BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION, LOCAL 662, AFL-CIO

and

QUALITY VENDING SERVICES

Case 2
No. 59957
A-5938

(Terry Albrecht et al Grievance)

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, appearing on behalf of the Union.

Mr. Paul Boettcher, President and General Manager, Quality Vending Services, appearing on behalf the Employer.

ARBITRATION AWARD

General Teamsters Union, Local 662, AFL-CIO (herein the Union) and Quality Vending Services (herein the Company) were parties to a collective bargaining agreement covering the period from October 10, 1999, to March 31, 2001, and providing for binding arbitration of certain disputes between the parties. On May 16, 2001, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the alleged failure of the Company to pay commissions earned by bargaining unit members Terry Albrecht, Eric Guerts and Mark Martell (herein the Grievants) in violation of the collective bargaining agreement, and requested the appointment of a member of the WERC staff to arbitrate the issue. The undersigned was designated to hear the dispute and a hearing was conducted on October 3, 2001. The proceedings were not transcribed. The parties filed briefs on October 24, 2001, and the record was thereupon closed.

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.

ISSUES

The parties stipulated to the following framing of the issues:

Did the Company violate the collective bargaining agreement in the amount of commissions it paid to the Grievants for the weeks ending November 11, 2000, and November 17, 2000?

If so, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

SCHEDULE "A"

. . .

Section 1. The wage rates for employees working in the following classifications during the term of the agreement shall be as follows:

	First Year	**After 1 Year**
Route Drivers-	First $4,000 - $236.00	First $4000 - $256.00
	Next $2,000 - 5.5%	Next $2000 - 6%
	Over $6,000 - 6.5%	Over $6000 - 7%

. . .

Starting rates for new employees:

4 – 8 weeks **$7.50 per hour**

Thereafter to receive the rate of the job

It is agreed that new employees that start may have experience in their relative classification and, if so, they may be paid commensurate with their experience up to the top rate of pay in their classification.

. . .

BACKGROUND

Prior to November 17, 2000, the Company owned and operated a vending machine service in Eau Claire, Wisconsin, and employed route drivers to service and supply the Company's machines throughout the area and collect the money therefrom. The Grievants

were all route drivers for the Company during the period in question. According to the collective bargaining agreement, new route drivers were paid $7.50 per hour during their training period of four to eight weeks. Thereafter, they were paid a base weekly wage and an additional commission on all monies collected from their routes in excess of $4,000 according to a schedule in the agreement. In their first year of employment, route drivers received a commission of 5.5% on receipts between $4,000 and $6,000 and 6.5% on receipts over $6,000. Thereafter they would receive 6% on receipts between $4,000 and $6,000 and 7% on receipts in excess of $6,000. Further, pursuant to long-standing Company practice, wages and commissions were calculated and paid biweekly, with the commissions being based on collections during the two-week period ending two weeks prior to any given payday. For example, if a payday occurred on the 30th of the month, the commissions paid out would be based upon collections during the two-week period ending on the 16th of the month, thus establishing a two-week lag between collection and the payment of commissions.

In November, 2000, the Company was purchased by Canteen Co., which intended to continue operation of the business and, in fact, did so, retaining the former Quality Vending employees, as well. In its negotiations with Canteen Co., the Company explained its practice of paying commissions on a two-week delay and was under the impression that Canteen Co. would continue the practice without interruption, although this understanding was not reduced to writing, nor did Canteen Co. apparently make any such representations to the Union.

As part of the sales agreement, the seller was entitled to all money collected out of the vending machines up to the date of transfer, which turned out to be November 17. The Company, therefore, instructed its route drivers to collect all the money out of all the machines on their routes before the transfer, which they did, and informed the employees that it would pay them an additional $18.00 per hour for all overtime put in during the final two days, although not required by contract. November 17 also coincided with the end of a biweekly pay period. Thereafter, they received their final paychecks from the Company, representing their wages for the final two weeks and commissions for the period from October 22 through November 4 and were told by the Company's management that their commissions for November 5-17 would be paid by Canteen Co. in two weeks according to the established practice. This did not occur. Subsequent to the change in ownership, Canteen Co. disavowed responsibility to the Grievants for commissions on collections prior to the date of sale, since the money upon which the commissions were to be based was retained by Quality Vending. Thereafter, Canteen Co. paid the route drivers according to the schedule in the collective bargaining agreement, but on a weekly basis, rather than biweekly.

Subsequent to the change in ownership, the Company learned that Canteen Co. refused to pay commissions for the final two weeks prior to the sale. It then issued supplemental checks to the Grievants to make up some of the loss. The amount of the checks was based upon an average of the collections made by the Grievants during an 11 week period between August 19 and November 4. As a result, the Grievants received as follows: Terry Albrecht - $260.72, Eric Guerts - $292.42, Mark Martell - $253.66. The Grievants calculated that for

the two-week period in question, they were entitled to $1285.43, $1557.13 and $1390.18, respectively and, therefore, filed a grievance on December 7, 2000, seeking the balance of the money they deemed was owed to them. The grievance was processed through the procedure set forth in the collective bargaining agreement and the parties were unable to settle the dispute. Additional facts will be referenced, as needed, in the discussion section of this award.

POSITIONS OF THE PARTIES

The Union

The Company contends that there is a past practice that employees who quit or retire do not receive their last two weeks' commissions and that, therefore, the Grievants are not entitled to the commissions they are seeking here. According to the "lag" built into the system, the Grievants are only entitled to commissions on monies collected up to two weeks prior to the transfer. This practice does not meet the requirements of clarity, consistency, longevity, repetition and acceptability which are necessary to form a binding practice. There is no documentary evidence of such a practice, and the Union witnesses at the hearing testified they were unaware of it. Had such a practice been known, the Union would have grieved it.

The Company admits it did not pay the Grievants commissions based upon the monies they collected during the weeks of November 11 and November 17. It simply denies it owes the money, based upon the two-week lag built into the commission payment system. The Company informed its successor of this system and erroneously assumed Canteen Co. would honor the obligation. Canteen Co. refused to pay, however, because Quality Vending retained the monies upon which the commissions were to be based and Quality Vending knew of Canteen Co.'s position before the transaction was completed. Quality Vending cannot, therefore, disclaim responsibility for the payment of the commissions.

Quality Vending failed to negotiate an agreement with Canteen Co. whereby Canteen Co. would pay the owed commissions and refused pay them itself, as well. This is an unfair hardship on the employees and violates the collective bargaining agreement, which establishes the wage and commission rates for the employees. Quality Vending received the benefit of the employees' services during the final two weeks of operation, but did not pay for them. If it is not required to pay the owed commissions, Quality Vending will receive an unjust "windfall" at the Grievants' expense. Joint Exhibit #3 sets forth the amounts the Grievants should have been paid based on the monies they collected in the last two weeks. Against this amount, the payment Quality Vending made based upon the 11-week commission average is an appropriate offset. However, Quality Vending should not get credit for previous payments or the amounts Canteen supposedly should have paid, but did not. Nor should the amounts Quality Vending paid the drivers in overtime for extra work the final week. This was a unilateral decision by the Company and is in no way connected to the commissions owed.

Quality Vending attempted to negotiate a provision with Canteen Co. for payment of the commissions due through November 17, but failed to do so. It was the owner of the business up until that time and is responsible for its obligations up to the point that ownership changed hands. These obligations include the commissions due to the Grievants through the date of the changeover.

The Company

Every commission driver for Quality Vending was paid for all their weeks of work. The issue is not whether the Grievants were paid for the weeks of November 11 and November 17, but whether they were paid the right amount. In this regard, the Company has followed the commonly accepted policy of basing commission payments on revenues generated two weeks earlier, creating a lag of two weeks between collection of the monies and payment of the commission. Further, it has also been the Company's long-standing practice to not pay commissions on monies collected during an employee's last week of work. The employees have always been paid up to their last day of work, but their commissions have always been determined by the collection period ending two weeks earlier. This has been Quality Vending's consistent procedure and has been recognized and understood to be so by all parties.

As was demonstrated by the testimony, the lag time means that no route driver would be disadvantaged by low revenues generated during their last week of work, if it fell during a holiday period, for instance. On the other hand, the Grievants are requesting that they be paid for an extra two weeks, which would be clearly unfair to the Company. At the time the drivers were hired, the vending pipelines were full and they benefited from that revenue which they did not create. For that reason, the Company felt no obligation at closing to compensate them for money likewise in the pipeline. The payment made was a goodwill gesture on the Company's part to bring the drivers up to the average wage they would have had their first week with Canteen Co. had it honored Quality Vending's pre-existing commission policy. It did not represent any acknowledgment of responsibility. The additional payment of $18.00 per hour for extra work at closing was, likewise, voluntary on the Company's part. The Company has clearly gone above and beyond in an effort to be fair and demonstrate goodwill and should not now be penalized.

DISCUSSION

The issue is whether the Company is liable to its route drivers for commissions on money collected from its machines in the last two weeks of operation prior to the sale of the business to Canteen Co. It did make a payment to the drivers, reflecting the commission rate on the average collections over the previous eleven weeks, but denies that this constitutes an admission of liability. Instead, the payment is characterized as a good faith gesture in response to Canteen Co.'s refusal to pay the commissions. In essence, the Company argues that its

obligation to pay ended with the transfer and bases its position on two main points. First, the Company's long-standing practice was to pay out commissions on a two-week lag for ease of bookkeeping. Thus, the payment received by the Grievants at the close of business on November 17 reflected commissions on money collected in the two-week period ending November 4. But for the sale, the Company would have paid the Grievants the commission for the two weeks ending November 17 on December 1. The second point is that the Company's practice upon separation of employment was that employees were not paid commission payments on collections made in the last two weeks of employment. The final paycheck only reflected commissions on collections up to two weeks prior to separation based upon the two-week lag. The justification for this is that when route drivers are hired, their initial commissions are based upon money already "in the pipeline" and collected by other employees, so they receive commissions at the beginning of employment on money they do not generate, and the money collected in their last two weeks then theoretically passes on to a successor route driver. The Company likens the transfer of ownership to a separation from employment and thus argues that the Grievants are not entitled to the commissions because their employment relationship with the Company ended. For a number of reasons, I do not agree and find that the grievance must be sustained.

In the first place, the evidence does not support the Company's underlying assumptions regarding commission payment. According to Schedule A appended to the contract, new employees were not paid commissions, but were paid a flat wage rate of $7.50 per hour for their first four to eight weeks of employment and only then were they paid according to the commission schedule. Thus, only after working several weeks were they paid commissions on their collections and, presumably, by that time the money they collected reflected money generated by their efforts. This is consistent with the testimony of Grievant Eric Guerts, who stated that he was not paid a commission on money collected on his route the two weeks prior to his taking it over at the time of his hire. Also, the Company's argument assumes that all new route drivers took over existing routes previously serviced by presumably departed employees. The argument does not account for new employees who were given new routes. By definition, there could not have been any previous collections on these routes and, therefore, no commissions.

On the other hand, the Company's assertion of the existence of a binding practice of not paying employees commissions on money collected up to the end of their employment has a ring of authenticity. The Company President, Paul Boettcher, testified that its practice of not paying post-termination commissions was generally known and accepted by the bargaining unit and pointed to the fact that no previous employee had ever grieved non-payment of commissions after separation. Nevertheless, the Grievants testified to having no knowledge of such a practice and expected to receive commissions after the sale. The competing testimony on this point is, therefore, in dispute. However, Grievant Terry Albrecht testified that while a Union Steward in 1994, he participated in contract negotiations wherein the Union unsuccessfully sought to add contract language guaranteeing the payment of commissions on all money collected prior to termination. This testimony strongly suggests that the Union was

aware of the issue at least as early as 1994, but was unable to resolve it. In order to be binding, a past practice must be 1) unequivocal; 2) clearly enunciated and acted upon; 3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by the parties. 1/ The evidence is sufficient to conclude that this was a mutually acknowledged practice, notwithstanding the Union's efforts to eliminate it.

1/ CELANESE CORP. OF AMERICA, 24 LA 168, 172 (JUSTIN, 1954)

Nevertheless, I find the practice of not paying commissions upon separation is not controlling in this situation. This is not a case where the Grievants were fired or quit. Rather, the Grievants stayed with the employer, but the ownership changed. Furthermore, as part of the sale, the Company retained the right to all money in the machines up to the date of sale and made extraordinary efforts to make sure that they were emptied before the ownership changed. This, in fact, was the Company's explanation for paying the employees an extra bonus for overtime worked in emptying the machines before November 17. Thus, the Company retained all the money upon which the employees' commissions would be based, but assumed its successor would accept responsibility for payment. This was not made a condition of sale, however, and not surprisingly, Canteen Co. declined to pay commissions on money collected and retained by Quality Vending. The effect of the Company's action, therefore, was that, merely by virtue of a change of ownership of the Company, the Grievants were denied commissions they had rightfully earned.

The Company, while denying liability on its own part for the reasons stated, also maintains that Canteen Co., while morally obligated to pay the Grievants, also has no legal liability to pay the commissions. If this position is sustained, the Grievants will be denied any recourse and the Company will realize a windfall by virtue of the fact that it was able to take advantage of the two-week lag it instituted for its own benefit for ease of bookkeeping. Whatever its past policy towards terminated employees, the reality remains that the Company insured that all money was removed from the "pipeline" prior to the sale and the money realized, but for the sale, would have been subject to payment of commissions to the Grievants. The Grievants were not parties to the sale, which the Company negotiated in its own interest, and cannot be expected to bear the loss of commissions occasioned by the Company's action. At the time of the completion of the sale, the Grievants had collected the money upon which their claim stands. It was in the Company's possession at the time of sale and the Company retained it thereafter. The Company was not able to negotiate a provision whereby Canteen Co. would accept responsibility for payment and cannot now walk away and leave the Grievant's bereft. The grievance is sustained.

As to remedy, the parties submitted documentation setting forth the basis for the Grievants' claims, as well as offsets sought by the Company. Joint Exhibit #3 sets forth the amount of commissions to which the Grievants would have been entitled for the weeks ending

November 11 and November 17, but for the sale of the business. According to this document, Terry Albrecht earned $1,285.43, Eric Guerts earned $1,557.13 and Mark Martell earned $1,390.18. Against these amounts, the Company is claiming offsets for the paychecks paid to the Grievants on November 17, the partial commission payments it made to the Grievants based on the average of the prior eleven weeks, the overtime payments it made for extra work the Grievants performed in emptying the machines in the last week of operations and the amounts the Company claims Canteen Co. should have paid. The November 17 paychecks were the Grievants' normal paychecks and included commissions on monies collected up to November 4. These are not legitimate offsets against commissions earned after November 4 and are not allowed. As I have found that liability for the commissions rests with Quality Vending and not Canteen Co., the amounts subtracted as Canteen Co.'s responsibility are also not allowed. The partial commission payments made on November 25 are conceded by the Union as legitimate offsets and are allowed. Likewise, the overtime payments made by the Company for extra work in the last week are allowed. It is clear that most, if not all, of the extra work involved the collection of the money from the vending machines. Inasmuch as this work is directly tied to the sizeable amounts collected 2/, and upon which commission is to be paid, to not allow this offset would, in effect, result in a double payment to the Grievants. In sum, therefore, I find the amounts to which the Grievants are entitled to be as follows:

	Terry Albrecht	Eric Guerts	Mark Martell
Commissions earned	$1,285.43	$1,445.98	$1,390.18
Partial payment	- $ 260.72	- $ 292.42	- $ 253.66
Overtime Payment	- $ 157.50	- $ 139.50	- $ 54.00
Commissions owed	**$ 867.21**	**$1,014.06**	**$ 1,082.52**

2/ Joint Exhibit #4 sets forth the commissions earned during the eleven-week period upon which the partial payments were based. In each case, the commissions earned by the Grievants for the week of November 17, during which the machines were cleaned out, are substantially more than in any week referenced in Joint Exhibit #2, which permits the inference that the additional amounts earned in commissions the week of November 17 are directly related to the extra work performed.

For the reasons set forth, and based upon the record as a whole, I hereby issue the following

AWARD

Quality Vending Services violated the collective bargaining agreement by failing to pay the Grievants the entire amount of commissions earned by them for the weeks ending

November 11, 2000, and November 17, 2000. As a result, the Company shall make the Grievants whole by paying them the following amounts:

Terry Albrecht -	$867.21
Eric Guerts -	$1,014.06
Mark Martell -	$1,082.52

Dated at Eau Claire, Wisconsin, this 17th day of January, 2002.

John R. Emery /s/
John R. Emery, Arbitrator

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