ARBITRATION PROCEEDING

In the Matter of a Controversy Between:

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL UNION 1245,
Complainant;

and

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

Involving the Discharge of
(Arbitration Case No. 155)

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

For the Union:

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For the Employer:

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PRELIMINARY STATEMENT

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

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ISSUE

Was the discharge of grievant S. in violation of the parties' Clerical Labor Agreement? If so, what is the remedy?

BACKGROUND

The grievant, S. , was hired by the Company in 1984 to work at its central office building. He worked on the graveyard shift as a Utility Clerk in the Customer Accounting division of the Company. His job duties, which varied from week to week, included transferring meter books by means of a heavy cart, micro-filming change tags, and clerical work. There were no complaints about the quality or quantity of the grievant's work.

In 1985 the Company and the Union negotiated a new "Drug Prevention Policy." That policy provides in relevant part:

> 1. Employees must not possess,use, furnish, sell, or offer illegal drugs or other controlled substances (as defined under Federal or California Law) while on the job or on Company premises. Proof that an employee furnished, sold, or offered illegal drugs or controlled substances while on the job or on Company premises will result in termination of employment. Proof of possession or use of illegal drugs or controlled substances while on the job or on Company premises will be cause for disciplinary action up to and including termination of employment.

The Company mailed copies of the new policy to the homes of all its employees in March of 1985. The policy was also publicized in the Union newspaper in March and April of 1985.

In mid-1985 the Company decided to institute an undercover surveillance operation on the graveyard shift at its central office building. It hired Mary Tucker, an undercover operative, to conduct the surveillance. Ms. Tucker was assigned as a messenger in the mail room so that she would have access to

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

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

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

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

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

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

ANALYSIS AND DISCUSSION

I. The Parties' Basic Contentions.

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

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

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

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

II. Discussion.

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

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

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

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

reports were indeed true and accurate?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

AWARD

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

February 9 , 1988.

David C. Nevins.
Neutral Chairman

Concur/~~Dissent~~

Rick Doering, Company Arbitrator

Concur/~~Dissent~~

Storme Smithers, Company Arbitrator

~~Concur~~/Dissent

Dorothy Fortier, Union Arbitrator

~~Concur~~/Dissent

Gwen Wynn, Union Arbitrator