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FOR INTRA - COMPANY USES

DIVISION OR DEPARTMENT **INDUSTRIAL RELATIONS**
FILE No. **741.5**
RE LETTER OF
SUBJECT **Arbitration Case No. 45**

July 8, 1974

MESSRS. F. A. PETER	S. E. HOWATT
C. H. SEDAM	J. H. BLACK
W. L. MURRAY	E. E. FOLEY
G. N. RADFORD	V. H. LIND
C. R. MARTIN	F. C. MARKS
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G. F. CLIFTON, JR.	H. P. PRUDHOMME
J. G. FOSTER	M. J. STONE

We are enclosing a recent decision of the Board of Arbitration in the matter of Arbitration Case No. 45.

The issue in this case submitted to the arbitrator was "whether an appraisal report is a proper subject for the grievance procedure." A short background of the course followed by this grievance to arbitration may assist you in better understanding the arbitrator's decision as well as the reason for the statement of policy, which is described below.

The case concerned a bargaining unit employee who took exception to a general statement as to his "poor attitude" contained in a periodic appraisal made pursuant to the provisions of Standard Practice 704.1-2. The basic intentions of the Union was that adverse or critical comments contained therein were subject to the grievance procedure of the Labor Agreement inasmuch as they constituted "discipline." The Company initially refused to accept the grievance concerning the supervisor's criticism on the basis that it was not discipline inasmuch as it had no present effect on the employee, and therefore not subject to adjustment under the grievance procedure of the applicable Labor Agreement. At the Review Committee level of the grievance procedure, the Company offered to modify its position by allowing the employee to submit a written rebuttal to the supervisor's conclusions which would be contained in his personnel jacket. The same proposal was also offered as an alternative to the arbitrator, but in reading his decision you will note that he has not accepted that as a settlement of the case.

Rather, the arbitrator has left the Company with a choice. First, the Company may develop a rule which provides that appraisals of bargaining unit employees for bargaining unit positions made pursuant to the Standard Practice or as it may be revised in the future will not be used in any formal grievance, promotion or demotion procedure as proof of the matter alleged. Similarly, if the Company adopts this policy, the Union also will be precluded from using the appraisal report at any stage of the grievance procedure. The alternative is to make the formal appraisal grievable.

The bulk of the testimony presented by Company's witnesses was to the effect that the appraisal report as provided for by the Standard Practice is not intended as a disciplinary tool, nor is it intended that the appraisal form be used to prove a point in the grievance procedure. Although admittedly at times where it supported the testimony of witnesses called by the Company, it has been used as proof of the substance in their testimony.

After reviewing the alternatives posed by the arbitrator's decision, with Mr. T. V. Adams and Mr. Paul Poulos, it is our conclusion that the use of the appraisal reports for these purposes serves little benefit in the development of the Company's position. The evidence that can be produced through witnesses and direct testimony far outweigh in value the contents of an appraisal report. Therefore, with concurrence of Mr. Adams, it will henceforth be the Company's policy that appraisal reports developed as a result of applicable Standard Practices shall not be used at any stage of the grievance procedure by either Company or Union or by Company in making promotion, demotion or discipline decisions within the bargaining unit.


I. WAYLAND BONBRIGHT

LVBrown:rto

Enclosure

cc: SLSibley	PMatthew
JFBonner	ADowen
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HPBraun	ECSuess
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HJLaPlante	Division Personnel Managers
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bcc: JKagel, Esq.
LNFoss, IBEW

In the Matter of an Arbitration)

between)

INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL UNION,)
NO. 1245,)

Complainant,)

and)

PACIFIC GAS AND ELECTRIC)
COMPANY,)

Respondent.)

Re: Whether an Appraisal Report)
is a Proper Subject for the)
Grievance Procedure.)

Arbitration Case No. 45

OPINION AND DECISION

of

BOARD OF ARBITRATION

JOHN KAGEL - Neutral Member

HENRY LUCAS - Union Member

LAWRENCE N. FOSS - Union Member

I. WAYLAND BONBRIGHT - Company Member

D. J. BERGMAN - Company Member

ISSUE:

Are the contents of an Appraisal Report a proper subject for the grievance procedure?

AGREEMENT PROVISIONS:

"TITLE 102. GRIEVANCE PROCEDURE

"102.6 Grievances on the following enumerated subjects shall be determined by the grievance procedure established herein, provided they are referred to Company within the time limit specified:

- "(a) Interpretation or application of any of the terms of this Agreement;
- "(b) Discharge, demotion, suspension or discipline of an individual employee;
- "(c) Disputes as to whether a matter is a proper subject for the grievance procedure." (Jt. Ex.2)

BACKGROUND:

It is the policy of the Company that annual Appraisal Reports be made concerning the performance of all Bargaining Unit Employees. These Appraisal Reports are used for counselling purposes between the Appraisee and his immediate Supervisor in terms of providing the Employee with the Supervisor's view of his performance. In conjunction with other

documents, the Appraisal Reports are used in determining whether or not an Employee is eligible for promotion to both Bargaining Unit and exempt positions. And, the record establishes that they have been used by the Company in disciplinary proceedings in the past.

POSITION OF THE PARTIES:

Position of the Union:

That when Appraisal Reports are unfavorable, they are disciplinary in effect and come within the scope of Section 102.6(b) of the Agreement; that Appraisal Reports have been used to justify discipline and job award bypasses in the past; that an Employee's work record affects his status in several ways without the Employee's knowledge since the Employee's file is maintained and consulted exclusively by Management personnel; that the appraisal of Employees is carried out in such a haphazard manner that the procedure is arbitrary and the reports should be subject to the grievance procedure; that Appraisal Reports have been admitted into arbitration proceedings and have been relied upon in upholding the discharge of Employees; that

an Employee's work record is considered ex parte by Management before any action is taken so that the presence of an unfavorable Appraisal Report may affect the Employee's status without ever coming before a Grievance Committee; that an Employee's status is affected immediately with respect to his promotability, his vulnerability to the initiation of disciplinary action and his inability to effectively contest disciplinary action when taken on receipt of an unfavorable Appraisal Report; that there is no meaningful distinction between a disciplinary letter which admittedly is subject to the grievance procedure and an Appraisal Report; that past arbitration cases involving other Companies and Unions support the Union's position; that the present Appraisal Report system is arbitrary in policy and in practice; that no legitimate Management interests would be harmed by making Appraisal Reports subject to the grievance procedure; that the Union does not question the propriety of the Company making out Appraisal Reports; that making Appraisal Reports grievable would not contradict the result of Review Committee Case No. 288 which denied an Employee a blanket

right to review his personnel file; that the Company's claim that Supervisors would tend to hang back in making appraisals if they would have to go through rigors and publicity of the grievance procedure does not establish that such result would occur since the current Company policy is now to have a face-to-face confrontation between the Supervisor and the appraised Employee himself; that making Appraisal Reports subject to the grievance procedure is sound industrial relations practice in that it allows disputes concerning the contents of the reports to be finally determined when events are still fresh in the minds of interested parties; that contrary to the Company's position, there has been no rule in grievance proceedings requiring Supervisors to come forward and testify concerning the substance of their Appraisal Reports.

Position of the Company:

That it cannot be adduced that there was any evidence that the Grievant's employment or status has been in any way jeopardized by the opinion held by the Supervisor; that there is no evidence that

the Union has ever sought to bargain on the appraisal performance review system; that a Supervisor's generalization of his subordinate Employee's work performance potential without threat of any immediate or future action is not a subject for a grievance simply because they are written down on an Appraisal Report; that the grievance procedure limits grievances to matters of action; that appraisals are neither intended to be used as a disciplinary tool nor is there any evidence in the record to indicate they have been misused; that the mere opinions of Supervisors have little evidentiary value so that with the passage of time their value dims showing that there is no immediate threat of disciplinary action against the Employee by the issuance of an adverse Appraisal Report; that Appraisal Reports are proper Management functions; that criticism of an Employee's general work performance is not an act of discipline; that it does not have any present effect upon the Employee; that the Appraisal Reports, when used by the Grievance Committees in the lowest step of the procedures or in arbitration proceedings, are merely written

documentations of the testimony of the witness involved; that they are not submitted as proof of the fact of the present alleged offense, but rather as a business record in support of the testimony of the witness before the Committee or Board of Arbitration; that the comments, opinions and conclusions of the Supervisors contained in past Appraisal Reports are hardly worth the paper they are written on unless at the time of their introduction they are accompanied by testimony from the appraiser or other direct proof that the comments rest on a factual basis; that a potential Grievant could obviate any possible harm seen in the comments by setting about to comply with the Supervisor's conclusions or to submit to the Company his written rebuttal for filing in his personnel jacket and in either event the sting of the critical remark would be withdrawn.

DISCUSSION:

Analysis of Issue:

It is important in this case to carefully define the points of differences between the Parties. The record discloses this is not a case where the

Union seeks to prohibit the Company from evaluating Employees' performance by means of Appraisal Reports. Rather, the Union's position would result in one of two rulings, namely, to determine that an adverse Appraisal Report can be grieved under Title 102.6(b) of the grievance procedure or that the Appraisal Report be limited in its use solely to counselling with Employees, but not used by the Company in disciplinary actions or in promotion decisions to other bargaining unit jobs. Accordingly, the Union concedes much of what the Company contends, namely, that the Company has a right to make Appraisal Reports of its Employees.

Rather, the question which must be answered is whether or not the record discloses that once the Company has made an adverse Appraisal Report, whether or not that is a "discipline" within the meaning of Title 102.6(b) which allows

"Grievances on the following
enumerated subjects . . .

"(b) Discharge, demotion,
suspension or discipline of
an individual employee; . . ."
(Jt. Ex.2)

Are Appraisal Reports "Discipline"?

The primary Company contention that such

actions are not discipline is that at the time of the Report, except for constructive counselling to improve an Employee's job performance by the appraiser, there is no specific adverse action taken against an Employee.

Instead, according to the Company, what is "discipline" within the terms of Title 102.6(b) of the Agreement is such matters as a written warning which an Employee receives which warns the Employee that, in the event he repeats certain conduct, adverse action will be taken against him. According to the Company, such written warnings can be grieved under Title 102.6(b) (Tr.50).

In this case, the Union has established that during the grievance procedure in many cases the Company has introduced Appraisal Reports to justify disciplinary action that it has already taken. The Company justifies the introduction of Appraisal Reports in such matters on two bases: The first is that such is subsequent use of the Appraisal Report which does not constitute discipline at the time the Appraisal Report is written, and

secondly that, in terms of evidence, with the passage of time the introduction of the Appraisal Report is entitled to little weight.

However, the Company has established no basic difference between an adverse Appraisal Report which is used in subsequent disciplinary proceedings and a written warning which is also so used. The fact the written warning which the Company admits is grievable may contain a threat of subsequent action in the event an Employee repeats certain conduct does not distinguish it from an Appraisal Report which contains no such express "threat". Both are adverse comments against an Employee, and both may be used in subsequent disciplinary proceedings against the Employee, or to deny an Employee a promotion. Accordingly, if a written warning is "discipline" within the meaning of Title 102.6(b), then so too must be an adverse Appraisal Report where the practice has been to use such reports against Employees in the grievance procedure.

Thus, the policy of the Company using Appraisal Reports in disciplinary actions and in denying promotions establishes that as currently used they are properly defined as "discipline" within

the intent of Title 102.6 and thus they are subject to the grievance procedure. There is no difference between a necessity to be able to immediately challenge an adverse Appraisal Report as opposed to a written warning since both may subsequently be used against the Employee in further actions. The necessity for immediate testing of the adverse statements is required while facts are still fresh in witnesses' minds; and a fairer determination of any grievance can be made at that time. Additionally, in the event an adverse Appraisal Report subsequently used in a disciplinary procedure is not grieved, then, as the Union points out, it can be assumed to be true from that point forward.

Alternative for Company:

The Company suggests there would be adverse effects in the event Appraisal Reports were to be subject to the grievance procedure, including the fact that Supervisors might tend to hold back adverse reports concerning Employees because the report might be subject to the grievance procedure

which would have a chilling effect upon the counselling aspect of the Appraisal Reports, including the beneficial aspects of that procedure for the Employees.

However, whether or not Appraisal Reports are subject to the grievance procedure is a matter for the Company to determine. As the Union concedes, Appraisal Reports are a Management function. It is to be noted that the Company official in charge of its Appraisal Report policy states that Appraisal Reports are not intended to be part of the disciplinary process and they were originally intended to have but a limited role in promotion decisions.

If the Company's policy is that Appraisal Reports are not be used in disciplinary nor promotion evaluation matters, but solely for counselling and communication between the Supervisor and the Employee then the Appraisal Reports would not be "discipline" within the meaning of Title 102.6(b) and not subject to the grievance procedure. Contrary to the Union's assertion, in the event that such is Company policy, since Appraisal Reports could not be used in the decision to discipline

or promote nor in any subsequent grievance by the Company - their mere presence in an Employee's record could not be used to initiate or sustain a disciplinary action or a promotion judgment by the Company. However, in the event the Company continues to use Appraisal Reports in the disciplinary and promotion process, then such Reports are under Titles 7.1 and 102.6(b) subject to the grievance procedure.

Other Company Contentions:

The Company's contention that even if Appraisal Reports are used in the grievance procedure, they are not entitled to much weight is self-defeating for, if in fact they are not entitled to much weight, then perhaps they should not be so used. But if they are so used, they are "discipline" within the meaning of Title 102.6(b) irrespective of how the Company, which introduced the Reports, views their value. The Company urges that in the event Appraisal Reports cannot be used in a disciplinary procedure then only the most immediate past incidents of an Employee's work record can be introduced. What the Company's argument

really means is that if in fact it intends to take disciplinary action against an Employee for improper conduct, then it should file a written warning against him rather than attempt to justify it by means of what it now considers to be ungrievable and inaccessible adverse material in the Employee's record. Finally, the Company's citation to review case number 288 is not dispositive of this case since that matter dealt with an Employee's personnel record, not with the subject of whether or not Appraisal Reports are subject to the grievance procedure (Co. Ex.2).

The Company has cited several cases which it maintains supports its position.

The case of Regent Refining (Candada) Ltd., is inapplicable for there the parties had a specific agreement provision which did not permit grievances concerning letters of "warning or criticism", allowing instead the filing of the employee's reply in his record. (61 LA at 158, 159). No such exception to the grievance procedure's applicability is found in this case.

21 LA 518, the Court found that a grievance concerning a warning was arbitrable under the applicable agreement. There the court was determining arbitrability in a case predating the Steelworkers' Trilogy. The Court found a "formula" for differentiating "discipline" from other company actions. In its "formula" the Court required express "discipline" such as specified adverse action to be taken against an employee in the event of repetition of conduct for the matter to be arbitrable. Here, given the Company's past use of adverse appraisal reports, there is by practice implied "discipline" as was found by the Court in that case so that the Court's statement of its "formula" does not foreclose the decision herein.

Finally, in National Cash Register Co., 48 LA 421, the company there took the position that adverse appraisal reports were not grievable for the appraisal plan was not designed nor was it used in the promotional process or to take disciplinary action against employees, (48 LA at 423) contrary to the facts here. Additionally, in that case the arbitrator found a "tacit understanding" that appraisal reports were not subject to the grievance procedure. And, again contrary to the record

record herein, in that case the program subject to such tacit understanding included the right of employees to file their own written comments in response to an adverse appraisal report.

Remedy:

Since the conclusion in this case must be that in the event the Company desires to introduce Appraisal Reports into the grievance procedure in support of its actions concerning discipline or denial of promotion, it is appropriate that the Company be given an opportunity to determine whether or not it wishes to continue this policy, in which case if it decides to use them in discipline or promotion cases Appraisal Reports will be subject to grievances under Title 102.6. Otherwise the Company must promulgate a Company-wide policy limiting the use of Appraisal Reports solely to job performance counselling of Employees and not to use them in discipline and promotion matters.

DECISION:

Within thirty (30) days the Company shall provide the Arbitration Committee a written statement as to whether or not Appraisal Reports

will be used in disciplinary and promotion matters within the bargaining unit. In the event that it desires to do so then Appraisal Reports are subject to the grievance procedure. In the event it does not, it shall promulgate such policy as a Company-wide policy and Appraisal Reports shall forthwith not be used by the Company to justify its action in disciplinary or denial of within-unit promotion matters in any stage of the grievance procedure and they shall also not be used by the Union in any stage of the grievance procedure.

Mr. Kege Concur/~~Dissent~~ 7/1/74
Neutral Member Date

Lawrence J. Fox Concur/~~Dissent~~ 7-1-74
Union Member Date

Henry B. Lucas Concur/~~Dissent~~ 7-1-74
Union Member Date

W. Bonbright Concur/~~Dissent~~ 1 July 1974
Company Member Date

David J. Benjamin Concur/~~Dissent~~ July 1, 1974
Company Member Date