

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of the Controversy)

Between)

PACIFIC GAS AND ELECTRIC COMPANY)

And)

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

Involving Discharges of C)
O , and W)

CASE NO. 78

OPINION BY

ROBERT E. BURNS

CHAIRMAN

AWARD BY THE ARBITRATION

BOARD

BEFORE THE ARBITRATION BOARD:

APPOINTED BY THE UNION:

LAWRENCE N. FOSS, Assistant Business Manager - and -
LAURENCE W. HOPE, Business Representative
Local 1245, P.O.Box 2790, Walnut Creek, CA 94596

APPOINTED BY THE COMPANY:

I. WAYLAND BONBRIGHT, Manager, Industrial Relations - and -
LEONARD C. BEANLAND, Manager, General Construction Personnel
Pacific Gas and Electric Company
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CHAIRMAN:

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FOR THE EMPLOYER:

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The Parties and the Issue

Pacific Gas & Electric Company (the "company") and International Brotherhood of Electrical Workers, Local Union No. 1245 (the "union") are parties to a collective bargaining agreement applying to operation, maintenance and construction employees effective January 1, 1977 and during the period covered by this controversy (the "agreement").

Pursuant to the agreement, and a submission agreement, hearings were held in San Francisco at which the parties and their attorneys were present. At the hearing, the parties stipulated that the grievance procedures of the agreement had been complied with or waived and that the following issue was properly submitted to the Board of Arbitration established pursuant to the agreement:

Were the discharges of grievants O ,
W and C , or any of them, in
violation of the physical labor agree-
ment? If so, what is the remedy?

At the conclusion of the hearing, the issue was submitted upon the filing of briefs by the parties. The briefs, together with supplementary correspondence from the attorneys, have been received by the arbitrator.

back to suspensions at earlier dates, except that C was put back to work after about a week of suspension. Grievant C was employed by the company on April 10, 1978; grievant O on January 23, 1978; and grievant W on June 21, 1976. The discharges were based upon events which occurred during the swing shift on August 31, 1978 when the Coca Cola machine was broken into. The three grievants were employed on the 3:30 p.m. to midnight shift. The work performance of grievants was good as attested by their supervisors, one of whom said that he did not wish to lose them.

At about 9 p.m. on August 31 an employee from the back shop reported to working foreman C1 who was in charge of the front shop that the Coca Cola machine had been opened. C1 went to investigate, saw that the coin box had apparently been pried open and that there was no money in the coin box. C1 called S, working foreman in charge of the rear shop, and the two of them propped the door to the machine closed.

The Coca Cola machine is located in a narrow corridor used by employees to pass from the back shop to the front shop. On one side of the corridor is the Coca Cola machine and candy and cigarette machines. On the other side of the corridor are bins containing nuts, bolts and small parts. The Coca Cola machine had been an object of annoyance to those

using it because it did not work and deliver the soft drinks at times. As a result it was dented from being kicked and pounded by frustrated users. The machine had been malfunctioning for some time and there was an envelope taped to it so that the users could obtain reimbursement for lost coins.

Shortly after discovering the forced entry into the Coca Cola machine, working foreman C1 and S called all the employees to a meeting. At this meeting, it was explained to the employees that there undoubtedly was money in the machine because employees had been using the machine that day, that the working foreman would like to have the money returned and if it was returned, the machine would be fixed and that would be it. The employees were also told that if the money was not returned, even more problems would be caused.

The next day, Friday, September 1, exempt foreman B, who worked on the day shift, was informed of the events of the night before. B also called a meeting of the second shift employees and told them that he wanted the money returned, and if it was returned, he would do what he could to see that the matter went no further. B also told the employees that if the employee responsible for the breaking in to the Coca Cola machine did not

come forward, he would tighten up on the break rules; that the working relationships on the night shift had been good; that the rules were applied flexibly; and that if the employee did not come forward the rules would be strictly enforced. There was no response from the employees except from shop steward F who stated that he would not file grievances regarding the tightening of the policies because the loose practices were not established by the agreement and he would not file grievances with respect to the removal of those practices until the money was returned.

Bui general foreman in charge of the Service Center, was on vacation on August 31, 1978. B visited him and told him of the incident. Bu returned to the Service Center on September 5 or 6.

There were considerable discussion and many rumors among the employees. Shop steward F was also making inquiries. He noted that employee L appeared worried. F spoke to L and told him that he should tell Bu what he knew. Thereafter, F saw L and grievant O in the parking lot. L's expression indicated deep concern. As F approached them, he heard grievant O tell L to "Keep his mouth shut and don't say anything, they can't fire us anyway."

F and another employee, G, told L he would be called in to explain himself to Bu and B. They also told L that they knew that the grievants were responsible for the break-in, and that L was a witness. L believed that his job was on the line.

At about 4 p.m. on September 13, L approached Bu in the yard. L was crying. There were several employees nearby. Bu told him that he would talk to him later. Bu called exempt foreman B, shop steward F, and L to his office. At that meeting, L stated that he had seen grievants W, O and C around the Coke machine and observed O prying the machine with a screwdriver. He also said at this meeting that he saw the three grievants standing next to a vehicle dividing the money.

Following L's statement, Bu, B and F met with the grievants. Grievant C was called first to the meeting and questioned by Bu. Bu testified that he told C that a witness had implicated him and grievants W and O in the incident on August 31 when the Coke machine was broken into; that the witness had said that he had seen grievant O pry open the Coke machine with a screwdriver; that he did not wish to suspend the wrong

persons; that C admitted that he had been involved as were the other two grievants; that while he had not participated in the breaking into the machine, he had some of the money shoved into his hands; and that grievants W and O were not the only others involved. At the arbitration hearing grievant C testified that F was not present at the meeting, and denied that he had admitted his involvement or the involvement of the other two grievants in the August 31 incident. Grievant C was placed on suspension at his own request. This suspension was later rescinded and he was returned to work pending a final decision with respect to the discipline.

After C, grievant O was interviewed. Bu testified that he told grievant O of C's admissions. Later, he made the same statement to grievant W. Each of them denied C's statements and invited Bu to fire them. Both were suspended.

On Monday, September 18 Bu and B met with grievants O and W in Bu's office. Bu testified that he asked both grievants if they were implicated and that he and B would recommend time off and reinstatement. Both Bu and B testified that grievants O and W admitted to taking the money and that grievant

O pried the machine open. At the arbitration hearing, grievant W denied making any such statement and grievant O denied breaking into the machine, but he did testify that in order to obtain reinstatement he said to B and B : that he got some of the money.

Bu: had no authority to discharge any of the employees under his supervision, but he did have authority to make recommendations to higher management. The discharges of grievants were approved on October 9, 1978.

Li , a garageman called by the company, testified that around 7 o'clock p.m. on August 31, as he was walking from the front shop to the back shop, he looked into the corridor and saw the three grievants near the Coca Cola machine; that grievant O had a screwdriver in his hand while he was standing about 2 feet from the machine; when he walked past the corridor the grievants were about 50 feet away; that he could not hear them speaking to one another; that later he and B , the son of working foreman B , found that the machine was pried open; that the door to the machine was closed with pry marks visible; that he and B : opened the door and saw that the money box inside was empty; that B: said that another employee had told him that the machine was broken; that some of the employees helped themselves to the Coke and soda bottles

inside the machine after it was opened; that after he discovered the machine was open, he returned to the hydraulic department; that he had a "free" Coke; that he attended the employees' meeting that evening; that after that meeting he saw the three grievants in a stall in the front shop in which there was a utility line truck awaiting repair; that after August 31 B. approached him while he was in the yard, Bu. being present; that he was crying because the night before F. had warned him that he was going to be spoken to concerning the incident and that there was some suspicion that he was involved; that he asked Bu. why his job was on the line; that Bu. asked him if he was involved and he told Bu. "No"; that Bu. asked him if the grievants were involved, and he told Bu. that as far as he knew they were involved, but that there was no way he could prove anything; that about a week later he told Bu. that he had never seen anyone open the machine; that the grievants separately asked him how much he was involved and what he was going to say "in court"; that another employee told him that supervision knew that he had witnessed the grievants in the corridor and when he was called in by supervision he had better tell the truth; that shop steward F. also told him that he should tell the truth if he was questioned by supervision; and that this

was before he spoke to B in the yard and started crying.

Bu testified that he was on vacation on August 31 and returned to the job on September 5 or 6; that B informed him on September 1 of the breaking into the Coke machine; that he instructed B to find out who was responsible; that upon his return B told him that he had held a discussion with the employees to try to find out who opened the machine; that on or about September 12 or 13 L indicated to him that he saw the three grievants open the Coke machine; that he discussed the matter with shop steward F, L and B; that his first discussion with L was in the presence of G, another employee; that on the night of September 14 he spoke with grievant C in the presence of B and F, and C admitted that he was involved in the break-in; that C said that he walked in on two other employees when they opened the Coke machine, and they put money in his hands; that the day before he returned to the Service Center \$30 was left on a desk in an envelope; that after speaking with C, he called grievant O in; that O said he was not involved; that he told O he was putting him and the two other grievants on suspension; that O said that he would resign;

that he then called grievant W in the office and told him basically the same as he had told O ; that W said he was not involved and to "Go ahead and fire me"; that he told grievant W he could not fire him but he could suspend him; that on September 18 he and B spoke with W and O at about 10 o'clock in the morning; that he told them that he wished to get to the bottom of the matter; that grievant O admitted that he was involved; that W also said he was involved; that he told them he would write a letter recommending maybe a week off; that all three grievants are "damn good at their work"; that the entire shop was upset by the incident because some of their privileges had been taken away; that he didn't know that L "knew anything" until L approached him in the yard with G ; that when L approached him in the yard he was crying and told him that he saw the three grievants breaking into the Coke machine and saw them divide up the money; later that afternoon he met with F , B ; and L ; that in his meeting with C C said that he had returned the money because breaking in was a foolish thing and that he had taken part of the money when it was shoved into his hands; that he said that if the thing was cleaned up and there was no company record of theft of company property, he could probably dismiss the thing;

that after a lengthy conversation C. . . . said that he was correct in having the names of grievants W. . . . and O. . . . ; that he recommended that C. . . . be suspended for one week; that at the second meeting grievant O. . . . admitted that he pried open the Coke machine with a screwdriver; that he told O. . . . at the second meeting that he would do the best he could to get him a light suspension, but that was in the manager's hands, and he had no authority to do anything.

B. . . . testified concerning the September 18 meeting with W. . . . and O. . . . ; that the meeting was at the request of O. . . . who said he and W. . . . would like to discuss getting their jobs back; that Bu. . . . and he could only recommend disciplinary action to their manager; that O. . . . said "Yes" to the question, "Did you pry open the Coke machine?"; that W. . . . nodded in the affirmative that he was involved; that C. . . . was returned to work after a week's suspension because "he had explained his complete commitment to the incident."

F. . . ., a mechanic at the Service Center and the shop steward on August 31, was subpoenaed by the company and called as a witness. He testified that he worked on the second shift on August 31, 1978; that he attended the meeting held by working foremen Cl. . . . and S. . . . on August 31, and the further meeting conducted by foremen

B and Gr on September 1; that at the September 1 meeting B stated that if the money was returned everything would be forgotten, if possible; that he conducted an investigation over a number of days beginning on August 31 and talked to employees concerning the incident; that he talked to L about every other day; that he asked L whether he was being harrassed and L told him he was being harrassed slightly; that L said that W and O had been over to his house; that on a day before September 13, while he was on his way out of the shop, he heard grievant O telling L that he shouldn't worry about anything "Don't say a word. They can't fire us anyway."; that he attended a meeting on September 14 with Bu, B and C; Bu told C that they had a witness who saw O prying the machine open or at the machine, and that he was there with a screwdriver; that Bu did not have to ask C if he was involved because C had already admitted being involved in the incident; that shortly thereafter a meeting was attended by grievant O; that Bu told O that he had a witness to the fact that he was there opening the Coke machine; that O said he didn't do it; that it was not his job as shop steward to assist management in investigating improper activities; that he was not assist-

ing the company with respect to the August 31 incident, but was investigating for himself and the union to find out the truth of the matter; that before the grievants were discharged he had called a union business agent, but was not able to get in touch with him; that he called the union business agent on a date after the day of the incident on August 31; that he talked with the business agent, and the business agent told him that if any of the grievants needed assistance they should contact him; that he communicated this to grievant C. . . ., but was unable to do so with respect to W. . . . and O. . . . because they had already been suspended; that after the Coke machine was broken into, one of the employees, G. . . ., mentioned to him on August 31 that grievant O. . . . was going to get into the Coke machine; that C. . . . said that grievant O. . . . had said he was going to get into the Coke machine because it took money from him without giving him his Coke; that he brought this to the attention of S. . . . and Cl. . . . and B. . . . the next day or two after the incident; that he asked O. . . . to turn the money in if he got the money, and O. . . . said that he didn't have the money; that at the meeting of September 1 B. . . . said that if the money comes back "we would do what we can to keep it from going any further"; that he was not "that gullible" to think that Bu. . . . could excuse the incident

himself because he was sure that Bu would have to make a report to San Francisco; that he learned about the break-in of the Coke machine when O and a group of the other employees were standing close by and O said, "There is Cokes over in the - - free Cokes over there for everybody"; that he did not say at the September 1 meeting that if the money was not returned, no one could count on his representation; but that he did say that if the money wasn't returned he would not file a grievance with respect to the privileges which were being taken away because the privileges were not in the contract, but had been given by the company.

During the week following August 31, grievant C heard F say to another employee that Bu was going to start firing low seniority people one at a time every day until someone came forward with information concerning the break-in of the Coke machine. Grievant C had low seniority. He testified that he had worries about his job; that he started asking other employees if they would chip in just to return the money so that Bu would drop the whole thing; that he asked most of the employees in the front shop if they would chip in and try to give the money back so that management would drop the whole thing; that since the August 31 incident, conditions had changed in the shop and he wished to

get the shop back to normal working conditions; that he thought Bu: had the authority to fire anyone on the spot and that one could count on Bu: 's word; that Bu: had said that he would not pursue it further if he got the money back; that he did not succeed in collecting any money from other employees; that he returned between \$20 and \$30 of his own money; that he gave it to another employee, Sc that he told Sc to put it in an envelope on a desk in the office because the employees were told by Bu: there would be an envelope on the desk and one on the machine to receive the returned money; that he didn't return it himself to the desk because he did not have an envelope; that he was unwilling to admit his involvement because he had nothing to do with taking the money; that Sc said that he could do it when nobody would find out who gave the money back; that Sc is the brother-in-law of working foreman Cl and could return the money to Cl. without being under suspicion; that after the money was returned, the working conditions became even harder, although he had thought that everything would be dropped because of what Bu: had said; that he gave the money to Sc within a week after the machine had been broken into and before he was questioned by Bu: and B ; that F confronted him and said he had found out that he was

the one who had given the money to Sc and that he should go in and tell Bu and maybe he would be able to save his job; that he did not admit taking the money and he did not take any of the money; that one night L confronted him; that L was emotionally upset and crying; that L said that Bu had told him he was going to lose his job because Bu thought he had broken into the machine or was involved; that his conversation with L was before he gave the money back; that L asked him to talk to the employees and get the employees involved to confess so that he, L would not lose his job; that he spoke to L again; L told him that Bu had said that he, L, was going to be fired; that shortly thereafter he was called to Bu's office; that Bu and B were present; that F did not join the meeting until later; that at the meeting either Bu or B said that they had heard that he had something to tell them; that he told them they shouldn't pursue L anymore because in his opinion he had nothing to do with the break-in of the machine, and that he was the one who had got the money back to them; that Bu and B wanted to know who else was involved; that Bu said that if he didn't tell who else was involved that he was going to be fired; that he wouldn't say because he didn't know who

did it; that Bu and B mentioned grievants W and O and that they had a witness who saw them break into the machine; that he told them he was not a witness to the breaking into the machine; that about an hour or two later he was called back to the office and asked if he had changed his mind; that he replied, "No" and that he didn't know who was involved; that they again told him he would be fired if he didn't tell them who else was involved; that Bu then said that if he would tell who was involved, he would guarantee he would not lose his job and would even transfer him to San Jose; that finally he said,

"You are dragging this on so much that in my mind and in your mind I am not going to be able to change your mind, and in your opinion you have got them, so what more can we do?"

that at that point, they suspended all three of the grievants; that working foreman Cl and grievant O were brought into the office; that there were also present Bu, O, F and C; that they started in on O that finally O became so discouraged and mad that he said, "I might as well resign or quit because you are not going to let off it"; that he again said he didn't know who was involved; that he said that he did not take any of the money and he did not tell anyone that he had taken the money.

Grievant O testified that the Coke machine had been causing problems during the nine months he was employed at the shop; that he had seen people kicking the machine, including foremen and garage foreman Bu that on August 31 just before the lunch period, between 6 and 6:30 p.m., he was in a hall where the parts and Coke machine were located; that it was possible that he was carrying a screwdriver about 14 inches long since it was not uncommon for him to carry tools in his back pocket; that he was looking for some binding screws for a plate he was installing on a truck; that he did not try to get any Coca Cola from the machine or any soft drink and did not attack the machine in any way; that he did not pry it open or take any money from the machine; that he did not kick it or pound it; that grievants W and C were present; that they worked in the front shop and he worked in the back shop; that he saw L: "walking through the door"; that earlier in the day he had deposited money in the Coke machine, did not receive a soft drink, and put his name on a list taped on the machine; that a lot of the people in the shop were angry with the machine; that at the meeting called by Cl and S, the employees were told that the machine had been broken into; that Cl and S wanted to limit the matter to the night shift before it went

any further; that if the money was returned nothing would be said; that at the meeting the next night the employees were told that if the money wasn't returned their privileges would be taken away; that he was not asked by anyone to contribute to the money that was returned; that on September 14 he handed in his resignation because he was being harrassed; that he asked Bu: and B: to produce the witness, but they refused; that he was angry at Bu: and B: because of false accusations; that he talked with L: and told him that if he didn't know anything he could not be fired for not knowing something, and that he did not tell him to keep his mouth shut; that L: was upset because he thought he was going to be fired; that B: called him after his suspension and asked him to come to the shop; that he did so on September 18; that Bu: again said to him that he knew who broke into the Coke machine and that he should make it easier on himself and "'fess up to it"; that if he told him he and W: broke into the machine he could be working that night; that Bu: said that it was his decision whether or not to fire him; that he thought about it a few minutes and said, "OK, J: you know I will say I am involved with the money, but I did not break into the Coke machine"; that he said that because he figured that if he said he was involved maybe Bu

would take that and let him stay on the job; that he said that because he was desperate to get his job back that night.

Grievant W testified that he was employed at the East Bay Service Center in June, 1976; that he had seen other employees, including supervisors, lose money in the Coke machine; that on August 31 he was working in the front shop; that he often went to the corridor or hallway where the nuts and bolts were stored and where the Coke machine was located; that there was frequent traffic through the corridor; that on August 31 grievant C was working in the next stall in the front shop; that he attempted to get a Coke from the machine which did not deliver it after he placed his money in it; that this occurred before 5 o'clock; that he was present in the corridor with grievants O and C; that he did not break into the Coke machine on August 31 or take any money from the machine; that he recalls that the machine was opened at some point during the evening; that this came to his attention when someone yelled, "Free Cokes!" at about 7:30 or 8 p.m.; that various employees took Cokes at this time; that at the meetings that night and the next night the employees were told that the machine had been broken into and that if the money was returned the matter would not go any further; that it would be hard for everyone in the shop if the money was not

returned; that the employees in the shop were upset by the removal of their privileges; that at the meeting on September 14 with Bu: and B: he told them he had nothing to do with breaking into the Coke machine and knew of no one else who had broken into the Coke machine; that at a meeting Bu: had said he had four witnesses that saw him break into the Coke machine; that he replied that Bu couldn't get one witness to sit down face to face with him to say that he "saw me break into that Coke machine or take any money"; that Bu offered him a choice of resigning or being fired; that he said he was not going to resign for something he did not do; that he thought that Bu had the power to fire him; that on the following Monday there was another meeting with B and Bu ; that he was not a personal friend of O , but an on-the-job acquaintance; that at this meeting Bu told him and O that if they said they were involved they would be back to work that night; that he replied that he did not have anything to do with it and that he would not confess to something he had not done; that after the events of August 31, he had no private conversation with L and did not visit his house; and that he did not say that he had retrieved any money from the machine after it had been opened.

L and F have been transferred to other

facilities.

Positions of the Parties

The Company

The company contends that the case involves two central questions: Whether the company had reasonable grounds for believing the grievants broke into the Coke machine, and appropriated the money, and if so, was discharge improper under the labor agreement. The first question deals with credibility of L , Bu , B and F . This testimony constituted the company's prima facie case. The burden of refuting the evidence then shifted to the union. The union then must prove that grievant C 's and grievant W 's denials and grievant O 's assertion that he was misled into a false confession are established by a preponderance of the evidence. The same principles apply with respect to the union's other defense that the grievants were induced by the company, particularly Bu , to make false admissions on the promise that the whole matter would be forgotten or that they would be let off with a short term suspension.

The second question presented deals with the propriety of the discipline imposed. It is generally accepted that if management acts in good faith upon a fair investigation and fixes a penalty which is not inconsistent with those

imposed in other like cases, an arbitrator should not disturb the judgment of the management. In determining just cause, the Board should follow the direction in section 7.1 of the agreement that discharge for just cause is subject to the provisions of the agreement and arbitration or review committee decisions and how these provisions have been jointly administered in the past.

Both grievants C and O had less than one year of service at the time of their discharges. By reason of section 106.5(b)(1), both employees may be terminated for inadequate work performance without recourse to the grievance procedure.

The Union

Grievants were charged with breaking into the Coca Cola machine and taking the money from the machine. The only purported eye witness to the alleged theft was I, but his testimony shows that he did not see the grievants do anything of even a remotely suspicious nature. There is no direct evidence that any of the grievants had anything whatsoever to do with the alleged theft.

The company claims that the grievants admitted their involvement in the theft to the supervisors. C and W directly deny that they ever made such an admission and C

testified that he made a partial admission, but only out of desperation after the supervisors made it clear that he would be fired if he did not admit guilt and promised him his job back if he did make an admission.

The East Bay Service Center is a totally self-contained working unit of the company and Bu is clearly in charge of the operation of the Center, aided by two second-level supervisors, B and G. Bu does all the hiring and has stated that he is responsible for everything at the Service Center.

One must appreciate the atmosphere which existed during the days and weeks following the break-in to the Coca Cola machine. Immediately following the break-in, the machine and the candy and cigarette machines were disconnected and removed, coffee breaks were eliminated, employees were warned they would be written up if they were a minute late, and employees were written up for very minor infractions. Supervisors and non-supervisors were continually engaged in questioning employees about what they knew. The former relaxed atmosphere which had existed at the Service Center degenerated into a very hostile and tense environment. Most seniority employees thought they were likely to be fired simply because management had not caught the persons responsible for the

break-in.

The shop steward for the second shift played a crucial role in creating the atmosphere following the break-in. At the meeting of the employees on September 1, F stated he would not file a grievance for anybody until the persons responsible for the break-in were caught. F conducted his own investigation, warning L that he would be fired if he did not tell Bu that he had seen the grievants break into the machine. F sat in on the interrogations of grievants, but he did little or nothing to assist them as a shop steward should have done.

L first told Bu that he saw grievant O break into the machine, but at the hearing he gave no such testimony.

The acts for which grievants were discharged constituted a criminal offense and the employer carries a very heavy burden of proof. Burden of proof in such cases is often stated to be proof beyond a reasonable doubt, and in any event, the evidence should be clear and convincing. The only evidence presented by the company was the testimony of Larsen concerning what he saw and didn't see on August 31, and the claimed confessions by grievants. Grievants had a perfect right in the course of their work to be in the corridor which

held the nuts and bolts and parts which they used in the course of their work. With constant traffic through the corridor during the shift, the statements L made to Bu and B were made out of fear of losing his job. Without the management threatening tactics following the break-in, L would not have even mentioned that he saw the three grievants.

The alleged confessions by the grievants should be rejected because they were induced by threats or promises of leniency. Moreover, two of the alleged confessions never occurred, and the circumstances with respect to the alleged third confession by C are such that that confession was made only in response to the inducement that he would not be fired. The grievants were told that there were witnesses to their alleged act who saw them break into the machine when there were no such witnesses, and the only information the supervisors had was L's statement that he had seen grievants in the vicinity of the machine. Despite the threats and coercion, C and W did not confess, and did not implicate anybody else.

The grievants reasonably believed that Bu could do anything he wished in the Service Center, including discharging them. They did not know that it was necessary for

him to submit his findings and recommendations to higher management authority. B testified that Bu 's offer to O to try to have him back on the job was made before O allegedly confessed while Bu testified that his offer was made after he allegedly confessed.

The grievances should be sustained, and grievants returned to their former positions with back pay and seniority restored.

Discussion and Opinion

Contrary to the contention of the company, the burden of proof in a case of this type does not change upon the proof by the company of a prima facie case. Depending on the evidence, there is an obligation on the part of the grievants to deny the charges or to give some explanation for their conduct, but the evidence considered in its entirety must establish that the grievants committed the acts with which they are charged. The burden to prove just cause remains on the company throughout the case.

There is conflicting and contradictory testimony in this case. One matter is clear. To borrow a phrase from the criminal law, the corpus delicti was proved - the Coca Cola machine was forcibly opened by an instrument of some kind and money was removed. It is also established that the machine

was defective and frequently failed to deliver the product in exchange for the coins inserted. It is a matter of common experience that there is nothing more frustrating than inserting money in a vending machine only to have the machine retain the money and not deliver the article which is to be vended. The foregoing does not constitute an excuse for breaking in, but it explains the frustration of the employees and their dissatisfaction with the machine.

There is no doubt that L saw the three grievants in the corridor close by the Coke machine. The three grievants could have been there at the same time fortuitously to obtain nuts, bolts or parts for use in connection with their work. Fortuitously or not, the three grievants were present at the same time at the machine.

L told Bu. that he saw grievant O breaking into the machine with a screwdriver. His testimony at the hearing was that he saw O with a screwdriver in his hand. That inconsistency is not enough to discredit all his testimony. O explained that he often carried tools with him as he went from one part of the shop to another or to the corridor to obtain parts. It is reasonable to conclude that L saw the screwdriver.

The testimony of Bu and B and of the

grievants is in direct conflict in critical portions because grievants C and W testified that they did not participate in the break-in and O asserts that he only made his admission under pressure and frustration, because he was tired of being harrassed, because he wanted his job back, and Bu said he would be reinstated if he admitted complicity.

The testimony of several witnesses has been set forth extensively. Although there are conflicts, there are several matters which point to the resolution of the controversy. Bu's testimony with respect to the admission by grievant C of complicity is corroborated by F in connection with the September 14 meeting. Both B and Bu testified to the admissions by O and W at the September 18 meeting. O testified that he said on September 18 that he was involved with the money although he did so out of desperation in order to get his job back. O had a change of mind because earlier he had said he was quitting because of the accusations and harrassment.

C's payment of about \$30 can be explained as another act of desperation to end the matter because of the statements of the foremen on August 31 and September 1. In this connection, there is some significance to C's testimony that no one in the front shop, including the other

two grievants, would contribute to the restitution of the money. If we are to draw an inference of innocence from such refusals, then there would follow the conclusion that the Coke machine was not broken into or someone in the back shop did the job. C's method of returning the money through Sc although explained, is another bizarre aspect of this case since there was an envelope on the foreman's desk into which the money could be placed. C's statement that he did not have an envelope is not convincing. The fact that C was returned to work after a week's suspension corroborates Buford's testimony that C had admitted complicity because Bu had said he would recommend suspensions. Bu's testimony that C had said that part of the money was "shoved into his hands" is too unusual to have been manufactured out of whole cloth. C admitted to him it was a foolish thing to do and he was returned to the job because of his commitment to the incident. Both Bu and B testified to this effect. L testified that he saw grievants at the machine. Grievants admitted they were there at the same time. Proximity does not establish the act, but it is one piece of the evidence. There is no suggestion in a lengthy record that anyone else might have done the job. No one of these items standing alone establishes

the complicity of grievants, but they become part of a mosaic.

There are other items which contribute to the mosaic. Shortly after the break-in, L saw the three grievants talking in one of the repair stalls in the front shop. F heard O tell L "Don't say a word. They can't fire us anyway." O's statement of "free Cokes" on August 31 in F's hearing is another item. Except for a possible desire to be able to report to higher management that he had solved the break-in, there is no sound reason to reject Bu's testimony.

Bu believed grievants were "damn good at their work." He clearly did not want to lose them and told them he would recommend a suspension. Upon his admission of complicity, he put C back to work. There is no sound reason to reject the testimony of Bu, B, F or L. Bu did say he would recommend leniency. He approved of the work of grievants. Although Bu was the boss of the shop, his authority was limited. F did not believe Bu could dismiss the charges. Grievants were short-term employees, but they could have consulted with F concerning Bu's authority. Moreover, Bu denied that he had told grievants more than that he would recommend a suspension.

The statements of the foreman at the meetings on August 31 and

September 1 did not induce grievants to admit complicity. It was not until Bu . . . called them to the office that the admissions began to come forth.

A study of the record requires the conclusion that grievants did participate in breaking into the Coke machine.

The company has a policy. It is called Standard Practice No. 735-6-1 and part of it provides that

"employees shall at all times continue to practice fundamental honesty."

There is nothing unusual about such a policy. The employment contract contains an implicit condition that the employee, as well as the employer, shall be honest on the job and in connection with the job. The company has applied the rule and disciplined for violations of the rule up to and including discharge. The treatment of grievants was not disparate.

The foregoing brings us to section 106.5(b)(1).

Grievants C . . . and O . . . had less than one year's service at the time of discharge. The union complains that the company's position that it could terminate these two grievants without proof of just cause was not raised at the hearing and that grievants were not discharged "for inadequate performance." "Inadequate work performance" may include a dishonest act on the job as well as other types of misconduct,

but the phrase is sufficiently ambiguous when applied to the facts of this case that no decision is made under that provision. The provision may only apply to the quality of work on the job. The decision under section 106.5(b)(1) must wait for a later day.

Accordingly, the grievances are denied. Grievants were not discharged in violation of the agreement.

Award

The Arbitration Board issues the following award:
The discharges of grievants [redacted],
and [redacted] and each of them, were not in violation of the physical labor agreement.

Dated: February 25, 1980.

ARBITRATION BOARD

Concurs/~~Dissents~~ I. Wayland Bonbright
I. WAYLAND BONBRIGHT

Concurs/~~Dissents~~ Leonard C. Beanland
LEONARD C. BEANLAND

~~Concurs~~/Dissents Lawrence N. Foss
LAWRENCE N. FOSS

~~Concurs~~/Dissents Laurence W. Hope
LAWRENCE W. HOPE

Concurs/~~Dissents~~ Robert E. Burns
ROBERT E. BURNS, CHAIRMAN