BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
TEAMSTERS LOCAL UNION NO. 43	Case 46 No. 47228 A-4899
and	
THE COCA-COLA BOTTLING COMPANY OF WISCONSIN	

Appearances:
Mr. John J. Brennan, Attorney at Law, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Riverc
Mr. Bradford L. Livingston, Attorney at Law, Seyfarth, Shaw, Fairweather & Gera

ARBITRATION AWARD

On March 25, 1992, Teamsters Local Union No. 43 and the Coca-Cola Bottling Company of Wisconsin filed a request with the Wisconsin Employment Relations Commission to have the Commission appoint a member of its staff to hear and decide a grievance pending between the parties. On April 10, 1992, the Commission appointed William C. Houlihan, a member of its staff, to hear and decide the matter. A hearing was conducted on August 17, 1992, in Kenosha, Wisconsin. The proceedings were not transcribed. Post-hearing briefs were filed and exchanged by September 25, 1992. This arbitration involves the three-day suspension of employe Gary Wash.

BACKGROUND AND FACTS

The Company is the exclusive distributor of Coca-Cola soft drink products in the Racine and Kenosha area. The region is divided into three territories, each headed by a district manager. Each district manager supervises 5 or 6 driver/salesmen. Each driver/salesman has a territory. In addition to selling and delivering the Company's products to existing route accounts, route salesmen are required to attempt to maximize sales by seeking additional displays and shelf space from existing accounts and by looking for new accounts. Route salesmen are directed to merchandise their accounts on a regular basis. Merchandising involves the cleaning and filling of shelves, and ensuring that accounts display "point of sale" advertising and promotions. Proper product rotation is also a responsibility of the driver/salesmen.

Driver/salesmen's routes consist of a variety of stops, which range from daily to weekly. Mr. Wash's three largest accounts in terms of sales, were all daily stops. They included Pick-N-Save, Ace Hardware and Sentry Foods. Route drivers' hours begin at approximately 7:00 a.m. and continue until the route is finished for that day. There is no mandatory work day or quitting time. Route salesmen are paid a base salary of $20.00 per day, relying principally on commission earned for their income. Thus, a route driver's income depends almost solely on what he sells.

Gary Wash, the grievant, has been a driver for the Company for 13 years. His route has one of the highest volumes of sales in the region. At the time of the incident in question, Mr. Wash had previously been subject to a written warning, issued in March of 1991 for unacceptable work performance. Wash had been cited for providing poor service to a smaller outlet for leaving that outlet messy, with unrotated product and having allowed competitors to take some of the Coca-Cola distribution space. No grievance had been filed over

that warning. 1/

The events leading to the discipline in this matter occurred on April 30, 1991. The previous day, April 29, the Ace Hardware account had requested Wash to deliver 340 cases of product the next day. A sale on product was on at the time, and the customer was aware that the Teamster contract was to expire on April 30, and it wanted to be sure to have the product on hand in case of a labor dispute. The parties had extended the contract indefinitely at the time. The Ace ad was scheduled to run on Thursday, May 2. Wash was interested in servicing the needs of this very large account. He wanted to get to the hardware store early, since the number of cases would take a significant amount of time to unload and display, and he did not want to be in the way of customers. Normally, Ace Hardware would not have been the first stop, rather, Sentry would have been. Sentry had a noon delivery deadline. There was no deadline applicable to Ace.

It was Mr. Wash's testimony that he called for two loads for April 30; his normal load and the special load for Ace Hardware. According to Mr. Wash, he intended to have a re-load situation, in which after delivering the special order to Ace Hardware, he would return to the warehouse to have his truck reloaded for his normal route. It was Wash's testimony that he decided not to put both loads on his truck because that would require him to jam the product in.

Upon arriving at the warehouse at approximately 7:00 a.m., on April 30, 1991, Wash discovered that his truck was not loaded. This was due to the fact that there was not enough of the sale product in the warehouse to fill the Ace order. Instead, the product was still on a late-arriving semi waiting to be unloaded. Consequently, Wash was required to wait for his truck to be loaded before he could leave for the day. By the time the truck was loaded, Wash was already significantly behind schedule. It was Wash's testimony that he started approximately two hours late. It is his testimony that he took the load to Ace Hardware, unloaded it and was not finished at Ace until approximately 10:30 a.m., or later. He was aware that he was running tight against Sentry's noon deadline. Since Sentry was on his way back to the warehouse, he stopped to see whether Sentry needed more product. It was his testimony that he arrived at Sentry, found the product level to be more than adequate, not necessitating any sale that day, straightened the product shelf and left. He thereafter returned to the warehouse for the normal load which would service the remainder of his accounts.

The Coca-Cola Bottling Company has computerized its inventory and delivery accounts. An ongoing system of recording is maintained by the Company. Company records indicate that Mr. Wash took his entire load at 7:54 a.m. According to Wash, he left a portion of that load on the warehouse floor. According to his supervisor, Dave Sherfinski, it would be extremely unusual, if not unheard of, for a driver to take a load and leave a portion of it on the floor. Any loss arising from the unprotected load being stolen would cost the driver. Company records show that Wash left the Ace Hardware store at 9:34 a.m.

It was the testimony of Dave Sherfinski that he came into the Sentry store somewhere between 11:00 a.m. and 12 Noon on the morning of April 30. He went to the Coca-Cola display and found at that time that there was a 60% sell-down on 2 liter Coke Classic. According to Sherfinski, it is unusual for the

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1/ The Company offered further evidence of prior discipline. The disciplinary incidents were taken into the record over the objection of the Union. Upon review, I believe those matters to be excluded by Article 11, Section 2, set forth below.

shelves to be so depleted. The display consists of 7 bottles across and 5 bottles deep for a total of 35 bottles. According to Sherfinski, the first and last rows were filled. That left the middle three rows empty. According to Sherfinski, had one bottle from the front row been removed, it would have left a hole. Sherfinski concluded that Wash had come in and simply pulled some stock to the front and failed to fill the shelves.

According to Wash, when he left the Sentry store, he returned to the warehouse for a reload. There is no tape reflecting a second load among the Company records. It is Wash's testimony that following his reload, he went to the Pick-N-Save store. The Company computer-generated tapes show him at the Pick-N-Save store at 11:11 a.m.

There was a dispute with respect to the formal Company policy on stocking. According to Sherfinski, he has been emphatic in directing drivers to keep the shelves stocked fully. It is in that context that drivers exercise judgment with respect to how much stock needs to be sold. Sherfinski testifies that it is absolutely inexcusable for 60% of the shelf to be left empty. According to Wash, the driver is to exercise discretion with respect to the allocation of his time and resources. It was his judgment that Sentry had plenty of stock left for the one day before he would return. Mike Monday, a union steward, testified. According to Monday, the drivers have the discretion to allocate their time and resources according to the perceived needs of their customers. On cross-examination, Monday indicated that if 60% of the stock was gone, the driver did not have the discretion to fail to replenish the stock. Monday indicated that if a driver had faced up only one row and left the space behind it empty, that would be wrong.

ISSUE

The parties stipulated to the following as the issue:

> Did the Company have just cause to issue the disciplinary suspension to the grievant? If not, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

> ARTICLE 11. DISCHARGE OR SUSPENSION
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> 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, being under the influence 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.

Section 3. Any employee who believes imposed discipline was without just cause may resort to the grievance procedure. Grievances over discharge or suspension shall be filed at step 2 within three (3) working days of receipt by the employee of the written notice of discharge or suspension.

Section 4. Discharges or suspensions not timely grieved under Section 3 of this Article, shall be deemed valid and shall not thereafter be subject to attack.

Section 5. The employee may be reinstated with or without backpay, or under other circumstances, pursuant to the terms of an agreement between the Employer and Union or arbitration award.

POSITIONS OF THE PARTIES

It is the position of the Union that the Company lacked cause to discipline the grievant. Subsequent to his suspension, the grievant was discharged. The Union points to the progressive discipline provision of the Agreement and cautions this arbitrator that the three-day suspension has now become a prelude to the discharge. If the three-day suspension is overturned, the Company is not free to discharge Wash. The Union believes that the seriousness of this discipline cannot therefore be exaggerated.

In its brief, the Union essentially points to the testimony of Wash and in that context contends that he was acting within the rule of reason. The Union notes that the Ace Hardware order was a big order from a big customer and that Wash was properly motivated to service that account. The Union points to Wash's testimony that he was unduly delayed on the morning in question and forced to change the sequence of account servicing. It was important to get the Ace order set up. Wash accomplished that. He subsequently stopped at the Sentry store, was satisfied that Sentry had sufficient product, faced off the shelf, and left. The Union relies upon Wash's testimony that the next day, before he was disciplined, he serviced Sentry again and only needed 8 cases to fill the entire display area. The Union points to the testimony of Wash and to that of Monday who indicated that Sherfinski had advised the workers that in a pinch, they were to face off the shelves and to be absolutely certain that the shelves were full on Fridays.

The Union points to the testimony of Wash which is more or less corroborated by Sherfinski that during the three days Wash was suspended the substitute driver was ordered to sell as much product as he could, a practice called "jamming". The result of a "jamming" is that the financial penalty to the suspended driver is magnified. In the Union's view, this is more evidence of the bad faith of the Company.

In the view of the Union, the Company's work rules were not negotiated. The drivers were not familiar with the rules and they should be afforded no significant weight. Similarly, it is the Union's view that the computer tapes can be inaccurate and they were not reviewed prior to the discipline. They too, are entitled to little weight.

In essence, what the Union is arguing is that Wash faced a judgment call on April 30. There is no hard and fast standard so far as the Union is concerned and Wash made the kind of call he is routinely required to make. The Company is now second-guessing that call. The Union questions the legitimacy of the Company's second-guessing insofar as neither the Sentry store owner (nor does the Ace owner) appear dissatisfied. The Union believes that Wash's true job is to satisfy his customers and that he has done so. Wash is paid on an incentive basis. His motive is to sell the product. There is no reason for him to be motivated to the contrary.

The Union points to the testimony of Wash and Monday that indicated that Sherfinski is a very aggressive, hard-driving supervisor. According to Monday, the number of disciplines has doubled since Sherfinski became a supervisor. Sherfinski is here attempting to second-guess Wash and any harm to any account is no more than de minimis.

The Company, relying upon the testimony of Company-called witnesses, believes it had cause to discipline the grievant. The Company relies upon the March 11, 1991 written warning as a progressive step for this suspension. On that date, Wash was not at work. Sherfinski accompanied the grievant's replacement and found a mess in at least one account site. A written warning was filed.

On April 30, Sherfinski visited the Sentry store immediately after the grievant left. He found that 60% of the stock was depleted. The Company notes that the soft drink industry is highly competitive, with little brand loyalty. The Company contends that it provides extensive training and predicates its compensation package on commission. In this instance, Wash had simply failed to stock the shelves. That, argues the Company, is the basic assignment going to the heart of what he is paid to do. The Company notes that both the grievant and the steward (Monday) admitted that the shelves should be filled beyond 40% capacity.

The Company contends that the grievant has a motive to lie about the state of the shelves and that the foreman does not. It is the view of the Company that the grievant had no intention of returning to the plant for more stock should Sentry have required it. The Company, pointing to its own computer records, contends that the grievant must have been fully loaded. It is foolish to only load 340 cases on a truck with a 1,000 case capacity, contends the Company. It is equally foolish for the driver to go to the Sentry store with an empty truck to check the stock.

The Company, through witnesses Sherfinski and Mark Stroinsky, the Division Manager, testified that at the grievant's hearing the grievant never claimed he went to Sentry with an empty truck or that he returned to the plant for a reload or that Sentry did not need product. According to the Company, all these defenses have first been raised at the grievance arbitration hearing.

The Company acknowledges that the grievant only sold one case of two-liter Coke Classic the next day. It argues that he must have used product in the back room to fill the shelves. According to the Company, Wash knew he was in trouble with Sherfinski before he left and acted accordingly.

DISCUSSION

I believe this dispute ultimately turns on whose version of the facts is accepted. If the facts are as Mr. Wash contends, he has indeed been victimized by a Company that has second-guessed his good faith efforts in making the kinds of judgment calls that are required. If on the other hand, the Company's view of the facts is sustained, it appears by all accounts that Wash took short cuts and got caught. A number of factual disputes underlie this discipline.

There is a dispute as to how much product was loaded on Mr. Wash's truck the morning of April 30. According to Wash, he took his Ace Hardware load only and left the remainder of his daily load on the floor. Company records show that he signed for the entire load and the form indicates that the entire load was loaded. Sherfinski testified that employes never leave portions of their load on the floor; that the Company does not permit it and that employes would be taking enormous financial risks by leaving their product on the floor. It was Sherfinski's uncontradicted testimony that the truck holds a capacity of 1,000 cases of soda. The combined total of the two loads was alleged to be 756 cases. That is the standard against which I am to judge whether or not Wash's testimony that loading both loads on the same truck, would have jammed the truck. On its face, it appears to me that it would not have done so.

A second issue over which the parties disagree is how well stocked the Sentry food store was. According to Wash, it was basically stocked; he completely stocked it with a fairly small sale the subsequent day. Wash indicated that he understood that he had the discretion to stock or not stock and was free to avoid stocking a shelf where he would have to break a case up in order to do so. Wash testified that while he could not recall just how much

stock the Sentry store required, it was his recollection that he was within the parameter of not breaking up a case when he determined not to stock it. Wash's testimony conflicts directly with Sherfinski's. According to Sherfinski, he was in the Sentry store approximately one-half hour to one hour after Wash left, and found 60% of the two-liter Coke Classic shelf empty. According to Sherfinski, the first row of bottles was unbroken indicating to him that no one had made a purchase of Coke Classic since it had been pulled forward, and he believed that he had arrived shortly after the shelf had been serviced. Sherfinski indicated that Coke Classic in a two-liter bottle is one of the Company's biggest-selling products and critical to its economic success. It appears to me that the testimony is not reconcilable. I believe that Sherfinski is to be credited in terms of his observation of the state of the shelf, I do not believe that Wash was accurately describing the state of the shelf.

There was a dispute as to whether or not any standard existed and if so what it was with respect to the direction drivers were under in stocking shelves. It was the testimony of the grievant that he had the discretion, particularly in a pinch, to do the best he could, and to see to it that there was enough stock to last a day and that he exercised this discretion. Sherfinski's testimony tended to indicate that he had given repeated directives that the shelves should be fully stocked at all times. I believe that the drivers operated under direction that they were to exercise judgment in the servicing of their routes. I believe that while Sherfinski might very much have desired to have shelves fully stocked, that drivers were not under a direct obligation to do so, without fail. I believe that the reality of their routes was such that they were free to exercise discretion under certain guidelines where such discretion was necessary in order to get the job done. However, Monday's testimony corroborates that of Sherfinski in that Monday indicated that if 60% of the two-liter Coke Classic display area was empty, a driver's discretion did not extend so far as to permit the driver to fail to stock that shelf that day for an account such as Sentry. Given my finding above, I do not believe that Wash acted within the scope of his discretion at the Sentry store.

There is a dispute as to what hour of the day Wash began his route. It was his testimony that he got started approximately two hours late. The tape indicated that he was out at 7:54 in the morning. That is a one-hour discrepancy. According to Wash, he serviced the Ace Hardware account, checked on the Sentry account, returned to the warehouse in order to pick up his second load, and thereafter proceeded to the Pick-N-Save store. Wash indicated that he left the Ace Hardware store somewhere in the neighborhood of 10 to 10:30 a.m.; that he proceeded to the Sentry store which took approximately 15 to 20 minutes. Company records indicate that he was at the Pick-N-Save store at approximately 11:11 a.m.

The Ace Hardware store ad was scheduled to run on Thursday. The events described in this proceeding occurred on Tuesday. Wash testified that he had been urged to get the display up because the owner/operator of the Ace Hardware store did not want to run the risk of having a work stoppage disrupt his proposed sale. By all accounts, the parties had agreed to extend the terms of the collective bargaining agreement indefinitely as of the events in question. This is noteworthy only in that Ace Hardware had no restriction on the hours of the day the drivers/salesmen were free to come into their stores. Both Sentry and Pick-N-Save were operating under such restrictions.

During the grievance hearing, Wash testified that the times he could recall were approximate at best. This was so because he did not wear a wristwatch. The truck that he drives has a clock on its computer. It was Wash's testimony that he did not look at his vehicular clock. I find this testimony baffling inasmuch as Wash explains a considerable amount of the

confusion and whatever service faults occurred because of his concern that he was under considerable time pressure. It appears to me that if the man genuinely felt that he was two hours behind in his route, at some point in the day he would have found some timepiece to confirm that view.

Essentially, I credit the testimony of the various Company witnesses. I have directly conflicting testimony between Wash and Sherfinski. There is directly conflicting evidence between the employer's computerized time and loading records and the testimony of Mr. Wash. It appears to me that Wash's testimony that he would have had to jam his two loads on the truck is inconsistent with the capacity of the truck and the size of the loads described. The computer tape shows that Wash was carrying enough two-liter Coke Classic to service the Sentry account at the time he was there. Wash, of course, contends that that portion of his load was sitting on the warehouse floor at the time.

On balance, I find Wash's testimony to be inconsistent with the testimony and physical evidence that surrounds this dispute.

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 23rd day of December, 1992.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator

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