

BEFORE THE ARBITRATOR

---

In the Matter of the Arbitration of a Dispute Between  
**PROMOTIONS UNLIMITED CORPORATION**

and

**TEAMSTERS LOCAL 43**

Case 13  
No. 55833  
A-5638

*(Grievance of Anthony Morales)*

---

Appearances:

**Ms. Andrea F. Hoeschen**, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, Milwaukee, Wisconsin, 53212, appeared on behalf of the Union.

**Mr. Victor Long**, Long & Halsey Associates, 8330 Corporate Drive, Racine, Wisconsin 53406, appeared on behalf of the Company.

**ARBITRATION AWARD**

On November 24, 1997, the Wisconsin Employment Relations Commission received a request from Teamsters Local 43 and Promotions Unlimited Corporation to have William C. Houlihan, a member of its staff, hear and decide a dispute pending between the parties. Mr. Houlihan was so designated and on March 4, 1998, an evidentiary hearing was conducted in Racine, Wisconsin. Closing arguments were made at the conclusion of the hearing. By prior agreement of the parties, the arbitrator rendered a bench decision at the conclusion of the evidentiary hearing. This Award confirms that decision.

This dispute concerns the discharge of employe Anthony Morales.

**BACKGROUND AND FACTS**

Anthony Morales, the Grievant, is employed by Promotions Unlimited as a case picker in

the Company's warehouse. Mr. Morales' work consists essentially of filling Company orders.

Page 2  
A-5638

On October 30, 1997, Mr. Morales suffered a death in his extended family and spent that evening grieving with a large number of family members. He drank during the course of the evening. His testimony is that he went home at around midnight. Mr. Morales testified that he was awakened around 4 a.m. and called to quell a family disturbance. He arose, drove to his aunt's house, and while there, consumed a portion of one beer. He thereafter returned home. Mr. Morales testified that at the time he had a bad cold, for which he took Nyquil.

Mr. Morales arrived at work on time, at approximately 7:25 a.m. the next morning, October 31. He testified that he felt capable of working, and that he was not under the influence of alcohol. He indicated that he was emotionally distraught, tired, and sick with a cold.

It was the testimony of number of people including Mr. Arias, Morales' supervisor, Ms. Ostergaard, the warehouse supervisor, and Ms. LaBarre, Human Resource Manager, that Mr. Morales could not be found for a significant period of time, approximating one hour, in the early morning of October 31. Those various individuals unsuccessfully looked for Mr. Morales. It was Morales' testimony that he was working, and that his job requires regular on-going returns to his work station. He claims that no one looked for him at his work station nor used the page system to attempt to contact him.

Ostergaard became concerned that Morales might be sick. An unidentified employe had evidently indicated to Ostergaard and to Arias that Morales might have been under the influence of alcohol. When asked, Arias indicated to Ostergaard that he believed that he might have smelled alcohol on Morales. Ostergaard was also concerned as to Morales' absence from work. Ostergaard and Arias testified that Morales spent a good deal of time in the restroom. She brought these concerns to Wayne Lazenby, Warehouse Manager, and also to Lisa LaBarre. As a consequence of her concerns, a meeting was convened involving Lazenby, Ellen Phelps, who is a part owner of the Company, Morales, and Cindy Vance-Smith, the Union steward. During the course of the meeting, Morales advised Company officials that he had experienced a death in the family and had spent a portion of the evening drinking. At the conclusion of the meeting, Ms. Phelps directed Morales to have a Breathalyzer alcohol test performed.

The test was subsequently performed at Aurora Medical Facility. Mr. Morales tested at .029, and on a confirming test, tested .026. He was discharged by the following letter:

This letter is to notify you that your employment with Promotions Unlimited is terminated effective October 31, 1997 due to the fact that you tested over the legal limit on a blood alcohol test taken on the same day.

According to Company policy, violating the Company's drug and alcohol policy is a major violation, and one that is subject to discipline including discharge.

...

Page 3  
A-5638

### ISSUE

The parties stipulated to the following issue:

Was Anthony Morales terminated for just cause?

### RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

#### 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:

...

#### ARTICLE 13. ADJUSTMENT OF GRIEVANCES

...

#### 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.

Settlements at any steps of the grievance procedure shall be final and binding on all parties.

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.

The decision of the arbitrator shall be final, conclusive and binding on both parties.

. . .

### DISCUSSION

I believe the Grievant was away from work for a significant period of time on the morning of October 31st. He probably spent a good deal of that time in the bathroom. I believe his absence from the work floor was due to some combination of alcohol consumption the prior night, emotional distress, Nyquil, fatigue, and his cold. Company officials unsuccessfully sought him out.

I believe the Company had a right to subject the Grievant to a test. Ostergaard looked for, and could not find Morales. It was her testimony that she believed he might be sick. Her testimony was predicated upon her observation that he was moving slow, and that he had spent a considerable amount of time in the bathroom. It also appears that someone, unidentified in this proceeding, had indicated to both Ostergaard and to Arias, that the Grievant might be under the influence of alcohol. She so informed LaBarre and Lazenby.

During their subsequent meeting with Morales, the Grievant indicated that he had been drinking the night before. That presented a reasonable explanation for Ostergaard's observation that he appeared ill. It was the uncontradicted testimony of Phelps that the Company has sent a number of employees to be drug and/or alcohol tested. Under this scenario, I believe the Company's request that Morales be tested was reasonable, and consistent with the Company drug and alcohol policy which permits testing where, "observed behavior raises any questions about his/her physical condition and fitness to perform his/her job."

The Company drug and alcohol policy speaks to potential discipline for being ". . .under the influence of drugs or alcohol. . ." On its face, it is not an absolute prohibition against having any drug and/or alcohol in the system. The implication of the language used is that it must be a quantity sufficient to influence behavior. The Company's use of a Breathalyzer test with a .2 tolerance level is evidence of that fact.

The Company uses a Breathalyzer test to determine the influence of alcohol in the system. It appears that the test was appropriately administered, the results obtained and confirmed. The test results showed .029 and .026 on the confirming exam. Those results appear to be valid readings. However, the test results were not interpreted. The only interpretation offered was that .02 is a threshold for a positive finding. There is no indication in the record what that means. Had the Grievant tested at .019 it would have yielded a negative result, notwithstanding the existence of alcohol in his system. Wisconsin Statutes permit a .1

percent level of alcohol in the blood before a driver is deemed to be "under the influence". [Sec. 346.63(1)(b), Wis. Stats.] The statutes further tolerate a .04 level for the operation of commercial vehicles. [Sec. 346.63(5)(a), Wis. Stats.]

Based upon this record, I am not willing to draw a conclusion that a test result of .02 constitutes a *per se* finding that a person is under the influence of alcohol for the purposes of the collective bargaining agreement. The potential influence of Nyquil complicates this analysis.

There is little corroborating evidence to support the claim that Morales was under the influence. It was Mr. Arias' testimony that he may have detected alcohol on Morales' breath, but he did not bring that concern forward. Ms. Ostergaard who testified at length, did not testify that she detected alcohol, nor did she indicate that she perceived the Grievant to be under the influence. She did testify that she became concerned that he might be sick. She testified that he was doing his job, slowly. LaBarre, Lazenby, Phelps, Vance-Smith, and Ms. Luebke, a co-worker, all testified. All had contact with the Grievant. None gave any indication that they smelled intoxicants on his breath or that he behaved in any way suggesting that he was under the influence.

Mr. Morales' prior work/discipline record is irrelevant to this proceeding. It was not made a part of this record. Ms. Phelps testified that it was not considered in the decision to discharge. That raises the question as to whether or not these facts, standing alone, and not as the culmination of a history of progressive discipline, warrant discharge.

There is not a meaningful practice to form a context to this proceeding. A Union witness testified relative to three named individuals who failed tests and who were not terminated. That testimony was explained and/or rebutted by the Company. The Union witness testified further to an unnamed employe who tested positive and who was not terminated. That testimony is not compelling. The Company offered testimony that in the last three years, inconsistencies with respect to drug and alcohol testing had been eliminated. It was the testimony of Ms. Phelps that positive tests have inevitably led to termination. However, there were no examples provided. The number and circumstances of those incidents are not a part of this record.

It is my conclusion that the Company did not prove that the Grievant was under the influence of alcohol within the meaning of the Company's drug and alcohol policy. That was the sole basis for his discharge.

#### AWARD

The grievance is sustained.

**REMEDY**

The Company is directed to reinstate the Grievant, and make him whole for lost wages, benefits and seniority rights he suffered as a consequence of the discharge. If he has received Unemployment Compensation, the Company is directed to restore the Grievant's eligibility for Unemployment Compensation. The Company is entitled to offset its liability by deducting interim earnings received from other gainful employment and Unemployment Compensation monies, if any.

**JURISDICTION**

I will retain jurisdiction for the sole purpose of resolving disputes as to the remedy.

Dated at Madison, Wisconsin, this 6th day of March, 1998.

William C. Houlihan /s/  
\_\_\_\_\_  
William C. Houlihan, Arbitrator