

A MATTER IN ARBITRATION

In A Matter Between:

PACIFIC GAS AND ELECTRIC
COMPANY

(Employer)

and

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL
UNION NO. 1245

(Union)

Grievance: Termination

Hearing: July 10, 1985

Award: November 4, 1985

DECISION AND AWARD

BOARD MEMBERS

GERALD R. McKAY, ARBITRATOR, NEUTRAL CHAIRMAN
PERRY ZIMMERMAN, UNION BOARD MEMBER
CORBETT WHEELER, UNION BOARD MEMBER
JOHN A. MOFFAT, EMPLOYER BOARD MEMBER
I. WAYLAND BONBRIGHT, EMPLOYER BOARD MEMBER

Appearances By:

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above identified Union and Employer.¹ Unable to resolve the dispute between themselves, the parties selected this arbitrator to act as the neutral chairman for the arbitration board in accordance with the terms of the Contract. A hearing was held on July 10, 1985. During the course of the hearing, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The neutral arbitrator received copies of those briefs on about October 14, 1985. Having had an opportunity to review the record, the Board of Arbitration is prepared to make its decision.

1. Joint Exhibit #1

ISSUE

Did the discharge of C violate the Agreement? If so, what is the remedy?

RELEVANT CONTRACT LANGUAGE

GENERAL

TITLE 1. PREAMBLE

1.1 PRINCIPLES

The parties recognize that the free private enterprise system in the United States has produced the highest standard of living anywhere in the world, and they hereby confirm their adherence to, and belief in, that system. In accordance with such belief the parties support the principle of private ownership for public utilities under enlightened regulation by public authority. Further, the parties support the principles of collective bargaining and self-organization.

TITLE 3. CONTINUITY OF SERVICE

3.3 Employees who are members of Union shall perform loyal and efficient work and service, and shall use their influence and best efforts to protect the properties of Company and its service to the public, and shall cooperate in promoting and advancing the welfare of Company and in preserving the continuity of its service to the public at all times.

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.

BACKGROUND

The grievant began working for the Employer on May 16, 1966 as a substation helper.² At the time of his termination, he was classified as an unassigned journeyman electrician and had held the position of journeyman electrician since January, 1973. The grievant's Company headquarters at the time of his termination was Santa Rosa, California. Aside from the incident which led to the grievant's termination, the grievant claimed that during his entire time with the Employer, he had never been disciplined for any other offense.³ The grievant was terminated by the Employer on September 6, 1984 for his alleged violation of Standard Practice 735.6-(Employee Conduct).⁴ The essence of the Employer's complaint is that the grievant sold the Employer an electrical transformer at a profit. In its brief, the Employer characterized the grievant's behavior with respect to the sale of the transformer as a simple case of dishonesty.⁵ The Employer concluded that the grievant intentionally deceived the Employer by submitting a false invoice which, the Employer stated, allowed the grievant to criminally profit at the Employer's expense.⁶

In May, 1983, the Employer experienced a crisis situation in its Unit 12 which is located near Santa Rosa, California. According to Mr. K , a supervisor,

2. Tr. Page 61

3. Tr. Page 62. This assertion was not rebutted by the Employer. The arbitrator will, therefore, assume that it is true and correct.

4. Union Exhibit #2

5. Employer's Brief, Page 6

6. Employer's Brief, Page 7. The Employer presented no witnesses to support its assertion that the grievant criminally deceived the Employer by submitting a false invoice. The Employer's case consisted of written documents and the testimony of Brian Kerchenko who testified that he could have purchased the transformer in question from the vendor used by the grievant for less than what the grievant paid. Mr. Fred Greenstein was the Employer's only other witness, and his testimony was intended to undermine the credibility of the Union's key witnesses, Mr. K , the grievant's supervisor.

the crisis arose over the Memorial Day weekend during 1983. One of the units at the Employer's Geothermal Generation Facility was out which resulted in a loss of revenue to the Employer of approximately \$8,000 per hour.⁷ In the repair of this unit, the Employer had obtained a transformer from the State of California, but the transformer had fans and controls at a different voltage than the Employer normally used.⁸ In order to control the voltage, Mr. K stated, it was necessary for the Employer to obtain a small transformer to regulate this problem.

Mr. K stated that the employees involved in the repair of this unit, including the grievant, worked 32 hours straight that weekend in order to make the necessary repairs.⁹ Mr. Bill Hughes, a substation specialist out of the general office, directed Mr. K to repair the State transformer and to obtain a smaller transformer as fast as possible.¹⁰ The direction to purchase the smaller transformer, Mr. K stated, came to him without any price restriction on the amount he could spend for the purchase of the transformer.¹¹ When he first received instructions to obtain a transformer, Mr. K testified, he checked with the Employer's Rohnert Park warehouse and had Mr. Don Jackson, the supervisor at the warehouse, check the Company system to determine whether the Employer had the necessary transformer available without having to purchase one. In response to this inquiry, Mr. K testified, Mr. Jackson informed him that the Employer did not possess an adequate transformer to meet the specifications set out by Mr. K. When an Employer-owned transformer

7. Tr. Page 16
8. Tr. Page 16
9. Tr. Page 17
10. Tr. Page 19
11. Tr. Page 20

was not available, Mr. K stated, he instructed the grievant to find a transformer and purchase it.

Mr. K stated he selected the grievant to make this purchase because the grievant possessed an electrical contractor's license issued by the State of California. Because the grievant was an electrical contractor, Mr. K testified, the grievant was familiar with the electrical houses in the Santa Rosa area and could use his contractor's license to make the purchase. Mr. Don Jackson, the supervisor at the Rohnert Park warehouse, told Mr. K that the transformer would cost in the neighborhood of \$1700.¹², but Mr. K is not sure whether he passed that information on to the grievant or not.

The grievant testified that Mr. K told him to get the transformer as fast as he could and described for him the type of transformer that the Employer needed. In response to this direction, the grievant contacted AMFAC and Bayside, both electrical houses in Santa Rosa. The grievant first called Bayside and asked for the transformer. During a discussion with the sales representative from Bayside over the telephone, the grievant was informed that the list price of the transformer was \$1460.¹³ The grievant passed the price information he obtained from Bayside on to Mr. K, and Mr. K asked the grievant if he could obtain a better price because of the grievant's contractor's account with Bayside.¹⁴

12. Tr. Page 22

13. Tr. Page 69, Union Exhibit #1. Union Exhibit #1 shows the suggested retail price for the transformer in question to be \$1460. The grievant testified that he obtained the price list from Bayside.

14. Tr. Page 69

Once the grievant located the needed transformer at Bayside, he discontinued his search and went over to Bayside to pick up the transformer.¹⁵ The grievant told the counter man at Bayside that the transformer which he was purchasing was for the use of PG&E, but the grievant had the transformer charged to his personal account.¹⁶ The grievant testified that he was not aware that PG&E had an account with Bayside because most of PG&E's purchases in the Santa Rosa area were made either at Friedman's or Consolidated.¹⁷ In addition to the transformer, the grievant was also asked to obtain some wire which the grievant took from his personal stock of wire that he used in the course of his electrical contracting business.¹⁸ The grievant picked up the transformer and the wire in an Employer vehicle and transported them to the job site.

When the grievant was billed by Bayside for the transformer, the price he was charged was \$859.77. According to the grievant, he checked with Bayside to see why the actual sales price was so much lower than the quote he had received. The grievant stated,

I went and I — I asked why it was so much cheaper. And I learned that that transformer had been purchased earlier for another contractor who had then changed his mind, and it had been sitting in their back room for a couple months.

Because of the size and the weight of the transformer, the grievant stated, Bayside was anxious to get rid of it as quickly as possible. When the grievant prepared his invoice which he submitted to the Employer for payment, he charged the Employer \$1356 for the transformer and then gave the Employer a ten percent discount to reduce

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- 15. Tr. Page 71
 - 16. Employer Exhibit #1
 - 17. Tr. Page 71
 - 18. Tr. Page 73

the price to \$1220.40.¹⁹ The grievant testified that he charged the Employer \$.25 a foot for the 300 feet of wire that he sold to the Employer, or \$75²⁰, for a total bill of \$1295.40.²¹ This bill was submitted on an invoice form which has the grievant's name and electrical contractor's license and address printed in the upper left-hand corner. The Employer received this bill on June 14, 1983, and Mr. K approved the bill for payment on that date.²² The grievant received a check from the Employer dated June 28, 1983 in the amount of \$1295.40 which the grievant cashed.²³

The grievant stated that he is not sure at this point how he arrived at the figure \$1356 for the transformer, but he stated that it was his normal practice as an electrical contractor to mark up the equipment he sold to customers anywhere between 15 to 25 percent.²⁴ While there was no discussion with Mr. K about the fact the grievant was making a profit on the transaction involving the transformer, the grievant recalls that Mr. K told him to "take care of yourself."²⁵ While Mr. K did not know the amount of profit involved, the grievant believed that Mr. K had authorized him to include some profit.²⁶ The grievant believed that it was appropriate to obtain a profit on this transaction because he obtained the transformer as part of his electrical contracting business and believed that he would be responsible to the Employer if there had been problems with the transformer rather than Bayside from whom he purchased

19. Employer Exhibit #2

20. Tr. Page 75

21. Company Exhibit #2

22. Employer Exhibit #2

23. Company Exhibit #2B

24. Tr. Page 75

25. Tr. Page 75

26. Tr. Page 76. Mr. K agreed with the grievant's testimony that he authorized the grievant to include a profit.

the transformer.²⁷ At no point prior to an audit conducted by the Employer in August of 1984 did any of the grievant's supervisors ask him for back-up documentation to support the price the grievant charged the Employer for the transformer.²⁸ When the auditors asked the grievant to produce evidence, he gave them a copy of the invoice he received from Bayside.²⁹

Mr. K testified that he received the invoice from the grievant for the transformer which listed the price at \$1220.40. Based on the information he had obtained from Don Jackson in the Rohnert Park warehouse, Mr. K stated, he believed that the quoted price was fair. When he submitted the invoice for payment, Mr. K stated, he knew that there was a profit for the grievant included in the quoted price but that he was not sure of how much profit was included.³⁰ According to Mr. K, he believed that some profit was appropriate. Mr. K explained this belief in the following manner,

Well, due to the fact that J does have a contractor's license and it is here on the invoice, there is a certain amount of schooling and money paid out for a contractor's license. That means that gentleman is in business. He is not in business just to shake hands. He is in business to make a profit when he does obtain a piece of equipment whether it's for PG&E or whether it's for an outside customer.³¹

Mr. K explained that once he has approved the invoice for payment that the invoice is then submitted to the superintendent who, at the time, was Morris Katz. After Mr. Katz reviewed the invoice, it was suppose to be reviewed further by Mr. Jim Sprecher before it was sent to San Rafael for payment. In the past, Mr. K

27. Tr. Page 76

28. Tr. Page 76

29. Tr. Page 76, Employer Exhibit #1

30. Tr. Page 28

31. Tr. Page 29

stated, Mr. Sprecher has disapproved invoices that have been submitted to him with Mr. K 's approval on them.³² At no point, Mr. K stated, was the grievant ever asked to provide back-up information to support his invoice.

About the same time the grievant was terminated, Mr. K was also terminated for misappropriation of Employer funds. Mr. K was accused of purchasing car parts through the Employer's accounts for his own personal use. This information was developed as the result of an audit conducted by the Employer of its Santa Rosa office. During earlier stages in the grievance procedure, Mr. K had provided information to the investigators which indicated he had no knowledge that the grievant was making a profit on the transformer transaction. Mr. K stated that based on the nature of the questions which were being asked of him, he believed that if he were to provide the answers he thought the auditors wanted to hear that he might preserve his job in this fashion.³³ It was for this reason, Mr. K stated, that he provided different responses concerning his knowledge of the grievant's profit earlier than he had presented in this arbitration.

The Employer called Fred Greenstein, who is involved in preparing the Employer's case for arbitrating the grievant's termination. In the process of conducting this investigation, Mr. Greenstein contacted Mr. K to see if he would be available as a witness for the Employer. According to Mr. Greenstein, the response he received from Mr. K was, "What's in it for me?" In response to this, Mr. Greenstein told Mr. K that the Employer could compensate him for his time. However, Mr. K,

32. Tr. Page 30

33. Tr. Pages 35 and 36

according to Mr. Greenstein, stated, "No. That's not enough." Mr. Greenstein stated further that Mr. K told him that he, Mr. K, would appear as a witness and lie in order to help the grievant get his job back.³⁴ In rebuttal, Mr. K denied that he ever told Mr. Greenstein that he would lie about the facts in this case. Mr. K stated,

I did ask him what was in it for me.

I also indicated to him that I would like my job back with back pay.

But I never did indicate anything saying about lying. I never used that terminology. Never used anything even closely resembling that or the Company or for J³⁵

According to the grievant, he has held an electrical contractor's license for the past seven years. In order to obtain this license, he had to pass certain examinations set by the State of California. In order to pass these tests, the grievant testified, he went to electrical contracting school which he paid for on his own.³⁶ It is not necessary, the grievant noted, to hold an electrical contractor's license in order to be employed by this Employer. In addition to the \$1800 the grievant spent going to school, he stated, he is required to pay a \$100 license fee each year, \$135 bond every two years, and approximately \$600 a year for insurance.³⁷ The Employer has never contributed any money to the costs the grievant has incurred as a result of holding an electrical contractor's license. The grievant stated that with the exception of the transformer, he had never been asked by the Employer to purchase anything for it in his capacity as an electrical contractor.

34. Tr. Page 89

35. Tr. Page 92

36. Tr. Page 64

37. Tr. Page 64

Mr. Ed Caruso, a business representative for the Union, testified that during the course of the grievance procedure, he investigated the practice of employees making a profit from transactions between the Employer and the employees' own private business.³⁸ According to Mr. Caruso, he gave the Employer all of the information he had obtained during this investigation so that the Employer would have an opportunity to check out the veracity of his claims. One example, Mr. Caruso stated, of employees making a profit through their private businesses was the Employer's use of notaries. Several employees, including a T , are notaries and receive a fee from the Employer for documents which they notarized during working hours. Another example, Mr. Caruso stated, involved a clerical employee in the Employer's Santa Rosa district office who operates a stationery store that supplies the Employer with stationery and envelopes.³⁹ Mr. B K, rented the Employer his chain saw, Mr. Caruso asserted, and other employees have rented equipment such as backhoes in emergency situations.⁴⁰ A troubleman located in the Napa, California area operates a sporting goods store from which he sold the Employer bright yellow plastic spotlights.⁴¹ Another employee ran a janitorial service on the side and sold his janitorial services to the Employer.⁴² Another employee manufactured name plates which were sold to the Employer.⁴³

After giving this information to the Employer, Mr. Caruso testified, the Employer responded by stating that this information was irrelevant and was minor in nature in

38. Tr. Page 53

39. Tr. Page 54

40. Tr. Page 54

41. Tr. Page 54

42. Tr. Page 55

43. Tr. Page 55

comparison to the charge against the grievant.⁴⁴ Mr. Caruso testified that he presented additional evidence to the Employer relative to illegal activity engaged in by supervisors. In one example, Mr. Caruso stated, a Level 10 supervisor was caught diverting energy for his private use without paying for it.⁴⁵ In response to the theft of energy, this supervisor was suspended and demoted.⁴⁶ Another employee, H. W. ., a welder for the Employer, told Mr. Caruso that he had fabricated various materials for his supervisors. According to Mr. Caruso, when he presented this information to the Employer, the response was that the Employer was aware of these events.

POSITION OF THE PARTIES

EMPLOYER

The Employer asserted that the issue involved in this dispute is simply one of dishonesty. Relying on an earlier case decided by arbitrator Burns, the Employer stated that the arbitrator concluded in that case that "honesty by both the Employer and employee is an implied condition of the employment contract." In this particular case decided by arbitrator Burns, the employees involved were accused of misappropriating Company property for their own use. The Employer argued that now that it has established the grievant in this case is dishonest, the Board is precluded from inquiring further. The only appropriate discipline for dishonesty, the Employer stated, is termination.

44. Tr. Page 55

45. Tr. Page 56

46. Tr. Page 57

The Employer asserted that it has proved the "grievant willfully set out on a course of action to intentionally deceive the Company to his profit." Whether K approved the purchase or participated in the grievant's illegal scheme is irrelevant, the Employer argued, because it is the grievant's criminal intent which the Employer has based its termination on in this matter. The Employer asserted that the grievant submitted a false invoice which he expected would go undetected.

The Employer characterized the Union's evidence of other employees profiting through their own private businesses as "yard gossip." But even if these assertions made by the Union were true, the Employer stated, the critical difference between their activities and those engaged in by the grievant is that the activities of these individuals was open and above board. The Employer dismissed the other charges leveled by the Union against supervisors for inappropriate activity as unsupported hearsay. The Employer concluded by stating that upon the totality of the evidence presented, the Board of Arbitrators must conclude that the grievant "willfully embezzled Company funds" and dismiss the grievance.

UNION

The Union noted that there is very little dispute with respect to the facts involved in the purchase of the transformer. The only area of dispute revolves around the question of whether Mr. K authorized the grievant to include a profit in the invoice which the grievant submitted. Mr. K , the Union stated, is accused of lying about this by the Employer in order to obtain revenge for his own termination. The grievant's failure to mention during the earlier stages of the grievance proceeding

that Mr. K was aware of the profit can also be explained by the stress under which the grievant was placed. The Union stated that the Employer presented no witnesses to substantiate its assertion that it did not know the grievant was making a profit in 1983. The Employer knew at all times, the Union argued, that the grievant purchased the transformer in his capacity as an electrical contractor. The only function of an electrical contractor license, the Union stated, is to make a profit. The Union pointed out that the Employer's standard practice, which the grievant is charged with having violated, contains no rule prohibiting employees from making a profit on a business transaction with the Employer. But even if the standard practice could be construed to prohibit profit-making, the Union argued, the uncontradicted evidence is that the grievant was never shown the standard practice nor in any other way made familiar with its content. The Union stated that arbitrators do not require specific notice to an employee if, (1) the employee's conduct is wrong in itself, either by definition of society as a whole or of industrial society specifically, or (2) his conduct is similar to offenses which the Company has given notice are subject to discipline. Neither of these exceptions are present in this case, the Union stated. The preamble of the collective bargaining Agreement, the Union noted, states that the parties promote the concept of free private enterprise. The grievant's sale of the transformer to the Employer at a profit is merely a part of free private enterprise. The Union asked that the grievant be reinstated in his former position and made whole for all wages and other benefits which he lost as a result of the termination.

DISCUSSION

The Employer has placed the Board of Arbitration in an awkward position. At no point during the arbitration hearing did the Employer ever produce evidence of why it terminated the grievant from his job. The Employer produced documents which show that the grievant purchased a transformer from Bayside for \$859.77 and then produced other documents which show that the grievant sold that transformer to the Employer for \$1220.40. Based on this evidence, the Board of Arbitrators could conclude that the Employer was terminating the grievant for making a profit or for making an excessive profit. It was the Union that introduced the letter the Employer issued to the grievant setting forth the Employer's reasons for termination.⁴⁷ In this letter, the Employer informed the grievant that, ". . . he was terminated for violating Standard Practice 735.6-1."⁴⁸ But again, the Employer did not provide the Board of Arbitration with the benefit of what that violation involved. It was the Union that provided the Board of Arbitration with a copy of Standard Practice 735.6-1.⁴⁹

In reviewing the Standard Practice, the types of misconduct covered include,

. . . employee activity which is in any way job related and which involves a dishonest or otherwise unlawful act or violation of Company instructions or policies relating to the use of alcohol or drugs, or Equal Employment policies, etc.⁵⁰

Based on the facts in the present case, it is safe for the Board of Arbitration to conclude that the grievant was not terminated for the use of alcohol or drugs or because of his violation of Equal Employment policies. This leaves the Board of

47. Union Exhibit #2

48. Union Exhibit #2

49. Union Exhibit #3

50. Union Exhibit #3

Arbitration with the option of selecting from dishonest acts, unlawful acts, or violations of Company instructions. It was not until the Employer submitted its brief that the Board of Arbitration was afforded the benefit of the Employer's conclusions relative to its reasons for terminating the grievant. In its brief, the Employer asserts that the grievant was terminated for deliberately and unlawfully deceiving the Employer by submitting a false invoice. While the brief is not normally the document in which one finds the reasons for a termination, the Board of Arbitrators will conclude that the reasons stated in the Employer's brief are the reasons it chose to terminate the grievant.

Based on this conclusion, for the Employer to sustain its burden relative to having just cause for terminating the grievant, it must establish that the grievant deliberately and unlawfully deceived the Employer by submitting a false invoice. While there is no evidence submitted by the Employer relative to which invoice it believes to be false, the Board of Arbitrators must conclude that the false invoice was the one submitted by the grievant to the Employer on the document which is imprinted with his name noting that he is an electrical contractor and setting forth his address.⁵¹ The invoice makes it clear that this is a document from Mr. C and not from some other source. The invoice also states that the Employer is being charged for a transformer and 300 feet of wire.⁵² There is nothing false about this invoice. The grievant sold the Employer a transformer and 300 feet of wire. The Employer received the transformer and received the 300 feet of wire. The grievant charged the Employer \$1220.40 for the transformer and \$75 for the wire. There is nothing deceptive, illegal or dishonest about the invoice per se. At the time the Employer received the invoice,

51. Company Exhibit #2A

52. Company Exhibit #2A

it knew that it had received the transformer and it knew that it had received the wire and it knew that it was paying the grievant for this material rather than a vendor such as Bayside. What the Employer is objecting to is the profit reflected in the \$1295.40 that it paid to the grievant for the transformer and the wire.

The question the Board of Arbitrators must now address in light of the fact that the invoice itself is not false nor deceitful is whether it is a violation of policy for an employee to make a profit in transactions that it conducts with the Employer. Certainly, it is not criminal, as the Employer has suggested, to make a profit. In fact, the parties state that, "The free private enterprise system in the United States has produced the highest standard of living anywhere in the world."⁵³ The issue then must focus on whether it is a violation of the Employer's rules to make a profit at the Employer's expense in transactions between an employee and the Employer. Standard Practice 735.6-1 does deal with this issue indirectly. In this supplement, which became effective December 1, 1983, some six months after the incident involving the grievant occurred, there is a provision entitled Conflict of Interest which addresses the nature of the issue before the Board of Arbitration. In the section under Conflict of Interest, it states as an example of a violation of this rule,

- When an employee's personal interest or course of conduct in relation to outside interest is such as to affect such an employee's independence of judgment in discharging responsibilities on behalf of the Company.⁵⁴

Clearly, the grievant's position as an outside electrical contractor created a conflict of interest situation when he was requested to purchase a transformer for the

53. Joint Exhibit #1, Title 1.1

54. Union Exhibit #3

Employer. The grievant's "independence of judgment" was likely to be affected in this situation as it appears to have been based on the facts presented. Of course, the difficulty presented by this prohibition relative to this dispute is that the existence of this prohibition originates from December 1, 1983, which makes it impossible for the grievant to have seen this in June of 1983. While there may have been a predecessor prohibition similar in nature to the one cited, it is the burden of the Employer to establish this fact, which the Employer has chosen not to do in this case. The only conclusion the Board of Arbitration may come to based on the facts presented to it is that as of June, 1983, there was no prohibition with respect to conflicts of interest such as that quoted by the Board of Arbitrators.

What the Employer has established in this dispute, either by its own documentary evidence or by the evidence presented by the Union, is that the grievant was directed to obtain a transformer for the Employer in an emergency situation. The grievant was selected because of his position as an electrical contractor and his familiarity with suppliers in the Santa Rosa area. The grievant went about obtaining the transformer and the wire as he was directed and delivered those to the Employer in a Company truck on Company time. The grievant then submitted an invoice which clearly indicates that he charged the Employer for the transformer and for the wire. The grievant's supervisors saw the invoice and must have recognized that it was the grievant charging the Employer for these items and not some independent vendor. Even though the invoice submitted by the grievant was reviewed by Mr. K , Mr. Katz, and Mr. Sprecher, none of these supervisors ever bothered to ask the grievant what he paid for the transformer or for the wire. These three supervisors approved the invoice submitted by the grievant and paid it. Later, when the Employer's auditors discovered

that the grievant made a profit on this transaction, the Employer chose to accuse the grievant of dishonesty.

The Employer suggested in its brief that the grievant submitted this invoice knowing that it was likely to be paid by the Employer without any questions. Because the Employer concluded that the grievant knew this, the Employer asserted that the grievant's knowledge of this made the transaction dishonest. While it may be the practice of the Employer to pay whatever invoices are submitted to it, normal control procedures in most businesses would cause an invoice submitted by an employee to be questioned. Clearly, the Employer's auditors suspected something in 1984 when they pulled this invoice and raised questions about it. The auditors realized that the grievant was an employee, and the auditors realized that the invoice was submitted by the grievant and not a vendor. Based on these facts, the auditors then asked the grievant what he paid for the transformer. These are the questions that one would normally expect Mr. K , Mr. Katz, or Mr. Sprecher to ask at the time the invoice was submitted to them for their approval. The Board of Arbitration believes that it must be one of the central functions of a supervisor to review the bills which the supervisor authorizes for payment. If the supervisor has some doubt about the items which are being paid for or the amounts which are being paid prior to authorizing the payment, those questions are normally asked. In the present case, that is not what happened. Perhaps this failure can be dismissed because Mr. K turned out to be a thief, but then one still is faced with the fact that Mr. Katz and Mr. Sprecher also were responsible for reviewing this invoice before payment was authorized.

It was un rebutted by the Employer that other employees have engaged in business relationships with the Employer that may well have resulted in a profit for those

employees. The examples cited by Mr. Caruso during the arbitration hearing were available to the Employer prior to the arbitration proceeding and could have been rebutted during the hearing. Given the fact that the Employer had knowledge of these assertions and had an opportunity to review the facts surrounding these assertions prior to the arbitration hearing, the Board of Arbitration must conclude that the assertions made by the Union are true. Notaries do make a profit off of the Employer even when they are on Company time. Other employees have sold items to the Employer or have rented personal items to the Employer for use by the Employer at various times. In light of this, it is clear that the Employer did not have a blanket prohibition against doing business with its own employees.

The Employer suggested in its brief that the distinction between the actions taken by the grievant and the actions of these other employees who are alleged to have engaged in business with the Employer is that the actions of the other employees were open and aboveboard. While the Board of Arbitration is not sure what the Employer means by "open and aboveboard," one must assume that the other employees made it clear to the Employer that they were dealing with an employee in the employee's capacity as a private entrepreneur. The Employer, of course, could have produced evidence to support this assertion. Perhaps there were contracts entered into with the employees and signed by the Employer, or perhaps there were other documents which would clearly and notoriously establish the Employer's knowledge that it was doing business with an employee who was also a private entrepreneur. Unfortunately, the Employer has chosen not to present any evidence of this nature in support of its assertion. The Board of Arbitrators believes that one indication of aboveboard dealing is to submit billings to the Employer in such a manner that the Employer knows who it

is that it is paying for certain goods or services. An employee who sells the Employer stationery, for example, ought to submit to the Employer a bill that identifies the vendor as the employee. In the present case, the grievant did submit the Employer a bill which identifies him as the vendor of items listed. There is nothing deceitful about the invoice submitted by the grievant.

The Board of Arbitration is not suggesting that the actions taken by the grievant are appropriate or are not in conflict with the grievant's relationship as an employee. It would have been more appropriate for the grievant to have gone to Bayside or some other electrical supplier and purchased the transformer in question for PG&E and have the vendor bill PB&E directly. It is a conflict of interest for an employee to be charged with the responsibility of purchasing items for his Employer and making a profit off of those purchases at the Employer's expense. It is even dishonest if an employee does this in a manner which conceals the fact that he is making a profit at the Employer's expense. On the other hand where there has been no effort to conceal the fact that an employee is buying items and selling them to the Employer, one cannot conclude that a deception has occurred relative to the question of profit. The Employer's supervisors knew that the grievant did not maintain a warehouse which stored the type of transformer the grievant purchased and should have realized that the grievant purchased it from some other source. In light of this, the Employer's supervisors should have recognized a potential conflict of interest when the grievant presented his invoice and asked where he purchased the transformer and how much he paid for it. For the Employer to accuse the grievant of dishonesty in light of the shortcomings of its own supervisors is inappropriate.

The Board of Arbitration agrees wholeheartedly with the decision of arbitrator Burns wherein he concluded that it was a condition of employment that the Employer and the employee act honestly. There is no obligation on an Employer to tell its employees that they must be honest. If an employee steals, the employee may be terminated immediately. However, it is the burden of the Employer to establish that the employee stole or otherwise acted dishonestly. The Employer cannot carry its burden of proof by making assertions and arguments. The Employer must establish that the grievant knowingly and purposely set about to deceive the Employer and, in fact, profited by that deception. Unfortunately for the Employer, it has not established a record which would support those conclusions. Even if the Board of Arbitration believed that Mr. K perjured himself during the arbitration hearing and told the truth earlier when he stated that he had no knowledge of the grievant's profit, the panel of arbitrators would still have to conclude that the Employer has failed to meet its burden of proof. At the time Mr. K received the invoice from the grievant, he was aware of all of the facts surrounding this purchase and could have asked the grievant then where he bought the thing and how much he paid for it. Mr. K could then have concluded that it was inappropriate for the grievant to make a profit in this manner and could have denied the payment of the grievant's invoice. One would think that a supervisor in Mr. K 's position would have suggested to the grievant that an invoice on his own business invoices was not appropriate, and he should have required the grievant to produce the original invoice from the outside vendor.

Even if Mr. K had no knowledge of the profit, there is no evidence that the grievant ever gave Mr. K an inaccurate price for the transformer. It is undisputed that when the grievant first contacted Bayside, Bayside informed him that

the list price of the transformer was \$1460. The grievant passed this information on to Mr. K. Aside from the list price, there is no evidence that any other price was ever put forward as the actual cost of the transformer. Had the grievant told Mr. K that he paid \$1220.40 to Bayside for the transformer, that would be deception and would be dishonest. There is no evidence that this occurred. Until the auditors asked, no one bothered to ask the grievant what he actually paid for the transformer, even though the grievant openly and notoriously submitted the bill to the Employer on his own company invoice which sets forth the fact that he is giving the Employer a ten percent discount off of the quoted list price of \$1356. The manner in which the invoice is set up should have suggested to the Employer on its face that \$1356 was not the amount the grievant paid, nor was \$1220.40 the amount the grievant paid. No reasonable employer would expect an employee to purchase an item for the Employer's use and sell it to the Employer at ten percent below what the employee paid for it. In light of the fact that the grievant discounted the item, the Employer should have been immediately on notice that there was a question with respect to the price paid.

The Employer has accused the grievant of knowingly and unlawfully deceiving the Employer by submitting a false invoice. The Employer has failed to prove that the grievant submitted a false invoice or that the grievant unlawfully deceived the Employer or that the grievant engaged in any act of dishonesty. The Employer has established that its internal control system in the Santa Rosa area in June of 1983 was not very good. The Employer has further established that its supervisors failed to review the bills they authorized for payment. The Employer has not established that it has a policy of not doing business with its own employees at a profit. While the

Board of Arbitration believes that the Employer should have a policy that precludes employees from submitting their own independent invoices for payment when items are purchased on behalf of the Employer, it is the Employer's responsibility to establish that policy and publish it so that its employees know what is to be expected.

AWARD

The Employer violated the Agreement when it discharged C. The grievant is ordered to be reinstated to his former position with full back pay and benefits, less any outside earnings that he has received in the interim.

It is so ordered.

November 4, 1985


Gerald R. McKay, Arbitrator


I. W. BONBRIGHT, Employer

~~Concur~~/Dissent

11/7/85
(Date)


JOHN A. MOFFAT, Employer

Concur/Dissent

11/6/85
(Date)


PERRY ZIMMERMAN, Union

Concur/~~Dissent~~

11/8/85
(Date)


CORBETT L. WHEELER, Union

Concur/Dissent

11-8-85
(Date)