

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration	:
of a Dispute Between	:
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TEAMSTERS LOCAL UNION NO. 43	: Case 11
	: No. 51445
	: A-5279
and	:
	:
PROMOTIONS UNLIMITED CORPORATION	:
	:

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Appearances:

Mr. Larry Greenfield, on behalf of the Company.  
Mr. Terry Simenson, Business Agent, on behalf of the Union.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Company", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Racine, Wisconsin, on November 15, 1994. The hearing was not transcribed and the parties there waived the filing of briefs.

Based upon the entire record, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Did the Company have just cause to discharge grievant E'fran Wilks and, if not, what is the appropriate remedy?

DISCUSSION

Grievant Wilks was employed by the Company for about a year before he was fired on August 12, 1994. 1/ During that time, he received two written warnings for tardiness and not calling in for an absence.

The Company requires employes to punch out whenever they leave the building even for lunch breaks and to that end it has posted the following notice on the employee bulletin board:

TO: ALL EMPLOYEES  
FROM: WAYNE  
RE: TIMECARDS

TO CLARIFY AN EXISTING POLICY, ALL EMPLOYEES WHO LEAVE

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1/ All dates hereinafter refer to 1994.

THE BUILDING FOR LUNCH ARE TO PUNCH OUT AND WHEN THEY COME BACK, THEY ARE TO PUNCH BACK IN.

IT HAS BEEN OBSERVED THAT SEVERAL EMPLOYEES ARE PUNCHING THEIR CARDS OUT AND THEN IMMEDIATELY PUNCHING THEM IN AT LUNCH BREAK, BEFORE LEAVING THE BUILDING. THIS IS A VIOLATION OF COMPANY POLICY.

EFFECTIVE IMMEDIATELY, ANY EMPLOYEES WHO PUNCH THEIR OWN TIME CARDS OUT AND IMMEDIATELY PUNCH THEM IN AGAIN AT LUNCH TIME WILL BE SUBJECT TO DISCIPLINARY ACTION.

On the afternoon of August 10, supervision became concerned over his whereabouts. As a result, supervisors Ellen Wrzesinske, Reynaldo Arias and Amy Gresl toured the plant in an effort to find Wilks, but to no avail. Wrzesinske and Arias acknowledged that they did not cover all areas of the plant and that it was possible that Wilks was in a storage area that day, as he claimed. Arias added that Wilks' nephew, who did not testify, had told him that Wilks had left for the day. Arias thereafter tried to find Wilks' car in the parking lot, but could not do so. Gresl testified, "We yelled his name a few times" and that she looked for Wilks in the storage and locker area, but could not find him. In addition, Wilks was repeatedly paged over the plant's intercom, but he did not respond to the pages.

Warehouse Manager Wayne Lazenby testified that Shipping Supervisor Bill Biggers had earlier told him at around lunch time that Wilks had left the building; that he heard a rumor that Wilks would be returning to the plant to punch out and/or that a friend would punch his time card; that he therefore pulled Wilks' time card; that he himself had four supervisors try to find him during that afternoon; that he eventually returned Wilks' time card; that Wilks finally was located at about 4:00 p.m.; that Wilks then told him, "I cannot lie. I was hiding and fell asleep"; that he would not let Wilks punch out because he did not deserve 8 hours' pay; that he then told Wilks that he would punch him out; and that he subsequently did so.

Biggers testified that when Wilks left the building, he was throwing his car keys in the air and that, in his words, "I did not see him come back in."

For his part, Wilks said that he went out to his car on August 10 at around lunchtime to retrieve a coat; that he did not then punch out because he was outside the plant for less than a minute; that he returned to the plant, but had nothing to do; and that he fell asleep in the storage area. He also admitted that he told Lazenby that he had been sleeping and said that he never attempted to punch out. Wilks further stated that he had no idea why his nephew told Biggers that he had left for the day and he further claimed that he never parks his car inside the Company fence where Arias tried to locate his car.

On that same day, Employee Relations Manager Ellen Phelps and Lazenby went to the storage area, which was then covered with dust. Phelps testified that there were no marks in the dust, thereby leading her to believe that Wilks had not been there. In addition, Phelps said, "His clothes were perfectly clean. I could not understand how he could be so clean" if in fact he was in that area of the plant as he claimed.

Union Steward Cynthia Vance - Smith testified that on August 10 she saw Wilks go out to his car and return to the plant at lunch time. However, she admitted that she did not actually see him enter the warehouse. Smith also said that she talked to supervisor Pat M. Ostergaard about Wilks at that day. Ostergaard, however, denied working that day and the Company's payroll records establish that she, in fact, was not at work on August 10.

On August 12 Wilks was told that he was being terminated and he was then

given a letter from Ostergaard reading:

This is to notify you that your employment with Promotions Unlimited is terminated effective August 12, 1994. This is due to violation of Employee Conduct and Discipline Policy - Major Violation #8 which states "Willful falsification of any company records, including employment application, medical history questionnaire, etc".

On Wednesday, August 10, 1994 you were observed by a supervisor, leaving the building on lunch break (11:45am) without punching out. Later that afternoon your immediate supervisor and (2) warehouse employees were looking for you in the warehouse after lunch (12:15pm) and at second break (2:15pm) without success.

When you could not be found, you were paged over the intercom system, receiving no response from you. However, due to you not being located in the building, it was determined that you were not on the premises.

At 4:00pm you were observed waiting by the time clock to punch-out for the day. Again, falsification of company records is a major policy violation and results in dismissal.

You may pick up your final check on Friday, August 19, 1994 at the front desk, otherwise it will be mailed to you at the address we have on file.

. . .

In this connection, the Company's Employee Benefits and Policies provides under a section entitled "Employee Conduct and Discipline Policy":

"The following rules are illustrative of the kind 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 employes, or knowingly receiving stolen property or employe property."

. . .

Another part of these same Policies states:

"Other Violations:

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

. . .

3. Sleeping or loafing while on duty."

. . .

Wilks filed his grievance on August 12 protesting his discharge.

In resolving this issue, it must first be noted that the Company bears the burden of proving that Wilks, in fact, was guilty of the misconduct charged. See, How Arbitration Works, Elkouri and Elkouri, pp. 324-325 (BNA, Fourth Edition, 1985).

As to that, there is no question but that the Company had a reasonable belief that Wilks had engaged in misconduct since: (1), he did not sign out when he went to his car; (2), he was seen by Biggers leaving the plant and throwing his car keys in the air; (3), he did not respond to repeated pages over the Company's intercom system; (4), he was not located by the various supervisors who tried to find him; (5), Wilks' nephew told Arias that Wilks had left for the day; (6), Arias could not locate Wilks' car in the parking lot, and (7), Phelps and Lazenby did not find any marks in the dust where Wilks claimed he had been all afternoon.

But despite all this, the fact remains that no Company representatives saw Wilks return to the building at about 4:00 p.m. to check out. As a result, there is no clear proof that he was away from the building during that afternoon. To the contrary, fellow employee Vance-Smith testified that she saw Wilks return towards the building at noon after he went out to his car. While Vance-Smith clearly erred in claiming that supervisor Ostergaard was not at work that day, I credit this part of her testimony. It therefore appears that Wilks did return to the plant even though she did not actually see him enter the building.

Moreover, Wilks was able to clearly describe that part of the storage area where he claimed to have fallen asleep during that afternoon - which is something he could not have done had he not been there.

While a close question, I therefore conclude that, on balance, the Company has failed to meet its burden of proof and that it did not have just cause to terminate Wilks for deliberately falsifying Company records as charged. Thus, the Company was only entitled to give Wilks a written warning over his sleeping, as its own work rules provide for that penalty, Wilks' discharge therefore shall be converted to such a written warning.

Furthermore, since Wilks does not wish to return to work, the Company shall make him whole by paying to him a sum of money, including all benefits, that he would have earned from the time of his termination to the time he found alternative employment, minus any money that he otherwise would not have received but for his termination. In addition, the Company shall remove from Wilks' personnel file all references to his discharge.

In order to resolve any questions which may arise over application of this Award, I shall retain jurisdiction for at least thirty (30) days.

In light of the above, it is my

AWARD

1. That the Company lacked just cause to fire Grievant E'fran Wilks.
2. That his discharge is converted to a written warning.
3. That the Company shall take the remedial action stated above.

4. I will retain jurisdiction for at least thirty (30) days.

Dated at Madison, Wisconsin this 27th day of December, 1994.

By Amedeo Greco /s/  
Amedeo Greco, Arbitrator