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5

6 IN ARBITRATION PROCEEDINGS PURSUANT TO TITLE 102 OF THE  
7 CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES  
8  
9

10 In the Matter of a Controversy )  
11 between )  
12 INTERNATIONAL BROTHERHOOD OF )  
13 ELECTRICAL WORKERS, LOCAL )  
14 UNION NO. 1245, AFL-CIO, )  
15 and )  
16 PACIFIC GAS & ELECTRIC COMPANY, )  
17 Involving the grievance of )  
18 i e )

OPINION AND AWARD  
OF THE  
BOARD OF ARBITRATION

19 This Arbitration arises pursuant to Agreement between the  
20 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO.  
21 1245, AFL-CIO, hereinafter referred to as the "Union," and  
22 PACIFIC GAS & ELECTRIC COMPANY, hereinafter referred to as the  
23 "Company," under which ADOLPH M. KOVEN was selected to serve as  
24 Chairman of a Board of Arbitration whose members also included  
25 LAWRENCE N. FOSS, Union Board Member; MANUEL A. MEDEROS, Union  
26 Board Member; DAVID J. BERGMAN, Company Board Member; and RAY T.  
27 BUFKIN, JR., Company Board Member; and under which the Award of  
28 the Board of Arbitration would be final and binding upon the  
29 parties.

30 Hearing was held May 18, 1978 in San Francisco, California.  
31 The parties were afforded full opportunity for the examination  
32 and cross-examination of witnesses, the introduction of relevant

1 exhibits, and for argument. Both parties filed post-hearing  
2 briefs.

3 APPEARANCES:

4 On behalf of the Union:

5 JOHN L. ANDERSON, ESQ.  
6 Neyhart, Anderson & Nussbaum  
7 100 Bush Street, Suite 2600  
8 San Francisco, California 94104

8 On behalf of the Company:

9 LAWRENCE V. BROWN, JR., ESQ.  
10 Pacific Gas & Electric Company  
11 245 Market Street  
12 San Francisco, California 94106

11 ISSUE

12 Can the Board of Arbitration order  
13 that the discharge of the grievant  
14 be pursued under the provisions of  
15 Title 102, as supplemented, of the  
16 Physical Labor Agreement? If so,  
17 was the discharge in violation of  
18 the Agreement?

16 RELEVANT SECTIONS OF THE CONTRACT

17 TITLE 102

18 102.2 The decision of a majority of the Board  
19 shall be final and binding. . . provided that such de-  
20 cision does not in any way add to, disregard, or modi-  
21 fy any of the provisions of this Agreement.

21 102.6 Grievances on the following enumerated sub-  
22 jects shall be determined by the grievance procedure  
23 established herein, provided they are referred to Com-  
24 pany within the time limit specified:

- 23 (a) Interpretation or application of any of the terms  
24 of this Agreement;
- 25 (b) Discharge, demotion, suspension or discipline of  
26 an individual employee;
- 27 (c) Disputes as to whether a matter is a proper subject  
28 for the grievance procedure.

28 It is the desire of Company and Union that griev-  
29 ances be settled promptly. To facilitate their settle-  
30 ment, grievances shall be filed on the form adopted for  
31 such purpose and within the time limits established in  
32 subdivisions (1) and (2) hereof:

- 31 (1) A grievance which involved the discharge of an  
32 employee shall be initiated and processed with-  
out undue delay, but in any event, such griev-



1 suspension was discussed at that meeting. The parties agreed to  
2 refer the matter to arbitration, but the Company refused to in-  
3 clude the propriety of the discharge in the issues to be arbi-  
4 trated because the Union had not filed a second grievance re-  
5 garding the discharge.

6 According to the Company, the Union representative stated at  
7 the meeting of the fact finding Committee that the Union was con-  
8 cerned that the grievant was not being paid during the period of  
9 suspension and that when the court proceedings were concluded, if  
10 the Company discharged the grievant, the Union might agree with  
11 the Company's determination that discharge was justified.

12 In two prior situations in which an employee had been sus-  
13 pended and then discharged, the Union filed a grievance regarding  
14 the suspension but did not file a later grievance protesting the  
15 discharge. Nevertheless, in those two cases the question of the  
16 validity of the discharge was considered in the grievance pro-  
17 ceedings provided for in the Contract. The Company had denied a  
18 number of grievances in the past because they were not timely  
19 filed.

20 POSITION OF COMPANY:

21 The Union's failure to file a timely grievance protesting the  
22 discharge and to first process the grievance through the lower  
23 steps of the grievance procedure is improper. The parties have  
24 agreed to an exhaustive and detailed procedure to handle griev-  
25 ances, and the Union's demand that the discharge grievance be  
26 heard even though no grievance has been filed amounts to a demand  
27 that the whole procedure be scrapped. Under the Contract, the  
28 grievance must be filed on a proper form with the proper person  
29 (§102.6). The time limits for filing and processing grievances  
30 are the backbone of the grievance settlement procedures, and they  
31 require that a grievance protesting a discharge must be filed  
32 within 14 calendar days of the discharge. The time limits pro-

1 vided in the Contract are absolute (¶VI, Supplemental Grievance  
2 Procedure). There is no provision for waiving time limitations.

3 While it is true that arbitrators do not favor final de-  
4 cisions based upon procedural defaults, an arbitrator may not  
5 change the provisions of the Contract regarding time limits for  
6 the filing of grievances (Cement Asbestos Products Co., 70 LA  
7 180). The Contract (§102.2) provides that the Board may not add  
8 to, disregard, or modify the Contract, and the terms of the sub-  
9 mission agreement itself, as set forth in a statement of the  
10 issue above, reinforce this proposition.

11 The Contract treats discharge and suspension as different  
12 actions since various provisions refer to suspension or discharge  
13 of an employee in the alternative (§102.14, Title 7). Thus, the  
14 filing of a grievance protesting a suspension does not amount to  
15 a grievance protesting the discharge. A decision by Arbitrator  
16 Burns reinforces this difference between discharge and suspen-  
17 sion, for it holds that although a discharge was not justified,  
18 a suspension for a period within which the Company could investi-  
19 gate the cause of discipline was allowable.

20 Although the Union contends that there is a past practice  
21 in its favor, there are several distinctions between the situa-  
22 tions upon which it relies and the present case. In the two  
23 cases relied upon by the Union, the issues of the discharges were  
24 raised in the first step of the grievance procedures within the  
25 time frames within which the grievances could have been filed.  
26 Secondly, the cases upon which the Union relies involved consider-  
27 ations of the grievance at levels below the Review Committee  
28 level and such errors are not precedent setting even if the com-  
29 mittees at those lower levels erred in considering the discharge  
30 without the filing of grievances. Where timeliness errors have  
31 been discovered in the Review Committee, the Company has rejected  
32 the grievances because they were untimely filed.

1           The Review Committee has been dealing with grievance pro-  
2 cedures for twenty-five years, and the two cases relied upon by  
3 the Union cannot be permitted to override the language of the  
4 Contract in the face of the well established rule that even a  
5 clear waiver in some instances, but not others, cannot take pre-  
6 cedence over clear and unambiguous language in the Contract.  
7 Where a contract contains clear and specific time limits for  
8 filing grievances and the parties have neither agreed to waive  
9 such limits and there is not evidence of lax enforcement or  
10 waiver of the employee's right to claim non-arbitrability, an ar-  
11 bitrator would exceed his authority if he were to override the  
12 clear time limitations set out in the contract (Gore Newspapers,  
13 Inc., 63 LA 538).

14 POSITION OF UNION:

15           Contractual provisions for filing of grievances should be  
16 construed to avoid forfeitures. The Company had timely notice  
17 of the grievant's claim from the filing of a grievance regarding  
18 the suspension, and it was not prejudiced by his failure to file  
19 an additional grievance when the suspension ripened into a dis-  
20 charge. In Dow Jones and Company, 66 LA 1271, a fifteen month de-  
21 lay in grieving an issue did not bar arbitration because the em-  
22 ployer was not placed at a disadvantage as a result of the delay.  
23 Many other arbitration decisions are consistent with this holding  
24 (Dow Jones and Company, 67 LA 965; Exhibitors Film Delivery &  
25 Service, 67 LA 983; E. F. Hauserman, 42 LA 1076).

26           Here the Union filed a timely grievance at the time of the  
27 suspension, and the subsequent discharge involved no new facts or  
28 issues. The discharge should be rationally viewed as covered by  
29 and incorporated into the original grievance. Indeed, the  
30 Company had a greater awareness of the circumstances relating to  
31 the criminal proceedings against the grievant than the Union.  
32 There is no action that the Company would have taken, nor did it

1 refrain from taking action, as a result of the Union's failure to  
2 file a separate grievance relating to the discharge.

3 In addition, the Union demonstrated that the Company had  
4 previously treated suspension and subsequent discharge as one  
5 issue for grievance and arbitration purposes. Since there is one  
6 set of facts to be investigated and one set of findings to be  
7 made, this is a reasonable approach. Suspension and discharge  
8 merely represent varying degrees of discipline for the same of-  
9 fense.

10 The Company's exhibits which showed that the Company has re-  
11 fused to consider certain grievances because they were untimely  
12 relate only to general aspects of untimely filing and not to the  
13 specific situation involved in the present dispute. Some of the  
14 examples relied upon by the Company in this regard focus on the  
15 effect of a timely grievance and the Company took the position in  
16 those situations that the time limits are designed to prevent  
17 stale claims and prejudice to the Company from delays. Neither  
18 of these situations applies in the present case.

19 CONCLUSION:

20 The critical inquiry in the resolution of this dispute is not  
21 whether the time limits for a grievance involving a discharge  
22 may be excused in certain circumstances, but whether the require-  
23 ment that a grievance be filed to challenge a discharge is satis-  
24 fied by the filing of a grievance to challenge a suspension which  
25 ultimately ripens into discharge. That is, the Union does not  
26 claim that it is entitled to file a grievance challenging the  
27 discharge at a time later than specified in the Contract, but that  
28 it is not required to file a separate claim at all.

29 Section 102.6 of the Contract provides that a grievance  
30 challenging a discharge must be filed within 14 calendar days  
31 after the discharge becomes effective. If there had been no sus-  
32 pension prior to discharge in the present case, the 14 day re-

1 quirement would clearly be applicable. But where, as here, a  
2 discharge precedes a suspension, the past practice of the parties  
3 has been to treat the two together so that a grievance chal-  
4 lenging the suspension has been treated as a grievance which  
5 also challenges the propriety of the discharge which follows.  
6 The Union demonstrated that in two prior cases only a suspension  
7 grievance was filed, but the propriety of the discharge was  
8 nevertheless considered by the grievance committees as included  
9 within the suspension grievance, without the filing of a separate  
10 discharge grievance.

11 The Company challenges the past practice in various regards.  
12 It asserts, first, that the Union has demonstrated only two  
13 grievances in the twenty-five years that the grievance procedure  
14 has been in effect where the filing of a discharge grievance was  
15 excused, and that these two examples should not be deemed to  
16 constitute a past practice. However, the Company presented no  
17 evidence to counter the Union's assertion that no second grievance  
18 is required in the suspension-discharge situation, so that it can-  
19 not be assumed that there are any cases involving a similar situ-  
20 ation in which a second grievance protesting a discharge was re-  
21 quired. The only examples put forth by the Company regarding  
22 past practice involved general timeliness requirements and not the  
23 requirements for grieving a discharge after a suspension has al-  
24 ready been grieved.

25 Another ground upon which the Company challenges the Union's  
26 showing of past practice is that in the two cases relied upon by  
27 the Union, the grievance committee meetings at which the dis-  
28 charges were considered occurred within 14 days of the discharge.  
29 But this factor is not directly applicable to the question  
30 whether a second grievance is required. In any event, the griev-  
31 ance committees in those cases simply proceeded to consider the  
32 discharge issues without reference to timeliness or whether a



1 discharge grievance was filed. In these circumstances, the fact  
2 that the grievance hearings happened to occur within the 14 day  
3 period is not a strong factor in the Company's favor.

4 Finally, the Company challenges the past practice on the  
5 ground that the committees which considered the discharges even  
6 though no discharge grievances were filed were committees lower  
7 than the Review Committee, and that only the Review Committee  
8 sets precedent. But the issue here is not whether determinations  
9 made by these lower committees set precedent but whether their  
10 practice indicates that no second grievance is required where  
11 a discharge follows a suspension and the suspension has been  
12 grieved.

13 Thus, the past practice favors the Union's position. There  
14 are other factors as well which are in favor of the Union. There  
15 is a very strong policy against forfeitures, and absent prejudice  
16 to the opposing party in a dispute, arbitrators are reluctant to  
17 impose a forfeiture. Although the Company is correct that time  
18 limits for the filing of grievances are to be enforced in accord  
19 with the provisions of the Contract, the showing made by the  
20 Union that both the Company and the Union have previously inter-  
21 preted the Contract to eliminate the need for a second grievance  
22 in a situation like the one here constitutes a convincing factor  
23 in the Union's favor.

24 Another matter which cannot be ignored is that the investiga-  
25 tion and findings required for both the suspension and discharge  
26 are substantially identical in the situation where a discharge  
27 follows a suspension.

28 To require strict compliance with the 14 day provision for  
29 the filing of grievance following a discharge is unwarranted as  
30 here (1) the parties have previously interpreted the Contract not  
31 to require a second grievance; (2) the Company has not been pre-  
32 judiced in any way since it is on notice that its action imposing

1 discipline based upon a particular event is being challenged;  
2 and (3) support of the Company's position would result in a for-  
3 feiture since the validity of the discharge could not be chal-  
4 lenged.

5 Thus, under all the circumstances, the Board of Arbitration  
6 may order that the discharge of the grievant be pursued under  
7 the provisions of Title 102, as supplemented by the Physical Labor  
8 Agreement. With respect to whether the discharge was in violation  
9 of the Agreement, since no evidence was produced on that question,  
10 that issue is not reached in this proceeding.

11 AWARD

12 The Board of Arbitration ~~may~~ or- *AWK*  
13 ders that the discharge of the *J.M.G.*  
14 grievant be pursued under the pro- *SWB*  
15 visions of Title 102, as supple- *man*  
16 mented by the Physical Labor Agree-  
17 ment. With respect to whether the  
18 discharge was in violation of the  
19 Agreement, since no evidence was  
20 produced on that question, that  
21 issue is not reached in this pro-  
22 ceeding.

23 Dated: 12-21-78 *Adolph M. Koven*  
24 ADOLPH M. KOVEN, Chairman

25 Concur:

26 *Lawrence N. Foss*  
27 LAWRENCE N. FOSS, Union Board Member Dated: 12-13-78

28 *Manuel A. Mederos*  
29 MANUEL A. MEDEROS, Union Board Member Dated: 12-13-78

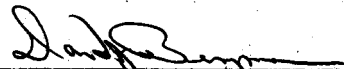
30 DAVID J. BERGMAN, Company Board Member Dated: \_\_\_\_\_


31 *Ray T. Bufkin Jr.*  
32 RAY T. BUFKIN JR., Company Board Member Dated: 11-3-78

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LAWRENCE N. FOSS, Union Board Member Dated: \_\_\_\_\_

MANUEL A. MEDEROS, Union Board Member Dated: \_\_\_\_\_

  
DAVID J. BERGMAN, Company Board Member Dated: 12-13-78

  
RAY T. BUFFIN, JR., Company Board Member Dated: 12/13/78