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6

7 IN ARBITRATION PROCEEDINGS
8 PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT
9 BETWEEN THE PARTIES
10

11 In the Matter of a Controversy)
12 between)

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

15 and)

16 PACIFIC GAS AND ELECTRIC COMPANY)
17 involving the discharge of)
18 S. A. C .

ARBITRATION OPINION
AND AWARD

CASE NO. 106

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20
21 ARBITRATOR

22 Dennis D. Brittenbach
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25 HEARING

26 July 30, 1982
27 Fourth Floor Conference Room
28 245 Market Street
San Francisco, California

1 APPEARANCES

2 For the Employer:

L. V. BROWN, Esquire
Labor Counsel
Pacific Gas and Electric Company
245 Market Street
San Francisco, California 94106

7 For the Union:

TOM DALZELL, Esquire
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1 PERTINENT CONTRACT PROVISIONS

2 TITLE 102 GRIEVANCE PROCEDURE

3 102.2 GRIEVANCE SUBJECTS

4 Disputes involving the following enumerated subjects
5 shall be determined by the grievance procedures
6 established herein:

- 7 (a) Interpretation or application of any of the terms
8 of this agreement, including exhibits thereto,
9 letters of agreement, and formal interpretations
10 and clarifications executed by Company and Union.
11 (b) Discharge, demotion, suspension or discipline of
12 an individual employee.
13 (c) Disputes as to whether a matter is proper subject
14 for the grievance procedure.

15 TITLE 7. MANAGEMENT OF COMPANY

16 7.1 MANAGEMENT OF COMPANY

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

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1 work on a customer's premises) and for misuse of employer time. In
2 addition to the suspension, the grievant was warned in writing
3 that, "any future acts of irresponsibility may result in more
4 severe disciplinary action up to and including your demotion and/
5 or discharge whichever is deemed appropriate at the time." The
6 disciplinary suspension and written warning were not grieved.

7 Beyond Standard Practice 850-3 for employees in the posi-
8 tion of Gas Serviceman, the employer has a written general policy
9 that prohibits employees from conducting themselves at any time
10 dishonestly or in a manner which would reflect discredit on the
11 employer. Similarly, the policy cites as a example of violation
12 "improper acts while on customers' premises" and warns that policy
13 violation will subject employees to disciplinary action, up to and
14 including discharge.

15 The employer has no policy prohibiting entering a custom-
16 er's premises where a lone female is present, so long as the
17 female is 18 or more years of age.

18 In December, 1981, for the purpose of turning on the gas
19 service, the grievant was authorized by the employer to make a
20 service call to the apartment of Lisa Torlone, an 18 year old
21 female customer of the employer. Torlone was employed as a pizza
22 cook in her father's restaurant and worked evening shifts. On
23 December 13, 1981, the restaurant was robbed by two men, one of
24 whom was armed with a handgun. Torlone was present during the
25 robbery and under threat was forced to hand over the restaurant's
26 cash. Torlone was able to identify the men, friends of her broth-
27 er, for the police and implicated her brother as the person who
28 had "set up" the robbery. The two men she identified and her

1 brother subsequently were arrested. The robbery and its aftermath
2 Torlone later described as the worst event in her life.

3 On the date scheduled for the service call, December 17,
4 1981, the grievant arrived at Torlone's apartment in mid-morning
5 and knocked on the door. The knock awakened Torlone from sleep and
6 wearing a flannel nightgown she answered the door. She admitted
7 the grievant to the apartment where the grievant proceeded to adjust
8 gas appliances, repair minor leaks around gas fittings, and engage
9 in conversation with Torlone.

10 The grievant describes himself as a friendly person who
11 will talk with customers if they want. The grievant says most of
12 the conversation with Torlone was about the robbery, that she was
13 nervous and uneasy because of the robbery, and that she feared for
14 her safety for having identified the persons she believed carried
15 out the robbery.

16 Torlone recalls that in addition to discussing the robbery,
17 the grievant made several sexually oriented remarks, such as asking
18 her repeatedly to change into something sexy, asking her if she
19 fooled around, asking her to remove her nightgown, and asking her
20 if he could peek. Torlone states that all of the grievant's re-
21 quests were refused. The grievant does not remember making any
22 such requests or any sexually oriented remarks.

23 Torlone says that at one point during the conversation she
24 asked the grievant to hold out his hand and saw that he had a
25 wedding ring, but he told her that his being married didn't make
26 any difference. Torlone relates that she asked the grievant if he
27 "did this all the time" and he replied "only to pretty ladies."
28 The grievant recalls only being asked by Torlone to hold out his

1 hand so she could see if he was married, but does not remember
2 what led up to the request.

3 The grievant recalls that he engaged in some kidding and
4 flirting with Torlone, but considered it just being friendly and
5 not necessarily intended to arouse a sexual response nor did he
6 think it would be misconstrued.

7 Torlone says the grievant told her to call whenever she
8 needed gas appliance service, but not on Saturday because that was
9 his day off. The grievant says he told Torlone to call the office
10 if she needed service, and would not have made the comment about
11 Saturday because he worked at the time Tuesday through Saturday.

12 Upon preparing to leave the apartment at the end of the
13 service call, and while still engaged in conversation with Torlone,
14 the grievant lit a cigarette on the balcony outside the door and
15 was then invited back into the apartment by Torlone. The grievant
16 accepted the invitation, finished the cigarette, completed some
17 paperwork, and departed the premises enroute to other service
18 calls. At no time during the grievant's visit to Torlone's apart-
19 ment was he asked to leave.

20 In the afternoon of December 17, 1981, having another
21 service call nearby, the grievant returned to Torlone's apartment
22 to affix an "orange dot" to the furnace to confirm completion of
23 work. The dot should have been applied during the morning visit,
24 but was forgotten by the grievant. The grievant feared that if he
25 reported the forgotten dot or if it was found to be missing upon
26 a work audit, points would be deducted from evaluation of his
27 performance or he would be accused of falsifying records.

28 Upon the afternoon visit, Torlone again was awakened and

1 again clad in her nightgown answered. Torlone admitted the griev-
2 ant, observed him affix the dot to the furnace, and invited him to
3 stop by the restaurant sometime for a pizza. The visit lasted only
4 a few minutes. Torlone recalls the grievant asking her why she had
5 not changed clothes yet; the grievant remembers making no such
6 comment. As the grievant was leaving, Torlone asked him to check
7 her car in the parking lot for vandalism; the grievant did so,
8 found nothing wrong, and did not return to Torlone's apartment
9 that day.

10 On December 22, 1981, a workday for the grievant, the
11 grievant returned to Torlone's apartment in the early afternoon.
12 His visit was not authorized by the employer and he had no employer
13 business to conduct. The grievant says he was working in the
14 general area (same apartment complex) and went to Torlone's apart-
15 ment solely to check on her and make sure she was all right.
16 Torlone recalls the grievant saying that he had been sent by the
17 employer to check on a gas leak; the grievant denies making any
18 reference to the employer and says he told Torlone that he was
19 just there to see how she was doing. Since Torlone was talking on
20 the telephone during this approximately two minute visit, there
21 was no additional conversation described between the grievant and
22 Torlone.

23 Subsequently, Torlone complained to the employer about the
24 grievant's behavior and stated her fear that the grievant might
25 return. The employer began an investigation of the matter and
26 suspended the grievant effective 11:30 A.M. on January 12, 1982
27 pending the final outcome of the investigation. Then on January
28 28, 1982, a letter was issued to the grievant discharging him

1 effective 10:00 A.M. on January 28, 1982. The reasons cited were
2 the grievant's misconduct and irresponsible behavior on December
3 17 and 22, 1981, coupled with the 1979 incident.

4 A grievance claiming the discharge was not for just cause
5 was filed and processed. The parties were unable to resolve the
6 grievance and this arbitration proceeding resulted.

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1 she never asked the grievant to leave her apartment and in fact
2 invited him back inside at one point to finish his paperwork. Such
3 actions are hardly consistent with those of a customer who has been
4 offended by irresponsible remarks of the grievant. Torlone also
5 allowed the grievant into her apartment on two subsequent occa-
6 sions, actions again inconsistent with the employer's position.

7 The grievant's conduct during the afternoon visit on Decem-
8 ber 17, was above reproach. Torlone's accusation that the grievant
9 told her to call him any day but Saturday is nonsensical because
10 the grievant had a Tuesday through Saturday workweek. When consid-
11 ering the grievant's conduct and purpose of the call-back, it is
12 clear the employer's argument is without merit.

13 The grievant was friendly and cheerful during the arbitra-
14 tion hearing and regularly displayed those same traits to custom-
15 ers, as evidenced by the large number of compliments in his per-
16 sonnel file. The grievant treated Torlone in the same manner. The
17 evidence simply does not support the employer's accusation of
18 irresponsible conduct during the December 17 service call.

19 When the grievant returned to Torlone's apartment in the
20 afternoon of December 17, he only stayed a few minutes and was
21 there for the sole purpose of affixing an "orange dot" to the wall
22 heater. The dot is required by employer policy and had been for-
23 gotten by the grievant on his earlier visit. Recognizing that he
24 forgot to affix the dot, the grievant selected the first of three
25 alternatives: 1) return to the apartment; 2) falsify employer
26 records by noting on the service tag that the dot had been affixed;
27 3) admit on the service tag that he forgot to affix the dot. The
28 grievant's return to Torlone's apartment to affix the dot was

1 entirely reasonable and is supported by a witness who was a Gas
2 Serviceman for 17 years with the employer's Sacramento Division.

3 On December 22, the grievant was working in the same
4 apartment complex where Torlone lived, so he visited her apartment
5 to see how she was doing. Torlone invited him in, but continued
6 her telephone conversation, so the grievant left after only a few
7 minutes. The allegations by Torlone that the grievant said he had
8 been sent by the employer to check on a gas leak are strenuously
9 denied by the grievant. The grievant told Torlone that he had just
10 come by to talk with her. He admitted performing no work on the
11 appliances while at the apartment on December 22.

12 Given the facts of this case, the employer has failed to
13 bear its burden and standard of proof of establishing beyond a
14 reasonable doubt that the grievant was guilty of misconduct justi-
15 fying termination.

16 The grievant's visits on December 17 involve no arguable
17 misconduct, and while the visit on December 22 appears to have
18 been poor judgment and a technical rule violation, discipline is
19 not justified.

20 The union's position is supported by past precedent
21 between the union and the employer which include numerous cases
22 where employees were charged with misconduct far more serious than
23 the grievant, which resulted in discipline far less severe than
24 discharge.

25 In light of the circumstances surrounding the three calls
26 on Torlone, the grievant's past record and the many letters of
27 commendation in his personnel file, and past precedent between the
28 parties, it should be found that discipline was not warranted and

1 that the grievant should be reinstated and made whole for his
2 losses.

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1 It cannot be overlooked that while the grievant strenu-
2 ously asserted during the arbitration hearing that his actions at
3 Torlone's apartment could not have been construed as sexual, he
4 admitted to the Local Investigating Committee that he was flirting
5 with Torlone. His testimony at the hearing was that he was simply
6 "kidding around" with Torlone. The combination of the grievant's
7 inconsistent testimony, the testimony of Torlone and her earlier
8 statements to the Local Investigating Committee, and the grievant's
9 claim that his return to the apartment on December 22 was due
10 solely to his interest in Torlone's problems because of her broth-
11 er's apparent involvement in the robbery, cause any reasonable
12 person to conclude that the grievant's conduct throughout was
13 based on a sexual motivation.

14 Because of the uncorroborated testimony of both the griev-
15 ant and the victim, there are problems in making a final deter-
16 mination in this arbitration. However, it must be noted that
17 Torlone's credibility is supported by facts the employer has
18 brought out, such as the grievant's age and marital status and his
19 comments to the Local Investigating Committee that he was flirting.

20 Similarly, attention is called to the earlier 1979 inci-
21 dent involving another teenage customer's complaints that the
22 grievant made sexual overtures to her in the course of a service
23 call. There is a great parallel between the 1979 incident and the
24 1981 incident. The customer in 1979 signed a sworn statement that
25 after the grievant's sexual overtures were rebuked, the grievant
26 returned the following day on the pretext that he had forgotten to
27 check the meter and had been sent back by the employer. During the
28 second visit, the grievant made physical advances to the customer

1 necessitating the customer literally fighting off the grievant.

2 The grievant did not have a call-back order for the second visit.

3 Both cases involve teenage girls, both involve the grievant's sexual overtures and attempts to get the girls to reveal
4 their breasts, both involve the grievant's forgetting to perform
5 a routine work requirement necessitating a return visit, both
6 involve the grievant's fallacious claim that he had been sent back
7 by the employer. These common links are most important, as is the
8 fact that the grievant did not grieve his two day suspension in
9 1979. For all of these reasons, it is submitted that the testimony
10 of Torlone must be accepted over that of the grievant.
11

12 The evidence of on-the-job misconduct is clear and con-
13 vincing and goes to the heart of the Gas Serviceman's obligations
14 to the employer. The grievant in the 1979 incident and in the
15 1981 incident has unequivocally demonstrated his untrustworthiness
16 and lack of qualification to remain in a public contact position.
17 It is the employer's right to make such a determination and it is
18 universally held that such a determination will not be reversed
19 in the absence of evidence tending to show discrimination and
20 arbitrariness and bad faith.

21 A demotion of the grievant was not a viable alternative
22 since the only non-public contact position in the grievant's line
23 of progression was that of Helper and there were no Helper vacan-
24 cies at the Sacramento headquarters at the time of the grievant's
25 discharge. Additionally, the grievant has no contractual right in
26 a situation such as this to demand a demotion to a vacancy or to
27 displace another employee.

28 The employer could, at its option, have placed the griev-

1 ant in a vacancy at its headquarters had one been available; how-
2 ever, such placements are strictly the prerogative of management
3 and in no event grievable if management elects discharge rather
4 than demotion.

5 For all of the foregoing reasons, the discharge of the
6 grievant was for just cause and the stipulated issue must be
7 answered in the negative.

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1 to allow me to reach any meaningful conclusion as to its potential
2 significance.

3 Torlone's judgment and possible culpability are called
4 into question because of her own actions and lack thereof: 1)
5 while wearing a nightgown sans robe, she invited the grievant into
6 her apartment when he visited on two occasions on December 17;
7 2) she engaged the grievant in a somewhat prolonged discussion of
8 the robbery; 3) following sexual remarks by the grievant during
9 his first visit on December 17 and as he was on the balcony pre-
10 paring to leave, she invited him back into her apartment to smoke
11 a cigarette and finish some paperwork; 4) at no point on December
12 17 did she ask the grievant to leave her apartment; 5) she again
13 admitted the grievant to her apartment on December 22. However,
14 while certainly not enhancing her veracity, these factors do not
15 neutralize her testimony or justify the conduct of the grievant
16 as she described it, but they do create in my mind a diminution
17 in the relative significance of pertinent evidence.

18 Torlone's pursuit of her complaint required a substantial
19 degree of perseverance and her depiction of events has been con-
20 sistent. She had nothing to gain from the complaint save the
21 security derived from preventing future visits by the grievant.
22 The grievant's testimony was characterized by an extremely selec-
23 tive and convenient memory loss. But he admitted forgetting to
24 affix the "orange dot" on his morning visit to Torlone's apart-
25 ment on December 17, he admitted an unauthorized return to her
26 apartment on the afternoon of December 17, he admitted an un-
27 authorized visit to her apartment on December 22 ("to make sure
28 she was OK"), and he admitted kidding and flirting with Torlone

1 during his December 17 visit. Given the evidence, the grievant's
2 denial of making any sexually suggestive remarks to Torlone on
3 December 17 is substantially lacking in credibility, as is his
4 visit on December 22 for expressed purely altruistic purposes.

5 The two day suspension of the grievant in 1979 is being
6 partially credited as resulting from a directly related precursor
7 to the grievant's conduct in December, 1981 notwithstanding the
8 grievant's stated belief that no grievance was filed in 1979
9 because the suspension was for an unauthorized stop at a customer's
10 residence, not for the allegations the customer made. While the
11 March 13, 1979 suspension letter to the grievant is moderately
12 vague, it is sufficiently clear to any reasonable person that the
13 suspension was related to the allegations as well as to the un-
14 authorized call-back.^{13,14} Even though nearly three years elapsed
15 between the February, 1979 incident and the December, 1981 inci-
16 dent, the former becomes instructive as to the proclivities of the
17 grievant in terms of his conduct with female customers, in view of
18 the confirmation provided by the latter.

19 There can be no question that the public utility employer
20 justifiably is most concerned about the work-related behavior of
21 its employees in public contact positions, particularly those
22 positions which regularly require the entering of the homes of
23 customers. High standards must be vigorously maintained, with
24 alleged violations actively investigated and evaluated; established
25 violations must be dealt with effectively to reduce or foreclose
26 repetition. To do otherwise is to flout the confidence and just
27 expectation of the community, damage the reputation and efficacy
28 of the employer, and open the employer to considerable liability.

1 The employer is entitled, indeed obligated, to expect and demand
2 fullest compliance from its Gas Servicemen relative to policies
3 and regulations governing conduct with its customers.

4 Countervailing these principles, however, is the need for
5 fair treatment of employees in such matters through reasonable and
6 consistent disciplinary decisions. While considering fully the
7 nearly duplicative nature of cases (misconduct and irresponsibility
8 associated with customer relations and unauthorized call-back) and
9 the written warning to the grievant in 1979 cautioning of possible
10 future discharge, I am not persuaded that the dramatic leap from
11 a meager two day suspension (not grieved) imposed by the employer
12 in early 1979 to the ultimate discipline of discharge imposed in
13 early 1982 is justifiable given the evidence and standard of proof
14 in the instant case and other more effective and reasonable options
15 open to the employer.^{15,16,17,18}

16 While the employer's argument with respect to not demoting
17 the grievant to another public contact position is sufficiently
18 persuasive, its argument against demotion to the beginner level
19 position of Helper is not convincing.^{19,20} Following the grievant's
20 discharge, his position was filled through promotion of a Reserve
21 Gas Serviceman and a Helper was promoted to Reserve Gas Service-
22 man. The Helper position was not filled because of low work load.
23 There is no evidence to indicate that had the grievant not been
24 discharged, the layoff of a Helper was imminent.

25 For the employer to suggest that it had no effective
26 option to discharge because there was no Helper position available
27 and that a three-year Helper would have to be laid off to accomo-
28 date a demotion of the grievant, while creating just such a vacancy

1 through a promotion, is to jeopardize its own credibility. Clearly
2 the selection and nature of disciplinary action is the employer's
3 prerogative, and just as clearly the result of exercise of that
4 prerogative is subject to arbitral review.^{21,22} I find no evidence
5 to establish a contractual bar or a precedential bar to discipli-
6 nary demotion.²³

7 And the discharge of the grievant as a handy surrogate
8 action to forestall the possible layoff of a Helper at some un-
9 determined future date simply does not have merit.

10 I conclude that the employer could have very nearly simul-
11 taneously accomplished the demotion of the grievant and the promo-
12 tion of the two persons above described (thus immediately removing
13 the grievant from a public contact position while keeping the
14 line of progression intact) had it chosen to do so. In addition to
15 demotion, the employer could have imposed a very lengthy suspen-
16 sion, thereby penalizing the grievant severely and providing
17 itself with even greater flexibility relative to the filling of
18 positions. The combination of a protracted suspension penalty for
19 repeated violation of the employer's rules on conduct and a demo-
20 tion because of the grievant's inability to perform properly in a
21 public contact position is reasonable in this case.^{24,25,26}

22 The amount of clear and convincing evidence in this case
23 does not reach a level to adequately support discharge for the
24 offenses involved; it does reach a level to adequately support a
25 one year disciplinary suspension coupled with a demotion to the
26 position of Helper.

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2 The discharge of the grievant was in violation of the
3 parties' current Physical Labor Agreement to the extent that the
4 evidence reaching a clear and convincing level is not sufficient
5 to support a discharge of the grievant, thus the imposition of
6 that unreasonably harsh penalty is not sustained; but the evidence
7 adduced is sufficient to cause the following remedy to be ordered:

- 8 A. The grievant shall be reinstated to employment
9 with the employer effective January 10, 1983;
- 10 B. The grievant shall occupy the position of Helper
11 in the Sacramento Division of the employer,
12 shall not be eligible for consideration for
13 promotion to any higher level position until
14 January 10, 1986, and shall be permanently
15 barred from holding any position with the em-
16 ployer which involves public contact work on
17 other than an occasional basis;
- 18 C. The period January 12, 1982 through January 9,
19 1983 shall be an unpaid disciplinary suspen-
20 sion for the grievant;
- 21 D. The grievant shall not be required to relinquish
22 any outside wages earned during the above stated
23 period of suspension, and any unemployment com-
24 pensation benefits received by the grievant
25 during said period shall be treated in accord-
26 ance with the laws of the State of California.



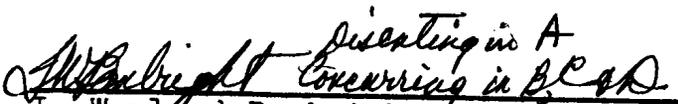
Dennis D. Brittenbach
Arbitrator/Board Chairman

Date: JANUARY 6, 1983



Roger Stalcup *Concurring in A+B*
Union Member *Dissenting in C+D*

Date: 1/19/83

 *Presenting in A*
Concurring in B, C, D

I. Wayland Bonbright
Company Member

Date: 1/10/83



Perry Zimmerman
Union Member

Date: 1/17/83

 *Dissent 'A'*

H. E. Haberman
Company Member

Date: 1-17-83

N O T E S

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2 ¹Funk & Wagnalls Standard College Dictionary, 880, 1445 (Funk &
3 Wagnalls - 1973).

4 ²Law Dictionary, Gifis, 133 (Barron's Educational Series, Inc. -
5 1975).

6 ³Black's Law Dictionary, Black, Revised Fourth Edition, 1160
7 (West Publishing Co. - 1968).

8 ⁴How Arbitration Works, Elkouri and Elkouri, Third Edition, 621-
9 623 (BNA - 1973).

10 ⁵Evidence in Arbitration, Hill and Sinicropi, 10-16 (BNA - 1973).

11 ⁶Arbitration and Labor Relations, Updegraff, 305-307 (BNA - 1972).

12 ⁷Practice and Procedure in Labor Arbitration, Fairweather, 203-
13 208 (BNA- 1973).

14 ⁸Cincinnati Bell, Inc., 73 LA 1148.

15 ⁹Elkouri, supra note 4, at 273-276.

16 ¹⁰Hill and Sinicropi, supra note 5, at 101-108.

17 ¹¹Pioneer Transit Mix Company, 72 LA 206.

18 ¹²Great Atlantic & Pacific Tea Co., 71 LA 805.

19 ¹³Elkouri, supra note 4, at 638-643.

20 ¹⁴Fairweather, supra note 7, at 218, 220.

21 ¹⁵Grievance Guide, Fifth Edition, 9-11 (BNA - 1978).

22 ¹⁶Arbitration and Conflict Resolution, Teple and Moberly, 238-240
23 (BNA - 1979).

24 ¹⁷Thompson Bros. Boat Mfg. Co., 55 LA 69.

25 ¹⁸Scioto Beverage Co., 50 LA 17.

26 ¹⁹Elkouri, supra note 4, at 630-632.

27 ²⁰Fairweather, supra note 7, at 234-235.

28 ²¹Fairweather, supra note 7, at 200-201.

²²Elkouri, supra note 4, at 624-627.

²³Elkouri, supra note 4, at 531-536.

²⁴Elkouri, supra note 4, at 245, 648-651.

... .., supra note 7, at 200-207, 295-300.

2 ²⁶ Remedies in Arbitration, Hill and Sinicropi, 40-43, 52-53, 97-
3 101 (BNA - 1981).

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