BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL NO. 662

and

MIDWEST COCA-COLA BOTTLING COMPANY

Case 51
No. 55792
A-5633
(Annual Guarantee)

Appearances:

Miller & Miller, LLP, by **Attorney Ronald G. Ingham**, 1000 Volunteer Building, 832 Georgia Avenue, Chattanooga, TN 37402-2289, appearing on behalf of Midwest Coca-Cola Bottling Company, a Division of Coca-Cola Enterprises, Inc.

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., by **Attorney Andrea F. Hoeschen**, P.O. Box 12993, Milwaukee, WI 53212, appearing on behalf of Teamsters Local Union No. 662.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Local Union No. 662 (hereinafter referred to as the Union) and Midwest Coca-Cola Bottling Company (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen as arbitrator of a dispute over the payment of an annual guarantee to employes. The undersigned was so designated. A hearing was held on March 16, 1999, in Schofield, 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. The parties submitted post-hearing briefs, which were exchanged through the arbitrator on April 30, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The issue before the arbitrator is whether the Company violated the collective bargaining agreement's annual guarantee provision and, if so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

1995 Collective Bargaining Agreement

. . .

II. Wages for Contract Period.

A. Full Time Employees.	1/1/95	1/1/96	1/197 (sic)
(1) Distribution			
a. Hourly (bulk) Delivery Driver	$13.52	$14.02	$14.42
b. Merchandisers	$8.80	$9.20	$9.60
c. Commissioned Delivery Driver	$372/wk $74.40/day .09/unit	$387/wk $77.40/day .09/unit	$405/wk $81.00/day .09/unit
(2) Cooler Service			
a. Cooler Service	$13.63	$14.03	$14.43
(3) Warehouse			
a. Warehouse	$13.09	$13.49	$13.89
(4) Reload Drivers			
a. Reload Drivers	$13.25	$13.65	$14.05
B. Part-Time Employees.			
a. Delivery	$9.80	$9.80	$9.80
b. Warehouse	$7.40	$7.40	$7.40
c. Reload Driver	$9.40	$9.40	$9.40
d. Merchandisers	$8.15	$8.15	$8.15

III. Fringe Benefits. Fringe Benefits for Base & Commission Drivers will be paid at bulk (hourly) rates, with longevity pay calculated on a quarterly basis.

IV. It is agreed that a re-open of the contract may take place, at the Union's request, and for this purpose only, to evaluate drivers' hours if the yearly average of drivers weekly hours exceed fifty (50).

V. Part-time Merchandiser Positions. Part-time Merchandiser positions will be staffed at a maximum of four (4) in each location. The part-time number may increase on a one (1) for one (1) ratio with the staffing of one (1) full time merchandiser position with each additional part time merchandising position.

VI. Bi-Weekly Pay. All Employees covered by this Agreement shall be paid on a bi-weekly basis.

VII. The base plus commission drivers will receive an annual guarantee based on the previous year's W-2 before any difference is applied to previous year's W-2 (base, commission and COT).

. . .

1992 Collective Bargaining Agreement

. . .

Wages for Contract Period.	1/1/92	1/1/93	1/1/94
A. Full time employees			
(1) Class A			
a. Hourly (bulk) Delivery Salesperson	$12.42	12.82	$13.22
b. Commissioned Delivery Salesperson	$12.42	$71/day .09/unit	$71/day .09/unit
(2) Class B			
a. Cooler Service	12.43	12.83	13.23
(3) Class C			
a. Warehouse	11.89	12.29	$12.69
b. Reload Driver	12.05	12.45	12.85

B. Part-time Employees			
a. Delivery	9.00	9.40	9.80
b. Warehouse	7.35	7.75	8.15
c. Reload Driver	8.60	9.00	9.40
d. Merchandisers	6.60	7.00	7.40

In addition, Base & Commission Drivers have a guarantee that earnings the first 12 months of implementation (1/1/93-12/31/93) will be equal to or better than earnings received during the 12 months prior to implementation; second year earnings (1/1/94 - 12/31/94) to be equal to or better than earnings received (Base & Commission or guarantee) during the first 12 months of implementation.

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BACKGROUND

The Company distributes a well-known line of soft drinks from facilities in Wausau and Eau Claire, Wisconsin. The Union is the exclusive bargaining representative of the Company's non-supervisory employes, including drivers. Prior to the 1992 contract, sideload drivers were paid on a straight hourly basis. In negotiations over the 1992-94 contract, the Company proposed to switch sideload drivers to a base plus commission compensation plan effective in 1993. The Union resisted the change, but ultimately accepted, after the Company agreed to guarantee the annual earnings of the sideload drivers against any reduction:

(1) Class A			
a. Hourly (bulk) Delivery Salesperson	$12.42	12.82	$13.22
b. Commissioned Delivery Salesperson	$12.42	$71/day .09/unit	$71/day .09/unit

. . .

In addition, Base & Commission Drivers have a guarantee that earnings the first 12 months of implementation (1/1/93-12/31/93) will be equal to or better than earnings received during the 12 months prior to implementation; second year earnings (1/1/94 - 12/31/94) to be equal to or better than earnings received (Base & Commission or guarantee) during the first 12 months of implementation.

In negotiations over the successor agreement to the 1992-94 contract, the Union initially proposed to return to an hourly compensation system, while the Company proposed to keep the base plus commission system and eliminate the annual guarantee. One specific

concern the Union raised about the 1992-94 language was that in making comparisons of a year's earnings to the prior year's earnings, the Company was taking credit for the guarantee payments as income in the year in which they were paid, rather than as earnings for the prior year. As the parties moderated their proposals, with the Company agreeing to retain a guarantee and the Union agreeing to continue the base plus commission system, the Union proposed a change in the language for the guarantee that would eliminate the double counting of guarantee payments. The parties exchanged proposals, with the Company doing the bulk of the language drafting work. An agreement was ultimately reached on a Union proposal to use the previous year's W-2, prior to any adjustments, as the basis for comparison.

After the agreement was reached, the Company prepared a draft of the new contract. Union representative Mike Thoms reviewed the draft, and noted two items had been omitted, including the new guarantee language. He wrote to Company spokesperson William Cahill, and brought the omissions to his attention:

August 9, 1995

William P Cahill
Regional Human Resources Manager
Midwest Coca-Cola Bottling Company,
PO Box 500
Shawnee Mission Kansas 66201-0500

EAU CLAIRE AND WAUSAU CONTRACT REVISIONS

Bill, I have finally completed the process of proofreading the above captioned agreement. I apologize for the delay.

The only areas of disagreement are as follows:

1. Page 21, ARTICLE 11.1 HOUSE RULES - WARNING -DISCHARGE

   We had previously agreed to eliminate the following paragraph (third paragraph):

   The Company further agrees that when any Employee shall be discharged for any cause other than those enumerated above and as a result of the receipt of two (2) notices within a six (6) month period, the Company will, at its election, either 1) give said employee at least one (1) week's notice in advance of the discharge, or 2) pay such an Employee an amount equal to forty (40) times his regular straight time hourly rate, it being understood and agreed that the Company may elect to give notice or to make payment as above provided and that the sole right of the

Employee if the cause for discharge assigned by the Company shall not be sustained, shall be to collect and recover the above provided for sum equal to forty (40) times his regular straight time hourly rate.

2. Page 29. APPENDIX "A" .

The following language should be added as previously agreed:

VII. The base plus commission drivers will receive an annual guarantee based on the previous years W-2 before any difference is applied to previous years W-2 (base, commission and COT).

Other than these two issues, it appears to me that everything else seems to be in order. Once these changes are made please send me at least two (2) signed originals for the Union and as many signed copies as you need for the Company, which Dave Reardon and I will, in turn, sign and return to your office.

Please contact me should you have any question relative to these corrections.

Yours truly,

Michael R Thoms
Business Agent

pc Brian LaVelle, Dave Reardon, Mark Schroetter, Dan Alexander

With these additions, the new contract was signed by both parties.

In May of 1997, the instant grievance was filed. The grievance arose because the Company had interpreted the new contract language as requiring a comparison of base, commission and calculated overtime for one year with the base, commission and calculated overtime for the prior year, and paying a guarantee based on that, while the Union believed that the gross earnings, including earnings in an hourly position, were the correct basis for comparison. The grievance was not resolved in the lower steps of the grievance procedure, and it was referred to arbitration.

At the arbitration hearing, in addition to the facts recited above, Company negotiator William Cahill testified that there was very little discussion of the new language at the bargaining table, but that he viewed the reference to "base, commission, and COT" as an important and rational distinction, since commission drivers serve different customers than do hourly drivers, and because the costs of delivery are accounted for differently. Cahill testified that applying the guarantee only to the commission related elements of compensation made sense as the transition from a pure hourly wage system to a pure base plus commission system

progressed. The 1992 contract guaranteed gross earnings for the first two years of implementation because the commission system was new and there was, understandably, a good deal of anxiety about it. The 1995 contract language reflects a later stage in the evolution, by excluding hourly earnings from the calculation. Cahill noted that he had negotiated five labor contracts in the industry containing guarantees, and all were limited to base, commission and COT.

On cross-examination, Cahill testified that it was the Union that proposed the reference to a "W-2," but that he drafted the ultimate contract language. He agreed that drivers on base plus commission could be assigned to hourly work in bulk deliveries, the cooler and the warehouse during the year, and that holidays and some leave time was paid on an hourly basis. He expressed the opinion that base plus commission drivers were not paid an hourly wage for vacation hours, but were instead paid on a formula based on base plus commission earnings. Thus, vacation pay would not be excluded from guarantee calculations. He subsequently retracted this testimony when it was shown that vacations were paid hourly, and agreed that vacation pay would be excluded from guarantee calculations. He explained that his original interpretation was based on other contracts in the industry. In response to a question from the arbitrator, Cahill agreed that limiting the basis of comparison for the guarantee made it possible for an employe to receive a guarantee payment for a year in which he actually earned more in gross income, depending on how much of his income was hourly and how much was base plus commission as compared to the prior year.

Additional facts, as necessary, will be set forth below.

ARGUMENTS OF THE PARTIES

The Arguments of the Union

The Union takes the position that the clear language of the contract and the intent of the parties in negotiations both dictate a finding in its favor. Moreover, the Union contends, management's position would lead to illogical results. The contract clearly states that the comparison for calculating the annual guarantee is from one W-2 to the next W-2. W-2's show only gross earnings. Thus, the parties must be held to have intended a comparison of gross earnings to gross earnings. Otherwise the reference to a W-2 is meaningless.

The Company's reliance on the 1995 contract's parenthetical reference to "base, commission, and COT" [calculated overtime] is misplaced. The prior agreement also had a parenthetical reference to base, commission and guarantee, but the Company admits that it did not affect the underlying pledge that no driver would lose earnings. The 1992 contract said:

> In addition, Base & Commission Drivers have a guarantee that earnings the first 12 months of implementation (1/1/93-12/31/93) will be equal to or better than earnings received during the 12 months prior to implementation; second

> year earnings (1/1/94 - 12/31/94) to be equal to or better than earnings received *(Base & Commission or guarantee)* (emphasis added) during the first 12 months of implementation.

In 1995, this was clarified to read:

> VII. The base plus commission drivers will receive an annual guarantee based on the previous year's W-2 before any difference is applied to previous year's W-2 (*base, commission and COT*) (emphasis added).

As the parenthetical had no effect in 1992, it should be held to have no effect in the 1995 contract. The only real change in the parenthetical was to eliminate the reference to the guarantee, and this was done at the Union's urging solely to stop the Company from double counting the guarantee payment.

There is no dispute over the intent of the guarantee language in the 1992 contract. It was an income protection device, and it prevented the drivers from losing any income year to year as the result of agreeing to the Company's base plus commission scheme. There is no evidence whatsoever that the parties intended to change this pledge when they negotiated the 1995 contract. There was no discussion of that, and the only change in the guarantee language was the Union's proposal. Even if there is some ambiguity, the arbitrator must enforce the contract in a manner consistent with the evident intent of the parties.

The Company's proposed interpretation of this provision would lead to bizarre results. If hourly wages are eliminated from the calculation, employes will be enriched by accumulating additional vacation time, since that is paid on an hourly basis. Moreover, employes are frequently assigned to perform hourly-paid work. If this is excluded from the comparison, an employe who does not actually lose any income may, nonetheless, qualify for the guarantee. That serves no purpose.

For all of these reasons, the Union urges that the grievance be sustained and the grievants made whole.

The Arguments of the Company

The Company takes the position that the Union is seeking to evade the clear language of the contract. In the 1991-94 contract, when the concept of base plus commission was first introduced, the Company agreed to a very generous guarantee as an incentive for the Union's agreement. The language guaranteed no diminution of "earnings." This guarantee was changed and limited by the 1995 contract. The language makes the scope of the compared year to year for the guarantee absolutely clear: base, plus commission, plus calculated overtime. It makes no sense at all to include income earned in other hourly-paid

classifications. There is no logical relationship between a change to base plus commission for drivers, and work

performed in some different hourly-paid classification. Where there is a mixing of hourly and commission duties, the only reasonable approach is to extrapolate an annual figure from the commission portion of the earnings and use that as the basis for comparison.

While the 1991-94 contract allowed comparisons between one year's overall earnings and the next year's overall earnings, that was purely a transitional agreement. The 1995 agreement defined the guarantee in terms more rationally related to its purpose by defining the three components to be compared -- base, commission and calculated overtime. The contract is utterly silent as to any other guaranteed component, and there is no basis for inferring that others exist. The change in the language from the 1991 contract to the 1995 contract signals a change in intent. The current contract language is clear, and the arbitrator must respect the parties' agreement. For these reasons, the grievance must be denied.

DISCUSSION

Clear Language, Latent Ambiguity and Patent Ambiguity

The role of the arbitrator is to uphold the intent of the parties in applying contract language to any grievance. The steps in determining intent depend upon the specific language at issue. The familiar rule is that clear and unambiguous language is to be applied, since the intent of clear language is obvious, while ambiguous language is to be interpreted first, so as to determine the intent of the parties. Language is clear where it is susceptible to but one interpretation. Language may be said to be ambiguous where reasonable contentions may be made for competing interpretations. The language at issue in this case is found in Subsection VII of Appendix "A" in the 1995-97 contract:

> The base plus commission drivers will receive an annual guarantee based on the previous year's W-2 before any difference is applied to previous year's W-2 (base, commission and COT).

Both parties contend that this language is clear and unambiguous as to the basis for comparing wages from year to year, and both are right as far as it goes. The term "W-2" in the body of the sentence refers to a specific document, showing gross earnings, and the Union correctly argues that term can only be understood to refer to gross earnings as the basis for comparison. That is what the sentence says. The terms “base, commission, and COT” in the parenthetical refer to discrete components of annual earnings, and the Company correctly argues that those terms must be understood to limit the year-to-year comparison to those three components. Read in isolation from each other, both portions of the cited sentence are perfectly clear. Read together, they are mutually exclusive and the sentence is incoherent.

Where seemingly clear language conflicts with other seemingly clear language, the contract may be said to be latently ambiguous. Where the conflict appears in the same sentence of the contract, the provision is patently ambiguous.

The Principles of Interpretation

The principles applied in interpreting ambiguous language fall into four general categories:

1. Those which look to the normal usage of language; 1/

2. Those which look to the conduct of the parties in negotiating and administering the contract; 2/

3. Those which look to the identity of the parties; 3/

4. Those which look to the effect of one permissible interpretation as compared to the effect of another permissible interpretation. 4/

1/ See headings entitled "Normal and Technical Usage," "Agreement to be Construed As A Whole," "To Express One Thing Is To Exclude Another," "Doctrine of 'Ejusdem Generis," "Specific Versus General Language" and "Construction In Light Of Context" in Chapter Nine of Elkouri and Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), (hereinafter cited as "Elkouri") at pp. 342-365.

2/ See headings entitled "Precontract Negotiations," "Custom and Past Practice of the Parties," "Prior Settlements as Aid to Interpretation" and "Interpretation Against Party Selecting the Language" in Chapter Nine of Elkouri; See also Chapter Twelve of Elkouri "Custom and Past Practice" at pp. 437-456.

3/ See headings entitled "Experience and Training of Negotiators" and "Industry Practice" in Chapter Nine of Elkouri.

4/ See headings entitled "Construction in Light of Law," "Avoidance of Harsh, Absurd, or Nonsensical Results," "Avoidance of a Forfeiture" and "Reason and Equity" in Chapter Nine of Elkouri.

The Normal Use of Language

Language should be given its normal meaning. As noted above, the main body of the disputed sentence strongly supports the Union's position that the annual guarantee remains a guarantee of gross earnings, rather than just limited components of annual earnings. Standing alone, it is a complete thought. The parenthetical reference at the end of the sentence to "base, commission, and COT" can only have meaning in reference to the sentence that precedes it. It is not, by itself, a complete thought. The difficulty in relating it to the main sentence is that it must be taken to relate to "W-2" but listing “base, commission, and COT” does nothing to clarify the term "W-2." W-2 is a specific document that lists specific information, and “base,

commission, and COT" are not broken out on the W-2. The parenthetical might plausibly be read as a listing of some of the components of the gross income totals on the W-2, but there really is no need for such a listing of examples, and that is not how it is styled. Taking the language at face value lends some support to the Union's theory of the case, but only if the parenthetical is ignored. Parties are generally presumed to have intended that their language be given meaning, and an interpretation that renders a piece of contract language surplusage is strongly disfavored in arbitration. Thus consideration of the normal rules of language shed little light on the meaning of the contract's annual guarantee provision.

Conduct of the Parties - Past Practice and Bargaining History

A frequently relied-upon factor in analyzing ambiguous language is how the parties conducted themselves before the dispute arose. There are two aspects to this analysis. The first, and most common, is how the parties have applied the language over time. Past practice is not particularly helpful in this dispute, since the grievance arose after the language was changed in negotiations. The practice that existed came about under the old language, not the new, and tells nothing about the accepted meaning of that new language. The second pertinent inquiry is what the parties said and did in the course of bargaining the language. In contrast with past practice, bargaining history is quite instructive in this case. Aside from the Company's initial proposal to eliminate the guarantee, the only substantive discussions of it at the bargaining table centered on the Union's demand that the Company stop counting the payment of the guarantee as income for the year in which it was paid rather than the year in which it was earned. That was ultimately accomplished by the specification of using the W-2 as it stands "before any difference is applied." During his testimony, Cahill gave a very cogent explanation of why the Company might have wished to limit the guarantee to base and commission related items, and how this could rationally be viewed as a natural evolution of the guarantee language. However, Cahill never claimed to have shared these thoughts with the Union's bargaining committee, nor to have told them that he intended to change the scope of the guarantee from gross earnings to commission-related earnings.

Statements of intent at a bargaining table cannot change the meaning of clear language, but they are valuable in determining the meaning of ambiguous language. Here the parties had a system that guaranteed gross earnings. The Company proposed to eliminate the guarantee, but backed off that proposal. The Union proposed a specific change in the way it was being calculated, to address a specific situation. The Union's concern is what was discussed. The parties exchanged proposals and ultimately agreed on a sentence that continued the gross earnings system and addressed the Union's concern, but was followed by the parenthetical phrase "base, commission and COT." The Company urges that this parenthetical phrase can only be taken as proof that the parties meant nothing by the term "W-2" and really intended to replace the gross earnings guarantee with a much narrower guarantee. It is very difficult to understand why the Union would have agreed to such a fundamental change without any discussion of it across the table, nor even a direct request by the Company for the change.

Consideration of the parties' bargaining history over the guarantee strongly supports the interpretation urged by the Union.

Identity of the Parties - Industry Practice

The Company argued, based on Cahill's testimony, that the practice in the industry is to limit earnings guarantees to base, commission and COT. That may well be the prevailing pattern in the industry, but without knowing what language is used in the other contracts and comparing it with this language, it is not possible to draw a meaningful conclusion. I would note that Cahill also testified, based on industry practice, that vacation pay under this contract was based on a calculation of base and commission, then retracted this testimony when it turned out that it was paid on an hourly basis. This observation is not intended as a criticism of Cahill. It merely illustrates the fact that there is a wide variation between contracts and practices even in the same industry. Consideration of this factor does not favor either party's interpretation.

The Effects of One Interpretation vs. Another

Given the choice between two permissible interpretations, one of which leads to harsh, absurd or nonsensical results and the other of which doesn't, an arbitrator should favor the latter interpretation. The Company makes the reasonable argument that a guarantee system that looks at the gross mix of hourly and commission earnings in the context of introducing a base plus commission system of compensation does not compare apples to apples. This argument makes some sense from the Company's point of view. However, from the Union's point of view, it makes perfect sense to guarantee gross earnings. Employes do not control the mix of hourly and commission based pay in their annual incomes, and from the workers' perspective, overall annual earnings are the important issue. Thus, a guarantee of annual earnings cannot be said to be harsh, absurd or nonsensical.

For its part, the Union points out that the Company's interpretation, which makes guarantee payments based solely on a comparison of base, commission and calculated overtime and excludes hourly income, can lead to ridiculous results. Employes who earn more in gross pay in a given year because of hourly work, but whose base plus commission earnings are down, will receive a guarantee payment, but those whose situation is the mirror image and who earn a lower annual gross but with a higher base and commission component, will not receive the guarantee payment. I agree that this is a peculiar result, particularly since every employe's vacation is paid on an hourly basis, and under the Company's interpretation in the year in which vacation entitlement increases with seniority, there would be a nominal drop in earnings from base plus commission. This is not so peculiar a result as to rule out the Company's interpretation, but it does demonstrate a conceptual flaw.

Consideration of this factor provides some support for the Union's interpretation, but overall it does not carry conclusive weight in arriving at the ultimate conclusion.

CONCLUSION

The main body of the sentence in the guarantee provision is clear, and it supports the Union's position. The items listed in the parenthetical at the end of the sentence are clear, and they support the Company's position. The conflict between the two sections of the provision creates a patent ambiguity. Even though the sentence supporting the Union's position is a complete thought, and the parenthetical items are not, the sentence cannot be read as if the parenthetical was not there. Thus, the ambiguity cannot be resolved through reference to the rules governing the normal use of language. Analyzing the bargaining history underlying the provision very strongly supports the Union's interpretation, since the then-existing language compared gross earnings to gross earnings, the discussion across the table centered on changing how the guarantee was counted against income, and there was no discussion of changing the basis of comparison. A move from a gross basis to a commission basis of calculation is a very significant change in the philosophy and the value of the guarantee, and it is virtually impossible to imagine the Union agreeing to this change with no discussion, nor even a clear Company request for the change. Finally, the Company's interpretation leads to peculiar results, in that it creates the potential for workers who experience an increase in gross earnings to receive a guarantee payment, while those who experience a decrease in gross might not qualify. On balance, it is not possible to perfectly explain the conflict in the sentence. It is oddly drafted and there is no way to get around that fact. However, the weight of the parole evidence concerning the intent of the parties supports the Union's contention that the proper basis for comparison is gross earnings to gross earnings, including hourly earnings.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

The Company violated the collective bargaining agreement's annual guarantee provision in 1996 by failing to compare gross earnings from the 1996 unadjusted W-2 with gross earnings from the 1995 unadjusted W-2 in calculating eligibility for and the amount of the guarantee. The appropriate remedy is to recalculate the guarantee paid to the four grievants for 1996.

Dated at Racine, Wisconsin, this 3rd day of August, 1999.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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