BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

PROMOTIONS UNLIMITED, INC.

and

TEAMSTERS LOCAL UNION NO. 43

Case 4
No. 49379
A-5080
Jerry Stickland 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 Jerry Stickland. 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: .....

. . .

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ARTICLE 11. SENIORITY

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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.

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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, Jerry Stickland, was hired by the Company in July of 1990 as an order picker.

On May 25, 1993, the grievant was working as a picker. At 11:45 a.m. he was approached by his supervisor, Pam Nguyen, and asked to help load trailers for the next two hours. He laughed her off and did not report to the loading dock to help load.

At 2:30 p.m., Nguyen again approached the grievant and asked him to help load. He said "no" and told her to find someone who had done loading before and wanted to do it. At 3:00 p.m., he was told to report to the office of warehouse supervisor Wayne Lazenby.

Present in Lazenby's office were the grievant, 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 said that he had been working for the Company for three years and had never loaded trailers. Lazenby told him that it was not fair to always have the same people loading trailers, and that the Company wanted to cross-train personnel in advance of their busy

season. Lazenby reminded the grievant of the contract provision allowing the Company to reassign personnel to jobs such as loading, and directed him to load the trailers. He refused, stating that loading was higher rated work and he wouldn't do it unless he got the higher rate of pay. He was told to punch out. Lazenby followed him down to the time clock, and asked if he wouldn't load just for the hour remaining in the shift. He again refused. 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 three 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 points out that the grievant has a bad work record. He has been employed for only three years. In the last twelve months, he has received three verbal warnings and two written warnings for production, a written warning for substandard work, and a written warning and a final written warning for attendance. Given his word record, 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. Moreover, the Company did not lose any production as a result of the grievant's refusal because another employee volunteered to work as a loader in the grievant's place.

The grievant's work record is better than it appears. 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 to his job.

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

witnesses. In this case, the grievant's responses to Nguyen are consistent with a belief that he was being solicited to volunteer for loading trailers. He told her to get someone who wanted to the job instead of him. Had this matter ended there, I believe the discipline would have been inappropriate. The Company bears a certain risk of misunderstanding in seeking volunteers for certain tasks, without making it clear when it seeks voluntary compliance and when it is issuing an order. However, this matter did not end there.

The grievant may have misunderstood Nguyen's intentions in the warehouse, but I do not believe he could have misunderstood the Company's serious intentions at the meeting in Lazenby's office. 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. Even if there was any doubt in the grievant's mind in Lazenby's office, he knew when he left the office that he was being disciplined for refusing to load trailers. In spite of this, he again refused when Lazenby gave him one last chance at the time clock.

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

The grievant was given a direct order four times and refused to obey four times. His reasons for refusing were that he had never done the job before and that he wanted the higher loader's pay if he was going to do the work. These may well have been the 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.
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> . . .
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> 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 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. 2/

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. Even if he doubted the Company's right to reassign him, he could have objected through the grievance procedure. Likewise if he felt he was entitled to loader's pay, he could have grieved the rate of pay after performing the work. Finally, the grievant was not summarily disciplined after his initial refusal. He was given three more opportunities to obey, including a last chance after he had been told to punch out and go home.

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

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2/ 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).

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. 3/ The only remaining question is whether discharge, rather than some lesser form of discipline, was the penalty called for under the contract.

The Appropriateness of the Penalty - Is Discharge Too Excessive?

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

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3/ 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.
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> 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.
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> Major Violations
>
> 1. Insubordination (refusal or failure to perform work assignments or to comply with instructions from supervision).
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> . . .

> 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.

The grievant's work history does not do a great deal to argue against discharge. He has been employed for a relatively short period of time and has a spotty disciplinary record. Even discounting the warnings he received as part of a Company-wide crackdown on poor productivity, the grievant has a written warning for attendance and a final warning for attendance. The only noteworthy aspect is that the grievant has not been suspended, which is the usual step preceding discharge in a system of progressive discipline. This fact makes discharge a much closer question than in the companion case, where the grievant's record was far worse. The employee here does not have the same air of incorrigibility about him as did his colleague. The lack of a suspension, however, does not mean that the grievant has not had the benefit of progressive discipline as that term is usually understood. There is no requirement, either in the contract or in the customary practice of labor relations, which requires a lockstep progression from a verbal warning to a written warning to a suspension before discharge. The offense of insubordination, absent provocation or a "heat of the moment" outburst, is often listed as grounds for immediate termination. The grievant in this case does not have a clean work record in his favor, and rather plainly premeditated the refusal to perform since he gave an economic reason or not loading (i.e. the demand for higher pay) and refused even after discipline was initially imposed. While his work record is not an aggravating circumstance, it does not provide much in the way of mitigation.

The only other factor arguing in favor of the grievant is that the Company apparently ignored its own policy of using volunteers before ordering an employee to load trailers. The record indicates that another employee did volunteer to take the grievant's place. It is not clear

whether the offer came at the same time as the initial refusals or later in the day. This is important, since once the grievant had refused the order, the Company was entitled to pursue the matter and require compliance. This ambiguity in the record precludes the assignment of great weight to this factor, but does point up the pressing need for the Company to clarify its policy with respect to voluntary vs. mandatory loading in the future.

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. While it appears that the Company may have been at fault in failing to clarify the dividing line between requests and orders, there is little question that the grievant should have understood that he was being ordered to load trailers. Even after he was discharged he refused an opportunity to recant his insubordination and load the trucks. Discipline was the inevitable result of his conduct. Given the nature of the offense, the relatively short tenure of the grievant and the spotty disciplinary record in the year preceding this event, I cannot say that discharge is grossly disproportionate to his misconduct.

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 11th day of September, 1993 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator