

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between
RADIO AND TELEVISION BROADCAST
ENGINEERS, LOCAL UNION NO. 715
OF THE INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS

and

WISN DIVISION - THE HEARST
CORPORATION

Appearances:

Lawton & Cates, S.C., by Mr. Bruce M. Davey, on behalf of the Union.
Quarles & Brady, by Mr. Robert H. Duffly, and Mr. Michael H. Grebe, on behalf

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Station", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Milwaukee, Wisconsin, on July 29, 1994. The hearing was transcribed and both parties filed briefs which were received by September 26, 1994.

Based upon the entire record and the arguments of the parties, I issue the following Award.

ISSUE

The parties have agreed to the following issue:

Whether there was just cause to discharge grievant Greg Zabolocky and, if not, what is the appropriate remedy?

DISCUSSION

The Station operates a television station in Milwaukee, Wisconsin, where it produces a television show called "The Money Game". That weekly thirty-minute show is taped every Friday afternoon before a live audience for subsequent showings. It centers on the Wisconsin Lottery and the approximately 50 or so finalists who are called into the television studio where some of them are chosen to participate in the weekly game, with the ultimate winner receiving about \$60,000.

A representative from the accounting firm of Conley McDonald - which has a contract with the Wisconsin Lottery - attends each show so that he/she can help ensure that certain procedures are correctly followed and that contestants' names are properly drawn from a drum. Its audit supervisor for the Friday, February 11, 1994, 1/ broadcast was auditor Cynthia Otts, who is employed by Conley McDonald, rather than the Station. Otts also worked on "The Money Game" on and off for about 2 years.

Grievant Zabolocky, a television technician, was employed by the Station for about ten years. He was on duty as a cameraman on February 11 when "The Money Game" was being produced.

1/ Unless otherwise stated, all dates hereinafter refer to 1994.

Right before the show began, Otts at about 2:30 p.m. walked over to a side in the studio to sit down at a small desk. As she was in the process of sitting down, Zabolocky - who later told management representatives that "The devil got in my head" - suddenly pulled out her chair from under her without any warning and caused her to fall to the concrete studio floor. Otts bruised her back and suffered scrape marks. She also jammed her wrists as a result of the fall and subsequently visited a doctor. Otts' medical bills totaled about \$523, which the Company paid. Otts did not miss any work as a result of this incident.

The Station on February 15 suspended Zabolocky from duty without pay and, following an investigation and review of his personnel file, terminated him via a February 25 letter stating he was being discharged for engaging in "willful misconduct which was contrary to the Station's interests", hence leading to the instant grievance.

In support of the grievance, the Union mainly argues that there was no just cause to discharge Zabolocky over a "juvenile act" which was "not injurious" and which was devoid of any intent to make Otts fall down; that since Zabolocky's conduct was not "willful", the Station under the contract lacked just cause to fire him; that arbitral precedent supports its position; and that there is "nothing in Zabolocky's work record that would warrant the termination of his employment. . ." As a remedy, the Union seeks a traditional make whole remedy consisting of a back pay award and Zabolocky's reinstatement.

The Station, in turn, asserts that Zabolocky's "misconduct demonstrated a callous disregard for a WISN guest's safety and well-being, and resulted in physical and emotional harm to her"; that his misconduct "demonstrated serious disregard for WISN-TV's best interests, and damaged WISN-TV's professional reputation and relationship with the Wisconsin Lottery, Conley McDonald, the station's guests and the public", and that his "past performance as an employee cannot mitigate the seriousness of his misconduct."

Section 35 of the contract, entitled "Discharges", provides on this point:

SECTION 35 - DISCHARGES - The Employer shall have the right to discharge any employee for just cause. Except for willful misconduct, or for engaging in unauthorized strike or walkout, the dismissal shall be preceded by two (2) week's written notice thereof, stating the reasons for such discharge. Discharge of less than two (2) weeks may be given to Engineers or Technicians employed on a probationary basis as provided in this Agreement. If the Union believes any discharge to be unjustified, the matter shall then be considered as a grievance and shall be handled as stated in Section 11 of this Agreement.

The Employer and the Union agree to co-operate insofar as possible to prevent discharges. The parties pledge to co-operate to the fullest extent under this agreement to assure a proper work performance of any Engineer or Technician whose performance seems open to question. If after investigation, which may include discussion with the employee, and the Employer has a complaint about the Engineer or Technician's performance, the Employer will advise the Union of the nature of the complaint, the parties will meet with the employee as soon as possible, at which time a mutual effort will be made to resolve this issue at hand. If

thereafter the Employer shall discharge the employee, the matter shall be handled as stated in Section 11 of this agreement.

In case of a discharge based on misconduct, no warning or notice shall be required, but a discharge on the grounds of misconduct shall be subject to the regular grievance procedure, including arbitration.

Zabolocky testified that he did not intend for Otts to fall down and that he actually tried to stop her from falling after he pulled out the chair from under her. I discredit his testimony because Wisconsin Lottery Public Information Officer Brian Touhey, who was present at the time, testified that Zabolocky was moving the chair as he, Touhey, tried to grab it in an unsuccessful attempt to prevent Otts from falling down. Touhey's testimony, which I credit, contradicts Zabolocky's claim that Otts did not immediately sit down and that he was powerless to prevent her from falling. I further credit the testimony of Wisconsin State Capitol Police Officer Michael Kowalski who filed a report over this incident stating that Zabolocky told him at the time that he, Zabolocky, "did not think Otts would end up on the floor or that she could fall as hard as she did."

Hence, I find that Zabolocky fully intended for Otts to fall down after he pulled out her chair. For that, after all, is the natural and probable - indeed, inevitable - consequence of what he did.

The record shows that Zabolocky was truly sorry for what he did and that he profusely apologized to Otts. But that was after Otts fell to the floor and after she found herself on the concrete floor where, in her words, she found herself "pretty much . . . sprawled with my legs kind of open, and my skirt flopped open. . .". Otts thus described how she felt after the fall:

"I was embarrassed by the attention, everyone looking at me, being on the floor with my skirt around me, and I felt kind of exposed, you know, not used to being in that kind of position at a client's place of -- or on client business dressed in the clothing I was wearing.

I felt like I had been taken back about twenty years and the boys at school were teasing me. It just brought back memories of when kids used to stick tacks on my chairs and stuff like that. At that point, I was near tears because I felt hurt that someone was -- it was almost like somebody didn't like me or something."

It is difficult, surely, to conceive of many more humiliating experiences than this, particularly when one remembers that this occurred before the hundred or so people in the television studio. Zabolocky's regrets in those circumstances therefore could not possibly undo the hurt he caused Otts.

Furthermore, his regrets could not undo the embarrassment he caused to the Station which was presented with the spectacle of having one of its employes pull the kind of stunt that one might expect of a first-grader. That embarrassment consisted of (1), subjecting one of its guests to physical and emotional pain as a result of falling down on a concrete floor in front of a live audience; and (2), projecting an infantile image to Otts and other outsiders such as Conley McDonald, officials from the Wisconsin Lottery, and the hundred or so people in the audience.

Zabolocky's only explanation for all of this was his claim that the devil made him do it. That explanation really is no explanation at all since the record is totally devoid of any supposed "horseplay" at the Station.

Furthermore, there was absolutely nothing in Zabolocky's relationship with Otts, which was strictly professional, which would in any way lead Zabolocky to reasonably believe that she would think kindly of what he did.

The Union cites Fisher Electronics, Inc., 44 LA 343, (Buckwaller, 1964), and Federal-Mogul Corporation, 91 LA 1402, (Nathan, 1988), to show that arbitrators in prior chair-pulling cases refused to sustain discharges for similar conduct. Thus, Arbitrator Buckwaller in Fisher converted the grievant's discharge to a ten-week suspension because he believed that discharge was "too severe". Id. at 346. Arbitrator Nathan reduced a termination to a suspension without any backpay in Federal-Mogul because she was not "a problem employe" even though he found that the incident there "must be considered more seriously than a matter of simple horseplay." Id. at 1405.

I disagree with those decisions, as they ignored the fact that chair-pulling cases are no different from outright physical assaults. For here, the physical pain inflicted on Otts was no different than if Zabolocky used a 2 by 4 board to hit her behind. Had he actually used such a board, discharge surely would be an appropriate penalty. The same is true if an employe deliberately engages in an act -- such as pulling out a chair -- which results in the same amount of physical pain. That goes doubly when, as here, such physical assault results in causing a lady to be sprawled out on the floor with her legs open and with her skirt around her.

The Union nevertheless argues that Zabolocky is a good employe and that he does not deserve to be discharged over this one incident. Even assuming, arguendo, that Zabolocky was a model employe - as he and fellow employes James Zabel and Howard Gomez testified - the fact remains that he chose to deliberately engage in an act which inflicted physical pain on Otts, just as if he used a piece of lumber to hit her. Given the gravity of that misconduct, I therefore find that Zabolocky's otherwise good work record is insufficient to mitigate the discipline imposed by the Station and that it therefore has just cause to terminate him.

It therefore is my

AWARD

That the Station had just cause to discharge grievant Greg Zabolocky; his grievance is therefore denied and dismissed.

Dated at Madison, Wisconsin this 5th day of January, 1995.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator