A MATTER IN ARBITRATION

In a Matter Between: PACIFIC GAS AND ELECTRIC COMPANY (Employer) and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1245 (Union)	Grievance:	Termination
	Hearing:	October 23, 1998
	Award:	December 21, 1998
	McKay Case No. 98-125	
	Arbitration Case No. 227	

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR
ROGER STALCUP, UNION ARBITRATOR
ED CARUSO, UNION ARBITRATOR
MARGARET SHORT, EMPLOYER ARBITRATOR
KATHY PRICE, EMPLOYER ARBITRATOR

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties selected this arbitrator to serve as chairman of a panel of arbitrators pursuant to the collective bargaining Agreement. A hearing was held in San Francisco, California on October 23, 1998. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or about December 9, 1998. Having had an opportunity to review the record, the arbitrator and the panel is prepared to issue its decision.

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1 Joint Exhibit #2

ISSUE

Was the grievant, L , terminated for just cause? If not, what shall be the remedy?[2]

RELEVANT CONTRACT LANGUAGE

TITLE 9. GRIEVANCE PROCEDURE

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9.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

(a) Interpretation or application of any of the terms of this Agreement, including exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.

(b) Discharge, demotion, suspension or discipline of any individual employee.

BACKGROUND

The grievant began working for the Employer in 1983 and assumed the position of gas service representative in 1985 where he remained until the day of his termination in 1997. It is the position of the Employer that the grievant engaged in abusive verbal behavior with a fellow employee and ultimately engaged in physical violence with that employee by throwing a table at her. As a result of this behavior, the Employer terminated the grievant. It is the position of the

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2 Joint Exhibit #4

Union that the grievant has been a long-term employee with a good record and did not engage in physical violence toward another employee. The Union asked that the grievant be reinstated with back pay and benefits.

On September 15, 1997, the grievant and another employee named J were in an area in the Hayward office referred to as the stand-up room or bull room which is a meeting room located right outside the offices of several supervisors. Ms. J was working a shift from 1 p.m. to 9 p.m. and was just beginning her shift on this particular day. She was sitting at one of the tables located in the room, filling out various paperwork and her timecard. As Ms. J was sitting there, she testified, the grievant approached her and began to talk to her about a call that she had made during the prior week to relight a customer's heater. She recalled the grievant asking the following, ". . . He just asked me if I'd looked at the heater, if I worked on their heater."[3] She continued by stating,

> He said I left a hazard.
>
> And I said, "No, no, I didn't leave a hazard." I said, "It was inoperable. There's a difference between an appliance not working and being a hazard; those are two different things.
>
> . . . . . .
>
> He said no, I didn't -- he said I left on the pilot.
>
> And I said, "No, I didn't. I turned the whole gas valve off underneath the house."
>
> He said -- kept saying yes, I did, and I kept saying no, I didn't. And so we went back and forth for a while. I tried to explain to him that, "You know, when things don't work -- you're taking it (indicating) away from me, huh? -- I said, "You know how things go." I said, "After we leave, customers try to do things cheaply, and try to work on things themselves, and don't know what they're doing. And this is how things happen."

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3 Tr. Page 12

And he -- he just kept insisting that I left a hazard.[4]

During this conversation, the grievant acknowledged that her voice and the grievant's voice escalated "hugely." One of the supervisors for the day, Art Hein, came out of his office and told the two of them, "Keep it down."[5] Ms. J stated that she tried to keep her voice down but that it continued to escalate along with the grievant's. Finally, the grievant was told to leave the area by Mr. Hein. Ms. J stated Mr. Hein asked the grievant two or three times, and finally, "Art really demanded him to leave the room."[6] In response to this, the grievant walked out of the room, then walked back into the room. In the meantime, Ms. J remained seated at the table, talking to another employee, F . Ms. J described what the grievant did when he came back into the room after first being told to leave the room,

He came in, making crazy noises, like a psycho, and picked up the table.

And I put up my arms to protect myself, because he lunged the table at me.[7]

Ms. J stated further, "He looked like a psycho -- he was crazy, yes."[8] Ms. J stated that the table hit her and she attempted to cover her face with her hands to avoid getting hit on the face. She stated, "I knew it was going to hit me, yes. That's why I blocked my face."[9] When asked whether the table had injured her, Ms. J stated, "On my forearm, down below, by my elbow. And it had already -- within a couple hours, it had already swelled up and had already gotten a bruise."[10]

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4 Tr. Pages 12 and 13
5 Tr. Page 13
6 Tr. Page 14
7 Tr. Page 15
8 Tr. Page 15
9 Tr. Page 152
10 Tr. Page 152

After being hit by the table, Ms. J stated, she got up and ran out the other door going towards M 's office in order to get away from the grievant. As she was exiting the room, she noticed two or three other people grab the grievant. Mr. Hein testified that he observed the grievant lift the table and throw it at Ms. J and as he observed this, he went over and grabbed the grievant, embracing him in a bear hug.[11] Mr. Hein stated that he began pushing the grievant toward the door to the parking lot, and as he was doing this, the grievant was resisting. As he pushed the grievant to the parking lot, Mr. Hein stated, he told the grievant to go to his truck and stay away from this office area.

> I instructed Mr. L to -- "I think it would be a good idea if you went out to your truck and stayed away from here."
>
> And I may have even -- I just wanted him to get out of here.[12]

After telling the grievant to do this, Mr. Hein stated, he had second thoughts.

> After that, I started thinking about it. And I didn't think it was such a good idea, maybe, to send him to his truck, because he may leave and, you know, and go out and -- because I knew he was rather shaken.[13]

Mr. Hein, who is a part-time supervisor, discussed the matter with Terry Lowe, a customer service supervisor, and turned the matter over to him and to Albert Bernal, the regular supervisor for the two employees involved.

Mr. G , an electric troubleman who was working out of Hayward at the time of the incident, testified that he was present when the argument began and overheard the

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11 Tr. Page 63
12 Tr. Page 64
13 Tr. Page 64

grievant and Ms. J talking about a customer visit the two of them had made where Ms. J went to the place first and the grievant visited sometime later. Ms. J and the grievant became very loud in their discussion and was told by Mr. Hein to keep their voices down. The two employees, according to Mr. G , were exchanging profanities with one another. Mr. G testified he turned at one point and noticed that the grievant had lifted the table perhaps a foot off the floor and apparently intended to push it or throw it at Ms. J . The table was pushed at Ms. J , and when this occurred, Mr. G and Mr. Hein grabbed the grievant and pushed him out the door to the parking lot. He stated, "Just kind of, more or less, just kind of pushed him. We kind of -- you know, it's like herding sheep."[14] At the time he was pushed out the door, according to Mr. G , the grievant was very upset.

The grievant testified that he was bringing a problem to Ms. J s attention which he believed reflected her negligence rather than bringing it to supervision first and possibly getting the grievant into more serious trouble. The grievant testified about the gas leak he found at a customer's house which he believed Ms. J should have addressed during her visit and corrected. He stated,

> I found the copper pilot line plugged, because I suspected that the pilot may have blown out. So I looked further for additional gas leaks.
>
> I had found a brass union fitting, just below the furnace, was leaking severely. I could not clock-test the meter, but I did spot it. And it was showing at about -- about a two-and-a-half, maybe three-cubic-foot flow.
>
> On a modified -- we have a modified leak procedure that I was -- I didn't have to shut down everything to identify the exact flow of that leak, but I did find the leak.
>
> And the appliance valve was in the "on" position.

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> So I immediately took the furnace off-line by shutting the appliance valve off, took out the union fitting, and capped the line off, and advised the customer that she had a major gas leak and it needed to be repaired properly.[15]

Rather than reporting this problem to a supervisor and getting Ms. Justice in trouble, the grievant decided that he would bring this up to Ms. Justice directly in order to help her improve her performance.

The grievant testified that he met with Ms. Justice as she was sitting doing her paperwork on Monday. He described the conversation he had with her in the following manner,

> I said, "Well, there was a gas leak you left behind."
>
> And she denied it, saying, "I was never there."
>
> I said, "Well, I saw your signature on the service report card."
>
> "No, I did not. I was never there."
>
> "Well, you left a gas leak. And I just wanted to let you know that" -- "you know, where you left the gas leak."
>
> "Well, I didn't leave no fucking address" -- "leaks anywhere. I don't leave leaks."
>
> I said, "Well, you left a leak. I'm just letting you know now, because I don't want to bring it up with the supervisor."
>
> "I didn't leave no fucking leaks."
>
> And it got a little -- I got a little upset at that. It's been so long, I can't remember too much of it --[16]

The two of them, according to the grievant, exchanged many profane words, including such samplings as "fucking," "asshole," "fucking bitch" and others. The grievant acknowledged that he

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15 Tr. Page 123
16 Tr. Page 125

got so angry he wanted to do something to the grievant, such as throw her paperwork on the floor or something worse. He testified,

> My -- I knew my temper was going to, so the only thing I did was that I intended only to lift the table up, tilt it as far as it would go, so all her paper would drop on the floor, and drop the table back down.[17]

The grievant acknowledged that Arthur Hein pushed and shoved him out of the room and out the door.

In a statement that the grievant gave to the Employer, he indicated several times that he was sorry for what occurred and would like to apologize to Ms. J . He stated,

> "I didn't mean for the table to hit her. I'm sorry that it happened."
> . . . . . .
> "I just wish I could've walked out the door and not let my temper take over."
> . . . . . .
> "I know better now to just walk away."
> . . . . . .
> "I'm ready to offer my hand to D when I see her and apologize, to tell her I'm sorry."
> . . . . . .
> "I want to put this behind us."[18]

On cross-examination, the grievant denied that he was upset because the grievant would not accept his help. Instead, the grievant stated, he was upset because the grievant had "insulted" him.[19] He took physical action, the grievant stated, not because he was insulted, however, but because he

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17 Tr. Page 127
18 Tr. Pages 129 and 130
19 Tr. Page 132

wanted to ". . . get a point across."[20] When asked why he wanted to dump her papers on the floor by lifting the table, the grievant stated, "I guess to upset her. . . ."[21]

The grievant acknowledged that after the first round of profanities, he left the room; but then he came back to where Ms. J was sitting. When he did so, Ms. J did not re-engage in the conversation. It was at this point when the grievant lifted up the table. When asked why he did so, he stated, "I was just very angry that she insulted me."[22] He acknowledged stating on his second visit to the area where Ms. J was working, "I can't believe you called me a 'fucking idiot.'"[23] When asked why he didn't just push her papers on the floor with his arm rather than lifting up the table, the grievant stated, "Because I was afraid I was going to hit her."[24] The grievant denied that the table hit Ms. J as Ms. J claimed. According to the grievant, when he lifted the table up, Ms. J stood up and said, "What the fuck are you doing?" And then the grievant put the table back down after all the paperwork had spilled on the floor.[25]

Mr. B , a gas service representative working for the Employer, testified that he spoke to the grievant a day or so after the incident ". . . just to see what was going on. . . ." Mr. B told him that he talked to the grievant about what kind of serious trouble the grievant would be in as a result of the incident. Initially, the grievant told Mr. B that he didn't care

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21 Tr. Page 134
22 Tr. Page 135
23 Tr. Page 135
24 Tr. Page 138
25 Tr. Page 140

because he could ". . . always find something else to do. . . ."[26] During the conversation, the grievant told Mr. B that if he came back to work, he would not be helpful to the grievant. Mr. B testified,

> Anything -- like I said, anything that -- like, for instance, if we're in a meeting, any strands she'd take, he would take the opposite, kind of be animo - -- -mistic (sic) to her, you know, against her in every step, whatever she did.[27]

He continued by stating that, "He was going to try to make things very hard for her. . . ."[28] Mr. B acknowledged giving a statement to the Employer where he alleged the grievant told him that if he lost his job he could go own a gun shop. The grievant also supposedly stated that he would, ". . . take care of D his own way." When asked if these were true statements, Mr. B acknowledged they were.[29] Mr. B testified that he talked to Ms. J and that she was "extremely" upset when he shared with her the comments made by the grievant in terms of owning a gun shop and taking care of the grievant in his own way. On cross-examination, Mr. B stated that he understood the grievant to be telling him that his way of taking care of Ms. J was being antagonistic. During the conversation, Mr. B testified, the grievant at no point expressed any remorse or sorrow for his role in the confrontation with Ms. J.

Michele Silva, the customer service manager who was responsible for the area where the grievant worked, testified she believed that discipline was appropriate both for the grievant and for Ms. J. In her opinion, Ms. Silva stated, Ms. J warranted an oral reminder for her

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27 Tr. Page 78
28 Tr. Page 79
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verbal confrontation with the grievant and her use of profane language. The grievant, according to Ms. Silva, warranted termination. The reason for the difference of the discipline, according to Ms. Silva, related to the circumstances of the incident. Ms. J had no active warning on her file and did not engage in any physical conduct with the grievant. On the other hand, the grievant had a written reminder active in his file and crossed the line when he engaged in physical conduct against Ms. J She stated, in part,

> It was the incident of, he had an opportunity to leave the premise, he was asked to leave the premise of where the incident occurred, and then came back and created a violent incident towards D [30]

According to Ms. Silva, if the grievant had not engaged in the physical assault, he would have received a decision-making leave for his participation in the confrontation with Ms. J . On cross-examination, Ms. Silva acknowledged that the Employer sent the grievant to a psychiatrist for a fitness for duty examination but that she made her decision to terminate the grievant before she saw the report.[31] The report which, in part, states, "Mr. L does not represent a serious risk or threat of violence in the workplace" did not change her mind, Ms. Silva stated, with respect to the decision to terminate the grievant. Ms. Silva testified that the reason for sending the grievant for a fitness for duty test was to determine whether it was safe to keep him on the premises until a decision to remove him from work could be made. She stated,

> The reason for the fitness for duty was to make sure that, were there any issues or problems of him working at that given point in time. "Should he be working or not?" was the purpose for the fitness for duty.[32]

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32 Tr. Page 98

Ms. Margaret Short, the director of industrial relations field services, testified that she reviewed the Employer's disciplinary history to determine whether other employees who had engaged in physical assault had been terminated by the Employer. After investigating her conclusion was that it has been the Employer's practice to terminate employees who engage in physical assaults. She cited an example of a long-term employee with no discipline who engaged in a physical assault on another employee who was terminated. Ms. Short stated that she believed the oral reminder given to Ms. J was appropriate for the conduct in which she engaged but that a termination was the appropriate penalty for the grievant. She described why the grievant deserved to be terminated. She stated,

> In our discussion, as best I recall, we talked about the incident, and how it progressed, and how it escalated.
>
> And we believed that there was a point in time when it could have been ended. And, in fact, there was a bit of a lull in the action, and then it started up again by the grievant.
>
> And the table involved -- the incident involving the table, in our view, put it over the line.[33]

Without the physical violence, Ms. Short stated, it would have been her recommendation to impose a decision-making leave on the grievant for his part in the verbal confrontation.

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POSITION OF THE PARTIES

EMPLOYER

The Employer stated it had just cause to terminate the grievant. The Employer's position against violent behavior is reasonable and well known in the Hayward yard. The rule is reasonable and designed to ensure the safety of the employees. It is not disputed that employees are aware of the consequences of engaging in violent behavior. The Employer's investigation regarding whether the grievant engaged in this conduct was fair and reasonable. All of the witnesses were given a full and fair opportunity to explain what they saw or heard and their respective actions. The Employer had substantial evidence that the grievant was guilty of engaging in inappropriate language and lifting up the table and pushing it toward Ms. J ..... During the investigation of the September 15 incident, the Employer uncovered overwhelming evidence that the grievant engaged in profanity during his verbal exchange with Ms. J and after exiting the bull room returned to the room and lifted and pushed the table at which Ms. J was seated. In addition to Ms. J 's statement, the Employer had creditable statements from two IBEW bargaining unit eyewitnesses. At the hearing, the Union and the grievant attempted to downplay the incident by disputing whether the grievant tossed, pushed, tilted or tipped the table toward Ms. J . The fact remains that the table was lifted off the floor in a manner that was intended to frighten and to capture Ms. J 's attention. Furthermore, the grievant injured Ms. J both physically and emotionally by lifting the table as he did. Even though the grievant asserts that he was in control of the table at all times, his own testimony and the testimony of eyewitnesses confirm that he was out of control throughout the incident.

The severity of the grievant's conduct warranted termination of his employment. The evidence the Employer discovered from its investigation shows that other employees who engaged in similar behavior were treated in the same manner as the grievant. In this dispute, the grievant was on a written reminder in the conduct category. If the grievant's conduct had remained non-physical, the Employer would have imposed a decision-making leave and not discharged him. When the employee crossed the line and engaged in physical violence, it was appropriate for the Employer to skip the decision-making leave process and go to termination immediately. The Union's contention that the Employer should have waited for the fitness-for-duty evaluation prior to terminating the grievant's employment is ridiculous. The fitness-for-duty evaluation was not designed to assist the Employer concerning the question of whether the grievant should be disciplined. For all these reasons, the Employer asked that the grievance be denied and that the termination be sustained.

UNION

The Union recreated the facts which it believed were established by the evidence from the arbitration hearing. From the midst of a mutually profane and acrimonious verbal sparring match between Ms. J and the grievant, the grievant lifted the table and dumped Ms. J 's papers on the ground. The grievant did not push, lunge, throw, toss, upset or overturn the table. It may have appeared that he was going to push the table toward Ms. J ., but he did not do so. In reacting to the grievant's lifting of the table, Ms. J moved back from the table and may have struck her elbow on the table injuring herself. When the grievant lifted the table, Mr. Hein intervened, putting his arms on the grievant and escorting or herding him out of the room. At the very most, the grievant somewhat resisted Mr. Hein's herding. The Union conceded that it was

inappropriate for the grievant to lift the table. However the Union suggested that Ms. J 's demeanor, particularly at the arbitration hearing, demonstrates that she is a troubled individual and a difficult employee. This demeanor may explain why the grievant felt so frustrated in dealing with her. While it is not appropriate for the grievant to have lifted the table, it does not automatically follow that the grievant's inappropriate action justify his termination from a position he has held for 14 years.

The Union suggested that the decision to terminate the grievant focused probably on misinformation which was received, suggesting that the grievant had said after the incident that he was going to buy a gun and kill Ms. J . It may also have been based on the statement that the grievant had to be physically restrained from hitting the grievant, or that the grievant attempted to re-enter the building in a rage and had to be held by two other employees. This information was incorrect. Mr. B who allegedly passed on the information concerning the gun testified unequivocally that the grievant referred to buying a gun shop and not to buying a gun to kill Ms. J . For Ms. Sylvia to rely on inaccurate and flawed information resulted in an inappropriate decision. She did not wait for the fitness-for-duty exam which the Employer had ordered and which shows that the grievant was not a serious violent threat in the workplace.

The grievant did express remorse, even though Ms. Sylvia informed the arbitrator during the hearing that the grievant had not. The Union cited the statements the grievant made to security, expressly articulating his remorse. The Union cited Dr. Raffle's fitness-for-duty report which indicates the grievant expressed remorse to him. When all is said and done, one is left with the grievant momentarily lifting up the table to dump Ms. J 's paperwork onto the ground after she called him a "fucking idiot." This is not sufficient evidence to warrant an escalation of positive

discipline from a decision-making leave to termination. The Union asked that the grievant be reinstated but with a decision-making leave to be in place for 12 months which is sufficient to guarantee near-perfect conduct. The grievant should be made whole for his losses since his termination.

DISCUSSION

The arbitrator's first task is to set forth what he believed occurred on the day of the incident which led to the grievant's termination. The arbitrator's reconstruction of the facts is, in many ways, no better than the reconstruction of the facts done by counsel for the Union or counsel for the Employer or the grievant's supervisors. Nevertheless, it is appropriate to engage in the effort of reconstructing the facts in order to determine whether in light of those facts the discipline selected by the Employer was appropriate. The reconstruction of the facts, in the arbitrator's opinion, is not all that difficult. While the parties may have placed their own gloss on the events hoping to enhance their respective arguments, a careful analysis of the facts as described both by the Union and the Employer are virtually identical.

The initiation of the incident occurred when the grievant approached Ms. J to provide her with "his assistance" because of a mistake which he believed she made when she provided service at a customer's home. The grievant believed that he was doing Ms. J a favor by educating her on how to perform her job properly and safely. He was doing this as a favor to the grievant and not reporting the incident to supervision which the grievant believed would lead to discipline being imposed on Ms. J for her grossly negligent work performance. Unfortunately for the grievant, Ms. J did not view her work performance at the customer's

house as grossly negligent and denied the conduct of which the grievant accused her. Ms. J denied that she left the premises in an unsafe condition. For whatever reason this lack of grateful response on the part of Ms. J triggered the grievant's anger to a point where he lost control of himself.

Ms. J used a number of profane remarks to describe the grievant and his ability which were met with profane remarks about the parentage of Ms. J by the grievant. The third-grade name calling in which the two engaged reached a pitch and volume that brought the attention of supervision to the floor to tell them to stop acting as they were. The grievant was also directed to leave which he did. Up until this point, there is no conduct which would warrant terminating either Ms. J or the grievant. While it is not appropriate work conduct to call a fellow employee a "fucking idiot" or to refer to another employee as a "fucking bitch," by itself, comments of that nature do not normally warrant immediate termination.

The problem for the grievant began at this juncture. The grievant had left the area, and the verbal confrontation for all intents and purposes was at an end. For reasons which the arbitrator does not understand, the grievant came back into the room determined to continue the verbal confrontation with Ms. J because he felt she had insulted him. The arbitrator has no idea whether those feelings of insult were culturally based for the grievant, but they were totally inappropriate for a workplace setting. If the grievant believed he had been insulted, his appropriate response was to take the matter to supervision and complain to a supervisor. There was nothing the grievant could obtain by going back to Ms. J to express his anger and frustration over the insult which he believed he had received. When the grievant came back into the room, he was clearly out of control by his own admission. When asked why he did not simply sweep

Ms. J 's papers onto the floor with his arm, he testified that he did not do so because he felt like hitting her and believed if he had used his arm to sweep the papers off the table, he might have physically hit her. To keep himself in check and not to physically punch Ms. J , the grievant chose to lift the table and push it at her.

There is no question whatsoever at the moment the grievant lifted the table, he was totally and completely out of emotional control. The grievant crossed the line from a verbal confrontation and entered the field of physical confrontation. Whether the grievant was taking his anger out physically on Ms. J 's papers or on Ms. J herself is irrelevant with respect to the physical nature of his expressed anger. Lifting the table was an extension of his anger, and it was physical in nature. The consequences of that physical response are disputed, but the physical nature of the action cannot be disputed. Ms. J asserted that the table hit her, and she had a bruise on her arm to substantiate that assertion. The grievant claimed the table did not hit her, but in light of his emotional condition at the time, his testimony is totally unreliable. It is the arbitrator's opinion when the grievant picked up the table and dumped the papers, the table hit Ms. J on the arm as she claimed and bruised it. For the grievant to claim that he did not intend to hit the grievant really is irrelevant. The grievant intended to engage in physical anger toward Ms. J and manifested that physical anger by lifting the table. The consequences of his actions resulted in Ms. J 's papers hitting the floor and the table hitting Ms. J .

After the grievant lost control and lifted the table, he had to be physically pushed out of the room. The Union has attempted to downplay the amount of force it took to remove the grievant from the room. It cannot be disputed that the grievant did not leave the room voluntarily. The grievant had to be pushed or herded out of the room, and the supervisor had to remain with the

grievant outside in the parking lot until the grievant left for his truck. The result of the grievant's actions in the room were twofold. First, he physically assaulted Ms. J by dumping her papers and pushing the table toward her which injured her arm. Secondly, he physically assaulted Ms. J 's emotions by his actions which frightened her to a considerable extent. It is not possible to argue credibly that Ms. J feinted her emotional upset over the grievant's behavior. Ms. J was seriously frightened by the grievant and his conduct. In a civil context in this respect, the grievant is guilty of both battery and assault against Ms. J . The question which then must be asked is whether in light of the fact the grievant engaged in battery and assault was it appropriate for the Employer to discharge him rather than to give him a decision-making leave?

One of the current problems in American workplaces which has been associated most poignantly with the United States Postal Service is violence where an employee loses control of his or her temper and kills or injures fellow workers. There have been a number of headlines in papers around the United States describing a situation where a disgruntled postal worker has gone home and come back with an assault rifle which the employee then uses to kill or wound his or her colleagues. The elements that are common in cases of this nature relate to the loss of control and frustration of the individual who does the violence. For whatever reason, the employee views himself or herself as being insulted or affronted in some manner that is so egregious that it must be addressed in the violent manner selected by the employee. It is difficult to know what triggers the anger and frustration that leads to this violence, but the consequence of the violence is clearly understood. One may be able to explain the behavior of the employee that engages in that kind of activity using psychological terms and by doing so understand what it is that triggered the behavior. But this does not really address the employment needs of an employer who has that kind of employee working on the premises. While the Employer may be interested in what causes an employee to lose his temper and engage in violence, the Employer's primary concern is how to

prevent that from happening in the first place and maintaining a safe environment for employees who work there.

If an employee loses his or her temper to such an extent that they feel compelled to engage in violence and assault and batter another employee, should that employee be given a second chance as the Union is requesting in the present case? What impact will that employee's violence have on fellow workers who must work with that individual in the future? Since Ms. J and the grievant both work in the same classification, what will the grievant's violence do to a relationship between them if they are required to work together? If the grievant loses control of his temper again as he acknowledged doing in the present case and engages in additional violence, what impact will that have on the Employer's liability for the grievant's conduct? These are all considerations an employer may weigh in the decision with respect to retain or terminate an employee who assaults another employee. There is no evidence in the present record that the Employer has ever treated employees who engage in physical assault differently than the grievant has been treated. Disparate treatment is not an issue. The only question is whether in exercising its discretion to retain or terminate the employee the Employer acted in an arbitrary or capricious manner. The answer to that is clearly no.

The Union asserted that the Employer's decision to terminate the grievant was influenced by the misinformation contained in the security report suggesting the grievant told someone that he was going to get a gun and kill Ms. J . There is no record evidence to substantiate that claim. It is clear, however, that the grievant fully intended to take his revenge on Ms. J if he had an opportunity to do so. The testimony of Mr. B , confirms the assertion that the grievant was not remorseful for his conduct but was revengeful. The grievant intended to be antagonistic and to

make it difficult for Ms. J every time he had an opportunity. The grievant expressed remorse to the security guards and to the psychiatrist which one would anticipate; but when speaking to a fellow worker, the grievant expressed his true feelings which were to find a way to get back at Ms. J. for the insult which she had imposed upon him.

The Union argued that the fitness-for-duty report showed the grievant was not a serious threat of violence. The arbitrator has had an opportunity to read many reports from many psychologists over the years, some of which dealt specifically with the threat of an employee to be violent in the future. From this arbitrator's experience in listening to psychologists testify about that subject and in reading the reports that were written, it is safe to say that psychologists and psychiatrists do not have a means of predicting whether an employee will be dangerous in the future or not. The fact that the fitness-for-duty report sayS the grievant is a low risk for future violence is based on the interview which the psychologist had with the grievant. It is possible the psychologist is correct. It is also possible that if another situation arises where the grievant loses his temper, feels insulted or becomes frustrated, he will do exactly what he did with Ms. J . As the psychologist suggested, he will become temporarily "mad." One cannot read the psychologists report as an exoneration of the grievant's behavior and a guarantee of the grievant's future behavior. One must read the report for what it is--namely, that ninety-five percent of the time while the grievant is working for the Employer, he will be a safe and sane employee. Perhaps five percent of the time, he will lose his temper and engage in violence.

In the context of industrial relations, there has been for many years a tradition that when an employee crosses the line between a verbal confrontation and passes into the arena of physical confrontation, the employee opens the door to termination. Nine of the treatises, including How

Arbitration Works or the Grievance Guide by BNA suggest any other consequence for workplace fighting than termination. People want to feel safe and secure when they work. They do not want to be intimidated or to be worried that if they say the wrong thing, a fellow worker will become violent and physically assault them. It is for this reason that when an employee crosses the line into the area of physical assault or violence that the consequence for doing so is, with very few exceptions, termination. In this manner, the line becomes bright and clear. An employee who thinks about becoming violent at work knows the consequence without any real doubt. In the present case, the grievant had an opportunity to walk away from his confrontation with Ms. J without engaging in violence. However, his anger, frustration and temper got the better of him, and he lost control of himself engaging in physical violence toward Ms. J . It was at that point the grievant crossed the bright line and made himself vulnerable for termination. When the Employer chose to terminate the grievant for doing so, it acted in a reasonable manner and it acted with just cause. One can certainly feel sorry for the grievant and hope that this experience has caused him to obtain whatever help he needs to make sure that his temper is within his control, but it is not the responsibility of the Employer to give the grievant a second opportunity to demonstrate what will happen if he becomes angry or frustrated in the future.

AWARD

The grievant was terminated for just cause. The grievance is denied.

It is so ordered.

December 21, 1998

Gerald R. McKay, Arbitrator

Roger Stalcup dissent

Roger Stalcup, Union Arbitrator

Ed Caruso, Union Arbitrator

Margaret Short concur

Margaret Short, Employer Arbitrator

Kathy Price concur

Kathy Price, Employer Arbitrator

AWARD

The grievant was terminated for just cause. The grievance is denied.

It is so ordered.

December 21, 1998

Gerald R. McKay, Arbitrator

Roger Stalcup, Union Arbitrator

dissent 1-04-99

Ed Caruso, Union Arbitrator

Margaret Short, Employer Arbitrator

Kathy Price, Employer Arbitrator