BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PROMOTIONS UNLIMITED, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Lee Stockdale Discharge
Case 2
No. 49172
A-5065

Appearances:

Teamsters Local Union #43, 1624 Yout Street, Racine, WI 53404 by Mr. Charles Schwanke, President, appearing on behalf of the Union.

Mr. Larry Greenfield, 7601 Durand Avenue, Post Office Box 080980, Racine, WI 53408 appearing on behalf of the Employer.

ARBITRATION AWARD

Pursuant to the provisions of their collective bargaining agreement for the years 1991 - 1994, Teamsters, Chauffeurs and Helpers Union No. 43 (hereinafter referred to as the Union) and Promotions Unlimited, Inc. (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 discharge of driver Lee Stockdale. Daniel Nielsen was so designated. A hearing was held on May 24, 1993 at the Company offices in Racine, 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 agreed not to submit post hearing arguments, and the record was closed at the end of the hearing.

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

ISSUE

The parties did not reach a formal stipulation of the issue in this case, but a review of the contract and the record make it clear that the issue is:

Did the Company have just cause to discharge Lee B. Stockdale on April 13, 1993
If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

ARTICLE 4. MANAGEMENT

It is agreed that the management of the company and the direction of the working forces are vested exclusively in the company and includes but is not limited to the following:

To direct and supervise the work of its employees to hire, promote, demote, transfer, suspend and discipline or discharge employees for just cause: to plan, direct, and control operations:.....
. . .

BACKGROUND FACTS

There is no dispute over the facts of this case. The Company produces promotional materials in Racine, Wisconsin. The Union is the exclusive bargaining representative for the Company's non-exempt production, delivery and warehouse employees. The grievant, Lee Stockdale, was hired by the Company in February of 1990 as a driver. In 1992 he was discharged, but a settlement was reached whereby he was reinstated.

In December of 1992, a Company tractor and trailer were stolen from a large unsecured parking lot next to a cafe in Bellwood, Illinois. As a result of this incident, a meeting was held in January with all of the Company's drivers and a representative of the Union. The drivers were told that they should park their rigs in secure areas, and were specifically warned not to park in the Bellwood, Illinois lot.

The grievant bid on a two week run to Texas leaving in late March and returning in mid-April. In the early morning hours of Easter Sunday, April 11th, he returned to the Midwest. The grievant made his home home in Bellwood, and lived two blocks from the lot where the rig had been stolen in December. At approximately 12:30 he parked his tractor and trailer in the lot behind the cafe. When he returned at 7:00 a.m., the tractor and trailer were gone. He reported the theft to Company officials, and admitted that he had been parked in the area they had warned drivers away from in January. He was discharged on April 13th. The instant grievance was thereafter filed challenging the discharge. It was not resolved in the grievance procedure, and was referred to arbitration.

Additional facts, as necessary, are set forth below.

THE POSITIONS OF THE PARTIES

The Company argues that the grievant was negligent, in that he parked his tractor and trailer in exactly the same spot that another had been stolen from only three and a half months earlier. All drivers had been specifically warned not to park there, and the grievant admitted that he knew he was not supposed to park in an unsecured lot because of the danger of theft. The Company faces a loss of $80,000 to $100,000 when its trucks are stolen. and an increase in the

cost of its insurance when the drivers ignore the need to safeguard the equipment. The Company simply has to take a stand if it is to enforce discipline among its drivers. Finally, the Company notes that the grievant has been employed for only three years, and has been discharged twice. Thus his work record does nothing to mitigate his offense or support a reduction in the penalty.

The Union acknowledges that the grievant should not have parked his truck in the Bellwood lot, but argues that discharge is too severe a penalty for a first offense of this type. For his part, the grievant testified that the Company had treated him fairly in this matter and that he understood that the Company had to take a stand, but that he had enjoyed working for the Company and wanted his job back. He indicated that he could not change what had happened in the past, but that that he now had his own vehicle and would never again need to park a truck anywhere but the Company's yard. Thus there was no chance that this type of thing would happen again. He stated that he would waive back pay and benefits if he could be reinstated to his job.

DISCUSSION

The grievant admitted that he had disobeyed the Company's directive not to park in the Bellwood lot, and the essential argument of the Union is not over the imposition of discipline but over the severity of the penalty. The question is whether the Company violated the principles of just cause by discharging the grievant rather than using a lesser measure of discipline.

While the Company has the right in the first instance to determine the severity of a penalty, it is commonly accepted that an arbitrator has the inherent authority to modify the penalty if circumstances warrant and the contract does not forbid such modifications. 1/ A decision to modify the penalty is not an act of leniency, since leniency is within the province of an employer. Instead it turns on mitigating factors and such fundamental notions of fairness as equality of treatment and proportionality. 2/

The mere fact that an arbitrator may reduce penalties does not lead to the conclusion that he should automatically do so. An arbitrator is not free to substitute his judgment for the Company's simply because he would have made a somewhat different decision had it originally been his to make. There is a range of permissible discipline in nearly every case, and the fact that an employer has reached the margin does not strip it of its discretion. Absent evidence of a violation of established disciplinary norms (as in a claim of disparate treatment), or the presence of factors traditionally considered to mitigate a penalty, the discipline imposed may be reduced only

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1/ City of Detroit, 76 LA 213 (Roumell, 198l) at page 220; Fairweather, PRACTICE AND PROCEDURE IN ARBITRATION, 2nd Ed. (BNA 1983), at pages 501-503; Elkouri, HOW ARBITRATION WORKS, 4th Ed. (BNA, 1985), hereinafter cited as "Elkouri", at pages 667-688; Hill & Sinicropi. REMEDIES IN ARBITRATION, (BNA 1981), Chapter 4, pages 97-105.

2/ City of Detroit, 76 LA 213 (Roumell, 1981) at page 220. Elkouri, at pages 669-670.

where it is grossly out of proportion to the grievant's offense.

The record in this case lends no support to a reduction in penalty because of disparate treatment. Just cause generally requires that similarly situated employees be treated in a similar fashion when discipline is imposed. Here, the grievant specifically acknowledged that he was being treated as any other employee would have in the same circumstances. In addition, there is no evidence of a disciplinary history in this workplace that would suggest that the Company has applied a different standard in other cases of misconduct.

Other traditional factors in mitigating a penalty are the personal characteristics of the grievant, in particular his length of service and work history. These offer no basis for reducing the penalty in this case, since the grievant has been with the Company for only three years and has already been discharged and reinstated once. The reasons for the previous discharge were not made clear at the hearing, and I have not credited it as a prior act of discipline that bears upon the appropriateness of the penalty in this case. However, I have drawn an inference from the fact that no other facet of the grievant's work history was put in the record. That inference is that there is nothing particularly noteworthy or outstanding about this employee's performance with the Company that should entitle him to special consideration.

The final factor in judging whether a penalty is appropriate is whether it is grossly out of proportion to the offense committed. The grievant ignored a directive and as a result, his truck was stolen. The grievant certainly did not intend that his truck be stolen, and I doubt that he would have been discharged simply for parking in the Bellwood lot if his truck had still been there in the morning. It is a fact of life, however, that a person's actions are judged by the totality of the circumstances, including results which he did not intend but which were reasonably foreseeable. The classic formulation of negligence is that a person is negligent when the burden of taking a reasonable safety step is outweighed by the probability of a loss occurring and the amount of the likely loss. In this case, the grievant was aware that the probability of having his truck stolen from the Bellwood lot was fairly high, since a truck had been stolen from that lot a few months before. He was also aware that, by parking in the Bellwood lot, he was placing $100,000 worth of his employer's property at risk. He ignored the order not to park his truck in that spot because it was only two blocks from his home. In short, he gambled his convenience at parking at the cafe against the risk that his employer's property would be stolen. The Company is not required to tolerate such a casual attitude to its interests among employees.

Certainly the Company could have decided on some lesser measure of discipline. However, given the clear order not to park at the cafe, the lack of any justification for ignoring that order, the large economic loss to the employer, and the lack of any mitigating circumstances, the arbitrator cannot conclude that the penalty of discharge is grossly out of proportion to the grievant's conduct. For that reason, I have made the following

AWARD

The Company had just cause to discharge the grievant on April 13, 1993. The

grievance is denied.

Signed this 26th day of May, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator