IN ARBITRATION PROCEEDINGS PURSUANT TO TITLE 102 OF THE AGREEMENT

BETWEEN THE PARTIES

LOCAL UNION NO. 1245 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Complainant, and PACIFIC GAS AND ELECTRIC COMPANY, Respondent. Suspension of . F	OPINION OF THE CHAIRMAN and DECISION OF THE ARBITRATION BOARD WILLIAM EATON, Chairman JAMES McCAULEY/MANUEL MEDEROS Union Members I. WAYLAND BONBRIGHT DAVID BERGMAN Company Members

ARBITRATION CASE NO. 74

APPEARANCES:

FOR THE UNION:

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I. STATEMENT OF THE CASE

This is an arbitration to determine the following issue as submitted by the parties: "Was the discipline of Grievant F in violation of the parties' Physical Labor Agreement?" Hearing was held at the company's general office in San Francisco on December 6 1978, at which time the parties were afforded the usual opportunity for the presentation of evidence. The issue was submitted to the Arbitration Board for final and binding decision upon submission of post-hearing briefs, which were received by the Chairman on February 13 1979.
The Board's determination was made in executive session in the office of the Chairman on March 28 1979.

The Grievant is a ditch patrolman in the company's Drum Division, in which capacity he is required to reside in a company cottage at the Big Tunnel Ditch Camp. The cottage consists of two floors, the lower floor being reserved for wood storage and emergency equipment, the top floor for living quarters. These quarters were inspected by company officials on October 25 1977, and again on November 30 1977. On the latter occasion the Grievant was accused of "threatening and arrogant performance" against one of the supervisors, for which he was assessed a three day disciplinary suspension.

Company testimony is that a few days before the October 25 inspection the Grievant was informed by his immediate supervisor, powerhouse foreman R , that G.L. Fee and Ronald Iriart wished to inspect his cottage. The Grievant agrees that he was advised that these two officials wished to see him on that date, but contends that R did not tell him what the reason was, and

that he had to infer that an inspection of the cottage was desired after certain other matters had been disposed of.

In any event Fee and Iriart entered the Grievant's cottage and inspected it without objection by the Grievant on October 25. The Grievant testified that on that day he had gone in first to get his dog because the dog was "skittish", and that he held the dog during the inspection.

Iriart testified at the arbitration hearing that the inspection disclosed that the floor was muddy, that there was a large quantity of dirty dishes in the kitchen, and that there were papers and clothing in the living room near the stove, which allegedly constituted a fire hazard.

While the Grievant did not substantially refute this finding in his testimony at the arbitration hearing, he stated that one reason was that a pump had been removed from the water system which services the cottage, and that the system had not been able to pump water for a number of days prior to the visit. However, it would appear that there was a large storage tank, and that water was available in that tank, although it was not clear how ample that supply might have been.

On October 26 1977 Fee addressed a letter to the Grievant enumerating the conditions which had been found, advising the Grievant that periodic inspections would be made from time to time, that the conditions should be corrected, and that if similar conditions were found upon future inspections the company would take certain actions, which would include subjecting the Grievant to disciplinary action up to and including discharge.

The Grievant responded to this letter on the following

day, noting the condition of the water supply system, making other observations, and indicating that the Grievant's resistance to entry into his cottage without his prior knowledge or consent "will be backed by law and the fang's of my dog."

The Grievant was advised by R that a second inspection would occur on November 30 1977. On that date Fee and Iriart arrived at the cottage with a third individual, whom Iriart stated was with them on other business, and who stayed in the car. The Grievant testified that the third individual was introduced as being "from San Francisco", which the Grievant assumed meant from the company's headquarters.

The Grievant testified that at this point he decided that his privacy was being invaded, and that there was no reason for Fee to reinspect the cottage since it was Iriart, not Fee, who was in charge of company building maintenance operations which included the upkeep of company owned cottages. The Grievant therefore informed Fee that he would not be allowed to enter the cottage, but that Iriart would be.

It is agreed that Fee responded by asking, in effect, what the Grievant would do if he intended to go in anyway. It is also agreed that the Grievant replied that he had two recourses, either to resign or to see Mr. Fee in court. Iriart testified that the Grievant also said that his dog would "get" Fee if he went in, a statement which the Grievant denies.

The threat, according to company testimony, included an indication by the Grievant that the dog was "under training", which was taken as an implied threat to Fee. The Grievant states that the training which the dog was undergoing was in Spanish, in order that he could perform bilingually.

Iriart testified that he inspected the house, found that it had been satisfactorily cleaned, and that the Grievant held the dog while he did so. Iriart described the dog as "very aggressive", and stated that he feared the dog might have attacked him if it had not been held back. He agreed that the dog had been present on the first inspection, but could not recall where the dog had been at that time. He stated that at the time the alleged threat was made that the dog would "get" Fee, the men were standing outside the building and the dog was inside barking.

Iriart testified that cottages such as those in which the Grievant lived at the time are subject to periodic inspections to determine whether there is need for repairs, whether there are leaks, whether the paint is in satisfactory condition, and for similar purposes. He stated that on the first inspection here at issue certain loose stairs were found outside, which were repaired prior to the second visit. The company has maintained certain rules for employees occupying company owned cottages at least since 1967.

Among other things, the rules note that the company endeavors to maintain such buildings and grounds in a safe, clean, and appealing manner, and that it expects the occupants to aid in that endeavor. The rules also state that any abuse "will result in disciplinary action being taken."

On November 21 1977 the company addressed a letter to the union indicating that "some problems" had arisen which had led the company to the conclusion that, "given the litigious state of our present society... a normal landlord-tenant agreement in writing between the Company and the employees who are tenants is desirable

and we are proceeding to develop such a lease agreement."

The letter of December 7 1977, addressed to the Grievant from J.F. Weber, assessing the three day disciplinary suspension stated that he had told Fee that if he entered on the second inspection he would have him arrested; that the reference to the training being given his dog was an "implied threat" to Fee; that the Grievant's conduct was "threatening and arrogant", and that his conduct toward Fee had been such that his own effectiveness was diminished; and that "in tolerating your insolent actions discipline throughout the department is adversely affected."

Both of the inspections at issue took place on a work day and during the Grievant's normal work hours.

II. DISCUSSION

Company Argument

While the company does not deny that a landlord-tenant relationship exists in this instance, it is unnecessary for the Arbitrator to resolve this case on principles of law governing landlord-tenant relationships, rather than confining the award to the applicable provisions of the labor Agreement. In any event, the provisions of the Civil Code cited by the union are only peripherally relevant, inasmuch as the inspections were made in the Grievant's presence and with his permission. Thus, the issue does not involve restrictions placed upon the landlord by the Civil Code.

The company's inspection policy is not in conflict with state law, any provision of the labor Agreement, or arbitration or review committee decisions under the Agreement. The policy is

a reasonable accomodation providing the employee a safe habitable residence. Indeed, the annual inspections are necessary to carry out the mandates of Civil Code Section 1941 which require a landlord to maintain buildings fit for human occupancy.

The matters to be resolved through the grievance procedure are set forth in Title 102 of the labor Agreement. Section 102.6 lists the subjects upon which grievances may be considered, which includes the interpretation or application of any of the terms of the Agreement, and questions of suspension or discipline of an individual employee. Section 102.13 allows, by implication, the company to discipline employees for violation of a company rule, practice or policy. The present dispute ultimately narrows to the question of whether the Grievant's misconduct was commensurate with the discipline levied.

While the relationship of landlord-tenant is peripherally involved, the discipline assessed was a direct result of the Grievant's challenge to supervisor Fee's authority to make an inspection commensurate with the rules established for employees who must occupy company-owned cottages.

The company does not encourage or tolerate its supervisors intruding in the private lives of employees to an extent unnecessary to carrying out their supervisory responsibilities. The union concedes that a requisite for employment as a ditch tender is that the employee reside in a company-owned cottage, and that all of the events leading to the employee's discipline occurred during the Grievant's regular hours of work.

Thus, the Board is not confronted with the problem that might arise should a resident employee barricade his home from

inspection or refuse to keep the place habitable. However, should the latter occur, it would certainly lead to a legal proceeding to quit the property, and thus effectively forfeit the tenant's employment due to his future inability to meet the residency requirement.

While this case reaches neither extreme, it does involve implementation of the employment residency rule which requires inspection. It is unequivocally the prerogative of the company to designate those persons responsible for making such inspections. The employee has no right at law or under the Agreement to interfere with that designation.

The Grievant seemingly accepted the fact that the inspection was proper by permitting both Fee and Iriart to make the October 25 inspection, and by permitting Iriart to make the follow-up inspection.

This leads to the conclusion that the employee's ire was not directed at the inspection, but at one of the inspectors, in this case, his boss. The Grievant's acts were deliberately intended to denigrate Fee's authority. His letter of October 31 to Weber, and not to Fee, as well as the later dialogue on the cottage steps, and his refusal to permit Fee to enter the cottage, were patently a challenge to his boss' authority. The Grievant's conduct is indistinguishable from a common garden variety refusal to perform an order given in any other work context.

The rule is well-established that the Board will not overturn the company's decision unless the union demonstrates by a clear preponderance of its evidence that the disciplinary action was arbitrary and capricious. The union's evidence does not meet that standard in this case.

The Grievant's hostility to Fee's authority was evidenced well before the second inspection. In the letter to Weber, the Grievant concluded with a clearly threatening remark that his demands would be backed up by "the fang's of my dog." On the steps of the cottage the Grievant told Fee that if he attempted to enter the dog would "get him." The additional testimony of Iriart that the Grievant had to hold the dog back, and to his continued concern during the inspection that the Grievant had a firm grip on the animal substantiates the threat.

In light of the foregoing, the company respectfully submits that Fee was acting within his proper authority to make the inspection and the follow-up inspection; that the Grievant's threat to Fee's authority establishes the nexus of the employer-employee relationship; and, that the three day disciplinary layoff was not only proper but exceedingly light in view of the Grievant's aberrant conduct.

Union Argument

The sole issue is whether matters involving the company as a landlord and the Grievant as a tenant are within the purview of the physical labor Agreement and, if they are, whether the events of November 30 1977 amount to just cause for discipline.

It is important to bear in mind that Section 500.5 of the Agreement, providing that any portion of the Agreement in conflict with federal or state law, regulation, or executive order shall be suspended and inoperative to the extent of such conflict, expands the normal function of an Arbitrator or Arbitration Board to include consideration and incorporation of state or federal law when construing the meaning of any provision in the Agreement.

This necessity was recognized by Arbitrator Benjamin Aaron in his opinion in a recent arbitration case between the parties, arbitration case number 72, decided January 22 1979.

Acts by an employee which might otherwise be considered "just cause" for discipline cannot be so considered if those acts are protected by federal or state law. In the present situation, since the Grievant was exercising his legal rights as a tenant under California law, the company has no just cause to discipline him. For discipline to be valid, the company must establish a just cause, and then relate that cause to the job context. It has failed in both respects in this dispute.

With respect to matters involving the interior of the Grievant's cottage the relationship has always been recognized by the parties as that of landlord and tenant. Thus, issues involving internal maintenance of company houses have never been part of the collective bargaining Agreement between the parties. Moreover, more than two weeks before the November 30 incident, the company finally codified its understanding of the relationship to be that of landlord and tenant. It is amusing, but finally uninstructive, to observe the company attempt to square the circle and argue that the disputes arising in a landlord-tenant relationship can now be resolved in a totally different context, that of employer-employee relations.

The course of conduct between the parties confirms the landlord-tenant relationship in the fact that the Grievant paid a monthly rent, that he paid utilities, and that the housing rules imposed by the company restricted his ability to make structural changes in a manner identical to rules commonly supplied by other conscientious landlords. The company also prided itself on entering

its cabins only upon advance notice to its tenants.

The landlord-tenant relationship adequately recognizes the constitutional rights of privacy of the Grievant, and also the ancient common law tradition that even a humble peasant abode possesses the legal status of an impregnable castle. Weighted against these venerable rights was the company's quite limited interest in the property, which in no way concerned the adequacy of the Grievant's performance as a ditch patrolman.

The only meritorious reason for the company desiring entry to the cabin was to ensure that no structural harm was occurring inside, an interest which was thoroughly satisfied by the October 31 inspection. The incidental fact that the residency in the cabin is a requirement of the job of ditch patrolman does not affect the characterization of the living relationship. While the requirement forced the Grievant to accept the company as a landlord, if the company attempted to go further and expand its right of access beyond that allowed to landlords, then the company would be in clear violation of California law.

Civil Code Section 1954 provides that a landlord may enter the dwelling unit only certain conditions, which include emergencies, the necessity to make repairs, to supply agreed services, to exhibit the dwelling for stated purposes, when the tenant has abandoned or surrendered the premises, or pursuant to a court order. The section also provides that the landlord shall not abuse the right of access or use it to harass the tenant.

California Civil Code Section 1953(a)(1) expressly prohibits any tenant from agreeing to waive any of his rights under Section 1954. The traditionally dominant position of the landlord as a landlord has, in the present dispute been

overwhelmingly reinforced by the company's additional status as the employer of the tenant. Therefore the legislature has acted sensibly in prohibiting a tenant from agreeing to broaden the landlord's right of access. Accordingly, the Grievant did not waive his Section 1954 rights by merely letting Iriart into the cottage on November 30 1977, or by permitting Iriart and Fee to enter on October 25 1977.

On November 30 1977 none of the circumstances under which a landlord possesses a right of access, pursuant to Civil Code Section 1954, applied. On the contrary, the company as landlord was abusing its right of access by using it to harass the Grievant in violation of Section 1954.

The October 25 visit was in no way announced to the Grievant. That alone is a violation of Section 1954. Further, Fee's insulting and threatening letter which followed can only be viewed as harassment, particularly in its indication that he would be making many inspections, with no indication that he would respect the Grievant's Section 1954 rights. Finally, on November 30, even after the Grievant had all too reasonably agreed to permit Iriart to inspect the cottage, Fee in a hostile and threatening manner attempted to precipitate a confrontation with the Grievant, despite the Grievant's clear legal entitlement to refuse Fee entry.

Even if the company in its role as landlord had a right of access on November 30, and the Grievant unjustifiably denied such access, the company in its role of landlord is restricted to the remedies provided by law to landlords, up to and including eviction. By invoking job-related disciplinary action, the company is in effect forcing a tenant-employee effectively to

waive his Section 1954 rights or suffer employment reprisal. Such action violates the letter, as well as the spirit, of Civil Code Sections 1953 and 1954.

It is commonplace that employee conduct away from the job is properly punishable by an employer only if that conduct affects the employer's reputation, renders the employee unable to perform his duties, or leads other employees to refuse to work with him. There is no evidence in this dispute that the Grievant's job performance has been affected, or that his communications with his immediate supervisor, who is R and not George Fee, have been in any way affected by the incidents on November 30. Nor is there any evidence that the company's reputation has suffered as a result.

If any bad feelings did result from the November 30 incident, the company rather than the Grievant must bear the entire burden. It was the company, through George Fee, that unjustifiably attempted to invade the Grievant's cottage. If there has been negative spillover from this incident into the employment relationship, the company must bear the blame.

Thus, the company failed to establish any off-duty wrong-doing by the Grievant. Instead, the company has violated his rights as a tenant, rights which are incorporated into the Agreement by Section 500.5 to limit the meaning of "just cause" in Section 7.1.

For these reasons it is respectfully submitted that the three day suspension assessed against the Grievant must be overturned and a suitable remedy fashioned for him, including back pay with interest, and recalculation of any pertinent fringe benefits.

Conclusions

This dispute raises what appears to have been a long and rather intractable area of disagreement between the parties, as well as a sensitive one. The record indicates without doubt a necessity to resolve questions relating to the landlord-tenant relationship which exists between the company and some of its employees.

In this regard, the union has presented an articulate and well argued summary of relevant law, together with its view as to the applicability of that law in the present dispute. The union's argument, however, appears to be based upon the assumption that we are dealing in the present dispute with a purely landlord-tenant relationship, with no admixture of an employer-employee relationship. With this assumption we cannot agree.

There is no doubt but that the Grievant is a tenant, and the company a landlord. Even in that relationship, taken by itself, both parties have certain rights and obligations. The company is not only authorized, but required, to keep its premises in good repair. In order to perform this function it is evident that reasonable access is required in order to determine the condition of the property.

Beyond this, the company has an obligation, not only under its own rules, but according to law, to see that premises which it rents are safe and habitable for human occupancy. In this regard, too, the company necessarily has a reasonable right of entry for the purpose of inspection.

It is the opinion of the Arbitration Board that in the facts of this dispute the company exercised these rights in a reasonable manner. The Grievant was notified in advance on both

occasions that inspections would occur. Indeed, in regard to the first inspection there was no dispute and no difficulty of access. It is only in regard to the second inspection, largely as a result of facts peculiar to this dispute, which are further discussed below, that a question arises.

The Grievant's case appears to rest heavily upon his contention that, while Iriart had a right to reenter to determine the condition of the cabin, Fee did not. There is nothing either in applicable law or in the collective bargaining Agreement to support the Grievant's right to make any such distinction. If the company had a right to make these inspections, which we have concluded that it did under the circumstances present, it had also the right to designate within reason who its representative would be in making such an inspection.

It is at this point that facts peculiar to this dispute begin to bear upon its determination. When Fee's letter of October 26, addressed to the Grievant as a result of the first inspection, is examined carefully, one is forced to conclude that the instructions to the Grievant to clean up the cottage are heavy handed and overdrawn. That the equally overdrawn and aggressive response of the Grievant followed is not too surprising.

In the meantime the Grievant cleaned up the cottage and made no objection to its being reinspected. He only objected to the presence of a particular inspector, who happened to be his supervisor. We must also conclude that the Grievant's letter, taken together with credible evidence as to his activities at the time of the second inspection, constituted a threat to supervisor Fee. So, in addition to making the threat, the Grievant refused entry to a properly designated company representative there to make an

inspection which was reasonable in the circumstances.

It is clear that the interaction between Fee and the Grievant was related both to their relationship as employer and employee, and to their relationship in which Fee was the designated representative of the landlord dealing with the Grievant as a tenant. Thus, any hope of a clear distinction between the landlord-tenant relationship on the one hand, and the employer-employee relationship on the other breaks down. The Grievant's threat concerning his "dogs fang's" in the letter, and the threat that the dog would "get" Fee if he entered the house at the time of the second inspection, were not designed to prevent the inspection, but, in our opinion, to flout the authority of Fee. In the circumstances of this dispute, that action necessarily ran to both sets of relationships.

We are also of the opinion that the escalation of feeling between Fee and the Grievant which led to these events would not have occurred but for the overreaching and intemperate nature of Fee's original letter. Blame for the dispute must therefore be shared, as is reflect in the Award which follows.

We are aware that this disposition of the matter does not deal with all the complications of the landlord-tenant relationship in a context which also touches upon the employer-employee relationship. However, we believe that the complicated issues which arise out of these relationships, such as rules for reasonable entry, rights of privacy, and the ramifications of legal requirements are beyond our proper jurisdiction in this dispute. For that reason we forego any further consideration along such lines.

DECISION

The discipline of Grievant F was in violation of the parties' Physical Labor Agreement for the reason that it was excessive in the circumstances. The penalty is reduced to a one day suspension, and the Grievant is awarded two day's back pay at the rate prevailing at the time of his suspension.

March 28 1979

WILLIAM EATON, Chairman

James E. McCauley - DISSENT
JAMES McCAULEY, Union Member

MANUEL MEDEROS, Union Member

I. WAYLAND BOMBRIGHT, Company Member

DAVID BERGMAN, Company Member