

ARBITRATION PROCEEDING

1 In the Matter of a Controversy Between:)
2 INTERNATIONAL BROTHERHOOD OF ELECTRICAL)
3 WORKERS, AFL-CIO, LOCAL UNION 1245,)
4 Complainant;)
5 and)
6 PACIFIC GAS AND ELECTRIC COMPANY,)
7 Respondent.)
8 Involving the Discharge of)
9 (Arbitration Case No. 155))

ARBITRATOR'S
OPINION AND AWARD

10 APPEARANCES:

11 For the Union:

12 Tom Dalzell, Attorney at Law
13 IBEW Local Union No. 1245
14 P.O. Box 4790
15 Walnut Creek, CA 94596

16 For the Employer:

17 Kenneth Yang, Esq.
18 Legal Department of PG&E
19 77 Beale Street
20 San Francisco, CA 94106

21 PRELIMINARY STATEMENT

22 David C. Nevins, Neutral Chairman of the Board of
23 Arbitration: This matter involves a controversy between Local
24 1245 of the International Brotherhood of Electrical Workers (the
25 "Union") and Pacific Gas and Electric Company (the "Company"). A
26 hearing was held on October 27, 1987, at which time both parties
27 were accorded a full opportunity to present evidence and
28 arguments. Briefs were submitted on January 22, 1988. The
parties agree to have the following question resolved:

//

//

1 all departments in the building. She was directed to observe
2 employees and prepare daily reports on any illegal activity, such
3 as theft or drug use, which she observed. If a particular
4 employee became the focus of her observations, she was to prepare
5 a separate report on that employee's activities.

6 Ms. Tucker (who did not testify at the hearing in this
7 matter) prepared five reports implicating the grievant in drug
8 use. The first four reports allege that the grievant was under
9 the influence of marijuana or hashish during work hours, on four
10 separate dates in 1986. Ms. Tucker never observed the grievant
11 using any illegal drugs; her allegations were based solely on
12 her observation of his physical appearance. The fifth report
13 alleges that the grievant was present when another employee sold
14 cocaine to Ms. Tucker.

15 On June 16, 1986, the grievant was interrogated by the
16 Company's Director of Corporate Security, Lyman Shaffer. During
17 that interrogation, the grievant admitted smoking marijuana on
18 Company time "two or three" times. He also signed a written
19 statement, prepared by Mr. Shaffer, which indicated that while
20 he was moving his car outside with a fellow employee, he
21 "provided" a marijuana cigarette which he and the fellow employee
22 smoked before returning to work. The grievant now claims he
23 never said he "provided" the drug, but only that he "shared" it.
24 He now contends that all the marijuana he consumed was provided
25 by the other employee. He has consistently denied ever using
26 hashish, or being present at any cocaine sale.

27 The written statement of the other employee, who
28 admitted to drug use and sales, states that he "smoke[d] with

1 [the grievant] a couple of times a week in the truck--either a
2 bowl or a joint," and that he smoked hashish with the grievant in
3 the past. The statement does not explicitly indicate whether
4 such activity occurred during working hours. The statement also
5 does not indicate the grievant was present at any cocaine
6 transaction.

7 The grievant's supervisor reviewed the report of the
8 Security Department (which summarized Ms. Tucker's reports) and
9 the grievant's statement. She determined that the grievant's
10 activities were in violation of the Company's Drug Prevention
11 Policy and made the decision to terminate him. The termination
12 was effected July 2, 1986.

13 ANALYSIS AND DISCUSSION

14 I. The Parties' Basic Contentions.

15 The Company contends that the discharge of the grievant
16 was for just cause. It argues that there is adequate evidence
17 that the grievant was under the influence of illegal drugs while
18 at work on several occasions and also was present at a cocaine
19 sale, which he did not report. Further, the Company claims the
20 grievant's own admissions show that he used marijuana while at
21 work and also furnished marijuana to another employee. "Furnishing"
22 a drug to another employee is grounds for immediate termination
23 under the Drug Prevention Policy, according to the Company. This
24 view was adopted by the parties in a previous precedential
25 grievance decision.

26 The Company argues that the grievant's current attempts
27 to retract his signed admissions must be rejected. The grievant
28 admitted he "provided" marijuana to another employee, and to

1 provide something is the same as to "furnish." Also, the
2 grievant's denial that he was aware of the Drug Prevention Policy
3 is not credible, since he admitted he knew it was wrong to use
4 drugs or share them at work. Therefore, the Company states, the
5 discharge must stand.

6 The Union contends, conversely, that there was no
7 just cause for the grievant's discharge for a number of reasons.
8 First, the Union contends the grievant was not aware that the
9 penalty for using or sharing marijuana was termination. Since
10 he was unaware of the potential consequences of his actions, the
11 termination cannot be upheld. Next, the Union argues that the
12 Company did not meet its burden of proof, since its case is based
13 entirely on hearsay and on admissions which have been shown to be
14 inaccurate. Further, the Union claims that past treatment of
15 similar cases shows that simple marijuana use has not resulted
16 in discharge, and the mere fact that the grievant shared one joint
17 with a friend does not remove his conduct from the category of
18 simple use. For all these reasons, the Union argues that the
19 grievant should be reinstated with, at most, a short suspension
20 as punishment for his admitted misconduct.

21 II. Discussion.

22 As with any discharge case, the burden of proof is on
23 the Company to show that the grievant committed the acts of which
24 he is accused and that those acts constituted just cause for
25 discharge. The Union contends that the Company has not met that
26 burden in the present case, relying as it did on the hearsay
27 statements of an investigator who was not even called to testify.
28 Clearly, the allegations against the grievant are serious and,

1 thus, the evidence against him should be clearly and directly
2 probative of his guilt.

3 The Company's initial "evidence" of the grievant's
4 improper drug activity consisted of the reports prepared by
5 Investigator Tucker. Those reports state that on four separate
6 occasions Ms. Tucker observed the grievant to be under the
7 influence of marijuana. On a fifth occasion, she claims the
8 grievant was present when another employee sold her cocaine (the
9 same employee to whom the grievant purportedly "provided"
10 marijuana). Ms. Tucker was not called as a witness and there
11 was no opportunity for her to be examined as to the basis for her
12 allegations. Her reports do not claim she saw the grievant using
13 drugs, but only that she observed him under their influence.
14 Her reported observations were not corroborated by the testimony
15 of any other witness (except, as discussed below, the grievant
16 himself).

17 Ms. Tucker's reports are classic hearsay: out of court
18 statements being offered to prove the truth of what they assert.
19 Although hearsay declarations are frequently accepted as evidence
20 in arbitration proceedings, the inherent dangers and risks which
21 dictate their inadmissibility in many other proceedings remain.
22 When the hearsay declarant is unavailable, there is no opportunity
23 to find out or test, through cross-examination, why and how the
24 declarant knew what the hearsay declaration asserts. For example,
25 we can ask without satisfaction just how closely did Ms. Tucker
26 observe the grievant and for how long? What was it that
27 convinced her that her allegations were correct? What particular
28 facts would convince our Board of Arbitration that her written

1 reports were indeed true and accurate?

2 Ms. Tucker's reports against the grievant involve
3 potentially serious misconduct. Their charges are simply too
4 serious to be substantiated solely on the basis of hearsay
5 evidence. If she had testified directly as to her observations,
6 or if her reports were corroborated by the observations of a
7 supervisor or other employee, her written statements might be
8 persuasive and probative. But standing alone as key, material
9 evidence as to a serious complaint against the grievant,
10 Ms. Tucker's reports that the grievant was under the influence
11 of drugs on four separate dates and was present at a cocaine
12 sale cannot be fairly accepted as convincing proof of his
13 misconduct.

14 The same problems apply to the statement of the other
15 employee who is alleged to have engaged in illegal drug use with
16 the grievant and to have conducted the cocaine sale. His signed
17 statement indicates only that he smoked with the grievant two
18 or three times a week and that he had smoked hashish with the
19 grievant. The statement is not even clear that these activities
20 occurred at work. Indeed, the statement is even further
21 weakened as probative evidence, as it amounts to little more
22 than a declaration of a co-conspirator. The signed statement
23 is simply too unreliable to prove the matters asserted therein
24 and, as noted, even fails to make clear or specific that the
25 grievant acted improperly while at work.

26 What direct evidence is there, then, to substantiate
27 the Company's charge? It must rest, if anywhere, on the
28 grievant's own purported admissions. When confronted, in what

1 appears to have been a fair and properly conducted investigatory
2 interview,^{1/} the grievant did admit to using marijuana "two or
3 three" times during work hours and also that he "provided" a
4 marijuana cigarette which he and another employee smoked before
5 returning to work. Although the grievant still admits to the
6 marijuana use, he now denies that he "provided" any of the
7 marijuana. He claims he only stated that he "shared" marijuana
8 with the other employee and now asserts that it was the other
9 employee who provided the marijuana.

10 The grievant's attempts to retract his signed admission,
11 now that he has realized its full consequences, are not convincing.
12 The grievant's overall testimony was not particularly credible.
13 He continually failed to recall pivotal facts, particularly on
14 cross-examination. His explanation that he was attempting to
15 protect his friend by earlier claiming that he provided the drug
16 is not convincing; why would he implicate him at all if he was
17 trying to "protect" him? Indeed, the grievant made an effort to
18 correct a portion of his written statement when reviewing it, and
19 one can presume that if he wished to correct the notion that he
20 "provided" the marijuana in question he would have or could have
21 done so. Whether he used the word "shared" or "provided," in his
22 investigatory interview, it is clear that the grievant did admit
23 that he brought marijuana with him to work, made it available to,
24 and smoked it with his friend during working hours.

25 The issue then becomes whether the grievant's admitted
26 misconduct was sufficient to justify his discharge. It is true,
27

28 ^{1/} In light of the grievant's signed waiver of Union representation, the contention that he was deprived of such representation is rejected.

1 as the Union argues, that in the past the Company has been more
2 tolerant of occasional marijuana use among its employees.
3 Generally, limited use has been treated much like an occasional
4 episode of beer-drinking and punished only by a suspension of
5 limited duration. The Company acknowledges that if simple use
6 or possession were the only activity alleged against the grievant,
7 a lesser penalty would be appropriate. However, because the
8 grievant also furnished the drug to a co-worker, the Company
9 argues his discharge was mandated under the negotiated Drug
10 Prevention Policy.

11 The Drug Prevention Policy is quite clear as to the
12 penalty for "furnishing . . . illegal drugs or controlled
13 substances" It states that such conduct "will result in
14 termination of employment."

15 Under the grievant's signed admission, it must be
16 concluded that the grievant engaged in "furnishing" a controlled
17 substance, marijuana. It is true that the grievant was not
18 selling drugs, nor providing them in quantity or to many
19 employees. But if he had not brought the marijuana to work and
20 shared it with his friend, his friend conceivably would not have
21 consumed the drug on break and returned to work under its
22 influence. The policy draws the line clearly, separating personal
23 drug use from use which encourages and makes available such use
24 to other employees. If the parties had intended termination to
25 be the penalty only for sales or attempted sales of drugs, they
26 would not have included the word "furnished," as they did under
27 the termination penalty. The policy most severely punishes those
28 who would expand drug use at the workplace, while the Company is

1 attempting to limit, if not eliminate, such use. In one sense,
2 it does seem harsh to terminate an employee for sharing a single
3 marijuana cigarette, particularly when solitary usage is not
4 generally a dischargable offense. But, the policy is clear, and
5 it would require linguistic acrobatics far beyond the norm to
6 somehow declare that the grievant did not "furnish" the drug
7 in question. Even though he did it only once, and with a small
8 quantity of a "less serious" type of drug, he still violated the
9 clear terms of the policy.

10 Nor can it be said that the policy itself is unduly
11 harsh or unfair. Even if it were contended to be so, the fact is
12 that the policy was not unilaterally implemented by the Company,
13 but was negotiated jointly with the Union. As with any
14 collectively bargained agreement, the Union had full authority
15 to determine, with the Company, how employees will be sanctioned
16 for workplace drug usage. The policy as negotiated is a clear
17 and equitable attempt to address a serious and dangerous problem
18 in the workplace. It cannot be said that termination is, per se,
19 too severe a penalty for someone who has furnished drugs to
20 another employee at the workplace.

21 An additional argument raised by the Union is the
22 grievant's alleged lack of notice of the Drug Prevention Policy.
23 The grievant claims not to have received his copy of the Policy
24 in the mail, nor to have read it in the Union newspaper, or
25 otherwise to have been made aware of its contents.

26 In the first place, the grievant's alleged lack of
27 knowledge of the policy is not convincing. Receipt of the policy
28 was one of the many things that the grievant failed to recall at

1 the hearing in this matter; it nevertheless seems likely that it
2 was delivered to him. The grievant had seen at least one
3 anti-drug use film prepared by the Company. He did admit
4 knowing it was wrong to use drugs at work, which indicates at
5 least some amount of common sense on his part, if not full
6 knowledge of all the details of the policy.

7 Further, the grievant was on some constructive notice
8 of the terms of the policy. It was a negotiated policy and
9 satisfactory efforts were made by both the Company and the
10 Union to apprise all employees, including the grievant, of the
11 terms of the policy. That the grievant apparently chose to
12 ignore those efforts does not excuse his violation of the policy.

13 In summary, there is no basis to overturn the
14 termination of the grievant. By his own admission, he furnished
15 drugs to another employee while at work and on Company time.
16 The Drug Prevention Policy, adequately published by the parties,
17 mandates termination for such an offense. There are no factors

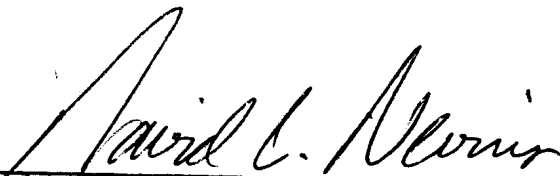
18 //
19 //
20 //
21 //
22 //
23 //
24 //
25 //
26 //
27 //
28 //

1 to seriously mitigate against imposition of this penalty. The
2 grievance is therefore denied.

3 AWARD

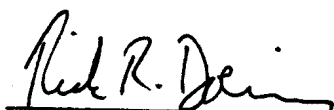
4 The grievance is denied. The discharge
5 of the grievant was for just cause.

6 February 9 , 1988.

7
8
9 

10 David C. Nevins.
11 Neutral Chairman

12 Concur/~~Dissent~~

13 

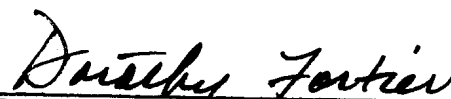
14 Rick Doering, Company Arbitrator

15 Concur/~~Dissent~~

16 

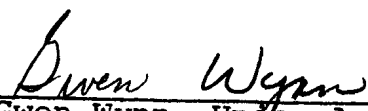
17 Storme Smithers, Company Arbitrator

18 ~~Concur~~/Dissent

19 

20 Dorothy Fortier, Union Arbitrator

21 ~~Concur~~/Dissent

22 

23 Gwen Wynn, Union Arbitrator

24
25
26
27
28