

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

--o0o--

In the Matter of a Controversy)	
)	
Between)	OPINION AND AWARD
)	
PACIFIC GAS AND ELECTRIC COMPANY)	CASE NO. 96
)	
And)	
)	
INTERNATIONAL BROTHERHOOD OF)	
ELECTRICAL WORKERS, LOCAL UNION)	
NO. 1245)	
)	

BEFORE THE BOARD OF ARBITRATION:

ROBERT E. BURNS, ESQ., 155 Montgomery Street, Suite 606,
San Francisco, California 94104; the Chairman.

DOROTHY FORTIER, Business Representative and ROGER STALCUP,
Assistant Business Manager, Local Union 1245 IBEW, P.O. Box
4790, Walnut Creek, California 94596.

DAVID BERGMAN , Industrial Relations Assistant and DAVID A.
SCHULTZ, Personnel Representative, Pacific Gas and Electric
Company, 245 Market Street, San Francisco, California 94106.

APPEARANCES:

ON BEHALF OF THE UNION:

RONALD YANK, ESQ., Neyhart, Anderson, Nussbaum, Reilly &
Freitas, 100 Bush Street, San Francisco, California 94104.

ON BEHALF OF THE EMPLOYER:

LAWRENCE V. BROWN, ESQ., Pacific Gas and Electric Company,
245 Market Street, San Francisco, California 94106.

The Parties and the Issue

Pacific Gas and Electric Company (the "company") and Local Union No. 1245, International Brotherhood of Electrical Workers (the "union") are parties to an agreement applying to office and clerical workers effective January 1, 1980 (the "agreement").

Pursuant to the agreement, hearings were held in San Francisco before the Board of Arbitration on October 5, 1981 and October 23, 1981 at which the parties, their attorneys and grievant Ivory Mitchell were present. At the hearing, the parties submitted a submission agreement with respect to arbitration case number 96 and the following issue:

Was the discharge of grievant M in violation of the clerical agreement; and if so, what shall the remedy be?

At the conclusion of the hearing, the issue was submitted upon the filing of briefs. Briefs were received on January 7, 1982. A union exhibit was received pursuant to stipulation on December 14, 1981. The case was thoroughly and well presented and briefed by both parties.

Statement of the Case

Grievant M, a machine operator-utility clerk, was discharged on December 10, 1980 for embezzling \$50.00 of the company's money. Grievant was employed at the company's customer accounting payment center at 62 First Street, San Francisco, as a machine operator-utility clerk. He was originally hired in September 1979, was off work for more than 30 days and was terminated. He was rehired on February 20, 1980.

The center operates on a three shift, 24-hour schedule. Customer payments by mail are delivered to the center three times during the

third shift to which grievant was assigned. Employees at the center work "flex time" hours. The third shift starts at 10:30 p.m. and ends at 9:00 a.m. and employees are permitted to adjust their eight hour work day within those hours.

The center receives and processes about 100,000 payments each work day which are processed by from 17 to 20 operators on each shift. Most payments are made by check or money order. Some customers mail cash. The mail is delivered to the slicer room where it is run through a machine which opens the envelopes and segregates the open envelopes into two groups. One group consists of customers who are current. The other group consists of customers who are delinquent in paying their bills and who receive a billing in a specially coded envelope (called "CS" envelopes) for processing by the center's operators.

Each operator works at an individual console. After the incoming mail has been opened and segregated by the slicer machine, the mail is placed on a work tray on the top of the console of the operator. When the operator starts to process a batch of mail, the operator opens his machine by punching in his* personal code number which is known only to him and his station number. On the night of December 9 and 10, 1980, grievant was operating console number 16 which is located across an aisle from the slicer room. There is a back door from the slicer room which leads to the loading dock. At the dock are dumpsters for the waste paper and trash.

The operator places the customer's bill in the console which records on the bill his code number and station number. The customer's check is inserted into the machine which prints the operator's code number

*The masculine gender is used for convenience. Women are also employed as machine operators.

and station number, the account number and amount of the remittance which the operator key punches into the machine. There is a trash sack attached to the console into which the operator deposits the envelope. At the end of the shift, the operator is required to remove the trash sack, place his identifying number in the bag, seal it, and remove it to a dumpster at the loading dock.

Special instructions are issued for the handling of cash payments. These instructions are posted near a lock box which is located on a pillar in the processing room. The lock box is more than 50 feet across the room from grievant's console. It is on the other side of a pillar which stands between the desk units of supervisor Leonard E. Quinn and the lock box. The instructions given to the operators provide that the operator will immediately place the cash payment, including the envelope and the customer's bill, in a new envelope obtained at the lock box, sign and seal the new envelope and deposit it in the lock box.

Before December 9, 1980, company supervisors were informed that cash payments were being removed from envelopes. Grievant was identified by an informant. William E. James, Section Supervisor, gave this information to John F. Hickey of the company's internal auditing department. Hickey and James decided to "seed" the CS work of certain of the employees with marked money. Hickey obtained \$200 in bills from the company treasurer. James secured five CS stubs and envelopes which he delivered to Hickey. Lowell S. Lawrence, a company security employee, obtained a special salve to coat the currency which Hickey obtained from the company treasurer. The salve was of a type that a person who opened and removed the seeded payments would have some of the salve on his hands which could be detected by the use of a black light.

In the presence of the security agent, Hickey used a tweezer and placed the coated currency in the envelopes which he sealed and placed in a larger brown envelope which he inturn sealed and taped and upon which he wrote his name. The brown envelope as sealed, taped and signed by Hickey was handed to James who placed it in his credenza. James locked his credenza and instructed Leonard E. Quinn, floor supervisor on the third shift, to place each CS envelope in the CS work of five indicated employees including grievant. Quinn testified that he removed the brown envelope from the James' credenza during the third shift on December 9-10 and found that it was sealed with scotch tape over the signature of Hickey. Quinn informed Michele Hovsepien, unit supervisor, of the operation which was about to take place and instructed her to observe the employees while they were working the seeded CS envelopes.

One of the CS seeded envelopes containing two \$20 bills and one \$10 bill was placed with other CS envelopes in grievant's work tray on the top of his console. The other four CS seeded envelopes were placed with other CS envelopes in the work trays of four other employees. The desks of Quinn and Hovsepien were close to the safe. Each of them testified that they kept the safe in full view during the period of the test. Hovsepien and Quinn also testified that they observed grievant working his CS envelopes, that no one approached his console during that processing period, that he did not leave his desk nor did he go to the safe to deposit the cash in the seeded CS envelope which had been given to him together with the other envelopes. The other four employees returned their CS cash seeded envelopes to the safe.

Quinn and Hovsepien testified that no one approached grievant's console during the time the CS envelopes were being processed and that he did not leave his desk or go to the safe.

James arrived at the center at about 6:00 a.m. on December 10. He inquired of Quinn whether the employees had turned in their seeded envelopes and was informed that all of them had done so except grievant and one other employee.* He testified that he waited for grievant to turn in the money. He approached grievant at the time clock and asked him whether he was through working for the day. Grievant replied in the affirmative and James invited him to his office. This occurred between 6:00 a.m. and 6:30 a.m. James testified that he asked grievant where he had been; that grievant said that he was putting his "stuff" away; that two security agents, the personnel manager, and Hickey appeared at the door and he told grievant that these people were going to ask him some questions; that grievant asked "what do they want me for? What have I done?" and he replied, "just to ask you some questions."; that the other people started to walk down to the conference room and grievant followed them; that grievant turned and said "I am not going in there" and started to push his way through; that the personnel manager Wayne Snyder said to let him go; that grievant ran out through the work area to the back through the slicer room which leads to the loading dock; that the group of management employees went into the conference room and about five minutes later, grievant returned; that grievant entered the office with Snyder, Hickey, and two security persons; that grievant was in and out of the meeting room while waiting for shop steward

*The other employee did turn in the money in the seeded CS envelope given to him.

A ; that he did not enter the conference room and grievant emerged therefrom between 7:30 and 7:45; that he and the group went to grievant's console and did not find the trash sack and then went to the loading dock where grievant's trash sack was not found; that they went to the dumpster and Quinn climbed in it and found the trash sack; that Quinn gathered up all the envelopes and papers in the bottom of the dumpster and handed them to him; that he brought the sack into the conference room and the management persons and A went through the sack looking for an envelope with a return address of "5 Berry Trail" which was the seeded CS envelope which had been given to grievant; that they did not find the "5 Berry Trail" envelope or any stubs; that he and other management persons returned to the alley where the dumpster was located and went over the dumpster which had been previously emptied; that there was an envelope and a bill stub in the bottom of the dumpster; that he gave the envelope and the stub to Hickey; that he did see the unprocessed customer billing for "5 Berry Trail" before he gave it to Hickey, but did not notice the name on the envelope. The bill stub which was found in the dumpster was addressed to Michele Scott, 5 Berry Trail, Fairfax. The envelope with which it was found had a return address from "Comfort Zone Waterbeds". Comfort Zone Waterbeds had paid its overdue bill with a check for \$1,433.20 and the back of the check showed the receipt of that amount of money as well as grievant's machine number and operator number and the date of 12/10/80. The customer billing to Berry Trail had not been processed.

While grievant, shop steward A and the other management representatives were in the conference room, Hickey explained to him

that the coded currency had been placed in his work that evening; that he was under suspicion; that he could clear himself by placing his hands under the black light which was on the floor and not in view. A testified that he took the direction as a work order which had been repeated about six times.

Grievant asked A whether he had to submit to the test and A advised him that he was not required to do so. Grievant did remove some currency from his trousers and placed it on the table during the interrogation. The currency was not placed under the black light. One of the currency bills was for \$10.00. No check was made of the serial numbers to determine whether they matched the seeded money.

Grievant testified that he arrived at the center shortly before 10:30 p.m. on December 9; that his shift would be over at 6:30 a.m. on December 10; that he took his half hour lunch break at 1:45 a.m. and returned at about 2:15 a.m.; that he took a break at about 2:45 a.m.; that he believed that CS envelopes slowed him down and interfered with his work production, a record of which is kept by the company for machine operators; that usually he returns CS envelopes to the mail room if he has a full tray of mail with CS's in it or to a table just outside the mail room; that his conduct in returning CS envelopes is about the same as that of other employees; that on the night of December 9-10 he returned some CS work because he believed that the CS's would knock down his production; that he got up at least three times to return CS work; that at about 6:00 a.m. he noticed that James had arrived at the center; that at about 6:30 he was attempting to clock out when James asked him to go to his office; that during the course of the shift he visited with

another employee and also gave five dollars for the Christmas party to still another employee at her desk; that when they were in the office James asked him why he was walking around 15 minutes before his quitting time and he explained that he only had seven clicks on the clock before his shift was up; that James spoke into his walkie-talkie and someone knocked at the door and asked him to step out in the hall; that he was asked to go to the conference room and he saw five people in that area; that he did not know what was going on and told them that he wanted a shop steward and would try to locate shop steward S ; that he wiggled his way between the men and then proceeded outside to look for S ; that he went to the parking lot and did not see S 's car and immediately returned to the conference room; that when he returned to the conference room, he told those present he did not want to discuss anything until he had a shop steward present; that Hickey said that they could proceed without a shop steward; that he repeated his request to have a shop steward present; that no one told him what was going on or who the people were; that after shop steward A arrived they went into the conference room and he was asked about the \$50.00; that he replied that he did not have \$50.00 or \$20.00; that Hickey explained that the money was planted in his tray and was not turned in; that he replied that he did not know anything about it and that he didn't find any money that day at work; that he was asked if he would take the test (black light); that Hickey repeated the request to take the test and that he didn't know what type of test; that Hickey never mentioned that the test was a black light; that he asked A whether he had to take the test and A advised him he did not have to do so; that

Hickey then said if he was not going to cooperate "just get up and get the hell out of here"; that at that point he became angry, got up, and threw his money consisting of a ten, a five and three ones on the table stating that's all the money I have; that he does not keep his money in his wallet but in his right pants pocket; that his pants are tight and he has to stand up to get his hands into his pocket (the trousers worn by grievant at the hearing were tight); that he does not keep money in his wallet because he has lost three of them; that on the night in question he was not wearing his jacket or coat while he was at the console; that his jacket was left on the back of the chair while he worked at the console; that he had never taken any money from an envelope while he worked on that shift and has never stolen any money from the company; that after he left the conference room the second time, he asked James whether he could leave and punch out; that he punched out, left by the back door, went to his car parked in the lot at the rear and went home for the day; that on the way out through the back area he saw Quinn pulling bags and going through bags; that he did not return to the building after he saw Quinn around the dumpster; that he did not sneak back, or throw an envelope into the dumpster; that when he returned from lunch during the shift there was some CS work on his tray; that he left the CS envelopes in the bottom of the tray and returned them; that he did not sign the supervisor's orientation checklist for new employees when he was first employed although the document contains a handwritten signature of M. Grievant later acknowledged that the signature was his.

W. , another employee seated at a console behind grievant, testified that the employees attempted to avoid CS bills and that he saw grievant walk in the direction of the desk or the mail room after the 2:30 a.m. break and during the testing period. S , who was working in the mail room testified that grievant came into the mail room a number of times including after 2:30 a.m. which was during the testing period.

A local investigating committee (LIC) hearing pursuant to the agreement was held. The minutes of that meeting dated March 12 and 13, 1981 were signed by company and union representatives. Included in the minutes is the following:

"It was agreed that it is an individual's legal right to refuse to take a test such as the one administered at the payment processing center on 12/10/80."

Also included in the agreed facts is the statement that "cash payments had been placed in the work of four designated employees (other than grievant) and those payments were reported by the completion of the shifts of those employees."

The company submitted to Forensic Science Associates the Comfort Zone payment envelope, the Berry Trail payment stub, and the inked finger print cards of grievant, W. , another employee in the center, and Leonard E. Quinn, the supervisor. The report submitted by Forensic Science Associates dated December 30, 1980 sets forth the following:

"The envelope and pay stub were processed for latent fingerprints. Two fingerprints and a palm print of value for identification were developed on the pay stub. One palm print of value was developed on the envelope.

The two fingerprints on the pay stub were compared with the inked prints of M. , W. and Quinn without effecting an identification. No palm prints from the three subjects were available for comparison."

Other facts are discussed in the Opinion.

Discussion and Opinion

Grievant was discharged for embezzlement (theft) of his employer's property. The discharge was not so bluntly worded, but the grounds of the discharge are based on grievant's conduct on December 9-10, 1980 in that he failed to turn in to the lock box or account for \$50.00 in cash which was placed in the CS Berry Trail envelope. To sustain the charge, the evidence should be clear and convincing. An employee discharged for misappropriating his employer's property sustains a mark on his work record which is difficult to erase and which, at the least, discourages other employers from hiring him. Grievant was not discovered with the money and we do not know whether his hands under the black light would have disclosed that he had handled the money. Another employee took the test and his hands were "clean".

It has often been held that circumstantial evidence is sometimes stronger and more convincing than the evidence of eye witnesses. Eye-witnesses at times may be mistaken. Circumstantial facts are often hard, undisputed evidence and may weave a web around the accused from which he is unable to escape despite his testimony that he did not commit the act with which he is charged.

Grievant refused to take the black light test. It was agreed at the LIC that he had the legal right to refuse to take the test. The company expresses its failure to understand grievant's refusal to take the test when he could have immediately cleared himself from the serious charges of misappropriating company funds and asserts that this refusal

is part of a mosaic which demonstrates grievant's guilt or a guilty knowledge that the charges would have been substantiated by the material on his hands. The company position is understandable. It is easy to say that if grievant was innocent and had a clear conscience, as apparently was the other employee who took the black light test, he would have put his hands under the black light. It is also easy to infer that an innocent person would have seized the opportunity as a vindication of his innocence. Resolution of this question is not so simple. The parties have stipulated that grievant had the right to refuse the black light examination. Much more significant is the fact that grievant was advised by shop steward A1 that he did not have to take the test. Except for A1, grievant was alone in the room with three or four management persons. If he didn't know, he must have suspected that he was being accused of taking the company's money. But he did not know all of the facts and details with respect to the seeded envelopes. He was standing accused and when he was told that he had the right to refuse the test, he made the instant decision that he would refuse. In the circumstances of the meeting, grievant did not have time to think or to confer privately with A1. Moreover, the right to refuse to take a test, a right which is acknowledged by the company, will not be of much effect if an exercise of that right is to be the basis of an inference, however slight, that the person refusing is guilty of the acts with which he is charged. The rule against testing has its drawbacks, but it is the agreed rule and the inference urged by the company would invalidate the rule.

The question in this case is not whether the evidence establishes the grievant's innocence but whether the evidence is clear and convincing

in establishing his guilt.

Considering the evidence as a whole, one may ask if grievant did not take the money, who did take the money? The answer to that question is not shown by the evidence, but the fact that the evidence does not show who took the money and that the money was not recovered does not mean that grievant took it unless the web of circumstantial evidence is such that it clearly and convincingly establishes that grievant is the guilty person.

Although Hovsepien and Quinn were instructed to watch the five employees who were being tested, Hovsepien did testify that she did take her eyes off persons being tested including grievant. Quinn testified that he was always able to watch two people at the same time. With the number of consoles in the processing room and the number of employees working at the consoles, it would be difficult to watch all five over the tops of the consoles unless the employee stood up. It is clear that grievant did not go to the safe and deposit the Berry Trail cash, but there is also his testimony, corroborated by two witnesses, that he walked to the table and slicer room and his testimony that he did not handle any cash transactions that night. There is, of course, a problem with this testimony. If he had stood up and walked over to the table outside the slicer room, or into the slicer room, he probably would have been seen by Hovsepien or Quinn despite the fact that his console is relatively close to that table and slicer room and is across the room from Hovsepien and Quinn.

There are pillars throughout the processing room which are about three feet wide. Quinn's desk was about 30 paces from grievant's console. There were from 40 to 50 operators moving about the room and going to and from the mail room. The parties and the board reviewed the processing room

during the course of the hearing.

At about 7:15 a.m., Quinn was in the dumpster cleaning it out. James was there observing Quinn. Quinn handed James the paper and both he and James saw that the dumpster was clean. At that time, James saw grievant pass by the dumpster and leave. He did not see grievant return. Quinn testified that when he left the dumpster after cleaning it, it was empty. The testimony of Quinn is corroborated by James who testified that grievant was leaving as Quinn was cleaning out the dumpster and that Quinn had gathered all of the envelopes and papers in the bottom of the trash bin and handed them to him. It was later and after the dumpster had been cleaned by Quinn and checked by James that the Comfort Zone envelope and the bill stub of Berry Lane were discovered in the dumpster. There is no evidence that grievant returned and placed the envelope and incriminating Berry Lane stub in the dumpster. Grievant would have been a stupid person indeed if, when he left the plant, he had in his possession the Comfort Zone Waterbed envelope and the Berry Lane stub and did not dispose of them some other place. It cannot be assumed that he returned and placed the envelope and stub in the dumpster. It is true that grievant processed properly the check from Comfort Zone Waterbed and thus had opened and discarded the Comfort Zone envelope. But no inference arises from that fact that he placed the Comfort Zone Waterbed envelope in the dumpster with the incriminating Berry Lane stub.

W. , who occupies a console in back of grievant, and shop steward S testified grievant went to the table and slicer room after the lunch break. This testimony corroborates grievant. Quinn and

Hovsepien were across the room and their observations of grievant and the other four employees were not likely to be as accurate.

The union urges two inferences: (1) that the Berry Lane envelope was picked up in the mail room or on the table outside the mail room by another employee who dumped the incriminating stub outside or that (2) a company official planted the stub in the bin. Both inferences are speculative. Neither inference is necessary because the evidence does not show that grievant dropped the Berry Lane stub or the Waterbed Comfort Zone envelope in the dumpster. The evidence indicates he did not do so.

The examination of fingerprints on the envelope and Berry Lane payment stub did not disclose an identification of the fingerprints of grievant, W or Quinn. If grievant had opened the Berry Lane envelope containing the Berry Lane payment stub and removed the \$50.00 in currency to which had been applied the salve like identifying substance, it seems probable that grievant's fingerprints would have appeared on the Berry Lane payment stub when it was examined by the forensic laboratory.

The union takes issue with the testimony of Hickey and Hickey's inability to produce a receipt for the balance of the \$200 (\$150) which he obtained for making the tests and which balance was placed in the lock box. The union also questions Hickey's memory with respect to his testimony before another LIC in 1979. These contentions are not convincing and do not bear on the decision in this case.

Cases of this type are very difficult. The evidence must show that only grievant could have taken the money because he was not seen by a credible witness taking the money and was not found in possession of the money.

The evidence is not clear or convincing that grievant took the money which was in the seeded Berry Lane envelope. The later discovery of the Berry Lane stub in the dumpster after grievant had left the premises has been discussed. None of the money which had been treated with the identifying substance was discovered on grievant's person. There is no evidence that grievant was seen placing money or any other object in his pockets. The finger print examination was negative so far as grievant was concerned and it is highly likely that if grievant had handled the Berry Trail stub, he would have done so while or after he handled the treated money in the envelope. His finger prints would probably have shown up on the Berry Trail stub. The ten dollar bill which grievant produced in the conference room was not examined under the black light nor was its serial number checked against the serial number of the ten dollar bill in the Berry Trail envelope. The principal evidence to connect grievant with the theft was the placing of the seeded Berry Trail envelope in his tray and discovery of the Berry Trail stub in the Comfort Zone Waterbed envelope in the dumpster. The placing of the Berry Trail envelope in his tray alone is not enough to find against grievant because of the testimony of W and S . The discovery of the Comfort Zone envelope and Berry Trail stub in the dumpster was made after grievant had left the premises and there is no evidence that he returned to the premises. The only evidence is that of grievant that he did not return. Grievant's testimony in this respect is not inherently incredible. As stated above, guilty or innocent, it would be incredible to believe he did return.

For the reasons given, the web of circumstantial evidence was not closed about grievant. There are very suspicious circumstances, of course. The \$50.00 were never recovered. But the test is whether the evidence is clear and convincing that grievant took the money. A nagging suspicion that if grievant did not take the missing \$50.00, who did take it, is not enough. The evidence does not convince the board that grievant took the \$50.00 enclosed in the seeded envelope on the night in question.

It is therefore concluded that there was not just cause within the meaning of Title 24.1 of the agreement for grievant's discharge.

Pursuant to the submission agreement, the stipulations of the parties and the evidence, the following award is issued:

- 1) The discharge of grievant I M. was in violation of the agreement.
- 2) Grievant shall be reinstated in his former position with back pay at the regular straight time rate less any earnings of grievant during the period of his discharge. The company shall pay all fringe benefits based upon the back pay awarded to grievant.
- 3) This case is remanded to the parties to determine the amount of back pay and jurisdiction is reserved pending that determination and for the purpose of computing back pay in the event the parties do not agree.

~~February~~ MARCH 8, 1982

Concurs/~~Dissents~~

ARBITRATION BOARD:

Dorothy Fortier

Dorothy Fortier, Appointed by the Union

Concurs/~~Dissents~~

Roger Stalcup

Roger Stalcup, Appointed by the Union

~~Concurs~~/Dissents

David Springa

David Springa, Appointed by the Company

~~Concurs~~/Dissents

D. A. Schultz

David A. Schultz, Appointed by the Company

Concurs

Robert E. Burns

Robert E. Burns, Chairman
Neutral Member