STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

RADIO AND TELEVISION BROADCAST ENGINEERS, LOCAL UNION NO. 715, IBEW, AFL-CIO, Complainant, vs. WISN DIVISION - THE HEARST CORPORATION, Respondent.	Case VIII No. 25628, Ce-1847 Decision No. 17572-C

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Bruce M. Davey, for the Union.
Quarles & Brady, Attorneys at Law, by Mr. David E. Jarvis, for the Employer.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Radio and Television Broadcast Engineers, Local Union #715, IBEW, AFL-CIO, herein referred to as the Union, having filed a complaint of unfair labor practices with the Wisconsin Employment Relations Commission; and the Commission having appointed Stanley H. Michelstetter II by mutual consent of the parties, to act as Examiner and to make and issue findings and orders as provided in s. 111.07(5), Wis. Stats.; and hearing having been conducted on March 23, 1980, before the examiner in Milwaukee, Wisconsin; and the examiner having considered the evidence and arguments of the parties and being fully advised in the premises makes and files the following

FINDINGS OF FACT

1. That Complainant, Union, is a labor organization with its principal offices at 5006 West Burleigh Street, Milwaukee, Wisconsin.

2. That WISN Division - The Hearst Corporation, herein referred to as the Employer, is an employer engaged in the operation of a television broadcast facility in the Milwaukee, Wisconsin metropolitan area. That the Employer is an employer over which the National Labor Relations Board would assert jurisdiction pursuant to its self-imposed standards therefor.

3. That at all relevant times, the Employer has recognized the Union as the exclusive representative of certain of its employees including broadcast engineers; that the Union and Employer have been party to a collective bargaining agreement for a term commencing October 1, 1973, and which apparently was in effect at the relevant times, with respect to said bargaining unit which contains a grievance procedure for the resolution of disputes culminating in binding arbitration and which agreement states in relevant party:

" . . .

SECTION 11

GRIEVANCES AND ARBITRATION

. . .

The decision of the Arbitrator, if made within the scope of his authority, shall be final and binding upon the parties hereto, and shall be put into effect within forty-eight (48) hours from the time the award is made and the parties notified thereof.

. . .

SECTION 13

WORK WEEK

A work week shall consist of five (5) days except at the Radio transmitter the Employer shall have the option of assigning Engineers to work four (4) consecutive 10-hour days. In those cases where the majority of Engineers in any studio or transmitter group desire to rotate days off and/or working shifts, the Employer agrees to schedule such Engineers accordingly. No Engineer working a 5-day week shall be assigned to work more than five (5) consecutive days, exclusive of overtime work, except by mutual agreement between the Employer and the Engineer, and except when there is an established plan for rotation of days off, in which case Engineers may be assigned to work not more than eight (8) consecutive days, exclusive of overtime work. Such Engineers shall be granted two consecutive days off per week. No Engineer working a four-day week shall be assigned to work more than four (4) consecutive days, exclusive of overtime work, except by mutual agreement between the Employer and the Engineer, and except when there is an established plan for rotation of days off, in which case such Engineers may be assigned to work not more than six (6) consecutive days, exclusive of overtime work. Such Engineers shall be granted three (3) consecutive days off per week. In all cases, days off shall be established and granted with regularity, except that any Engineer may take non-consecutive days off by mutual agreement between the Engineer and the Employer providing the Steward of the Union is advised of such mutual agreement. A work week shall not exceed forty (40) hours, exclusive of overtime work.

SECTION 14

WORK DAY

. . .

Any regular full-time Engineer employed under this agreement shall work only on a full time, forty-hour-per-week basis as an Engineer and shall be paid the specified minimum weekly wage, subject, however, to the provisions of Section 17, and subject to loss of pay due to tardiness reporting to work, which loss of pay shall be exactly equal to the amount of tardiness.

. . .

SECTION 36

SEVERANCE PAY

Except for willful misconduct, any Engineer whose services are terminated by the Employer shall receive severance pay on the basis of one week's pay for each full year of service, up to a maximum of ten (10) week's pay.

. . . "

4. That the Employer employed Clifford Rodney Negley, Jr. continuously as a full-time broadcast engineer from January, 1970, until his discharge on August 7, 1978. Upon his discharge, the Employer paid Negley slightly more than $3,000 in severance pay. That while Negley was employed by the Employer, his regular hours were from 3 p.m. to 11 p.m.

5. That after his discharge and at all relevant times thereafter, Negley became employed by Briggs & Stratton Corp. That his regular hours of work during the relevant period were from 9 p.m. to 8:30 a.m.

6. That the Union grieved Negley's discharge through the applicable grievance and arbitration provisions, and the Union and Employer submitted the matter to arbitration before Arbitrator Sherwood Malamud. That on July 11, 1979, he rendered

the following award:

> "The Employer did not have cause to discharge Grievant, Clifford Rodney Negley, Jr. The Employer shall offer Grievant immediate reinstatement to his former or equivalent position, but without backpay. Grievant's seniority shall include all time worked prior to August 7, 1978, and it shall continue from the date reinstatement is offered to Grievant. The period covering the processing of the grievance and arbitration award shall not be included in the computation of Grievant's seniority."

7. That on July 17, 1979, the Employer notified Negley that it offered him unconditional reinstatement to his former position.

8. That on July 23, 1979, Negley notified the Employer of his unconditional acceptance.

9. That the Employer notified Negley to report to work Thursday, July 26, at 3:00 p.m. and thereafter scheduled him to work his previous hours with Tuesday and Wednesday as his scheduled days off.

10. That at no time did Negley notify Briggs & Stratton Corp. of an intention to quit. That although Negley informally explored the possibility of a leave of absence or other accommodations of his Briggs & Stratton job to his job with the Employer, at no time, did he make a formal or informal request to Briggs & Stratton Corp. for a leave or other change to accommodate the two jobs. That by July 25, 1979, Negley's efforts in this regard were abandoned.

11. That on July 25, Negley notified the Employer that he would leave work three hours early on the following day and each work day until July 29, 1979.

12. That shortly after Negley reported for work on July 26, 1979, he met with his supervisor, Robinson, who told him that he was to work a full eight-hour day on that day and every subsequent day. That he also told him that he expected Negley to repay the severance pay and offered various time payment options to him. That at the conclusion of this conversation, Negley walked out and never returned to the Employer's place of business. That Negley quit his employment with the Employer because of an irreconcilable conflict between the schedule with the Employer and his schedule with Briggs & Stratton Corp. and not because the Employer threatened to require the repayment of the severance pay.

13. On January 16, 1980, the Union filed the instant Complaint in which, in essence, it seeks Negley's reinstatement with full backpay.

Based upon the above and foregoing finding of fact, the Examiner makes and issues the following

CONCLUSION OF LAW

That since Clifford Rodney Negley, Jr. quit his employment with the Employer, it did not commit an unfair labor prac-

tice within the meaning of section 111.06(1)(f) or (g) by thereafter refusing to employ him.

Based upon the above and foregoing findings of fact and conclusion of law, the Examiner makes and issues the following

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner

WISN DIVISION - THE HEARST CORPORATION, Case VIII, Decision No. 17572-C

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Clifford Rodney Negley, Jr. was employed as an engineer by the Employer, WISN, from January, 1970, until his discharge on August 7, 1978. At the time of his discharge, his normal hours were 3 p.m. to 11 p.m., and his regular days off were Wednesdays and Thursdays. Upon his discharge, Negley received more than eight weeks severance pay, which amounted to slightly more than $3,000. Under the agreement apparently then in effect, severance pay is paid to certain discharged employees, but not to employees who quit. 1/ After his discharge and at all relevant times thereafter, Negley became employed by Briggs & Stratton Corp. His regular hours of work during the relevant period were from 9 p.m. to 8:30 a.m. Upon his discharge, the Union, I.B.E.W., grieved Negley's discharge, and the parties submitted the matter to arbitration before Arbitrator Sherwood Malamud. On July 11, 1979, he rendered the following award: "The Employer did not have cause to discharge Grievant, Clifford Rodney Negley, Jr. The Employer shall offer Grievant immediate reinstatement to his former or equivalent position

---

1/ Section 36 of the parties' 1973-1975 collective bargaining agreement states, "...SECTION 36 - SEVERANCE PAY - Except for willful midconduct, any Engineer whose services are terminated by the Employer shall receive severance pay on the basis of one week's pay for each full year of service, up to a maximum of ten (10) week's pay...."

but without backpay. Grievant's seniority shall include all time worked prior to August 7, 1978, and it shall continue from the date reinstatement is offered to Grievant. The period covering the processing of the grievance and arbitration award shall not be included in the computation of Grievant's seniority."

On July 17, the Employer sent Negley a letter which was received by his wife on July 18. The body of that letter states:

> "In accordance with the order of the arbitrator, Sherwood Malamud, WISN-TV hereby offers you immediate reinstatement to your former or equivalent position but without backpay.
>
> "Please contact me immediately to let me know whether or not you accept the offer. If you accept the offer we will put you in the work schedule and notify you promptly."

By July 18, 2/ Negley had learned that the Employer had offered him reinstatement as directed by the award. On July 19, he appeared at the station and attempted to see the general manager, who was not in, and then went to the personnel director's office. She asked him to wait, but instead he went to visit various co-workers. While he was talking to one, the personnel director approached him. Negley testified she asked

---

2/ All dates are in 1979 unless noted otherwise.

him to leave. 3/ In any event, it is undisputed that she did ask him to tell her whether he was going to accept the offer of reinstatement.

On Monday, July 23, Negley sent, and the Employer received, a telegram, the body of which states: "I will accept the job." Thereafter, but on the same day, Negley called his immediate supervisor, Gerald R. Robinson. Negley testified he told Robinson he would accept the job. He testified Robinson told him to report "immediately," but then recanted and told him to report Thursday, July 26, at 3:00 p.m. and that his scheduled days off would be Tuesday and Wednesday. Negley testified, but Robinson expressly denied, that he asked to have one of his scheduled days off designated as Sunday in order to be with his family. By Negley's version, Robinson denied this apparently on the basis that he had other people to take care of. Negley testified that he drew the impression that Robinson was deliberately going to do as little for him as possible. It is undisputed that in this conversation Negley asked for a longer period of time in which to give notice to his present employer. Robinson refused.

3/ Exhibit 5, a contemporaneous letter from the personnel director contradicts this assertion; however, she did not testify at the hearing.

On July 25, Negley went to the station to tell Robinson he wanted to leave work early on July 26 in order to work his scheduled shift at Briggs and Stratton that evening. He saw only Robinson's secretary and told her that he would leave work three hours early on the following day and each work day until July 29.

Shortly after Negley reported for work on July 26, he met with Robinson. Resolution of the disputed testimony of this discussion is central to determination of the case. It is undisputed that Robinson told Negley that he was to work a full eight-hour day that and every subsequent day. Until this point, the Employer had not raised the issue of repayment of the severance pay. It is undisputed Robinson told Negley in this conversation that the Employer expected Negley to repay the severance pay and offered various time payment options to Negley. It is also undisputed that at the conclusion of this discussion, Negley walked out and never returned.

The Union filed a complaint alleging the Employer failed to comply with the arbitrator's award and thereby committed an unfair labor practice within the meaning of section 111.06(1)(f) (violation of the collective bargaining agreement) and 111.06 (1)(g) (refusal to accept award). It is the Union's position that the instant offer of reinstatement was conditioned on Negley's unconditional agreement to repay the severance pay. On this basis, it asserts the offer was not in compliance with

the award and, therefore, unconditional. Alternatively, it argues that the offer was made in a manner intended to cause its rejection because of the onerous condition to repay severance pay and other actions calculated to convey to the employee that he would be given disproportionately more onerous treatment than fellow employees. It seeks reinstatement together with full back pay to July 17 and reasonable attorney's fees.

The Employer takes the position that the Union must establish a violation by the clear and satisfactory preponderance of the evidence. It denies the Union has done this. Affirmatively, the Employer argues the offer of reinstatement was not conditioned in any way on repayment of the severance pay and otherwise precisely complied with the award in every respect. It asserts the discussion of paying the severance pay took place only after Negley commenced work and Robinson never threatened to terminate him for failure to repay. It further argues the Employer had a good faith belief in its right to recover the severance pay and had a right to pursue it by private civil action. It alleges Negley quit rather than lose his job at Briggs and Stratton and rather than have to repay severance pay.

DISCUSSION

The determinative issue is whether Negley quit or was constructively discharged. 4/

4/ The parties waived resort to the arbitration provisions of the agreement, transcript pp. 5-6.

Essential to a determination of the above issue is an interpretation of the disputed conversation which occurred July 26. This interpretation rests on the background leading up to it. From Negley's side he admited he was not interested in permanently retaining the WISN job or in doing anything that would jeopardize his Briggs and Stratton job. His goal in accepting reinstatement was to work approximately six months until his pension vested. 5/ Because the scheduled hours of the two jobs overlapped, Negley knew he had to arrange to avoid the conflict if he was to keep both of them that long. To do this, he first discussed the possibility of taking a leave of absence or other alternatives from the Briggs job with lower ranking personnel there. Although the Union characterizes Negley as still being in the process of exploring these efforts on July 26, I conclude they were abandoned. 6/ No formal or informal request was ever made to proper authorities at Briggs. I conclude that if Negley had intended to do so, he would have done so before the late date of July 26. Instead, at best Negley whimsically intended to try to work both jobs by limiting his work at WISN to five non-conflicting hours followed by his full shift at Briggs. 7/ However,

---

5/ The parties were unable to stipulate to the present value of that pension.

6/ Certain of this information was provided at my request after the close of the hearing.

7/ Regular full-time engineers may only be employed on a full-time (40 hour) basis. Section 14 of the agreement. Compare Section 9. Nothing in the record suggests the Employer permits part-time work.

Negley's testimony and conduct suggest he was hoping to provoke his discharge before July 26. From the Employer's side, if Negley's testimony about earlier conversations is to be believed at all, its actions appear to be calculated to convey the Employer's displeasure and designed to pressure Negley to quit. Although it offered full reinstatement, it began by treating him coldly. Thereafter, it escalated to denying his discretionary type requests.

Turning to the disputed conversation itself, Robinson testified 8/ that after he gave Negley the letter, he insisted he work a full eight hours on that day and he "expected him to be on the job forty hours per week..." (Emphasis supplied.) He testified that at the same time he also told Negley that he "expected the...severance pay to be repaid in total." (Emphasis supplied.) It is undisputed that he offered Negley various time payment options. He testified Negley professed to not understand and that he read him the award. He testified Negley thought about it for a while and then said, "If I go now, do I owe you anything?" When he responded, "No," Negley got up, shook hands, and left.

Negley's version appears to substantially conflict with Robinson's. 9/ He testified Robinson told him that if he didn't

---

8/ Transcript, page 57.

9/ Transcript, pp. 25-26.

work the full eight hours on July 26, he would be fired and also said that the Employer would have the severance pay back or "(it) was going to take care of me." It appears that he inferred he would be fired on the spot if he didn't agree to repay the severance pay. He asserts the two bickered for a while, and then he just walked out. Negley's testimony at this point and in other places clearly confuses his inferences with what was said. Further, his memory of the discussion was clearly sketchy and disjointed. Accordingly, I credit Robinson's testimony as to what was said.

Robinson's testimony, that he "expected" Negley to repay the severance pay in the context of also using the term to direct Negley to work eight hours clearly carried with it the implied threat to discipline or discharge him if he did not eventually agree to repay the severance pay. It also carried with it the message that it was part of the Employer's "minimum required" posture. No consideration is given as to the Employer's legal right, if any, to recover the severance pay; it is possible from the context and timing that the Employer was attempting to use it to cause Negley to quit rather than to really obtain repayment. If this is so, I would find a violation of section 111.06(1)(f) or (g). However, I conclude this possible threat was not, in fact, the reason Negley quit, but instead, he quit because he recognized he could not work both jobs. I, therefore, conclude Negley quit his employment

and was not constructively discharged. Accordingly, the Complaint is dismissed.

Dated at Milwaukee, Wisconsin, this 31st day of March, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stanley H. Michelstetter II

Stanley H. Michelstetter II
Examiner