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IN ARBITRATION PROCEEDINGS PURSUANT TO TITLE 102 OF THE  
CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy )  
 )  
 between )  
 )  
 LOCAL UNION NO. 1245 OF INTERNATIONAL ) ARBITRATOR'S  
 BROTHERHOOD OF ELECTRICAL WORKERS, ) OPINION AND AWARD  
 )  
 and ) ARBITRATION CASE NO. 139  
 )  
 PACIFIC GAS AND ELECTRIC COMPANY, )  
 )  
 (Involving Case No. 139, discharge )  
 )  
 )  
 )

This Arbitration arises pursuant to Agreement between  
PACIFIC GAS AND ELECTRIC COMPANY, hereinafter referred to as  
the "Company," and LOCAL UNION NO. 1245, INTERNATIONAL  
BROTHERHOOD OF ELECTRICAL WORKERS, hereinafter referred to as  
the "Union," under which ADOLPH M.KOVEN, ESQ., was selected to  
serve as Chairman of a Board of Arbitration which also  
included JOEL ELLIOFF and ROGER STALCUP, Union Board Members,  
and I.W. BONBRIGHT and ROBERT C. TAYLOR, Company Board  
Members, and under which the Award of the Board of Arbitration  
would be final and binding upon the parties.

Hearing was held on May 7, 1986, in San Francisco,  
California. The parties were afforded full opportunity for  
the examination and cross-examination of witnesses, the

introduction of relevant exhibits and for argument. Both parties filed post-hearing briefs.

**APPEARANCES:**

**On Behalf of the Union:**

TOM DALZELL, Attorney at Law  
IBEW Local No. 1245  
Post Office Box 4790  
Walnut Creek, CA 94596

**On Behalf of the Employer:**

L.V. BROWN, JR., Attorney at Law  
Pacific Gas and Electric Company  
245 Market Street  
San Francisco, CA 94106

**ISSUE**

Was the discharge of grievant in violation of the Agreement? If so, what is the remedy?

**Background**

The grievant, a General Construction Field Garage Mechanic A, had worked for the Company for 14 years at the time he was discharged on November 10, 1984, because he failed to follow instructions to submit to a medical examination to determine if he was under the influence of drugs or intoxicants.

The grievant worked as a field mechanic repairing heavy construction equipment. Before 1984, he worked in the field rather than in the garage. In 1980 he was discharged for drug use. He appeared to a supervisor to be very tired, his eyes were watery, his speech slurred, and his movements erratic. He was sent to a doctor, who took samples of his blood and

urine but failed at first to test them for traces of cocaine. The grievant saw the report stating that the tests of blood and urine were negative. Thereafter, the Company asked that the samples be checked for cocaine, and the second test showed that the blood was negative for cocaine, but the urine sample positive. The grievant signed a statement that he had been using 1-1/4 ounces of cocaine a week during April 1980.

The grievant was discharged and filed a grievance, which was later settled. He was reinstated and the termination reduced to a five-day suspension on the basis of his agreement to comply with certain conditions. Among these were that he would "provide acceptable medical evidence in the form of an examination by a qualified professional at Company expense that he had discontinued his admitted past use of intoxicating drugs and his agreement to cooperate in the future with counselors of the Employee Assistance Program to ensure that he was maintaining a "drug free" program. After demonstrating that he had maintained a drug free environment for a one year period, the grievant was to be released from the requirement to meet with the EAP. The settlement continued, "Following grievant's return to work with the Company, the grievant will be required to perform satisfactorily as an Equipment Mechanic without any drug-related employment problem. It is understood that a future discipline or discharge action for the use of an illegal narcotic or prescription drug, except as prescribed by a licensed physician on the job or because of its effect on job performance, will not be grievable, except as to whether

the future drug-related incident occurred."

In October 1984, the grievant was under considerable stress because of personal problems. He asked to be transferred to work in the garage rather than in the field, and also requested a two-week medical leave of absence, which was granted. He was due in to work at 7 a.m. on November 5, but called the Company, said he was ill, that he was going to see a doctor, and that he would be in at 10 a.m. The grievant did not appear at work that day and did not call. He later explained that he had fallen asleep and did not awake until 6 p.m. that night.

When he appeared for work on November 6, Long, the Assistant Superintendent, came from Davis to the garage in Emeryville where the grievant worked, after Long was told that the grievant had not appeared to work the prior day. Long testified that the grievant's speech was slurred, that his eye movements were slow, that he did not respond as he would normally have responded to questions, and that he was unstable. The grievant was ordinarily very neat and clean-shaven. Long's testimony was confirmed by two other supervisors at the meeting. A working foreman testified on the grievant's behalf that although he looked ill on November 6, he was not unstable and his speech was not slurred.

In Long's judgment, the grievant might have been under the influence of drugs and was unable to perform his duties. He instructed the grievant to go to the doctor's office for tests to decide if he had taken drugs. The grievant asked as to the

type of test the doctor would administer, and Long replied that he did not know. The grievant said there were several types of tests, and that he wanted to know what type would be administered before he agreed to take it, and that he wanted to receive the results of the tests at the same time as the Company received them. The grievant was ordered to submit to a medical test by November 9 and was told that he would be terminated if he did not do so. He failed to appear for a test by that date and was terminated for that failure.

The grievant testified that he was sick with the flu on November 5 and 6. He refused to submit to the test for drugs except under the conditions he told the supervisors at the November 6 meeting because he wanted to assure that the tests would not be "manipulated" as they had been in 1980, when they at first were negative for drugs and later the urine sample tested positive.

He testified also on direct examination that he had not used cocaine since 1980, and that in February he had participated in a drug counseling program sponsored by Santa Clara County because he was under considerable stress and was afraid that he would relapse into drug use. On cross-examination, he affirmed that the reason for his participation in the drug rehabilitation program was to prevent a relapse, that he had not used drugs since 1980, and he testified that he had not been arrested since his termination in November 1984.

At this point, the Company attempted to introduce

documents from the Municipal Court indicating that the grievant had been arrested for drug possession in December, 1984. The Union objected, and the exhibits were received on a conditional basis, their admission into evidence depending on the arbitrator's final determination after the parties submitted written arguments on the question of admissibility.

Thereafter, the grievant testified that he participated in a pre-trial diversion program following the December 1984 arrest and had completed it in March 1985.

A Union witness testified that the Company had a published policy concerning the use of drugs, but that the policy did not include a requirement that an employee was required to submit to a test at the demand of his supervisor. When the Company made a proposal for such a requirement, the Union objected, and the Company withdrew the proposal.

### Discussion

The first question is whether the grievant had agreed as a condition of his reinstatement in 1980 to submit to tests for drugs requested by Company personnel. The Company does not rely strictly on the settlement agreement quoted above as justifying such a requirement but, rather, on the grievant's testimony at the hearing that a condition of his return to work in 1980 was "seeing a doctor upon Company request." This statement is obviously too general to justify a conclusion that the grievant understood the settlement agreement as requiring that he submit to examinations for drugs at Company

request for an indefinite period. In fact, the settlement agreement imposes no such requirement. It states that the grievant would "provide acceptable medical evidence in the form of an examination by a qualified professional at Company expense that he has discontinued his admitted past use of drugs," that he would cooperate with counselors of the Employee Assistance Program, and that if he maintained a drug-free environment for one year, he would be released from the latter requirement. This statement does not mean that the grievant would be required to submit to drug testing for all future time but that before he returned to work he would be required to submit to such an examination. The grievant's admission that as a condition of returning to work in 1980 he agreed that he must see a doctor upon Company request is entirely consistent with this conclusion. Thus, the Company failed to prove that the grievant violated the conditions of this 1980 reinstatement by failing to agree to the test ordered on November 6, 1984.

The Union contends that the evidence of the grievant's arrest is not admissible for several reasons. First, under section 1000.5 of the Penal Code, a record of an arrest for drug possession may not be used without the arrestee's consent to deny employment if he has successfully completed a drug diversion program. Second, Labor Code section 432.7 prohibits an employer from utilizing a record of arrest which did not result in conviction in making termination decisions. Third, even if post-termination evidence is admissible to decide

questions of credibility, here the grievant was authorized by Penal Code section 1000.5 to deny that he had been arrested for a crime involving drugs. Finally, the arrest record was not relevant because it does not tend to prove or disprove any material issue in the case.

The Company claims, first, that the record of arrest was introduced to impeach the grievant. That is, he did not answer truthfully when he was asked whether he had been arrested, and he stated on both direct and cross-examination that he had not used drugs since his 1980 reinstatement.

It cannot be denied, however, that Penal Code section 1000.5 authorized the grievant to answer that he had not been arrested since he had completed the diversion program. It is not clear that section 1000.5 protects his further misstatement that he had not used drugs since 1980. But even assuming that he does not have the protection of the statute for this purpose and that his credibility is therefore damaged by his testimony, the relevance of this lack of credibility is not clear under the circumstances of the present case. The facts are not in serious conflict: the grievant was ordered to take a test for drugs and he refused to do so. Whether that refusal justified his discharge is the issue here, not whether he lied at the arbitration hearing about whether he had used drugs after his termination.

Another assertion by the Company is that since the grievant placed his credibility in issue by testifying on direct examination that he had not taken drugs since 1980, it



would be unfair to prevent the Company from exploring the truth of his statement on cross-examination by introducing the arrest record. There is some justice in this view, although it may contradict the terms of section 1000.5 of the Penal Code, and again the matter relates to the issue of credibility which is of questionable relevance in this case. Even if the grievant was not being truthful about his drug activities after 1980, the reason for his discharge was his failure to take the test ordered by the Company and not his use of drugs after 1980.

The Company makes another claim that would make the evidence of the grievant's drug involvement relevant. It argues that a condition of the grievant's reinstatement in 1980 was not only that he submit to a test for drugs at the Company's request, but also that he maintain a "drug-free life-style" following re-instatement. There is nothing in the settlement agreement which imposes such a requirement. It does provide that "a future discipline or discharge action for the use of an illegal narcotic...drug...on the job or because of its effect on job performance, will not be grievable, except as to whether the future drug-related incident occurred." If the court record was admissible it might provide evidence that the grievant was not maintaining a "drug-free life style," but since the arrest occurred after his discharge it had no relation to the grievant's job. Under the settlement agreement, even an arrest for drug possession prior to the discharge would not have called for a

non-grievable termination unless it was "on the job" or had an "effect on job performance."

Finally, the Company claims that the evidence of the grievant's arrest was admissible even though it occurred after he was terminated. It relies on a prior arbitration case, No. 46, which upheld the discharge in part on the basis of misconduct which the Company discovered after the grievant was terminated. There is a critical distinction between that case and the present one, however. In Arbitration No. 46, the misconduct occurred on the job prior to discharge even though the Company did not learn about it until later. Here, by contract, the grievant's arrest occurred following his discharge.

In short, since the grievant was discharged for his refusal to take a test to determine if he was under the influence of drugs, he did not agree to take such a test in the 1980 settlement agreement, and the Company does not claim that it was entitled to compel him to take such a test aside from his alleged agreement to do so, the discharge cannot be upheld.

In view of this conclusion, it is not necessary to consider any of the other issues raised by the parties.

As to the remedy, the grievant is entitled to reinstatement but without back pay or other benefits. Clearly, he bears considerable responsibility for the events which led to his discharge. He failed to report to work at the beginning of his shift at 7 a.m. on November 5 and also

failed to report at 10 a.m. after he promised to come in at that hour following a visit to a doctor. His statement that he fell asleep and did not awaken until 6 p.m. on that day did not justify his failure to appear any more than it would have justified an employee who was late for work. The grievant's appearance and demeanor on November 6, when viewed in the light of his prior history of drug use, justified the Company in concluding that he might be under the influence of drugs and in requesting that he submit to a test to determine whether he had been taking drugs. Although his refusal of the request does not justify the discharge, the grievant's conduct in failing to report to work as promised on November 5 generated the events which led to his discharge.

AWARD

The grievant was discharged in violation of the Agreement. He is entitled to reinstatement but without back pay or other benefits.

Dated: \_\_\_\_\_

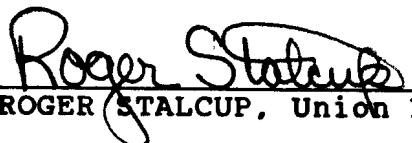
12-16-86

  
ADOLPH M. KOVEN, Chairman,  
Board of Arbitration

Concur:

  
\_\_\_\_\_  
JOEL ELLIOFF, Union Board Member

Dated: 12/22/86

  
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ROGER STALCUP, Union Board Member

Dated: 12/22/86

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I.W. BONBRIGHT, Company Board Member Dated: \_\_\_\_\_

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ROBERT C. TAYLOR, Company Board Member Dated: \_\_\_\_\_

Dissent:

\_\_\_\_\_  
JOEL ELLIOFF, Union Board Member Dated: \_\_\_\_\_

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ROGER STALCUP, Union Board Member Dated: \_\_\_\_\_

*I.W. Bonbright*  
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I.W. BONBRIGHT, Company Board Member Dated: 12/22/86

*R.C. Taylor*  
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ROBERT C. TAYLOR, Company Board Member Dated: 12-22-86