, the Company argues that it thoroughly and fairly investigated this incident and fully weighed the grievant's prior record, including his eight performance related disciplines in the preceding two years, and determined that a suspension was the least restrictive alternative available that still reflected the seriousness of the offense. For these reasons, the Company asks that the grievance be denied.

The Position of the Union

The Union takes the position that the grievance must be granted and the grievant made whole for his losses. The Contract requires that written responses to grievances be forthcoming within three working days of submission. The contract further requires that if the supervisor fails to respond within three working days "then the grievance shall be in favor of the grievant and considered settled." This grievance was submitted in writing on January 30th. There was never a written Company response to this grievance at any time. The Company did not even meet with the Union until February 11th. Since the Company failed to meet the strict procedural requirements of the grievance procedure, the grievance should be settled in the grievant's favor.

The Union also points to Article 11, §2 of the contract, which specifies that warning notices "must be given to the disciplined employee within ten (10) working days of the date of the Company's knowledge of the infraction." This accident occurred on January 28th, yet the grievant received a warning letter from the Company on February 18th. Thus the discipline is untimely under the contract, and invalid.

Even if the Company had complied with the timelines, the discipline in this case is obviously excessive. At the hearing, the Union cited five cases of employees who had been involved in accidents without suspension or termination. One of these employees had two accidents in a very short period and received only a reprimand. The Company was able to cite only one case of an employee who had lost pay for a first accident. In that case, the employee, who worked out of a different terminal than the grievant, hit a viaduct with his truck. The rules in effect at that time, under the accident review program, called for immediate termination for any incident of hitting a viaduct. The Company admits, however, that the accident review program is no longer in force at the Wisconsin facility. Given the distinctions between the two cases, the one termination the Company could identify should have no weight in determining the appropriateness of the penalty.

For all of the foregoing reasons, the Union asks that the grievance be granted and the grievant made whole for his loss of pay.

DISCUSSION

The initial issue in this case is whether the merits of the grievance may be addressed. The Union contends that the grievance should be considered settled in the grievant's favor because the Company failed to respond to the grievance within the time required by the Labor Agreement. The Company takes the position that no discipline was actually imposed until it informed the Union and the grievant on February 14th that he was reinstated as of that date, with no pay for the preceding two work weeks. Thus the grievance was premature and did not require an answer.

It is axiomatic that ambiguities in a contract should be interpreted against the forfeiture of any party's rights. The Labor Agreement in this case does not present any ambiguities in the area

of grievance processing. Article 18 §3 sets forth the express agreement of the Company and the Union to "the following system of presenting and adjusting grievances which *must* be presented and processed in accord with the following steps, *time limits* and conditions." Step 1 of the grievance procedure goes on to establish the time limits for filing grievances and the time limits for answering them: "Within three (3) working days after receipt of a written grievance, the supervisor *shall answer the grievance in writing*." … "If, however, the supervisor fails to write his decision of the issue within three (3) working days of the date the grievances were submitted in writing, *then the grievance shall be in favor of the grievant and considered settled…*" Section 4 of the Article reiterates the agreement of the parties to follow the time limits for processing grievances, and recites their agreement that failure to process the grievance according to the contract results in a settlement. Finally, Section 5 provides that extensions of time may be had only by mutual agreement of the parties. Thus if the Company was presented with a valid grievance, they were obligated to respond to it within three days or forfeit their right to contest it.

There is very little question but that the grievant submitted a written grievance form protesting the indefinite suspension. The Company's position is, in essence, that this grievance was improper because no discipline had yet been imposed. A grievance is defined in the Labor Agreement at Article 18, §1:

> Section 1. A grievance is defined to be any matter involving an alleged violation of this Agreement by the Company as a result of which the aggrieved employee maintains that his rights or privileges have been violated by reason of the Company's interpretation or application of the provisions of this Agreement.

On the day of the accident, the grievant was given a form headed "EMPLOYEE DISCIPLINARY NOTICE". The Notice stated that he was suspended pending further investigation. The Notice separately indicated that he was receiving a disciplinary suspension, although it did not specify the duration of the disciplinary suspension. Given this, the undersigned has some difficulty in crediting the Company's claim that no grievable event occurred until February 14, 1991. 1/ Any reasonable reading of the Notice given to the grievant indicates

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1/ While the Company contends that it was investigating the accident during the 16 days between the accident and the decision to reinstate the grievant without backpay, it is difficult to understand what exactly the focus of this lengthy investigation might have been. The grievant's work record was well known to the Company's managers. He admitted fault in the accident and there was no dispute over what had occurred, how it had occurred or the extent of the damage that had been caused. Most of this information was in the Company's possession when the grievant returned to the shop after the accident on the 28th. All of this information was in the Company's possession when the grievance was filed on the 30th.

that a disciplinary suspension was being imposed, but that the precise duration of the disciplinary suspension was not yet determined. The grievant certainly read it that way in submitting his grievance. His protest that suspensions had not been imposed on other drivers for their first accident presents a claim that his contractual right to be disciplined only for just cause had been violated. This meets the definition of a "grievance" under the Agreement and triggers the Company's obligation to respond.

As previously noted, interpretations resulting in a forfeiture are disfavored. It is an even more fundamental tenet of labor arbitration, however, that clear language must be applied as written. This principle underlies virtually every reported Award, and is set forth as a specific limit on the arbitrator's jurisdiction in the contract between these parties:

> *"The arbitrator shall have no right to amend, modify, nullify, ignore or add to the provisions of this Agreement*. He shall consider and decide only the particular issue(s) presented to him in writing by the Company and the Union, and *his decision and award shall be based solely upon his interpretation of the meaning or applications of the terms of the Agreement to the grievance presented. "* Article 18, §3 (emphasis added)

There is no latitude for interpretation of the specific time limits set forth in the grievance procedure of this collective bargaining agreement. To attempt to do so would constitute either amending or ignoring the terms of the contract. Since the grievant's protest on January 30th meets all of the requirements of a written grievance under the contract, the Company was obligated to answer it in writing within three days. 2/ The penalty for failing to do so, negotiated by the parties and set out in their Agreement, is settlement of the grievance in the grievant's favor. The grievance challenges the type of penalty imposed and demands compensation for all time lost from work. Accordingly, the undersigned directs that the grievant be made whole for lost wages and benefits for the period of his unpaid suspension.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

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2/ In light of the conclusion that the grievance was proper because the Notice indicated both an investigatory suspension and a disciplinary suspension, there is no need to consider the permissible length of an investigatory suspension without pay and the undersigned expressly declines to do so.

AWARD

The Company did not comply with the provisions of the Labor Agreement for responding to the grievance. The remedy required by Article 18, §3 of the Labor Agreement is awarding the grievance in favor of the grievant, and directing that he be made whole for all lost compensation during the period of the suspension from January 28th through February 13th, inclusive. The Company is hereby directed to make the grievant whole for his lost compensation.

Signed this 29th day of October, 1991 at Racine, Wisconsin:

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator