In Re the Arbitration between:

WCCO- TV, CBS Broadcasting, Inc,

Employer,

GRIEVANCE ARBITRATION OPINION AND AWARD

and

NABET – CWA, Local 411,

Union.

The parties have submitted the above captioned matter to arbitration in accordance with **Article 10** of the collective bargaining agreement effective April 6, 2005 through April 5, 2009.

The parties selected James A. Lundberg as their neutral Arbitrator.

The parties stipulated that there are no procedural issues and the grievance is properly before the Arbitrator for a final and binding determination.

The grievance was initiated on September 5, 2008.

The hearing was conducted on January 28, 2009.

Briefs were submitted on February 20, 2009.

APPEARANCES:

FOR THE EMPLOYER
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ISSUE:

Whether the Employer had just cause to suspend the grievant, Andy Smith, for three (3) days? If not, what shall the remedy be?

FACTUAL BACKGROUND:

The grievant, Andy Smith, has been employed as a news photographer for WCCO- TV in Minneapolis, Minnesota from September 5, 2008 until the present. He is a member of the NABET – CWA Local 411 bargaining unit. Other than a couple of "situations involving station vehicles", the grievant has no disciplinary history.

On September 2, 2008 Mr. Smith was assigned to work with a team covering news from the Republican National Convention in St. Paul, Minnesota. News reporters and camera men were stationed at Mears Park in St. Paul, where a group of protesters were gathering.

Large numbers of people appeared in St. Paul, during the Republican National Convention to protest a broad variety of issues. The vast majority of the protests were non-violent and well organized. However, within the ranks of the protestors were a small number of people who appeared to be focused on instigating unrest and violence. Those who were interested in disruption were on a number of occasions able to manipulate the crowd and the police. Several incidents of police and crowd conflict did arise during the convention. On several occasions tear gas and other crowd control measures were used by the police.

Warnings had been delivered to the television station regarding possible acts of violence against the media, station property and people covering the convention. As a precaution, employees of WCCO – TV were told to be cautious while covering the event

and careful not to get into harms way. No specific training was given to employees before they went out on assignment. Security was increased at the television station but no additional security was provided at the convention site for reporters and camera crews. Other stations that covered the convention provided some additional security for news crews.

On September 2, 2008 live coverage was set up in Mears Park and a broadcast was made from the site of an upcoming protest. Mr. Smith's camera and tripod were positioned a significant distance, about forty (40) feet, from the WCCO-TV van. As an individual in the crowd near the WCCO-TV van was arrested, protestors began moving toward the intersection near the place where the van was parked. After observing the crowd movement, Mr. Smith determined that he needed to recover his tripod and camera and return it to the van.

On his way back to the WCCO-TV van, Mr. Smith moved toward what appeared to be an open space between a van, which was parked directly behind the WCCO-TV van, and the curb. Mr. Smith did not know that a person had a seizure next to the van parked behind the WCCO-TV van and the open space was being kept open by people, who were trying to protect the injured person, who lay on the ground.

At some time shortly before the incident, which resulted in Mr. Smith being disciplined, Mr. Smith testified that he was assaulted by people in the crowd and the lanyard around his neck was pulled. Mr. Smith testified that he was disoriented, overwhelmed and fearful of the circumstances wherein he found himself.

As Mr. Smith tried to walk between the van parked behind the WCCO-TV van and the curb in order to bring his tripod and camera to the perceived safety of the

WCCO-TV van, his pathway was blocked by people trying to protect the person who was injured and on the ground. Simultaneously, a WCCO camera man on the roof of the WCCO-TV van and a KARE -11[1]camera man were panning the scene. Mr. Smith's actions were caught on camera by both the WCCO-TV camera and the KARE 11 camera. His encounter with the people who were trying to protect the injured person appeared on the KARE 11 blog shortly after the incident.

Mr. Smith tried multiple times to move past the people who were blocking his way. He pushed with his body and his tripod aggressively at those who were blocking his way and shouted obscenities at the people in his pathway.

Those who were blocking Mr. Smith's way shouted at him that there was an injured person down and he needed to find a different route. Several people in the crowd attempted to calm Mr. Smith. A co-worker called out to "Andy" telling him to stop trying to go forward. After several minutes of pushing and shouting, Mr. Smith was guided by the arm of a large man to the opposite side of the van and was able to walk unmolested to the WCCO-TV van.

While Mr. Smith was engaged with the crowd, a reporter was in contact with the News Director. As the incident wound down, the reporter, who the News Director had ordered to "tell him to stop talking", attempted to calm and redirect Mr. Smith. She did not tell him to stop talking, as she believed such a comment might further provoke Mr. Smith. In response to the reporter's attempt to calm him, Mr. Smith said, "Don't you 'f…ing' tell me what to do!" As time passed, Mr. Smith apologized to the reporter for his comment.

[1] KARE 11 is a rival television station in the Minneapolis-St. Paul, Minnesota region.

Mr. Smith was able to continue working that evening. He was a part of the team that set up the next live broadcast from Mears Park.

Mr. Smith had some bruises and scraps from the incident and his camera was damaged. The bruising and scrapes were minor. The zoom lens and view finder on the camera were damaged.

Mr. Smith reported the incident to his supervisor by e-mail. In his narrative he explains that as he moved into the “human chain” to get to the WCCO-TV van. He “told them to please excuse me.” He then relates how he was victimized, abused and otherwise mistreated by the crowd. Neither the WCCO-TV camera man nor the KARE 11 camera man captured the “please excuse me” nor the opportunity Mr. Smith said he took “to run away without further incident.” Both cameras shooting from different angles shot several minutes of aggressive moves by Mr. Smith, while people he was pushing at were attempting to reason with him and calm him. Also, Mr. Smith clearly was led out of the situation and walked toward the WCCO-TV van.

The KARE 11 video appeared on the KARE 11 blog, which resulted in an investigation into Mr. Smith’s conduct on September 2, 2008. After a brief investigation and review of the video taken by KARE 11 and the WCCO camera man, management met with Mr. Smith and his union representative on September 5, 2008. Mr. Smith was given a three (3) day suspension. Management required Mr. Smith to obtain anger management counseling from the Employee Assistance Program.

Upon receipt of notice of discipline, the union processed the grievance.

SUMMARY OF EMPLOYER'S POSITION:

There is no dispute that the situation in Mears Park on September 2, 2008 was "volatile and menacing." The witnesses at hearing testified that they were fearful while carrying out their assignments and the situation was very stressful. However, Mr. Smith failed to conduct himself appropriately under the circumstances.

Mr. Smith had no specific assignment to complete, when he was returning his equipment to the WCCO-TV van. He was not intending to photograph any specific disturbance that may have been taking place, he was not trying to photograph an arrest nor was he trying to photograph the injured person who was lying on the ground and being protected from harm by members of the crowd. It was not imperative that he immediately return to the WCCO-TV van with his camera and tripod.

Management had notified employees, including Mr. Smith, that they were to be particularly cautious during the convention. Employees were to avoid unnecessary risks. Camera men were to be careful of their blind side when the camera was on their shoulder and were told they would not get into trouble with management, if they used their best judgment and put safety first.

Mr. Smith used very poor judgment by failing to take into consideration the physical environment wherein he found himself and the large number of protestors who appeared to be attempting to instigate violent incidents. Rather than move about the periphery of the crowd, Mr. Smith walked right into a human blockade. He engaged in pushing, shoving and used his tripod as a ram, while shouting and cursing at those who blocked his passage. The video record clearly demonstrates that people in the crowd were trying to inform Mr. Smith of why they would not let him pass but Mr. Smith was not

paying attention. Furthermore, at least one co-worker was loudly shouting to Mr. Smith by name to stop what he was doing and withdraw from the crowd.

Mr. Smith unnecessarily placed his person and the station's equipment at risk by moving into a completely avoidable confrontation with the crowd. Furthermore, his conduct damaged his reputation and the reputation of the station when it was caught on video and the video played on the KARE 11 blog. The fact that the risky situation wherein Mr. Smith found himself appeared easily avoidable was given considerable weight in management's decision to suspend Mr. Smith.

Mr. Smith's conduct following the incident was also taken into consideration. When offered assistance by a reporter and fellow team member, Mr. Smith waved his finger at her and shout a profanity. The e-mail Mr. Smith sent to his supervisors did not accurately reflect Mr. Smith's disengagement from the crowd. Mr. Smith was not remorseful.

The Employer considered Mr. Smith's conduct to be "deliberate or aggravated misconduct" for which the contract allows the Employer to immediately discharge an employee. Given the nature of Mr. Smith's deliberate and aggravated misconduct, the Employer believes that it had just cause to impose a three (3) day suspension on the grievant and asks that the discipline be upheld and the grievance denied.

SUMMARY OF UNION'S POSITION:

The Employer failed to take any mitigating circumstances into account before imposing discipline on the grievant, despite the existence of many mitigating factors. The Republican National Convention was a once-in-a-lifetime event in the St. Paul-Minneapolis area. There were known threats to members of the media. The Employer

took special steps to secure the station's physical plant but not the personnel who were gathering news. The news crews were on twelve (12) hour shifts, rather than the normal eight (8) hour shifts. The level of stress from fatigue and the highly charged atmosphere surrounding the convention was not taken into consideration. No training was given to reporters and camera men, despite foreknowledge that they would be working in a dangerous and hostile environment. Furthermore, the grievant was unusually stressed because his first child was about to be born.

Mr. Smith was not the aggressor but was acting in self defense. He testified without contradiction that he had been an assault victim, he was kicked and his lanyard pulled prior to the incident recorded on video. Mr. Smith admitted that he reacted aggressively to the situation wherein he found himself. However, his reaction was both reasonable and understandable under the circumstances.

The Employer was not thorough and even handed in its' investigation. Only one co-worker was interviewed prior to imposing discipline upon Mr. Smith. The co-worker who prepares the WCCO blog did call out to Mr. Smith, when he was embroiled with the crowd. However, Mr. Smith did not know the co-worker and had no reason to respond to her shouted instructions.

A confrontation with protestors and WCCO employees was foreseeable and WCCO should have done more to protect employees from harm. Unlike other news organizations, no additional security was provided to WCCO news crews covering the convention. The station knew of the threat but provided neither training nor protection to its workers.

The union asks the grievance be upheld. They ask that the three day suspension be revoked and the grievant paid back pay and lost benefits. They also ask that the suspension be expunged from the grievant's personnel record.

OPINION:

The Employer established by a preponderance of the credible evidence that on September 2, 2008 the grievant engaged in aggressive, hostile and profane conduct with protestors who were located near the WCCO-TV van. The protestors had positioned themselves near the WCCO-TV van for the purpose of protecting an individual who had a seizure and was on the ground. Mr. Smith made repeated attempts to aggressively push past a mass of people using his tripod as a wedge and employing a string of profane statements. Video evidence demonstrates that people in the surrounding crowd attempted to inform Mr. Smith that he they would not let him pass because an injured person was on the ground in the area. The video also demonstrates that people in the crowd tried to calm Mr. Smith, a co-worker of Mr. Smith's called out to him and encouraged him to disengage from the path that he had chosen. The videos taken from two different sources demonstrate that Mr. Smith had space in which to maneuver and chose to move aggressively into the crowd rather than go around the crowd.

Mr. Smith may have had a violent encounter with people from the crowd wherein he was assaulted prior to the incident shown on the video clips. However, the videos reflect multiple opportunities for Mr. Smith to have disengaged from the crowd and multiple opportunities for him to have gone in a different direction. The video evidence and the testimony of eye witnesses are credible evidence that Mr. Smith engaged in unnecessarily risky conduct. Mr. Smith's actions could have resulted in serious personal

harm and did result in damage to an expensive camera owned by the television station. The number of times Mr. Smith returned to push into the crowd supports a finding that his conduct was deliberate and the misuse of his tripod supports a finding that the misconduct was aggravated.

While the Employer did not consider any mitigating factors when it imposed the three (3) day suspension on Mr. Smith, it clearly did consider the fact that coverage of convention protests was a dangerous activity. The Employer did compare the conduct of other workers in similar circumstances, before the discipline was imposed. The video evidence clearly demonstrated that Mr. Smith had a number of opportunities to disengage from the conflict but elected not to remove himself from harms way. The video also demonstrated that the people Mr. Smith was attempting to push through made multiple attempts to inform him that an injured person was on the ground and that was why they would not let him pass. There was no video evidence that members of the crowd initiated violent contact with Mr. Smith.

The arbitrator acknowledges that the grievant was stressed due to the birth of his first child. However, the video evidence does strongly support the position that Mr. Smith had multiple opportunities to disengage from the conflict but chose to take multiple "runs" at the crowd. Furthermore, the people with whom Mr. Smith made physical contact and whom he was "cussing out" were attempting to tell him why his path was being blocked. Mr. Smith was not listening and chose a course of action that endangered him, that endangered those around him and endangered the Employer's equipment. Mr. Smith's conduct was deliberate and was aggravated.

Given the gravity of the incident, the three (3) day suspension was appropriate. Mr. Smith unnecessarily placed himself in harms way. Industrial discipline is designed to correct misconduct, when possible. In this case the rather harsh penalty was imposed to emphasize that it is imperative for news crew members to stay out of harms way.

The Employer made arguments regarding the negative impact of Mr. Smith's conduct on both Mr. Smith's reputation and the reputation of WCCO-TV. While there may have been some harm done to both reputations, it is impossible to gauge what, if any, lasting impact the KARE 11 video may have on WCCO's reputation. The award in this case is arrived at without speculation over any damage to the Employer's reputation.

AWARD:

The Employer established by a preponderance of the credible evidence that it had just cause to discipline the grievant, Andy Smith.

The three (3) day suspension of Andy Smith was reasonable under the circumstances.

The grievance is hereby denied.

Dated: March 3, 2009

James A. Lundberg, Arbitrator