

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

MADISON GAS AND ELECTRIC COMPANY

and

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,
LOCAL 2304**

Case 78

No. 69801

A-6406

Appearances:

Peter L. Albrecht, Albrecht, Backer Labor & Employment Law, S.C., 131 West Wilson Street, Suite 1202, Madison, Wisconsin, appeared on behalf of the Employer.

Marilyn Townsend, Attorney at Law, 122 West Washington Avenue, Madison, Wisconsin, appeared on behalf of the Union.

ARBITRATION AWARD

International Brotherhood of Electrical Workers, Local 2304, herein referred to as the "Union," and Madison Gas & Electric, herein referred to as the "Employer," jointly selected the undersigned from a panel of arbitrators from the staff of the Wisconsin Employment Relations Commission to serve as the impartial arbitrator to hear and decide the dispute specified below. The arbitrator held a hearing in Madison, Wisconsin, on October 26, 2010. Each party filed a post-hearing brief, the last of which was received January 28, 2011.

ISSUES

The parties stipulated to the statement of the issues:

1. Was the termination of Grievant Hayes for just cause?
2. If not, what is the appropriate remedy?

RELEVANT AGREEMENT PROVISIONS

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ARTICLE XIV – GRIEVANCE PROCEDURE

Section 14.1 Grievance Procedure

The Employer agrees, unless otherwise provided for by this Agreement, should any employee covered by this Agreement believe that employee has been unjustly dealt with or the Union believes that any of the provisions of this Agreement have been violated, then the said party may take the matter up with the Employer in the following manner:

Section 14.3 – Successful Complaints – Pay

If it is found that an employee has been unjustly dealt with, the employee shall be restored to employee's former position and paid for the time lost.

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FACTS

The Employer is the electric utility for the Madison area. The Union represents various rank and file employees including Grievant Darcey Hayes and Mark Davis. One of the plants which the Employer operates is the Blount Generating Station located in downtown Madison. The incident in dispute occurred in that plant's control room. The control room contains the controls over the customers' busses outside the plant. Errors in the control room could turn off power to all of downtown Madison or cause high or low voltage across a bus. It also contains the controls that regulate the power to the plant itself. The switches which are in the control room can be accidentally triggered. The switches control voltages running up to 13,800 volts and steam pressures at 12,500 PSI.¹

Mr. Hayes and Mr. Davis work in the control room of the Blount Generating Station. Mr. Davis has been with the Employer for seven years and was in the position of Control Operator. He operates and maintains the boilers. Mr. Hayes has been with the Employer for five years and he was in the position of Auxiliary Operator. In that regard, he controls the turbines and substitutes for the Control Operator while he or she is on break.²

Mr. Hayes completed his scheduled 12 hour shift at about 6:39 a.m. on December 18, 2010. He was planning to leave for a trip at the end of that shift. Mr. Davis reported for the

¹ Tr. p. 75 et seq.

² Tr. p. 165

start of his 6:39 a.m. day shift at about 6:00 a.m. Mr. Davis's version of what occurred is summarized in the following paragraphs and credited below as correct.

Mr. Davis ordinarily makes coffee when he arrives. He walked over to the coffee maker and discovered that it was turned off. This is highly unusual. An exchange took place between him and Mr. Hayes in which Mr. Davis said "Who the f**ck turned off the coffee maker?" Mr. Hayes was leaning against the edge of a counter across the control room. Mr. Hayes became irked with Mr. Davis' complaining about the coffee maker and finally stated: "Deal with it, you p*ssy." Mr. Hayes took the edge of a ruler and threw it end-over-end so that it hit Davis in the chest. Mr. Davis described it as being thrown "quite hard."³ Mr. Hayes then said something to the effect of: "Quit your whining!" The ruler bounced off Mr. Davis and landed a few feet away from Mr. Davis.

Mr. Davis was about 6 feet from Mr. Hayes. He picked up the ruler by the end and moved toward Mr. Hayes, waving the ruler as he went toward him. Mr. Davis did not know if Mr. Hayes was kidding or not. Mr. Davis said something to the effect: "What the f**ck?" At that point he was not angry and was tending to believe that Mr. Hayes was merely kidding. He approached Mr. Hayes and was less than an arm's length from him. Mr. Davis believed he was a normal distance and not crowding Mr. Hayes. Mr. Davis made no attempt to have any physical contact with Mr. Hayes and was seeking confirmation that Mr. Hayes was kidding.

Mr. Hayes suddenly reached around Mr. Davis and grabbed him by the neck, squeezing very hard and painfully. Mr. Hayes then forced him into a kneeling position by forcing Mr. Davis' face to the floor and held him there. Mr. Davis tried to reach behind him and strike Mr. Hayes hand away. Mr. Hayes let go and Mr. Davis got up. Mr. Davis did not strike Mr. Hayes, but Mr. Davis was still "swinging."⁴ Mr. Hayes then grabbed Mr. Davis and threw or pushed him across the room so that Mr. Davis hit a refrigerator and then the exit door. This was about 10 feet away. While Mr. Davis was staggering to regain composure Mr. Hayes came over and grabbed Mr. Davis by the neck and pushed him down again by that same refrigerator. He kneeled on Mr. Davis' face or neck. He then let go Mr. Davis did not attempt to fight because he knew he was no match for Mr. Hayes. Mr. Hayes then exited the door leading to the locker room.

After this incident Mr. Hayes went to the locker room to gather his thoughts. Another employee went in with him and discussed the fact that this conduct might be reported. When asked what occurred, Mr. Hayes responded he "just snapped." Mr. Hayes went back to the control room and tried to apologize. Mr. Davis was angry and threatened to report the matter. Mr. Hayes then left. He returned a little while later and tried to apologize again. Mr. Davis did not accept. Mr. Davis commented that Mr. Hayes probably beat his wife.

³ Tr. p. 40

⁴ Tr. p. 23

At first, Mr. Davis had no pain. However, a little while later he began to experience pain. He reported the situation to management and then went to seek medical attention. The medical records are in evidence. Basically Mr. Davis suffered neck and shoulder injuries. The doctor recommended that Davis be off, but ultimately this was converted to light duty for a two week period.

When Mr. Hayes reported the incident to his immediate boss, Mr. Ed Maas. Mr. Maas took a written witness statement from Mr. Hayes. He then reported it to Labor Relations Manager Todd Grossnickle the next morning. The two then contacted Mr. Steve Schultz, the Executive Director of Energy Production. They conducted an investigation including interviewing nine witnesses and Mr. Hayes. They then checked as to how they had handled similar issues in the past, but they concluded there were no similar incidents. They presented their conclusion to Assistant Vice President in Charge of Human Resources Joe Pelitteri who made the decision to discharge.

The Union filed the instant grievance and the same was properly processed through the grievance procedure to arbitration.

POSITIONS OF THE PARTIES

Employer

The collective bargaining agreement does not contain a just cause provision. In any event, the Employer has just cause to discharge Mr. Hayes for having assaulted his co-worker in a safety sensitive work environment. The Employer has a policy prohibiting violence in the workplace. Mr. Hayes certainly should have known better. The policy was distributed to all employees. The attack was unprovoked. The attacker is a body builder and far outweighs the victim. The victim offered no resistance. The victim was physically injured and needed medical attention after the attack. He remained on light duty for several weeks after the attack. This attack effectively constitutes an aggravated battery. It was not mere horseplay. The Employer cannot, and does not have to, tolerate this behavior. The Employer conducted a thorough investigation and confirmed the facts. It gave Mr. Hayes an opportunity to respond to the charges. The Employer also attempted to see how it had handled similar incidents in the past only to find out that none had occurred. The Employer asks that the grievance be denied.

Union

The Employer did have just cause to discipline Mr. Hayes, but the penalty of discharge is too severe. The Employer has failed to meet the "Seven Tests" for discipline. The Employer's disciplinary policy prohibits violence in the workplace, but does not put the employee on notice that he or she will be discharged for any offense. The policy only states that an employee will be "subject to discipline up to an including termination." Vice President for Human Resources Pelliteri testified that he was aware of two employees who had made

threats of violence, but who were not discharged. The violation which occurred in those cases fell under the same policy, but did not result in discharge.

The Employer's investigation was inadequate. The investigators did not talk to Mr. Hayes immediate supervisor to determine whether or not it was likely that Mr. Hayes would engage in a physical altercation in the future. The Employer did not consider Mr. Hayes' good work record. The Employer also ignored evidence about Mr. Davis' past aggressive behavior in response to situations in the workplace. He had pushed fellow employees in the past. It did not consider whether this conduct might have been a reasonable basis for Mr. Hayes to feel threatened by Mr. Davis in this incident.

The Employer based the discipline on the following incorrect premises:

1. Mr. Hayes was the sole aggressor,
2. Mr. Hayes could have walked away,
3. Mr. Hayes was the one who chose to continue the altercation,
4. Mr. Davis did nothing wrong.

Mr. Davis approached Mr. Hayes and waived the ruler in his face. Mr. Davis effectively cornered Mr. Hayes when Mr. Davis did that. Mr. Hayes' reaction, while wrong, was still in self-defense. When Mr. Hayes let Mr. Davis get up, Mr. Davis violated the zero tolerance policy when he admittedly tried to hit Mr. Hayes. It is entirely unfair that Mr. Hayes was discharged while Mr. Davis was not disciplined at all. There would have been no physical altercation at all if Mr. Davis had not moved toward Mr. Hayes.

Specifically, it was reasonable for Mr. Hayes to perceive that he needed to defend himself. First, if Mr. Davis had no intent to threaten Mr. Hayes there was no need for him to move toward Mr. Hayes. It took only two steps to do so. The speed of the advance, the fact that Mr. Hayes was cornered, and the fact that Mr. Davis was shaking the ruler in Mr. Hayes' face all created a reasonable impression that he intended to threaten Mr. Hayes. This is true irrespective of the facts in the next paragraph.

Mr. Hayes also credibly testified that Mr. Davis reached out with his left hand and tried to grab Mr. Hayes' leg while shaking the ruler in Mr. Hayes' face with Mr. Davis' right hand. Mr. Hayes credibly testified that he does not like to be touched and that he viewed this as an assault by Mr. Davis.

The Employer also failed to recognize that it was Mr. Davis who chose to keep the altercation going, not Mr. Hayes. After Mr. Hayes had restrained Mr. Davis, he let him get up. It is Mr. Davis who then got up and chose to "swing" at Mr. Hayes. Mr. Davis told this to the Employer's investigators and the Employer chose to ignore it. It does not matter if Mr. Davis actually connected and hit Mr. Hayes.

Contrary to the position of the Employer, Mr. Hayes could not have walked away from the situation. Mr. Davis responded to the incident of being pushed down by becoming angry and coming up “swinging,” actually connecting with Mr. Hayes. Mr. Davis effectively cut off any retreat Mr. Hayes had. Mr. Hayes had no other alternative but to push Mr. Davis out of the way until Mr. Hayes could escape into the hallway. Mr. Davis’ claim that he was thrown ten feet is unbelievable because it would have required superhuman strength for Mr. Hayes to have thrown him that far.

The Employer did not apply its rules even-handedly. It did not discharge an employee who threatened to shoot a payroll assistant for allegedly shorting his paycheck. Mr. Pelliteri explained that although the payroll assistant took the threat seriously, he did not know the employee who made it. The Employer did not give Mr. Hayes the same treatment. It did not inquire of Mr. Hayes’ supervisors who knew Mr. Hayes as to their perspective of whether Mr. Hayes was a threat in the future or Mr. Davis had engaged in provocative or violent behavior in the past. The fact that Mr. Davis did not get any discipline at all implies unequal treatment of the two. Mr. Davis violated the Employer’s policies by approaching Mr. Hayes and waiving the ruler, by trying to grab Mr. Hayes’ leg and by trying to hit Mr. Hayes when he allowed Mr. Davis to stand up.

In any event, the degree of discipline was not reasonably related to the situation. Mr. Hayes immediately apologized to Mr. Davis. Mr. Hayes left rather than respond to Mr. Davis’ comment about Mr. Hayes’ wife. Mr. Hayes has an excellent work record, has not missed work and has always worked extra hours when asked. There is no evidence that Mr. Hayes is a risk for any further similar actions. The Union requests that the discipline be reduced to a three-day or less suspension.

Employer Reply

The Union failed to address Mr. Hayes’ admission right after the fact that he “just snapped.” The Union’s brief characterized Mr. Hayes’ as being trapped at the time Mr. Davis first approached him. This is inconsistent with even Mr. Hayes’ version of the events. Mr. Hayes, himself acknowledged in his statement that at the time Mr. Davis approached him, Mr. Hayes only thought Mr. Davis was “fooling around.” Similarly, Mr. Hayes’ testimony that Mr. Davis threw a punch when he got up is not supported by the facts. But even if Mr. Davis did “throw a punch,” the fact is that Mr. Hayes admitted that he had already thrown Mr. Davis to the ground. That act alone caused injury to Mr. Davis.

What Mr. Hayes did is a crime. In any event, termination is the only appropriate penalty. Mr. Hayes knew, or should have know, that this type of conduct would lead to termination. The issue of whether Mr. Hayes received a copy of the Employer’s policy or the usual language about “up to” termination was not sufficient notice is irrelevant.

The Union’s theory that the Employer was somehow lax is not supported by the record. There is no evidence management was ever aware of the incidents alleged about Mr. Davis

from years ago. The incident about the alleged death threat does not support the Union's view because management concluded that it was not intended as a death threat, but an unfortunate choice of words. In any event, the seriousness of this offense alone warranted the discharge penalty.

Union Reply

The Union replied by motion to strike certain parts of the Employer's brief.

DISCUSSION

The determinative issue in this matter is the credibility of Mr. Davis versus Mr. Hayes with respect to the disputed incident. I conclude that Mr. Davis is credible and that Mr. Hayes' version of the critical elements is not credible.

Mr. Hayes acknowledged that the incident did occur. His version of the events included the following crucial observations. First, when Mr. Davis picked up the ruler he stated "I'll take this ruler and shove it up your a**." Mr. Davis then came at him in a "slouched over" position (tackling type position) and grabbed Mr. Hayes' right leg. Mr. Hayes then pushed on the back of Mr. Davis' head to avoid being grabbed.⁵ He did not hold it down as described by Mr. Davis.⁶ When he released Mr. Davis, Mr. Davis came up and threw an "upper cut" to Mr. Hayes' face and continued punching at him, hitting him in the chest. He then pushed Mr. Davis away to protect himself. Mr. Davis grabbed his shirt and the two of them struggled, hitting the door, bouncing off of the refrigerator and then breaking contact. Mr. Davis then came at Mr. Hayes, but Mr. Hayes was then able to escape out the back door.

I find this version of the events incredible. First, it is unlikely that Mr. Davis would have attacked Mr. Hayes because of the disparity in their size. Mr. Hayes is a body builder and Mr. Davis is a slight individual. Second, Mr. Hayes' version of Mr. Davis coming at him with the ruler is not likely. The position he described would have been very awkward and difficult for Mr. Davis. Third, the statements which Mr. Hayes gave to management investigators conflict with what he testified to at the hearing. They also conflict with some other witnesses' statements at the time. Specifically, witnesses indicate the Mr. Davis did not make a threatening statement as he approached Mr. Hayes. They also otherwise indicate the Mr. Davis approached Mr. Hayes in a "playful" mood. Mr. Hayes also indicated that he only thought Mr. Davis was "fooling around" then. Fourth Mr. Hayes version that he only pushed on Mr. Davis' back and did not squeeze him by the neck is inconsistent with the physical facts. Mr. Davis reported that he had abrasions on his neck. The medical records corroborate that there were marks on his neck. In order for an abrasion of that nature to occur and persist, Mr. Hayes would have had to have applied a lot of pressure to Mr. Davis' neck. Finally,

⁵ Tr. p. 167 et seq. [correction tr. p. 180] See, also p. 183-7, 196-7

⁶ Tr. p. 178, 181-2

Mr. Hayes' testimony as to what he told management investigators contradicts what they say they were told.

I also note that Mr. Hayes' testimony trying to minimize his statement to a co-worker immediately after the event that he "just snapped" is not credible. The co-worker would not have reported the statement as he did were Mr. Hayes' version at all true.

The better view of the testimony is that Mr. Hayes attacked Mr. Davis without provocation in a ferocious manner. The Employer had just cause to discipline Mr. Hayes.

I conclude that discharge was the only appropriate remedy in this circumstance. Even though Mr. Hayes' has a good work record, this is a particularly aggravated situation. Mr. Hayes not only attacked Mr. Davis, but he persisted. He inflicted significant injury on Mr. Davis. Mr. Hayes attacked Mr. Davis in a safety sensitive area of the work place. He totally disregarded the potential safety risks.

The Union has argued that the Employer was inconsistent in the way it treated Mr. Davis and Mr. Hayes. Mr. Davis did indicate that he "flailed" his arms while he was pinned down and continued to do so when Mr. Hayes allowed him to get up. The Employer concluded that Mr. Davis' actions were excused because he acted in self-defense. As noted, Mr. Davis did nothing to provoke being seized by the neck. Once Mr. Davis was seized by the neck, he had no way of knowing what would happen next. The credible tenor of his testimony was that he was shocked and fearful for his safety. The Employer's judgment that Mr. Davis acted in self-defense is correct. The decision to not impose any discipline upon him is supported for two reasons. First, the fact that the attack was unprovoked and that it was far more aggressive than anything related to the situation implies that it was reasonable for Mr. Davis to conclude that he had no other practical choice but to defend himself. Second, Mr. Davis was reluctant to report this situation in the first place even though he threatened to do so. The imposition of any discipline solely to provide facially equal treatment would seriously undermine the Employer's legitimate need to have serious situations reported.

The Union has also argued that the Employer has been inconsistent in the enforcement of its violence policies. It points to two situations. The first involved an employee who bumped his chest against others in discussions and the other involved an employee who threatened to kill a payroll clerk for allegedly shorting his paycheck. The Employer concluded that the first situation was not threatening, but merely unwelcome. The evidence is insufficient to conclude otherwise. The second situation the Employer concluded was not intended to be a threat and not likely to be a threat since the aggressor did not know the payroll clerk. The evidence is insufficient to conclude otherwise. Thus, this situation is far worse than any which the Union has offered to demonstrate that the Employer has been inconsistent.

The Employer has an absolute duty to protect workplace safety. Irrespective of Mr. Hayes' prior work record, he has demonstrated a proclivity for unprovoked violent behavior which cannot be tolerated in any work place. Similarly, any penalty less than

discharge would unduly minimize the seriousness of the offense to other employees. Accordingly, the Employer had just cause to discharge Mr. Hayes.

AWARD

That since the Employer had just cause to discharge Mr. Hayes, the grievance is denied.

Dated at Madison, Wisconsin, this 8th day of July, 2011.

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Arbitrator