

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**TEAMSTERS LOCAL UNION NO. 43**

and

**PROMOTIONS UNLIMITED CORPORATION**

Case 18  
No. 57803  
A-5784

(Policy on Early Quits)

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Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney John J. Brennan**, P.O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union No. 43

**Mr. Victor J. Long**, Long & Halsey Associates, Inc., 8330 Corporate Drive, Racine, Wisconsin 53406, appearing on behalf of Promotions Unlimited.

**ARBITRATION AWARD**

Pursuant to the provisions of the collective bargaining agreement between the parties, Teamsters Local Union No. 43 (hereinafter referred to as the Union) and Promotions Unlimited Corporation (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate Daniel Nielsen of its staff to serve as arbitrator of a dispute between the parties over the Company's policy of imposing written reprimands on employees who left work early. A hearing was held on September 14, 1999, at the Company's offices in Sturtevant, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and argument as were relevant to the dispute. The parties submitted post-hearing briefs, which were exchanged through the arbitrator on October 5, 1999, whereupon the record was closed.

Now, having considered the testimony, exhibits, and other evidence, the arguments of the parties, and the record as a whole, and being fully advised in the premises, the undersigned makes the following Award.

**To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.**

### ISSUE

The parties stipulated that the following issue should be determined herein:

Is the Company in violation of the collective bargaining agreement by its application of its attendance policy? If so, what is the appropriate remedy?

### RELEVANT CONTRACT LANGUAGE

#### **1997-2000 Contract**

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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: to determine the amount and quality of work needed, 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 employees or similar awards to any other employee.

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**ARTICLE 17. ABSENCE PROGRAM**

Absences will be disciplined as follows:

An employee with 12 months or less seniority

6th Unexcused absence	First written warning
7th Unexcused absence	Second written warning
8th Unexcused absence	Final written warning
9th Unexcused absence	Termination

An employee with 13 to 36 months seniority

8th Unexcused absence in 12 month period	First written warning
9th Unexcused absence in 12 month period	Second written warning
10th Unexcused absence in 12 month period	Final written warning
11th Unexcused absence in 12 month period	Termination

An employee with over 36 months seniority

10th Unexcused absence in 12 month period	First written warning
11th Unexcused absence in 12 month period	Second written warning
12th Unexcused absence in 12 month period	Final written warning
13th Unexcused absence in 12 month period	Termination

Tardies

An unexcused tardy (arriving late or leaving early) shall be treated as follows:

Up to 2 hours arriving late or leaving early	1 Tardy
2 to 4 hours arriving late or leaving early	2 Tardies
over 4 hours arriving late or leaving early	3 Tardies

3 Tardies equal one absence.

Refer to Company's manual for detailed explanation.

**EXCERPTS FROM EMPLOYEE HANDBOOK**

**PROMOTIONS UNLIMITED**

**WAREHOUSE  
EMPLOYEE BENEFITS AND POLICIES**

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The purpose of this handbook is to give you information about the policies, benefits and other matters pertaining to employment at Promotions Unlimited. The contents of this employee handbook are not intended to provide answers to every question that may arise. Rather, they are intended to summarize the policies and practices of the Company. If matters do come up that are not fully covered in the handbook, you should consult your immediate supervisor. The information in this handbook may be revised from time to time.

As a warehouse employee, you will be required within thirty-one (31) days to become a member of the Union, and your terms and conditions of employment will be covered by the collective bargaining agreement with the Union as your representative. Many of the policies and procedures set forth in this handout are taken from that agreement. This handout should not be read as deviating in any way from that agreement, and wherever any conflicts may appear, the agreement shall govern.

Once again, we are happy to have you as a member of our team.

. . .

August 1997

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**WORKING AT PROMOTIONS UNLIMITED**

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Attendance

Your steady attendance is very important to the Company. Absenteeism and tardiness, regardless of their cause, place a hardship on your fellow employees.

### Absences

Excessive absenteeism will be disciplined as per Article 17 of the collective bargaining agreement.

An absence is any time an employee is scheduled or expected to work and fails to do so for reasons not associated with company operations. This excludes break or lunch periods when the employee is not scheduled to work.

Tardiness is an incident when an employee has not reported to work at the normally scheduled time or when the employee has previously agreed to work. This covers all cases, including reporting to work from home, returning to work from lunch, voluntary overtime and mandatory overtime.

An employee is tardy if he/she reports after his/her scheduled start time.

The attendance period for the current system covers any twelve (12) consecutive months dated from the first occurrence of absence or tardy within the twelve (12) months.

Absence for the following reasons shall not be considered an absence occurrence. Proper notification and/or documentation must be provided to the immediate supervisor.

- A. Industrial injury
- B. Vacation, Holiday (when not scheduled for work), Jury Duty
- C. Legal summons
- D. Leave of absence for any period of time (approved in advance by the company and in accordance with federal and state laws).
- E. Family death per collective bargaining agreement

### Tardy or Leaving Early

If an employee is late for work for any reason or if an employee leaves early during the regular shift time or voluntary or mandatory overtime for any reason, he/she will be charged with a tardy as per Article 17 of the collective bargaining agreement.

All absences and tardys (sic) must be reported to the warehouse office prior to your start time. You must personally call in. A call in sick line is available at [\*\*\*-\*\*\*\*]. You will be asked to answer questions regarding your absence on a

recorded line. Third party calls will be accepted in extenuating circumstances. The person reporting the absence must state the employee's name, specific reason for the absence, and expected return to work date.

#### No Call, No Show

An unreported absence, "No Call, No Show" will result in an immediate written warning. Three written warnings for unreported absence will result in immediate termination of employment at the time of the fourth occurrence.

If you are absent for three (3) consecutive days or more without having made satisfactory arrangements with the Company, you will be considered self-terminated. In no case shall a satisfactory reason for an absence exist when you do not notify the Company.

If you sign up to work a lay-off, it is mandatory that you report for work, unless excused by your supervisor. If you do not report, you will be charged with an unexcused absence.

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#### 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. While it is not possible to list every conceivable infraction, these types of conduct are unacceptable in our work place. These guidelines may be amended by the Company within its total discretion.

1. Insubordination (refusal or failure to perform work assignments or to comply with instructions from supervision).

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13. Violating the absenteeism or tardiness policies (See p. 6).

...

15. Leaving the premises during working time (except as required by one's job) without authorization by supervision.

. . .

### **BACKGROUND**

The Company distributes products and promotional materials from its facility in Sturtevant, Wisconsin. Its warehouse employees are represented by the Union. The Union and the Company have been parties to a series of collective bargaining agreements, including the current agreement for the 1997-2000 term. In that agreement, for the first time, the parties included a negotiated no-fault attendance policy. Article 17 addresses both complete absences and tardies, with the latter being defined as arriving late or leaving early. There is a schedule of penalties for absences, varying in severity depending upon the employees' seniority and the number of occurrences within a twelve-month period. Tardies of 2 hours or less are treated as one-third of an absence, 2 to 4 hours are equal to two-thirds of an absence, and a tardy of more than 4 hours is treated as one absence. Under the no-fault policy, an employee with 12 months or less of seniority receives a written warning for his or her 6th unexcused absence. Thus a new employee with no other attendance infractions could accumulate 17 tardies of 2 hours or less under Article 17 without receiving a disciplinary warning. The 18th tardy would trigger a written reprimand.

In October of 1998, Company officials became concerned about what they perceived to be an increase in the instances of employees leaving work early without permission. Often this was in connection with employees failing to work scheduled overtime. This caused a number of problems, including a need to rearrange the work teams in the middle of the shift and a shortage of workers to finish the work. Employee Relations Manager Ellen Phelps discussed the problem with others and determined that the Company could adopt a stricter approach than was available under the no-fault policy, by enforcing a rule contained in its work rules. Rule 15 of the "Employee Conduct and Discipline Policy" prohibits "Leaving the premises during working time (except as required by one's job) without authorization by supervision."

Phelps composed a notice to employees:

### **TO ALL WAREHOUSE EMPLOYEES**

As clarification of the following existing policy:

"Leaving the premises during working time (except as required by one's job) without authorization by supervision."

Any employee who leaves the building during working hours **must notify their supervisor** (except lunch break). The supervisor will decide whether to allow the employee to leave or not.

**Any employee who leaves without permission will be dealt with according to the Employee Conduct and Discipline Policy.**

**Violation of the above policy may result in disciplinary action up to and including discharge.**

Please notify your supervisor by 8:00 a.m. if you know in advance that you need to leave early.

Leaving early without permission will be counted against the no fault attendance policy.

Any employee who is absent or late must call the Company attendance line by 7:30 a.m.

Thanks for your cooperation.

Phelps sent a copy to Terry Biarnesen, Business Agent for Local 43, and told him that the Company was going to post the notice. They discussed the policy in a telephone conversation, and the Company thereafter began enforcing it against employees. As administered by the Company, leaving early triggered several consequences. Leaving early for any reason was counted as a tardy under the no-fault policy of Article 17. If the employee gave an inadequate reason, or no reason, for leaving early, the employee would receive a written warning, progressing through a series of warnings and a suspension, to a discharge for the sixth occurrence. If an employee could provide an adequate explanation (for example, a compelling family emergency) the discipline would be rescinded, but the points under the no-fault policy would remain.

On May 17th, the Union filed a class action grievance challenging the Company's policy as contrary to the procedures in the collective bargaining agreement. The grievance requested discontinuance of the policy and the removal of all write-ups for leaving early from employee records. The grievance was not resolved in the lower steps of the grievance procedure, and was referred to arbitration.

Additional facts, as necessary, will be set forth below.



## **ARGUMENTS OF THE PARTIES**

### **The Arguments of the Union**

The Union takes the position that the Company is applying its employe handbook in a manner that trumps the collective bargaining agreement. This violates the normal order of such documents, as well as the express terms of both documents. The handbook itself cautions that the terms and conditions of employment for warehouse workers are governed by the labor agreement, and that the handbook cannot be read as deviating from the agreement. The handbook further contains the flat declaration that "excessive absenteeism will be disciplined as per Article 17 of the collective bargaining agreement." It goes on to say that arriving late or leaving early will be charged as a tardy under Article 17. Given all of this, the Company cannot seriously argue that it has some recourse, other than Article 17, for disciplining employes who leave early.

Article 17 of the collective bargaining agreement comprehensively addresses the topic of discipline for attendance related problems. With respect to leaving early, it defines this as a tardy, and sets forth a schedule of discipline. Notwithstanding this, the Employer has adopted a system of imposing discipline under the work rules, which results in far harsher penalties than allowed under Article 17. Having bargained and reached agreement over the appropriate penalties for leaving early, the Employer does not now have the option of unilaterally changing the penalty schedule. Accordingly, the arbitrator must sustain this grievance and order that all employe records be purged of discipline for leaving early imposed according to the work rules rather than the negotiated no-fault attendance policy.

### **The Arguments of the Company**

The Company takes the position that the grievance is without merit and should be dismissed. It is axiomatic that companies have the right to establish reasonable work rules regulating the conduct of employes. The rule against leaving work without permission during the shift is just such a rule. No employer can be expected to tolerate employes coming and going as they please during the shift. It is extremely disruptive of their work, the work of others, and the Company's whole team approach to production. The Company has not applied this rule arbitrarily. To the contrary, each alleged violation is reviewed on its own merits, with an eye to identifying mitigating or excusing factors. Thus the Company has a reasonable rule, reasonably applied.

The Union's claim that the Company somehow lost its right to enforce the rule against going AWOL when it agreed to a no-fault attendance policy is not persuasive. The policy in Article XVII and the rule both address similar conduct, but there are important distinctions. The no-fault policy is designed to address general attendance problems, whatever the reason

for those problems. It is an objective system, and any unscheduled absence no matter how well justified leads to the assessment of points. The work rule regulates specific conduct, and hinges on whether permission is received for leaving early. The element of willfully disobeying when told not to leave distinguishes a Rule 15 violation from a violation of the no-fault attendance policy.

### DISCUSSION

The question in this case is whether the inclusion of a no-fault attendance policy, including a specification of penalties, in the current collective bargaining agreement was intended to be a comprehensive regulation of attendance-related infractions and thus forecloses the regulation of attendance through unilateral Company rules. The Union takes the position that it does, while the Company asserts that it has a range of options open to it beyond assessing points under Article 17.

Looking at the plain language of Article 17, a compelling argument can be made for the Union's position. The provision clearly regulates tardiness, which it defines as including "leaving early," and the opening words of the Article speak in terms that suggest it is the exclusive vehicle for responding to attendance-related infractions: "Absences will be disciplined as follows" (emphasis added). However, the Article also refers to the Company's manual as the source for a detailed explanation of its operation ("Refer to Company's manual for detailed explanation"). Thus the intent of the language cannot be determined without also looking at the Handbook.

The essence of the Employer's argument is that one must look beyond the contract to the Handbook, since that is where Rule 15 is set forth: "Leaving the premises during working time (except as required by one's job) without authorization by supervision." However, the Employer chooses to read only the portion of the Handbook that contains Rule 15. Rule 15 is listed under the "Discipline" section of the Handbook, and is directed at leaving the premises, whether briefly or for the balance of the shift. Earlier in the Handbook, in the "Attendance" provisions, tardiness and absenteeism are more directly addressed:

Excessive absenteeism will be disciplined as per Article 17 of the collective bargaining agreement.

An absence is any time an employee is scheduled or expected to work and fails to do so for reasons not associated with company operations. This excludes break or lunch periods when the employee is not scheduled to work.

Tardiness is an incident when an employee has not reported to work at the normally scheduled time or when the employee has previously agreed to work. This covers all cases, including reporting to work from home, returning to work from lunch, voluntary overtime and mandatory overtime. (emphasis added)

An employee is tardy if he/she reports after his/her scheduled start time.

...

Tardy or Leaving Early

If an employee is late for work for any reason or if an employee leaves early during the regular shift time or voluntary or mandatory overtime for any reason, he/she will be charged with a tardy as per Article 17 of the collective bargaining agreement. (emphasis added)

...

The attendance portions of the Handbook define tardiness in precisely the terms that the Employer is defining a Rule 15 violation, and they provide that discipline for tardiness will be in accordance with Article 17 of the contract. While Article 17 itself invites reference to the Handbook, it is far more plausible to conclude that the negotiators were referring to the attendance provisions of the Handbook than to believe that they meant to incorporate the general discipline provisions of the Handbook. 1/ This conclusion is buttressed by the fact that the Company itself treated leaving early solely as a violation of Article 17 until it decided that the schedule of penalties in that Article was an inadequate deterrent and sought out a more effective sanction by resurrecting Rule 15.

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*1/ In contrast to the disciplinary rule against leaving the premises, the contract's reference to the attendance portions of the Handbook would still allow the Company to enforce the rule providing written warnings for a "No Call/No Show," and the presumption that three consecutive days of absence with no contact constitutes a voluntary quit. Even though those penalties are facially inconsistent with the schedule of penalties in the no-fault system, they were set forth in the attendance portions of the Handbook at the time the system was bargained, and may be treated as having been expressly incorporated into the system.*

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Given the relationship of Article 17 and the wording of the Employer's own Handbook provisions on attendance, the contract cannot be read as allowing the Employer to impose discipline for attendance related offenses which is inconsistent with the schedule of penalties in

the contract. The only remaining rationale for issuing written warnings under Rule 15 to employes who leave early is that there is an element of insubordination in leaving early when the employe has been denied permission to leave. There are two problems with that distinction. First, it treats more harshly the employe who seeks permission to leave than it does the employe who simply leaves. That is not a rational distinction. That problem can be circumvented by assuming that there is an implicit standing order to remain at work, but in that case every absence or tardy is an act of insubordination, since presumably there are also implicit standing orders to come to work and to arrive on time. Second, and more importantly, this is not a distinction that has been followed by the Employer. By Phelps' account, discipline for leaving early does not turn on whether the employe sought and was denied permission to leave. Instead, employes who leave without asking or without obtaining permission, but who can provide an adequate, after-the-fact explanation for leaving early will have their discipline rescinded. The Company certainly has the right to give a post-occurrence authorization for the employe to leave if it chooses, but that does not really affect the degree of insubordination that may or may not have existed at the time the employe elected to disobey orders not to leave work.

I can readily believe that the Employer did not fully appreciate the problem of early quits when it negotiated the provisions of Article XVII, but the answer to that is to renegotiate the provision. As it stands, the contract does not allow the Company to issue written warnings to employes for leaving early unless they have reached the appropriate step on the schedule of penalties set forth in the body of the contract.

On the basis of the foregoing, and the record as a whole, I have made the following

### AWARD

The Company is in violation of the collective bargaining agreement by its application of its attendance policy. The appropriate remedy is to rescind the discipline imposed on employes, beyond that which would have been appropriate for a tardy within the meaning of the no-fault attendance policy. If any employe has suffered a loss of income by virtue of improper discipline for leaving early, the employe shall immediately be made whole. If any employe has been terminated by virtue of improper discipline for leaving early, the employe shall immediately be reinstated and made whole.

Dated at Racine, Wisconsin, this 17<sup>th</sup> day of November, 1999.

Daniel Nielsen /s/

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Daniel Nielsen, Arbitrator