BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PROMOTIONS UNLIMITED, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 3
No. 49378
A-5079
Mark Leinweber Discharge

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 and Ms. Beth Casey, 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 Mark Leinweber. Daniel Nielsen was so designated. A hearing was held on August 23, 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 stipulated that the following issue was to be decided herein:

Was the Company within its right in discharging the grievant? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

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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: .....

. . .

. . .

ARTICLE 11. SENIORITY

. . .

It is agreed that due to the nature of the company's operation, employees may be moved from job to job at the sole discretion of the company in order to sustain efficient operations.

. . .

BACKGROUND FACTS

There is little 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, Mark Leinweber, was hired by the Company in August of 1991 as an order picker.

On June 1, 1993, the grievant was working as a picker. At 9:45 a.m. he was approached by his supervisor, Pam Nguyen, and asked to help load trailers for the next two hours. He said he would not do the work unless he was given the higher loader's pay. A few minutes later, she asked him again and he refused. Nguyen left him on his job. After lunch, she again approached him and asked him to load trailers. He refused and she told him to report to the office of warehouse supervisor Wayne Lazenby.

Present in Lazenby's office were the grievant, Nguyen, Lazenby, Personnel Director Beth Casey and the grievant's steward. The grievant was asked to explain what was going on, and why he would not load trailers. He stated that he wanted to know why he was good enough to help load trailers, but not to be given a permanent job as a loader when he applied. Lazenby said that was the line supervisor's decision. The grievant then stated that he had difficulty in getting along with some of the loaders on his team, and Lazenby offered to switch him to loading with a

different team. The grievant said that was only part of the reason for his refusal, and repeated his demand for loader's pay if he was doing loader's work. He also complained that on other occasions when he helped load, the permanent loaders would slack off and watch him work. Lazenby said the grievant should advise him when things like that happened. He again told the grievant to help load the trailers, and the grievant again refused. He was told to punch out and go home. Casey prepared a termination letter for insubordination and the grievant was fired that same day.

Additional facts as necessary will be set forth below.

THE POSITIONS OF THE PARTIES

The Company argues that the grievant blatantly refused a valid order from supervision, after being given four chances to reconsider and obey. The Company cannot function if employees are allowed to refuse valid orders from supervisors. The contract expressly grants the Company the right to make work assignments between classifications, and there can be no excuse for the grievant's conduct. The Company also notes that another employee was fired for precisely the same offense just a few days before the grievant refused to load trailers.

The Company points out that the grievant has a bad work record. He has been employed for only two years. In the last twelve months, he has received a verbal warning and a written warning for poor productivity, a written warning for attendance, a three day suspension for falsifying Company records, and three written warnings for work rule violations. At the time of his discharge, he was up for a five day suspension for the work rule violations. Therefore, discharge was the appropriate step and the grievance should be denied.

The Union acknowledges that the grievant should have obeyed the order to load trailers, but argues that discharge is far too severe a penalty. The Union presented six signed statements from other employees who had refused work assignments, and none of them were ever disciplined, much less discharged. The grievant himself expressed frustration at the supervisor's attitude toward him, contending that he was followed and harassed, and written up for things that he never did. He had been warned that the supervisor would get him fired, and this is simply part of that effort. Many of the things he was written up for did not happen. He also expressed frustration at having voluntarily worked loading on many occasions at his lower pay rate, in an effort to get a chance at a permanent loading job, only to be passed over several times. The Union notes that many write-ups were issued by the Company for poor productivity in the past year, as a means of sending a message to employees, but that no employee had lost any time as a result of these write-ups. Thus these write-ups should be discounted in judging the grievant's work record. For these reasons, the grievant should be reinstated and made whole.

DISCUSSION

The grievant was discharged for insubordination. Insubordination consists of an unjustified refusal to obey a management order. There is no question that the grievant refused to load trailers. The issues in this case are (1) whether the grievant was given an order to help load trailers and, if so, (2) was there some justification for the refusal and, if not, (3) was the penalty of discharge too harsh? Each is addressed in turn.

The Prior Refusals - Was There an Order?

The strongest argument made by the Union is the claim that this employee and another were fired within a week of one another for refusing to load trucks when many others had refused without any disciplinary consequence. The Union presented statements gathered by its steward from seven other employees who said they had refused to load trucks or had seen others refuse to load trucks. The Company responded with testimony to the effect that it generally looked for volunteers before ordering people to load trucks, and that some of the statements might have confused requests with orders. Warehouse supervisor Wayne Lazenby testified that one of the people who refused to load did so because of a doctor's restriction. Two other employees who submitted statements were women who were excused from loading because the Company does not use women for loading trucks. Two others who gave statements had not, according to their supervisor, Pam Nguyen. ever refused to load, although they grumbled about having to do the job. Another had, to Nguyen's knowledge, neither refused to load nor even complained about the job. No one in management could speak to the remaining statement, as neither Lazenby nor Nguyen was familiar with the employee.

Certainly if the Company generally made loading trucks optional, it could not suddenly decide to discharge this grievant for refusing to load a truck. The whole purpose of rules and disciplinary enforcement is to prompt employees to conform to the employer's expectations. An employer that has allowed its practices to contradict its rules sends a message that employees need not be concerned with the written rule. This does not means that an employer which has been lax in enforcing rules loses the right to stiffen its enforcement policy, but simple fairness demands that it must give the employees reasonable notice of the new policy before imposing discipline. Here, however, I cannot conclude that the grievant had a reasonable basis for believing that the order to load trucks was somehow optional.

The Company's policy of seeking volunteers for loading may well have led to confusion among employees as to whether it was mandatory. The hearsay evidence presented by the Union certainly suggests that this was the case. The weight of this evidence is substantially reduced by the inability of the parties or the arbitrator to probe further into these written statements at the hearing 1/, and by the explanations and contradictory evidence provided by the Company's

1/ Although the hearsay evidence was admitted into the record, it was not backed up with the testimony of any of the employees who gave the written statements to the steward. The direct testimony of Nguyen, Lazenby and Larry Greenfield, with the Union having an

witnesses. More importantly, in the unlikely event that the grievant still understood this as a request after his supervisor ordered him to load trucks for the third time, no one could have misunderstood the Company's serious intentions at the meeting in Lazenby's office. 2/ A reasonable person would have to view a meeting with the line supervisor, Warehouse Supervisor, Union Steward and Personnel Manager as a prelude to either compliance or discipline. Any question of a casual request to perform this work had to have been left behind on the warehouse floor. In short, it had to be obvious to the grievant that he was being ordered to load the truck, and that the Company was serious about the order.

The Grievant's Other Contractual Claims - Was There Justification?

The grievant was given an order four times. The repetition of the order in Lazenby's office could not have been misunderstood as a request. Yet he refused, raising objections to the rate of pay he would receive for loading, the fact that he had been denied a permanent job as a loader, and to working with the other members of his crew. These may all have been reasons that he would have preferred not to perform the loading job, but they do not excuse a refusal to follow the order. The general rule in industrial relations is that an employee, except in unusual circumstances, must "obey now, grieve later." This reflects the practical reality that a shop floor is not a debating society, and that production cannot stop every time an employee believes that a directive is unfair or inconsistent with the contract. The answer is to obey the order and seek relief through the grievance procedure. As noted by the eminent arbitrator Whitley P. McCoy:

> When an employee is told by a supervisor to do something, his duty, perhaps after preserving his rights by a protest, is to do it. He then has the right to file a grievance and have the propriety of the order tested. No plant could operate if the employees were free to obey or disobey orders according to their own notions of their contract rights.
> . . .
> Certain exceptions to this principle are equally well recognized. No employee is bound to obey an order which would involve an unreasonable hazard to life or limb; no employee is bound to obey an order which would humiliate him or which has no reasonable relation to his job duties -- such as to shine a foreman's shoes or

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opportunity to cross-examine on these points, is entitled to greater weight on the question of prior refusals to load.

2/ This assumes that the grievant was testifying truthfully when he claimed to have been unaware that another employee was fired a week earlier for refusing to load. The grievant claims to have been off work that day. It seems unlikely that the news of a firing for refusing to load would not have gotten around in a workplace of this relatively small size.

to withdraw a grievance. Arbitration decisions have established these and other exceptions.

> This case presents the question whether the facts here involved bring it within the scope of the general principle or the scope of the exceptions. In considering this question, it is important to bear in mind the reasons for the general principle; the necessity for the efficient, orderly, uninterrupted operation of production; elimination of unseemly argument on the plant floor; and the practical necessity, for reasons of efficient operations, of maintaining the proper authority and dignity of those entrusted with supervisory duties. Since these are the reasons for the general principle, absence of such reason in a particular case (such as in the shoeshine case), or the existence of an overriding right or interest in the employee (such as to life or health), may form the basis for a legitimate exception. A weighing of the conflicting interests may be necessary on a given state of facts…" Sheller Mfg. Corp., 34 LA 689 (McCoy, 1960) at 689. 3/

This case does not present any of the circumstances described by McCoy and others that might justify a refusal to follow orders. There was no danger to the grievant's health, nor was the order some serious affront to his personal dignity. The order was entirely legitimate, and the Company's right to reassign the grievant in this manner is specifically provided for in the collective bargaining agreement. If he was entitled to loader's pay, he could have grieved the rate of pay after performing the work. Likewise, if he was entitled to a loader's job on a permanent basis, he could have raised a challenge to the methods used for filling open positions. The fact that he did not like the other members of the crew loading the truck is irrelevant, but it should be noted that the Company offered to assign him to a different crew if he would agree to perform the work. Finally, the grievant was not summarily disciplined after his initial refusal. He was given

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3/ Arbitrator Harry Shulman, as umpire for Ford Motor Co. and the UAW also wrote strongly in support of the principle, upholding discipline against a union committeeman who had directed employees not perform work in other classifications:

> "..[An] industrial plant is not a debating society. Its object is production. When a controversy arises, production cannot wait for the exhaustion of the grievance procedure. While that procedure is being pursued, production must go on. And someone must have the authority to direct the manner in which it is to go on until the controversy is settled. That authority is vested in supervision. It must be vested there because the responsibility for production is also vested there; and that responsibility must be accompanied by authority. It is fairly vested there because the grievance procedure is capable of adequately recompensing employees for abuse of authority by supervision…" (Ford Motor Co., 3 LA 779 (Shulman, 1944) at page 781).

three more opportunities to obey.

The record as a whole offers no reasonable grounds for excusing the grievant from following the order to help load trailers. The order was valid, he understood it, and he was given repeated opportunities to follow it. Thus he was guilty of insubordination. Insubordination is grounds for discipline in every work place. Here the Employee Handbook specifically lists insubordination as a major violation of Company rules. 4/ The only question is whether discharge, rather than some lesser form of discipline, was the penalty called for und
er the contract.

The Appropriateness of the Penalty - Is Discharge Too Harsh?

The Union challenges the penalty as excessive. It is generally recognized that an employer has the right in the first instance to determine penalties, but that this right is not unlimited. The penalty assessed by an employer is reviewable in arbitration to insure that the employer's discretion has not been abused. As I noted in a recent case involving these same parties:

> "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. 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

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4/ In the section entitled "EMPLOYEE CONDUCT AND DISCIPLINE POLICY", entered into the record as Joint Exhibit #3, the handbook states:

> The Company requests the cooperation of its employees in a joint effort to operate safely, efficiently and professionally.
>
> The following rules are illustrative of the kinds of offenses which may be the basis for disciplinary action up to and including discharge. However, this is not a complete listing of all such offenses and this listing should not be construed as limiting the Company's right to terminate for any other reason.
>
> Major Violations
>
> 1. Insubordination (refusal or failure to perform work assignments or to comply with instructions from supervision).

factors and such fundamental notions of fairness as equality of treatment and proportionality.

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 where it is grossly out of proportion to the grievant's offense." (Stockdale grievance, at page 4).

The penalty of discharge is the most severe that can be imposed in the employer-employee relationship. In that sense it can always be said to be harsh. It is appropriate, however, in those cases where the violation of workplace norms is very serious or the employee's conduct is consistently unacceptable. Insubordination is usually considered to be a very serious offense. It goes to the heart of the employee's duty to perform his work, which is the reason for employment in the first place. Failure to respond to insubordination undercuts the employer's ability to obtain production, which is the Company's reason for being. No two cases are ever exactly alike, but given the blatant and repeated nature of the refusal to perform in this case, and the fact that insubordination is listed in the Company's manual as a "Major violation" of Company rules, the Company is entitled to view the grievant's behavior as a serious offense.

Nothing in the grievant's work history serves to mitigate his insubordination. He is a short term employee who has been repeatedly disciplined within the seven months preceding the discharge, receiving during that time a verbal warning, five written warnings and a three day suspension. 5/ At the time of his discharge, he was up for a five day suspension for a separate violation of the work rules. Although he claims that much of the discipline was not warranted, none of it was grieved. This is not the proverbial long service employee with a good record who made one mistake. On the contrary, the grievant has visited every lower step of the disciplinary chain without any apparent improvement.

As noted above, discharge is the most serious form of discipline but may be a legitimate response to misconduct. Given the aggravated nature of the insubordination here, the short tenure of the grievant, and his past disciplinary record, I cannot conclude that the penalty of discharge is

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5/ Even discounting the verbal warning and written warning for poor production, which were apparently handed out throughout the workforce in a management crackdown, the grievant's disciplinary history is quite poor.

disproportionately harsh.

CONCLUSION

Even if the grievant had some doubt about his supervisor's seriousness in ordering him to load trailers and/or authority to make the order stick, he had no basis for doubting the validity of Lazenby's order or the likely consequences of ignoring it. Discipline was the inevitable result of his conduct, and his disciplinary history entitled the Company to respond with discharge rather than some lesser penalty. For these reasons, and based on the record as a whole, I have made the following

AWARD

The grievant was guilty of blatant insubordination, and his work record supports the imposition of discharge. Thus, the Company was within its rights in discharging the grievant. The grievance is denied.

Signed this 9th day of September, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator