

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration :
of a Dispute Between : Case 7
: No. 50538
TEAMSTERS LOCAL UNION NO. 43 : A-5182
: :
and : Case 8
: No. 50539
PROMOTIONS UNLIMITED CORPORATION : A-5183
: :
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Appearances:

Mr. Charles G. Schwanke, President, Teamsters Local Union No. 43,
1624 Yout Street, Racine, Wisconsin 53404-2160, for Teamsters Local
Union No. 43.
Ms. Beth A. Casey, Human Resources Manager, Promotions Unlimited Corporation,

ARBITRATION AWARD

Teamsters Local Union No. 43 and Promotions Unlimited Corporation are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The union made a request, in which the employer concurred, that the Wisconsin Employment Relations Commission appoint a member of its staff to hear and decide a series of grievances relating to the imposition of discipline. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearings in the matters were held on April 24, 1994, in Racine, Wisconsin. The parties agreed on a voluntary resolution of two grievances, and that the two remaining grievances could properly be consolidated in their consideration. The hearings were not transcribed. The parties filed written arguments on May 16, 1994, and were given until June 3, 1994, to file reply briefs, which opportunity they both waived.

ISSUES:

Did the employer have just cause to issue a five-day unpaid suspension to Jeffrey Techert?

If not, what is the remedy?

Did the employer have just cause to terminate the employment of Jeffrey Techert?

If not, what is the remedy?

RELEVANT CONTRACTUAL 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 and to lay off employees because of lack of work or for other legitimate reasons, in accordance with the provisions herein: to introduce new or improved methods or facilities or to change existing manufacturing practices, designs, methods and facilities: to schedule the hours of work and assignment of duties: to vary the minimum wage rates hereinafter provided by granting of merit pay increases to certain employees at the sole and exclusive discretion of the company, to award bonuses in any form to employees designated by the company, pursuant to its sole and exclusive discretion. The awarding of any merit increases or bonuses by the company shall not create any obligation on the part of the company to make subsequent awards to the same employee or similar awards to any other employee. None of the foregoing shall be used for the purpose of discrimination because of union membership nor in violation of any of the provisions hereof.

ARTICLE 13. ADJUSTMENT OF GRIEVANCES

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Step 3.

In the event that the company and union are unable to agree on the settlement of any grievance it is agreed that said two parties will request the Wisconsin Employment Relations Commission to appoint an arbitrator from their staff.

....

The arbitrator shall have no power to add to, nor subtract from, nor modify any terms of this agreement.

If the arbitrator shall decide that an employee was discharged in violation of this agreement, they shall have the power to award such employee pay for time so lost after allowance of a credit for any earnings received from other gainful employment.

....

OTHER RELEVANT LANGUAGE

The company has implemented a policies handbook which contains the following:

EMPLOYEE CONDUCT AND DISCIPLINE POLICY

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).
2. Theft of Company property or other employees, or knowingly receiving stolen Company property or employee property.
3. Fighting or attempting to inflict bodily injury on a supervisor, Company official, fellow employee or customer.
4. Using profane, abusive or threatening language towards customers, fellow employees, supervisory personnel or officials of the Company.
5. Carrying concealed weapons or possession of weapons on Company property.
6. Violating the Company's drug and alcohol policy (see p. 10).
7. Refusing to cooperate in the investigation of any accident, felony, theft or other incident of misconduct on Company property.
8. Willful falsification of any company records, including employment application, medical history questionnaire, etc.
9. Intentionally destroying, damaging, defacing, or hiding any property of the Company or of fellow employees.
10. Bribery, including but not limited to, offering money or other valuable consideration in exchange for advancement or other employment advantages.
11. Intentionally making false claims of injuries, illnesses or disabilities.

Other Violations

Violations of the following rules may be cause for one or more written warnings followed by discharge.

1. Violating any safety rules or practices or engaging in

horseplay or disorderly conduct that endangers the safety or property of employees, the Company or the public.

2. Violating the absenteeism or tardiness policies (see p. 4).
3. Sleeping or loafing while on duty.
4. Leaving the premises during working time (except as required by one's job) without authorization by supervision.
5. Performing personal work on Company time without specific permission from supervision.
6. Negligence or carelessness in the performance of one's assigned duties or in the care of use of Company property.
7. Leaving one's workplace, or visiting areas on the premises away from one's usual or assigned place of duty, without permission of management.
8. Unauthorized soliciting of money or other valuable consideration during working time or in working areas.
9. Unauthorized use of Company vehicles or equipment outside or in excess of the Company's granted scope of permission.
10. Posting any material without authorization by the Company.

BACKGROUND

Promotions Unlimited Corporation ("the company," or "the employer,") provides advertising and promotional programs for independent retailers nationwide. Among its personnel are employees who pick, package and load items for shipping. For such work, the company unilaterally set daily production guidelines which called for employees to pick 600-800 full cases or 18 pages of orders of partial cases. The grievant, Jeffrey Techert, was one such warehouse employe, hired October 16, 1991 as an order picker. Techert was usually assigned to handle both full and partial cases. Employees performing such "combination picking" were held to production standards of 18 pages.

On December 2, 1992, the company issued a written warning to Techert for substandard work, as follows:

This is your first written warning concerning substandard work. You have had prior verbal warnings regarding this during the picking period for F-12. During sale G-01 you have been averaging 500 cases picked per day. The average standard for a picker is 800 cases per day. Your average is well below the acceptable minimum and you must take steps to improve this. Further incidence of substandard work will result in disciplinary action up to an including discharge.

Techert signed for receipt of the notice, stating on the form that he disagreed with the company's statement.

On December 21, 1992, Techert was discharged for allegedly insulting the

warehouse manager. On January 4, 1993, the company reduced the discharge to a disciplinary suspension, and Techert returned to work on January 20, 1993.

On June 16, 1993, the company issued another written warning for substandard work, as follows:

This is your second written warning concerning substandard work. During sale G07 your case average was 520 cases picked per day and your page average was 12 pages per day. Both of these are well below the company guideline of 800 cases picker (sic) per day and are therefore unacceptable. You have had prior verbal warnings regarding your production, also. Further incidence of substandard work will result in disciplinary action up to and including discharge.

Signing for receipt of the notice, Techert again stated he disagreed with the company's statement, adding, "show me that I am the worst case scenario, and I'll accept this."

On October 1, 1993, the company issued another written warning for substandard work, as follows:

This is your 3rd and FINAL written warning concerning substandard work. You have had 2 prior written warnings concerning this. During Sale G10 your average cases picked per day was 452 and your average pages was 14. This is wll (sic) below the established guidelines of 800 cases picked per day and 18 pages picked. We have given you ample opportunity to improve your production, but your average is still unacceptable. Further incidence of substandard work will result in disciplinary action up to and including discharge. (emphasis in original)

Signing for receipt of the notice, Techert again stated he disagreed with the company's statement.

For sale G11, which ran from September 13, 1993 to October 5, 1993, the company issued a verbal warning to employe Corey Irish, whose production amounted to an average of 527 cases and 12 pages. For that same sale, the company also issued a verbal warning to employe Gary Johnson, whose production amounted to an average of 553 cases and 15 pages. On October 18, 1993, the company issued to employe Jesse Morales the following written warning:

This is your 1st written warning concerning substandard work. You received a verbal warning in September. During Sale G11 your average cases picked per day was 453 and your average pages picked were 16. This average is well below the acceptable guidelines of 800 cases per day and 18 repack pages per day. We have given you ample opportunity to improve your production. Further incidence of substandard work will result in disciplinary action up to and including discharge.

For sale G11, Techert's production amounted to 522 cases and 11 pages. On or about October 14, 1993, the company determined to impose a five-day unpaid suspension. Techert grieved, as follows:

I am being given a 5 day suspension for poor performance. My first written warning was given to me on 12/2/92, only 6 hrs. after receiving my only verbal warning. I would

like to see if there is anybody with a lower average than mine for G11. If anyone is lower, are they being warned and or written up? I am hurt and burned out on picking for the past 2 yrs. I have tried to transfer to another job that would be better for my feet & back, but have been passed over for people that are only here three weeks. Please move me from picking. (emphasis in original)

The company denied this grievance, notifying Techert on November 12, 1993 that the five-day suspension would be served November 15-19, 1993.

On November 15, 1993 and December 17, 1993, the company posted notices of vacancies in the position of warehouse sweeper. Techert unsuccessfully applied for both vacancies.

From May 20, 1993 to December 13, 1993, Techert's daily averages per sale, for cases and pages picked, respectively, were as follows:

G07	May 20 - June 4	520	12
G08	June 14-July 16	170	17
G09	July 26 - Aug 9	283	21
G10	Aug 17 - Sept 9	452	14
G11	Sept 13 - Oct 5	522	11
G12	Oct 11 - Nov 12	146	13

From November 22, 1993 to December 13, 1993, the company ran sale H01, for which Techert's daily average was 417 cases and 11 pages. For sale H02, which closed on January 4, 1994, Techert's daily average was 471 cases and 16 pages. On January 4, the company's part-owner and its warehouse manager met with Techert to discuss the situation. Techert explained his production problems arose because he became too involved in the personal situations of other employes; that his feet hurt, and that he was angry at not getting the sweeper position. The company representatives told Techert they needed to see immediate improvement in his performance, or he would be terminated.

On January 5, 1994, Techert picked 512 cases and 14 pages. On that same the average number of cases picked was 406, and the average number of pages was 17.54. There were 12 warehouse employes who picked more cases and 25 (including some in both categories) who picked more pages. There were 24 employes who picked fewer cases than Techert (20 of whom picked fewer than 406 cases), and nine who picked fewer pages. There were six employes who picked both fewer cases and 14 or fewer pages. Of these, five had activity, in either picking or checking, in categories where Techert had none. The top five case-picking employes picked 818, 802, 768, 739 and 733 cases and 6, 12, 18, 17 and 17 pages, respectively; the bottom five case-pickers picked 159, 169, 171, 172 and 174 cases and 21, 4, 31, 18 and 23 pages, respectively. The top five page pickers picked 35, 35, 31, 29 and 29 pages and 251, 196, 171, 212 and 207 cases, respectively. The bottom five page-pickers picked 4, 6, 10, 11 and 12 pages, and 159, 818, 625, 388 and 802 pages, respectively.

On January 6, 1994, Techert picked 466 cases and 13 pages. On that date, the average number of cases picked was 452, and the average number of pages was 16.3. There were 22 employes who picked more cases and 23 (including some in both categories) who picked more pages. There were 14 employes who picked fewer cases than both the average and Techert's totals, and nine who picked fewer pages. There were three employes who picked under Techert's totals for both cases and pages, two of whom were partially assigned that day to loading duties. The top five case pickers picked 807, 769, 720, 648 and 647 cases and 19, 11, 10, 16 and 18 pages respectively. The bottom five case-pickers picked 177, 189, 192, 194 and 196 cases and 5, 18, 28, 15, and 35 pages, respectively. The top five page-pickers picked 35, 35, 33, 28 and 19 pages and 218, 196, 229,

192 and a range from 279 to 807 pages, respectively. The bottom five page-pickers picked 5, 8, 9, 10 and 11 pages and 177, 604, 390, a range from 445 to 720 and a range from 560 to 769, respectively.

On January 7, 1994, Techert picked 606 cases and 18 pages. On that date, the average number of cases picked was 468 and the average number of pages was 18.5. There were 14 employes who picked as many, or more cases and 16 (including some in both categories) who picked as many or more pages. There were 22 employes who picked fewer cases and 18 (including some in both categories) who picked fewer pages. There were eight employes who were ranked below Techert for both cases and pages; of these, six listed activity substantially greater than Techert's in other lines. The top five case pickers picked 839, 827, 802, 791 and 678 cases and 20, 25, 15, 25 and 13 pages, respectively. The bottom five case pickers picked 110, 142, 143, 149 and 167 cases and 16, 5, 11, 25 and 21 pages, respectively. The top five page-pickers picked 41, 39, 35, 32 and 25 pages and 257, 280, 199, 246 and 827 cases, respectively. The bottom five page pickers picked 5, 9, 11 and 12 pages, and 142, 498, 143, 612, 564 and 637 cases, respectively.

On January 14, 1994, the company terminated Techert, as follows:

TO: Jeff Techert

This is to notify you that your employment with Promotions Unlimited is terminated effective Friday, January 14, 1994. This is due to substandard work performance.

You have received three written warnings and one five day suspension for substandard work. Company guidelines suggest that the average number of cases picked per day is 600-800, depending on the sale. Over the last eight sales your productions averaged 300-400 cases per day. This is well below the acceptable level. You served a five day suspension in November 1993. For the next two sales, H01 and H02, your cases picked per day averaged 417 and 471, respectively. On January 4, 1994 you met with Wayne Lazenby, warehouse manager, and Ellen Phelps, employee relations liaison, to discuss your situation. However, your work performance still did not improve after that. We have given you every available opportunity to improve your average but this has not happened. Therefore, we have no choice but to terminate your employment.

You may pick up your final check on Friday, January 21 at the front desk; otherwise, it will be mailed to you.

Sincerely,

Pam Nguyen /s/
Pam Nguyen
Floor Supervisor

Techert grieved, stating as follows:

I was fired from Promotions for not making quota. This firing came 3 working days after I met with Ellen Phelps and Wayne Lazenby to discuss my not getting quota. Ellen told me, "We will put everything in the past behind us and start fresh. Show us that you are honestly making an effort to give us your quota and everything will be alright."

I want my chance that Ellen promised me. I want my job back so I may be the employee they want me to be.

The company denied this grievance. Both grievances were then processed to arbitration.

POSITIONS OF THE PARTIES

In support of its argument that the grievance should be sustained, the union asserts as follows:

The testimony and exhibits clearly showed that the system of work value or count leaves much to be questioned. It is not a recognized system by the Union.

The exhibits and documents shown by the Employer had shown many possible discrepancies and it was further obvious that these counts could have varied due to different job assignments.

The established 800 case count per day is not and was not agreed to by the Union.

Because of the questionable documentation and methods of work totalization, there can be no other decision but to reinstate the grievant and make him whole for all lost wages and fringes.

In conclusion, there was not sufficient grounds for discharge and that the grievant be returned to work.

In support of its argument that the grievance should be denied, the employer asserts as follows:

The grievant was aware of the work guidelines, which themselves are reasonable; otherwise, no other employee would be able to meet them. The other employees, though, do meet these guidelines. The grievant was more than capable of performing his job up to company standards; he had several months of acceptable

production. He became apathetic about his job. Because of this his attitude and attendance became worse and his production began to fall. After repeated written warnings, suspensions and conferences, it still did not improve. He was given proper notification of poor production and the company was more than fair in giving him enough opportunity to improve it. He did not want to. This is not the type of attitude the company expects of its workforce. It placed a hardship on the company and created morale problems for other employees. There was sufficient grounds for discharge; the company was justified in terminating the grievant's employment.

DISCUSSION

The contours and concepts of just cause are fairly well-understood. They include: foreknowledge to the employe of the adverse consequences of certain acts; a reasonable rationale to support a policy or procedure the employer seeks to enforce; a fair and objective investigation; application of rules and penalties which is neither arbitrary nor capricious.

The collective bargaining agreement empowers the company to "plan, direct and control operations; to determine the amount and quality of work needed," and to "schedule the hours or work and assignment of duties...." Acting under this general grant of authority, the company has set production guidelines, which the union challenges as a system which it has neither recognized nor agreed.

The distinguished arbitrator Arnold Zack has spoken on the issue of productivity, stating that there "is no question of the company's right to set production standards," including the "amount of work an employe is to produce on an hourly-paid basis," with the union having the right "to challenge the reasonableness of the compensation for meeting those job standards...." Grievance Arbitration, Zack, Lexington Books, 1989, p. 136.

Here, the company maintains daily records of the productivity of each warehouse employe, which it measures against the standards it has determined are necessary to remain profitable in a competitive economy. Absent language preventing the company from setting basic production guidelines, or absent evidence indicating that the guidelines are so extreme as to be unreasonable and capricious, I believe the prevailing attitude among arbitrators is to allow such standards to stand. Here, the record evidence shows language in the collective bargaining agreement generally authorizing production standards, and no language expressly preventing the company from setting such standards. The record evidence also shows that most employes meet these standards, an indication of general reasonableness. Thus, while the production standards themselves are not the immediate focus of this arbitration, I find that they are not on their face invalid, and may, if further conditions are met, form a proper basis for discipline. In so holding, I do not give final and binding endorsement of these standards in all situations, but only address their application in the matter before me.

In his grievance of the five-day suspension, Techert said he would "like to see if there is anybody with a lower average than mine" for that sale, asking, "if anyone is lower, are they being warned and or written up?" The evidence indicates that there were other employes with production levels roughly similar to Techert's, and that they were disciplined. Employes with no prior verbal warnings who picked 527 cases/12 pages and 553 cases/15 pages, respectively, were each issued verbal warnings. An employe who had already received a verbal warning who for sale G11 picked 453 cases/16 pages was issued a written warning.

Techert, who had already received a verbal warning and three written warnings, picked 522 cases/11 pages. Since December 2, 1993, Techert had been on notice of the company's production expectations, the company's belief that he was not meeting those standards, and that further incidence of what the company determined was substandard work would result "in disciplinary action up to and including discharge."

Thus, the record evidence establishes that Techert had foreknowledge of the adverse consequences of certain acts, namely discipline for failure to maintain production standards; that there was a reasonable rationale and sufficient authority for the policy the company has sought to enforce, and no meaningful challenge to the accuracy of the productivity levels credited to Techert. Finally, given that other employes with similar production levels were also disciplined, the application of the standards does not appear to be either arbitrary or capricious.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, I find that the company did have just cause to issue a five-day unpaid suspension to Jeff Techert.

Turning now to the grievant's discharge, similar arguments and similar analyses apply. Upon his return from suspension, Techert's production was 417 cases/11 pages and 471 cases/16 pages for the first two sales, respectively. The company asserts that it could have terminated Techert at that point, but, following a meeting on January 4, 1994, gave him one last chance. Over the next three days, Techert was more productive than some, but less productive than most. But while this level of productivity might have been acceptable, or occasioned lesser discipline under different circumstances, it was not acceptable under these circumstances. The primary circumstance, of course, was that the company had been trying to get Techert to improve his productivity for over a year, with little success. It had pursued a steady course of progressive discipline, from a verbal warning, through three explicit written warnings, and a five-day suspension. Techert's explanations -- that he got caught up in the personal business of co-workers; that his arms and feet hurt; that he was disappointed at not getting a transfer to the sweeper position -- add an undeniable element of poignancy to this unfortunate situation, but they do not change the basic facts.

In his grievance, Techert related his impression of the January 4, 1994, meeting, that being that Company representative Ellen Phelps told him that they would "put everything in the past behind us and start fresh." At hearing, however, Techert acknowledged that he "knew she didn't mean the slate would be all clean," but he believed that if he made an honest effort, that would be sufficient. "I made the effort," Techert testified. "Maybe I didn't make quota, but I gave them my best."

At hearing, the union raised an issue regarding the accuracy of the company's activity reports, alleging that the computer records are skewed because the warehouse employes do not turn in tracking tickets on a daily basis. The evidence, however, fails to establish how widespread such a practice is, or its actual impact. There may come a case where the evidence successfully challenges the validity of the company's activity reports; this, however, is not that case.

The Union also challenged the accuracy of the activity reports on the grounds that they did not take into account time Techert spent training other personnel. The Company offered rebuttal testimony and evidence which has convinced me that the aggregate reports per sale did in fact take such activity into account.

On January 4, 1994, the company gave Techert a final chance. But at a time when he knew that his job depended on high productivity, Techert performed at only a marginal level. The company, and Techert's co-workers, were entitled to more.

Techert had more than sufficient knowledge of the consequences of a continued failure to meet productivity standards. Those standards, on the record to date, have a reasonable rationale. The accuracy of the investigation -- the validity of the activity reports -- has not been successfully challenged. The application of the rules and penalties has been neither arbitrary nor capricious.

Accordingly, on the basis of the collective bargaining agreement, the arguments of the parties, and the record evidence, I find that the company had just cause to discharge Jeff Techert.

Therefore, it is my

AWARD

That the grievances filed in this matter are denied.

Dated at Madison, Wisconsin this 20th day of September, 1994.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator