In the Matter of Arbitration

between

PACIFIC GAS AND ELECTRIC COMPANY,

Employer,

and

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

Union.

OPINION AND AWARD

(Individual Grievant H)

Parties' Arbitration Case No. 88

Arbitrator: Harvey Letter

Appearances:

For the Employer:
Laurence V. Brown, Jr., Esq.

For the Union:
Neyhart, Anderson, Nussbaum & Reilly
by John L. Anderson, Esq.

STATEMENT OF THE CASE

As parties to a collective bargaining agreement, which initially took effect September 1, 1952, and, as amended, was effective from January 1, 1977, to December 31, 1980, the Union and the Employer submitted this matter to arbitration. The dispute concerns the Employer's discharge of the Grievant. The Parties stipulated that the procedures required by the Agreement have been satisfied and that the matter is properly before the Arbitration Board. Hearing was held on November 25,

1980. The Parties had full opportunity to present evidence, including the examination and cross-examination of witnesses. After the close of the hearing, the Parties submitted briefs which the Chairman of the Arbitration Board received on February 25, 1981. Subsequently, the Members of the Arbitration Board met on May 22, 1981.

ISSUE

The Parties stipulated:

> Was the discharge of the Grievant in violation of the Physical Labor Agreement?
>
> If so, what is the remedy?

RELEVANT DOCUMENTARY MATERIAL

The Agreement contains the following:

TITLE 7. MANAGEMENT OF COMPANY

7.1 Management of Company

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provisions of this agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

* * *

TITLE 102. GRIEVANCE PROCEDURE

* * *

102.4 Finality

* * *

(a) If an employee has been demoted, disciplined or dismissed from Company's service for alleged violations of a Company rule, practice or policy and Company finds upon investigation that such employee did not violate a Company rule, practice or policy as alleged, Company shall reinstate the employee and pay the employee for all time and benefits lost thereby plus interest on such reinstated pay in the amount of 7½% annum.

The record establishes that the Employer has the right to promulgate and implement reasonable rules and regulations which do not conflict with the Agreement. Company Standard Practice No. 735.6-1 contains rules of Employee Conduct. It has been in effect at relevant times, has not been shown to conflict with the Agreement, and contains the following:

STATEMENT OF POLICY

1. It is the policy of this Company that employees shall at all times continue to practice fundamental honesty. Employees shall not, nor attempt to: deceive, defraud, or mislead the Company, other employees, or those with whom the Company has business or other relationships; take or misuse Company property, funds, or service; misrepresent the Company or its employees; divulge or release any information relating to the Company of a proprietary nature; obtain a personal advantage or benefit due to their association with the Company or by use of the Company's name; withhold their best efforts to perform their work to acceptable standards; engage in unethical business practices; violate applicable laws or conduct themselves at any time dishonestly or in a manner which would reflect discredit on the Company. Violation of this policy will subject any employee to disciplinary action, up to and including discharge. In addition, supervisors and working fore-

men who knowingly allow others to engage in acts of misconduct are subject to appropriate disciplinary action.

* * *

APPLICATION

3. This Standard Practice applies to all Company or subsidiary Company employees, subject to the provisions of any labor agreement delineating a grievance procedure applicable to employees represented by a labor union.

The California Penal Code contains the following:

Section 499a. Electricity.

Every person who shall willfully, and knowingly with intent to injure or defraud, make or cause to be made any connection in any manner whatsoever with any electric wire or electric appliance of any character whatsoever operated by any person, persons or corporation authorized to generate, transmit and sell electric current, or who shall so willfully and knowingly with intent to injure or defraud, use or cause to be used any such connection in such manner as to supply any electric current for heat or light or power to any electric lamp, or apparatus or device, by or at which electric current for heat or light or power is consumed or otherwise used or wasted, without passing through a meter for the measuring and registering of the quantity passing through such electric wire or apparatus, or who shall knowingly and with like intent injure, alter or procure to be injured or altered any electric meter, or obstruct its working, or procure the same to be tampered with or injured, or use or cause to be used any electric meter, or appliance so tampered with or injured, shall be deemed guilty of a misdemeanor.

OPERATIVE FACTS

Undisputed Matters

The Grievant started working for the Employer in General Construction in 1970. After holding jobs in various classifications, in December 1978, the Grievant was assigned to work in the Electric Department - Transmission and Distribution. The record indicates that, in performing those various jobs, the Grievant

learned about the operation of an electric meter, which measures electric power consumption, and he learned how to install a meter so that it will operate properly.

The Grievant moved into a newly-constructed house in Madera about the end of June 1978. The Employer provided electric power to the house, and, on June 29, 1978, an electric meter was installed in the house. (For ease of reference, that meter is herein called Meter I.)

On October 31, 1979, a Company Meter Reader, in the course of her duties, observed that Meter I was connected to the power source at the Grievant's residence in an upside down position. The result of such inversion of the meter was to cause it to operate in reverse. That had the effect of not registering the electrical energy being used and actually subtracting that amount of energy from the meter. Later that day, two officials of the Company, Manager Al Suneson and General Foreman Bill Thompson, went to the Grievant's residence to investigate. Suneson and Thompson spoke to the Grievant who denied that he had inverted the meter or even knew that it had been inverted. On November 2, the Employer removed Meter I and replaced it with another.

An Employer Security Representative, Merle Person, examined Meter I and concluded that it had been removed, inverted and reinserted into the power source a total of approximately twenty five times since June 1978. (Subsequently, in the processing of the grievance in this matter before arbitration, Senior Meter Tester M , appearing for the Union, expressed the view that

Meter I had been "set more than five times but probably under twenty-five times.") On December 5, 1979, the Employer terminated the Grievant for "meter tampering."

The Grievant's Testimony

The Grievant testified that he first learned Meter I had been inverted on October 31, 1979, when Suneson and Thompson spoke to him. He then talked to his wife; "she explained . . . that a few weeks before -- two, two and a half weeks before, something of that nature -- she had had trouble getting the plugs actually to work in the bathroom, and my folks were there and that my dad had . . . fooled with the panel." According to the Grievant, his wife did not tell him about that incident when it occurred. He otherwise testified, "There had been prior times that it had kicked out. Yes, that was to my knowledge. That particular day I was not notified." The Grievant also stated that, before October 31, 1979, he had remarked to Foreman Whitaker "in passing" that he had experienced problems with electrical energy at his residence. In regard to those earlier losses of power, the Grievant testified, on cross-examination,

Q. . . . what effort did you make to correct it?

A. I made none whatsoever.

Q. Did you even check the meter to see if it was damaged?

A. No, I did not.

* * *

Q. Just let it slide by?

A. I'll answer yes in those terms. Yes.

On re-direct examination, the Grievant then stated,

A. . . . I had . . . tried to reset the switch, and it would not set, and I really didn't know why it would not set at that time. But I could see that there was moisture in the -- where the wires fit in. It's, you know, a fairly open spot, and you can look into it. I could see there was moisture in there.

* * *

. . . I'm referring to where the wires fit into the ground fault indicator, or whatever we're calling it, ground fault interrupter itself where the wires fit in.

* * *

I could see moisture.

* * *

And I could also see rust.

Q. On what occasion did you take a look at this?

A. . . . That was prior to my talking to the foreman that I worked for. Maybe -- I don't know.

Q. What, if anything, did you do about it?

A. I really didn't do anything about it, except I tried to find out what, you know, should be done or how to fix it or whatever.

Q. How did it get fixed?

A. To my knowledge, it's still the same way.

(The record discloses that, in January or February, 1980, Company Troubleman H , in the course of his duties, went to the Grievant's residence in answer to a "no-power call." After lifting an outer metal lid which is part of the meter box located on the same plane below the meter and then removing a circuit breaker cover inside that outer lid, Hatcher found moisture and

water which he dried. H s testimony made no reference to rust. Because of the meter's location on the house in relation to the usual direction and slant of rain in the Madera area, H suggested that the Grievant's wife "get some weather-proofing tape and try to seal the box a little better or cover it somehow.")

On November 1, the Grievant told General Foreman Thompson that his father had "removed the meter, pulled the ground fault indicator and had used the jumpers, or prongs, to kind of rig a plug to plug a hairdryer in and dry the moisture out of the ground fault indicator. . ."

THE EMPLOYER'S POSITION

The Employer contends that the evidence establishes that the Grievant was responsible for pulling, inverting and resetting Meter I a number of times and was particularly responsible for the "October [1979] meter inversion and energy diversion." That action assertedly violated Company policy and was just cause for the discharge. The Employer argues that the Grievant's denial of misconduct should be rejected, noting, among other things, that none of the persons who could have corroborated his testimony concerning the removals and reinsertions of Meter I testified at the arbitration hearing.

THE UNION'S POSITION

The Union contends that the Employer's evidentiary burden in this case - involving a charge that is "criminal in nature" -

has been to prove beyond a reasonable doubt that the Grievant was guilty of inverting Meter I "to avoid charges for electrical usage." The Union argues that the Company has not met that burden. According to the Union, the evidence demonstrates that the Grievant did not effect the various removals and insertions of Meter I and the pattern of utility use at the Grievant's residence indicates particularly that he did not invert the meter and had no knowledge of its inversion before October 31, 1979. The Union urges that even "if one disregards the substantial evidence presented by the Union, PG&E's offering is hardly sufficient."

DISCUSSION AND CONCLUSIONS

The broad framework for arbitral consideration of this matter is, of course, derived from the Parties' Agreement, as amended January 1, 1977. Sections 7.1 and 102.4 of the Agreement provide, among other things, that the Employer has the right to "discharge employees for just cause." Such cause includes worker "violations of a Company rule, practice or policy." A Company policy, contained in Standard Practice No. 735.6-1, establishes "that employees shall at all times continue to practice fundamental honesty." That concept of honesty includes prohibition against employees taking or misusing "Company property, funds, or service," or violating "applicable laws," or conducting "themselves at any time dishonestly." Additionally, violation of the Company policy contained in Standard Practice

No. 735.6-1 subjects an employee to disciplinary action "up to and including discharge."

The record also identifies for the Arbitrator a September 26, 1979, Review Committee Decision issued by the Parties' representatives. It states, in part,

> To the extent that this Decision sets forth policy for the future, and in accord with our understanding of the Company's policy, violations of Standard Practice 735.6-1 must be judged on the merits of each incident; taking into account the value of the property at the time of misappropriation, the seriousness of the misconduct, the employee's service record and length of service. These considerations of merit will be applied only following a finding that the misconduct occurred. However, violations of this policy will still be considered serious transgressions of the employee/employer relationship.
>
> It must be emphasized that the above-mentioned consideration of merits will not be applied by the Review Committee or Fact Finding Committee in instances where it has been proven that an employee has stolen Company cash or is responsible for the revenue metering diversion of natural gas, electricity, water or steam for personal use.

The Union has acknowledged the thrust of that Review Committee Decision is to permit the Employer to preclude judgment of violations of Standard Practice 735.6-1 "on the merits of each incident" in those cases where "it has been proven that an employee . . . is responsible for the revenue metering diversion of electricity . . . for personal use." The Union has specifically warned its members that such violations of Standard Practice 735.6-1 result in discharge with "little hope for reinstatement." The April 1979, issue of the Union's publica-

tion, "Utility Reporter," contained the following article:

GRIEVANT RECORDS SHOW

Stiff Penalties for Energy Theft

Utility companies are cracking down on consumers and employees suspected of energy diversion, meter tampering and other types of energy theft. The consumers are prosecuted in the courts, while the employees receive severe discipline and usually discharge in the majority of cases.

Energy theft by employees is considered to be as serious as any other theft of company property. The penalties are harsh and little can be done to soften them. Arbitrators across the country have sustained the discharges of employees with long service records.

The discharge pattern applies to utilities in Local 1245's jurisdiction. In a recent case, a PG&E employee who tampered with his meter and diverted energy was discharged after working 17 years for the Company. Similar cases have occurred at other power companies.

Although grievances are filed in these cases, there is little hope for reinstatement. The Company is well aware that its action will be sustained by an arbitrator, and that it doesn't have to compromise by putting the employee back to work.

It is seen that the Parties' own guidelines set forth the quantum of proof which the Employer must satisfy in order to sustain discharges for just cause. In order to meet its burden in the instant case, the Company is to prove clearly and convincingly that the Grievant "is responsible for" a revenue metering diversion of a resource, including electricity, for his personal use. Manifestly, the Arbitrator is bound to accept that ground rule as set in the Parties' collective bargain. Otherwise stated, the Arbitrator may not adopt any other burden of proof standard in this case - for example, a requirement of proof of employee

guilt beyond a reasonable doubt - even if he believes that such an alternative burden is more valid or appropriate. It follows that the record is to be reviewed in the context of the burden of proof imposed upon the Employer by the Parties' arrangement.

It is given that, on October 31, 1979, Meter I at the Grievant's residence was inverted. Further, Union Assistant Business Manager Lawrence Foss testified that electrical energy diversion occurred at the Grievant's residence "in mid-October until discovery on October 31." Thus, the October 1979, inversion constituted a revenue metering diversion of electricity that was personally used by the Grievant. In applying the Parties' prescribed quantum of proof, it remains to determine whether or not the Grievant was responsible for the energy diversion.

The nature of this case makes the credibility of the Grievant himself the fundamental concern of the Arbitrator in his resolution of the question of responsibility for the meter inversion. To make that resolution, the Arbitrator has for consideration the Grievant's demeanor as a witness and his testimony for review in relation to the remainder of the record. The Arbitrator also has for consideration the fact that the individuals, other than the Grievant - who have direct information that is material to the October 1979, energy diversion - did not appear as witnesses and testify.

According to the Grievant, he had no knowledge of the October 1979, meter inversion until after it was brought to his

attention by Company representatives on October 31. As told by the Grievant, his wife subsequently informed him that, about two weeks before October 31, the Grievant's father had "fooled with the panel" of the meter box. The Grievant identified as individuals who were at his home about mid-October 1979, his "folks" - presumably his father and mother - and his wife. The Grievant did not suggest that either his mother or his wife was not at home at the time his father assertedly inverted Meter I. For that reason and in view of the record generally, the Arbitrator deems it reasonable to believe that at least two persons, and possibly as many as three, were at the Grievant's residence and could have provided firsthand, "eyeball" evidence relative to the asserted action of the Grievant's father in relation to the meter box.

Under ordinary conditions, one or more persons with firsthand awareness of critical events are called as witnesses in litigation such as an arbitration hearing where their testimony will support an asserting witness - such as Grievant in this case - in his testimony that he has not been involved in, and had no knowledge of, those events. However, no such individual, assertedly having firsthand knowledge of the October 1979, meter inversion, appeared at the arbitration hearing to testify in support of the Grievant's denial of such knowledge. (A written report of a June 6, 1980, statement given by the Grievant's father to a Fact Finding Committee convened under the Agreement is,

patently, hearsay for the purposes of this arbitration proceeding. The Grievant testified that his father was "unable to be [at the arbitration hearing] because he is an alcoholic" and was then in a period of drinking. The failure of the Grievant's father to appear at the arbitration hearing and be available for cross-examination by the Employer kept from the Arbitrator a reasonable basis for providing any probative effect to his June 6, 1980, statement to the Fact Finding Committee.)

The Arbitrator is constrained to find that the failure of the father or wife, and possibly the mother, of the Grievant to appear or testify at the arbitration hearing warrants a negative inference in relation to the reliability of the Grievant's testimony denying knowledge of the October 1979, meter inversion. In so finding, the Arbitrator has considered the Grievant's assertion that his father suffers from the disease of alcoholism but also his failure to provide any explanation for the non-appearance of his wife and possibly his mother.

As suggested above, there are also aspects of the record, that have been affirmatively adduced, which provide ground for review of the Grievant's denial of prior knowledge of the October 1979, inversion of Meter I. For example, the Grievant testified that, before October 31, 1979, he knew there was a problem with the supply of electrical energy at his residence. He stated, on cross-examination, that he made no effort whatsoever to correct it and did not even check the meter. On being asked about the

matter on further direct examination, the Grievant stated, however, that he had actually tried to reset the switch, but he could not do so. It seems reasonable and logical to believe that the consequence of such failure to correct the energy problem - if the effort was made - would have been a continued absence of electrical power. Yet, when asked by Union counsel at the arbitration hearing on November 25, 1980, what action, if any, was taken to correct the energy deficiency, the Grievant answered, "To my knowledge, it's still the same way."

In changing his prior testimony, by testifying on redirect examination that he made an effort to reset the switch, the Grievant stated that he saw moisture and also rust in the meter box. That testimony not only contradicted his earlier statement that he did not even check the meter, it was not fully consistent with the testimony of a Union witness, Troubleman H . Thus, when H later checked the meter box in early 1980, he saw water in the box. Unlike the Grievant, however, H did not state that he saw rust. In this regard, the Arbitrator has closely examined the photographs of the meter box that are in evidence, but he has been unable to validate the Grievant's assertion that he saw rust.

The Arbitrator concludes that the Grievant was not a reliable witness at the arbitration hearing. Further, the Arbitrator does not credit the Grievant's testimony that he had no knowledge of the October 1979, inversion of Meter I before October 31, 1979.

Upon consideration of the entire record, the Arbitrator

concludes that the Grievant had working expertise at least sufficient to handle meters and meter boxes insofar as such expertise was required to effect inversion of Mater I. It is deemed reasonable to infer from the evidence that the Grievant's wife was sufficiently aware of the Grievant's work and its character as to make it likely that she would have informed the Grievant of any problem with electrical energy at their residence at, or about, the time it assertedly occurred in mid-October 1979. The evidence indicates that the Grievant had control over the meter located on his residential property and singular opportunity to invert Meter I. Upon these factors and the rejection of the Grievant's testimony that he did not have knowledge of the inversion of Meter I in October 1979, and upon the overall record, the Arbitrator concludes that the Grievant knew, before October 31, 1979, that Meter I had been inverted. Nevertheless, the Grievant took no action to stop that diversion of energy and failed to acknowledge its existence when confronted with the fact on October 31, 1979. In the judgment of the Arbitrator, those circumstances make it clear that the Grievant was responsible for the revenue metering diversion of electricity for his personal use within the contemplation of Company Standard Practice 735.6-1 and the Parties' collective bargain which acknowledges the validity of the discharge penalty for such misconduct.

In sum, the Arbitrator concludes that the Employer's

discharge of the Grievant was for just cause. The Arbitrator will deny the grievance.

AWARD

The grievance is denied.

Harvey Letter, Arbitrator
Chairman of Arbitration Board

We concur.

/s/ [illegible]
/s/ D. J. Bergman
Employer Arbitration Board Members

We dissent.

/s/ Lawrence N. Foss
/s/ Roger Staicup
Union Arbitration Board Members

Dated: May 27, 1981