IN ARBITRATION PROCEEDINGS PURSUANT TO THE

CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN

THE PARTIES

In the Matter of a Controversy between LOCAL UNION NO. 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and PACIFIC GAS AND ELECTRIC COMPANY, Involving the discharge of [redacted] S[redacted]	Case No. 24

OPINION AND AWARD

BEFORE THE FOLLOWING ARBITRATION BOARD:

ROBERT E. BURNS, Esq., Attorney at Law, 155 Montgomery Street, San Francisco, California; Chairman.

BRUCE J. LOCKEY, Business Representative, Local Union No. 1245, I.B.E.W.; Member selected by the Union.

ORVILLE OWEN, Business Representative, Local Union No. 1245, I.B.E.W.; Member selected by the Union.

DAVID S. SOLBERG, Personnel Manager, Stockton Division, P G & E; Member selected by the Company.

ELMO PETTERLE, Personnel Manager, North Bay Division, P G & E; Member selected by the Company.

APPEARANCES:

ON BEHALF OF THE UNION:

MESSRS. NEYHART & GRODIN, by JOSEPH R. GRODIN, ESQ., 1035 Russ Building, San Francisco, California.

ON BEHALF OF THE EMPLOYER:

L. V. BROWN, ESQ., and HENRY J. LaPLANTE, ESQ., 245 Market Street, San Francisco, California 94106.

The Parties and the Issue

Pacific Gas & Electric Company (herein called the "company") and Local Union No. 1245 of International Brotherhood of Electrical Workers, AFL-CIO (herein called the "union") are parties to a collective bargaining agreement dated September 1, 1952, as thereafter amended (herein called the "agreement").

Pursuant to the agreement, a hearing was held in San Francisco on May 19, 1967, before the Arbitration Board at which the parties, their attorneys and representatives and grievant, [redacted] S[redacted], were present. At the hearing the parties stipulated that the grievance procedures under the agreement had been complied with or waived and that the following issue was submitted to the Arbitration Board constituted pursuant to the agreement:

> "Was the discharge of [redacted] S[redacted] on February 8, 1967, in violation of the labor agreement dated September 1, 1952, as amended thereafter? If so, what is the remedy?"

At the conclusion of the hearing the issue was submitted to the Arbitration Board upon filing of briefs. The briefs having been filed on June 13, 1967, the issue stands submitted for de-

cision and award.

Review of the Evidence

Grievant, [redacted] S[redacted], an apprentice lineman employed by the company was discharged on February 8, 1967, because he was no longer suitable as an apprentice lineman and later as a journeyman lineman. Grievant's lack of suitability arose out of his plea of guilty on January 31, 1967, in the Justice Court at Martinez, California, to three charges of violation of Section 314.1 of the Penal Code. The three violations occurred in Martinez on January 16, 1967, January 25, 1967, and January 28, 1967. Section 314 of the Penal Code reads in part as follows:

> "Every person who wilfully and lewdly, either
>
> exposes his person, or, the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; ....is guilty of a misdemeanor."

On each of the days in question grievant, while sitting in his car parked on a street in Martinez, had opened the door and exposed his private parts to passing children. While he sat in the car he was clothed above his waist and unclothed below his waist. On January 15, 1967, grievant had committed a similar act. On the day of his trial grievant had his wife report to the company that he was sick. After his conviction grievant was placed on probation and he was sent to a psychologist in Walnut Creek.

Grievant was born in 1942. He is 24 years old. He has been married for one year and eight months. He was employed on July 19, 1965, as a groundman. After six months he was promoted to the classification of truck driver, and on August 22, 1966, was promoted to apprentice lineman. Grievant served in the Navy for four years. He received an honorable discharge. He had never before (nor since) been convicted of any crime.

The company is a public utility serving its customers with gas and electricity. As an apprentice lineman and later as a journeyman lineman grievant was and would be required to enter the yards and properties of customers during working hours. At times he might be assigned to work alone. There was no publicity in connection with grievant's conviction and no publicity concerning his employment by the company. Other employees in the company, however, became aware of grievant's conviction.

Grievant testified at the hearing concerning the commission of the offenses. The psychologist was not produced but the grievant testified that he had been advised by the psychologist that he suffered from a slight lack of will power. He and his wife had bought a home and both of them were working on the home and improving it. They were spending more money than their income allowed and this resulted in dissension in the family and preyed on grievant's mind. Grievant had been sent to a training school by the company. He attended the school during working hours and also studied at night. The psychologist commented on

grievant's relationship with his father. Grievant's father apparently is a demanding man who had an excellent academic record in college and who has been successful in his business. Grievant was not interested in advanced education and his grades in school were not high enough to please his father. Grievant was having domestic difficulties with his wife.

The psychologist discharged grievant with the advice that the combination of what might be called the "father complex", his problems at home because of his financial problems and overwork, and his slight lack of will power, all caused and contributed to his conduct on the days in question for which he was convicted.

During the course of the grievance procedure the union review committee filed the following opinion:

> "It is the opinion of Union's Review Committee Members that Mr. [redacted] should not have been discharged by the Company.
>
> Mr. [redacted] is guilty of unlawful conduct which was committed during times when he was not performing work for the Company and as a result, this conduct does not reflect upon the Company, its products or its employees.
>
> Other employees who have been involved in similar unlawful conduct have not been discharged by the Company but have continued in their employment. The treatment accorded to Mr. [redacted] should not be different than that accorded other employees in similar situations.
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> Mr. [redacted] is in need of assistance in overcoming the problems which led to his improper conduct. One of the specifics necessary to his rehabilitation is continued employment. The Company, serving the entire community, is obligated

for its share of social responsibility. This responsibility was not properly discharged when the services of Mr. S[redacted] were involuntarily terminated."

Under date of March 22, 1967, the company chairman of the review committee advised the union of the following:

"OPINION OF THE COMPANY

The discharge of [redacted] S[redacted], an apprentice lineman, on February 8, 1967, was for proper cause."

Other factual matters appear in the opinion.

Opinion

The conduct of grievant for which he was convicted did not occur during working hours. Under ordinary circumstances an employer has no right or power to discipline an employee for his conduct outside of working hours and away from the company property. There are exceptions to this general rule.

Among the exceptions are those cases where the acts and conduct of the employee are such that they reflect on the employer and harm the reputation and business of the employer.

The company is a public service company. It has the well-deserved reputation of providing excellent service to its customers through competent and reliable officers and employees. The company is entitled to protect its reputation. Most of its contacts with the public are through its employees.

There was no publicity or public notoriety of grievant's conviction. There is no evidence that the company's reputation was damaged by grievant's conduct.

The position of the company is that grievant is the type of man whom it does not wish to have in its employ and whom it would not employ in the first instance if it knew at the time of employment of offenses such as those of which grievant was convicted. As an apprentice lineman grievant would work alone only in special circumstances. Promotion to lineman comes after three years as apprentice. Linemen enter the private property of customers during daylight hours and at other times in cases of emergency. Normally during daylight hours only women and children are present in most homes, and the company has the obligation to see to it so far as reasonably possible that the men who do enter or work in or about the customer's property are reliable and normal individuals.

Grievant did not commit these acts while on duty with the company. The basic question is, therefore, whether grievant is such a person that there is a reasonable probability that he may again commit the acts for which he was convicted. We can only look to the evidence to determine whether such a probability exists. To state the matter in another form: since grievant's work in the future may require him to enter the yards and possibly the homes of customers, then he should not be employed by the company if the evidence establishes there is a reasonable probability that he will again commit the acts for which he was convicted.

In its brief the company urges that the discharge must stand if the grounds are such that under all the circumstances

they justify the termination of employment, citing an opinion in the I.B.E.W. v. P G & E, Case No. 20, June 12, 1963. In Case No. 20, after a detailed analysis of the agreement, it was decided by a majority of the Board of Arbitration that a discharge under the agreement must be for just cause. There appears to be no reason to change the interpretation of the agreement in this case.

Whatever language may be employed to describe the meaning and effect of the agreement, it does appear that a discharge must be based on grounds which are relevant to the employment relationship and that the grounds must be established by evidence which leads an impartial mind to the conclusion that the discharge or discipline was fair, just and proper under the circumstances.

The trier of the facts in cases such as this must approach the basic question herein involved in as dispassionate a manner as possible. The conduct of grievant was not only distasteful, but to most people revolting.

But let us examine the evidence. Grievant was convicted of the three violations in January 1967 and admitted a fourth. The only evidence we have concerning the details of these occurrences come from grievant himself. There was no thorough inquiry into all of the details of the occurrences for whatever light they might throw on the basic question here: whether there is a reasonable probability that grievant is likely to commit similar acts again while he is working on the job. The only report of the psychologist's views is from grievant himself. There is no written report, nor do we have the benefit of the testimony of the psychol-

ogist. We do have grievant's testimony that the psychologist said that he was discharged and that the psychologist did not expect to see grievant again. This may be the subject of an inference that the solution of grievant's domestic problems and his realization that his conscious or subconscious struggle to please the demands of his father had been eliminated by the consultation with the psychologist.

There were a number of areas which could have been explored. The psychologist could have been called as a witness. His testimony might have been a primary source of evidence concerning the basic question before the Adjustment Board. A written report could have been obtained from the psychologist. He could have been interviewed and possibly his deposition taken if he was not for some reason available for the hearing. Fellow employees could have been interviewed to learn whether grievant had conducted himself in any way so as to indicate an abnormal personality. Last, but not the least, grievant could have been subjected to a searching cross-examination concerning all of the facts and circumstances in connection with each incident, his subjective thinking and reactions, the immediate events leading to each incident, what prompted him in each incident to do what he did, and what were his emotional reactions and thinking after each incident. All of these matters and things, and undoubtedly others, would probably be the basis of an inference or conclusion whether there is a reasonable probability that grievant would again commit similar acts. But none of this evidence was produced.

There was testimony of investigation by the security employees of the company and the careful consideration given by the several levels of supervision to the discharge of grievant. Yet, the supervisors presumably had no more evidence than the evidence produced at the hearing. The decision of the supervisors was based on the commission of the acts themselves. If there was other evidence it was not produced.

The evidence in the record which bears on grievant's future conduct so far as probable recommission of the acts in question is his conviction and admission that he committed those acts. Such evidence is not sufficient. The company has the burden of showing that there is a reasonable probability that grievant will commit similar acts at some future time. It does not appear that the company has met its burden to prove the basic issue. Consideration of all the evidence leads to the conclusion that future commission by grievant is speculative. The commission of the four acts in January, closely grouped as they were, together with the other evidence is not sufficient to raise an inference that grievant will probably commit similar acts again. The commission of the acts must be considered in the light of grievant's testimony concerning the solution of his domestic problems and inner conflicts and his discharge by the psychologist. Grievant's prior record of no convictions and his honorable discharge from the Navy are also entitled to consideration.

Arbitration decisions have been cited by both parties. The basic rules are rather clear. It is unnecessary to discuss

all of them. There must be a direct relationship between the off-duty conduct and the employment relationship (Babcock v. Wilcox Co., 43 LA 242 (1964). The time of the commission of an offense by an employee is not necessarily the deciding factor. It is the quality of the offense and its effect on the employment relationship, present and future. If there was sufficient evidence in this proceeding upon which an inference could be based that there was a reasonable probability that grievant would again commit acts similar to those for which he was convicted, then the discharge should be upheld because the company is entitled to demand that the men and women in its employ are normal and decent people who will not give grave offense to its customers. The evidence in this proceeding does not measure up to those standards. It does not establish a reasonable probability that grievant will again commit similar acts.

The investigation which was necessary in this case would take time. The company should not be required in a case such as this to make its decision hurriedly or without the evidence and information which it needs to make a decision based on substantial evidence. Grievant could have been suspended pending the investigation and a reasonable time for the investigation would appear to be four weeks in addition to the time taken. Since grievant's misconduct gave rise to the necessity of an investigation, the company should not be required to compensate him during that period.

For the foregoing reasons the discharge of [redacted] S[redacted] was without proper cause and he should be reinstated in

his former position with seniority rights preserved. Grievant should receive back pay less any amounts he has earned and less pay for a period of four weeks.

Award

Pursuant to the agreement, the stipulations of the parties, and the evidence in this proceeding, the following award is made:

The discharge of [redacted] S[redacted] on February 8, 1967, was in violation of the labor agreement dated September 1, 1952, as amended thereafter.

Grievant, [redacted] S[redacted], shall be reinstated in his former position with seniority rights preserved and he shall receive back pay less any moneys earned by grievant and less pay for a period of four weeks.

Dated: July 10, 1967.

ARBITRATION BOARD:

Robert E. Burns

Robert E. Burns, Chairman

We concur: Emiliee Lowen

Bruce Lockey

We dissent: _____

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