In the Matter of an Arbitration between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, Complainant, and PACIFIC GAS & ELECTRIC COMPANY, Respondent. RE: Arbitration Case No. 167. Discharge	Opinion & Decision of Board of Arbitration -oOo- San Francisco, California

BOARD OF ARBITRATION

Roger Stalcup, Union Board Member
Frank Saxsenmeier, Union Board Member

Rick Doering, Company Board Member
Kenneth Yang, Company Board Member

Barbara Chvany, Neutral Board Member

APPEARANCES

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INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (Jt. Ex. 1). Pursuant to the Agreement, the Board of Arbitration was duly constituted and an arbitration hearing was conducted on January 17, 1990 in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as Tr. ___). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (Tr. 2-3). Post-hearing briefs were filed by the Parties, and the matter was deemed submitted for decision on March 20, 1990.

The Grievant, G , was hired by the Company on July 10, 1972. He was discharged effective June 15, 1988. He was a Journeyman Lineman at the time of his termination (Tr. 3, 61). His discharge was triggered by an accident on May 20, 1988, when the Grievant hit a parked car while driving a Company vehicle on Company time (Jt. Ex. 3, Att. 3; Tr. 4, 6, 8).[1] The matter was grieved (Jt. Ex. 3). The grievance was not resolved in the lower steps of the grievance procedure, leading to this arbitration.

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[1] For the period between May 20, 1988 and June 15, 1988, Mr. G was on vacation with pay (Tr. 3).

ISSUE

Whether the discharge of the Grievant, G , was for just cause; and, if not, what shall be the remedy? (Tr. 2).

REMEDY REQUESTED

The Union requests that Mr. G be reinstated with full backpay and benefits and all rights restored (Tr. 3; Un. Bf. 9). The Company seeks denial of the grievance in its entirety (Tr. 3; Co. Bf. 14).

PERTINENT AGREEMENT PROVISIONS

Section 7.1, MANAGEMENT OF COMPANY, sets forth the Company's right to "discipline or discharge employees for just cause," within the limitations set forth in the Agreement and applicable decisions interpreting it (Jt. Ex. 1).

The Parties have entered into an AGREEMENT ON POSITIVE DISCIPLINE, which was in effect during the relevant period. That Agreement provides, in part, as follows:

> II. THE POSITIVE DISCIPLINE SYSTEM
>
> STEP THREE - DECISION MAKING LEAVE (DML)
>
> The DML is the third and final step of the Positive Discipline System. ... It is an extremely serious step since, in all probability, the employee will be discharged if the employee does not live up to the commitment to meet all Company work rules and standards during the next twelve (12) months ... .
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> * * *

III. TERMINATION

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML. ... .

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider mitigating factors (such as Company service, employment record, nature and seriousness of violation, etc.) before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. ... .

(Jt. Ex. 2)

BACKGROUND

The facts of this case are substantially undisputed. On May 20, 1988, the Grievant hit a parked car while driving a Company line truck on Christie Street, near the intersection with 64th, in Emeryville, California (Tr. 6-8). The accident occurred at approximately 9:10 a.m. on a clear day, on flat terrain (Tr. 17; Jt. Ex. 3). The parked car involved, a Mazda, was parked on the right side of the street, at the head of a line of approximately 30 parked cars (Tr. 8, 16; Jt. Ex. 3). The site of the accident was along a section of the street that afforded substantial visibility, and there was no obstruction to the Grievant's view of the Mazda (Tr. 7-8).[2]

The accident occurred when the right side of the Grievant's line truck came into contact with the left side of the Mazda,

[2] The testimony indicates that the site of the accident could be seen from approximately 3,000 feet away as a vehicle was approaching (Tr. 7).

striking the Mazda's mirror on the driver's side and scraping along the side of the vehicle for approximately 4 feet, until the line truck came to a halt (Jt. 3; Tr. 12-16, 29-31; Co. Ex. 1). The lugs of the line truck's rear wheel axles were imbedded in the fender of the Mazda (Tr. 12-14; Co. Ex. 1).

The Grievant was traveling approximately 5 miles per hour at the time (Tr. 66). When he heard the noise of the impact, he immediately stopped his vehicle (Tr. 67). In the position he stopped, the sides of the vehicles were in contact towards the front, and very close together towards the rear of each vehicle (Tr. 8-9). The Grievant immediately reported the accident (Tr. 67).

Clifford Ray, an Electric Construction Supervisor, investigated the incident, arriving approximately 30 minutes later (Tr. 6). He took photographs, measurements and analyzed the scene. He determined that the street was 44 feet, 3 inches wide (Jt. Ex. 3; Tr. 15-16, 25-26). At the point the accident occurred, there were cars parked only on the right side of the street, and the opposite side was a red zone (Tr. 26, 33, 35; Co. Ex. 1). The Mazda was approximately 5 feet wide and was parked less than a foot from the curb; and, the PG&E line truck was approximately 8 feet wide (Tr. 26). There was construction going on farther down the road, where there were some cones and barricades and the road narrowed (Tr. 65). Although traffic in the area was light, there were trucks due to the construction (Tr. 10, 64, 65-66).

Mr. Ray inquired of the Grievant what had occurred, and the Grievant told him he was traveling north at approximately 5 miles per hour when he saw a cement truck coming towards him, he swerved to the right to avoid it, and hit the parked car (Tr. 8, 19; Jt. Ex. 3, Att. 4, 5). The Grievant could not describe the cement truck by color or other particulars (Tr. 9). He told Mr. Ray he did not stop, sound his horn, wave, flash his lights or take other action to attract the attention of the cement truck driver when he observed it approaching (Tr. 9-10). He reported to Ray that his first thought was to turn the wheel, and he did not notice the Mazda parked in front of the other cars (Tr. 9, 21). He further told Ray that he did not realize he had hit the Mazda until he heard a crash as he pulled away (Tr. 10).

From his investigation of this accident, Mr. Ray drew the conclusion that the position of the line truck vis a vis the Mazda was inconsistent with the Grievant's having made a hard right veering turn (Tr. 10-13, 29, 31-32; Jt. Ex. 3; Co. 1). The vehicles came to a stop in a position that was almost parallel. This gradual angle indicated the Grievant had not swerved sharply just prior to contact (ibid). Mr. Ray further testified that street traffic was passing the line truck without difficulty (Tr. 10). Under the circumstances and conditions involved, Mr. Ray concluded that the accident was avoidable (Tr. 12, 18, 32).

Later that morning, after investigating and documenting the accident, Mr. Ray discussed the matter with General Foreman Chris Heimgartner (Tr. 21-22). A meeting later occurred among the Grievant, a Union Shop Steward, the General Foreman and Mr. Ray

concerning the incident (Tr. 22-23, 38). In the meeting, the Grievant offered the same explanation he had given to Mr. Ray at the accident site, that is, that he swerved to the right to avoid a cement truck, causing him to make contact with the Mazda (Tr. 24, 38). No additional explanation was offered (Tr. 39). In the meeting, he confirmed that he had not taken any other evasive or preventative action (Tr. 24-25, 39).

Following the meeting, Mr. Ray maintained his belief that the accident was avoidable. In his view, there was ample room to maneuver to avoid the oncoming vehicle without striking the parked car (Tr. 22, 25). Although he did not find intentional misconduct, he concluded the accident resulted from the Grievant's negligence (Tr. 35-36).

Acting General Foreman Heimgartner concurred with Ray's evaluation that the accident was preventable and resulted from negligence on the Grievant's part (Tr. 43). Following the meeting, he made the decision to recommend termination of the Grievant, which recommendation was approved (Tr. 37, 40; Jt. Ex. 3, Att. 3). The termination was based upon the Grievant's "inattention and negligence" in the accident on May 20, 1988, viewed in the context of "the totality of [his] record" and the Positive Discipline System (Jt. Ex. 3, Att. 3). There was no allegation of willful misconduct.

At the time the accident occurred, the Grievant was at the Decision Making Leave (DML) stage in the Positive Discipline System (Tr. 28; Jt. Ex. 2, 4). The DML resulted from a work incident in which the Grievant was charged with violating AP Rule

10a, Care in the Performance of Duties, and was issued in view of his "previous record of repeated safety violations and irresponsible conduct" (Jt. Ex. 4).[3] As set forth in the provisions cited hereinabove, while in DML status, an employee is subject to termination for an additional disciplinary problem within a 12-month period. It is undisputed that the accident of May 20, 1988 occurred within the relevant 12-month period of the Grievant's DML.

In reaching the decision to recommend termination, the Acting General Foreman testified he took into consideration not only the facts of the accident, but the Grievant's DML status, his years of service, and his past record. Under the circumstances, he concluded the incident was not excused or mitigated (Tr. 42-43).

The record establishes that the Company has Rules governing safety, accident prevention, and the use of reasonable care in the operation of motor vehicles (Tr. 28-29; Jt. Ex. 5). It is undisputed that employees have been disciplined in the past for preventable accidents (Tr. 40-41, 42, 59). At the time of the Grievant's termination, avoidable automobile accidents were consistently treated as falling within the "conduct" category under the Positive Discipline System (Jt. Ex. 2; Co. Ex. 2; Tr. 46-47).[4]

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[3] The initial discipline taken against the Grievant was a final warning in lieu of a five day suspension, which action was converted to a DML when the Parties adopted the Positive Discipline System. A grievance filed concerning the issuance of the final warning was denied by the LIC (Jt. Ex. 4).

[4] Over a year after this termination, the Parties reached an agreement to transfer this type of offense to the work performance category under the System (Tr. 49-50; 51; Co. Ex. 3).

Grievant's Testimony:

At the hearing, the Grievant testified there was heavy construction going on down the street, and there were trucks in the area as a result, although traffic was generally light (Tr. 64, 65-66). There was no divider or marked lane lines on the street (ibid).

The Grievant further testified that, as he was proceeding north on Christie Street, he suddenly saw a big truck speeding down the middle of the street, approximately a 150 feet ahead of him (Tr. 66, 72). He "slowed down and pulled over some," traveling approximately 5 miles per hour, and the truck passed within 6 feet of him (Tr. 66, 77). The truck was noisy, and he did not initially hear the impact of his truck with the Mazda (Tr. 66). He further testified that he did not see the Mazda until after he had hit it (Tr. 71). He confirmed he had not taken any action to gain the attention of the cement truck driver at the time of the incident (Tr. 70).

Gurke Incident:

Dean Gurke, a Business Representative for the Union formerly employed by the Company, testified he was involved in an avoidable accident in the last quarter of 1987 while he was assigned to the Oakport Service Center in Oakland, the same place the Grievant was assigned at the time of the accident at issue in this case (Tr. 53, 63). Mr. Gurke testified that he was not disciplined as a result of the incident (Tr. 55).

Mr. Gurke's recollection was sketchy concerning the specifics of the accident, the investigation, and the involvement of other crew members (Tr. 56-57). However, he did recall that the street was narrow (Tr. 58). When supervision spoke with him about the matter, he was advised to avoid accidents in the future, although no formal discipline was issued. (Tr. 58-59). Mr. Gurke acknowledges that employees have been disciplined in the past for avoidable accidents (Tr. 59).

POSITIONS OF THE PARTIES

The Company:

According to the Company, it reached a reasonable conclusion that this accident was avoidable, and the evidence presented sustains that conclusion. The Grievant clearly caused a preventable accident, with no good explanation for its occurrence, at a time when he was on active DML resulting from his prior record of safety violations and irresponsible conduct. In the Company's view, the Grievant was not paying attention to what he was doing and admittedly struck a parked car under conditions which provide no excuse.

The Grievant's own testimony at the hearing indicates he did not quickly swerve to avoid striking an oncoming truck. He was traveling slowly, he saw the truck from 150 feet away, and he unnecessarily kept veering towards the right until his truck hit the Mazda. The Grievant took no reasonable steps to avoid the collision by attempting to gain the cement truck driver's attention. As the Grievant admitted at the LIC, he was not aware of

where his vehicle was on the road, and there is no acceptable explanation for his hitting the parked car.

The Company maintains that termination was the appropriate discipline, given the Grievant's status under the Positive Discipline System at the time. As the Positive Discipline System provides, there is only one active DML allowed (Jt. Ex. 2). The Grievant had been specifically notified that further irresponsible conduct or violation of safety rules would result in his termination. The Grievant's lengthy period of employment was not adequate to mitigate the incident under the circumstances, and the Grievant's disciplinary history refutes any allegation of good performance during his tenure of employment.

According to the Company any contention that the level of discipline imposed was too severe must be rejected. Although the Company does not charge the Grievant with intentionally hitting the Mazda, the accident occurred due to his negligence, and discipline therefor is proper. The Company contends that failure to use good judgment can be just as destructive to Company property as intentional misconduct.

The Union:

The Company has not charged the Grievant with willful misconduct or gross negligence and, at worst, the incident involved mere negligence. When mitigating factors are considered, such as Company service, employment record, and nature and seriousness of the violation, the record fails to support the discipline imposed by the Company.

In this regard, the Union points out the Grievant had almost 16 years of service. While the Grievant's employment record was imperfect, his record was unblemished for 9 months prior to this accident, and the Grievant had demonstrated successful rehabilitation in his past record. All of these factors mitigate in his favor. In addition, avoidable accidents have not always constituted automatic grounds for discipline, as demonstrated by the testimony of Mr. Gurke.

The accident was caused by the Grievant's attempt to avoid an accident with the cement truck. Although his striking the Mazda was regrettable, it was unavoidable under the circumstances and preferable to a head-on collision with the cement truck, which would have led to greater injury. At worst, inattention or negligence was shown.

After full consideration of the above mitigating factors, the Union concludes the Grievant's termination was not for just cause. The Union emphasizes that the Grievant has been forthright and honest concerning the incident, and has demonstrated his ability to learn from past mistakes.

DISCUSSION

The conclusion is required that the Company has met its burden of establishing just cause for the Grievant's termination. First, it is undisputed that the Grievant was on active DML status at the time of the incident in question. He had an obligation to meet all Company work rules and standards for the twelve months of his DML, and he was subject to termination in the event he failed

to do so (Jt. Ex. 2). He had received clear notice that discharge could result from further violations, as follows:

> In view of the facts found in this case and your previous record of repeated safety violations and irresponsible conduct, you are being given this last and final letter as a final warning in lieu of a five day disciplinary suspension. Any further violations of T&D Bulletins safety rules employee conduct, Company standard practices or further irresponsible conduct will result in your discharge.
>
> (Jt. Ex. 4)

Second, the Company has established that the Grievant committed a violation of Company rules by incurring an accident caused by his negligence on May 20, 1988. Even viewing the record in a manner most favorable to the Grievant, the evidence establishes the accident was preventable. The Grievant's own testimony demonstrates that he had the opportunity to observe the oncoming cement truck from a distance of 150 feet, providing him the opportunity to take preventative measures; and, it shows that the truck passed him with a clearance of 6 feet, leaving adequate clearance for the truck to pass without his having to pull so far to the right that he struck the Mazda.

Moreover, the Grievant's own testimony and the physical evidence establish that he did not swerve abruptly to avoid a head-on accident with the cement truck. Rather, he kept slowly pulling to the right, and did so more than he needed to in order to avoid the oncoming vehicle. The circumstances simply fail to demonstrate that he had no alternative but to hit the Mazda.

The conclusion that the accident resulted from the Grievant's negligence rather than unavoidable circumstances is reinforced by

after he struck it. Had he been exercising due care, he would have seen the parked car and stopped before hitting it. The circumstances and conditions involved in the incident fail to provide mitigation, justification or excuse for the accident.

The Grievant is a long-term employee, and the record establishes that his length of service was taken into consideration in evaluating the discipline to be imposed. However, in light of circumstances of the accident, his past record, and his disciplinary status at the time of the incident, his length of service is insufficient to warrant a reduction in the penalty.

With respect to the Union's contention, based upon Gurke's testimony, that the Company does not always discipline for avoidable accidents, there is no evidence that Mr. Gurke was on DML at the time of his accident. The vague and conclusionary testimony regarding the circumstances of that accident render it difficult to make a meaningful comparison between the facts involved in that case and those involved here. Whether disciplinary action is warranted for a particular accident depends upon the particular facts and circumstances involved. In short, the evidence with respect to Gurke fails to demonstrate that discipline was improperly taken in this case; or, that the Grievant was unreasonably singled out for harsher treatment.

Finally, the fact that the accident was due to the Grievant's negligence or inattention rather than intentional misconduct does not undermine the Company's case. Negligence may properly form the basis of disciplinary action when an employee is on notice of

his obligation to exercise reasonable care and fails to do so. Here, the Grievant had clear notice of his obligation in that regard, and he failed to meet that standard, resulting in a preventable accident that caused damage to a third-party vehicle. Under the circumstances, particularly in light of his DML status, it is found that discharge was warranted.

Accordingly, the following Decision is rendered:

DECISION

The discharge of the Grievant, G , was for just cause. The Grievance is denied.

Roger Stalcup Union Board Member	~~Concur~~/Dissent	4/30/90 Date
E.A. Sapienza Union Board Member	~~Concur~~/Dissent	6-7-90 Date
Rick Doring Company Board Member	Concur/~~Dissent~~	4/30/90 Date
Company Board Member	Concur/Dissent	April 30, 1990 Date
Neutral Board Member	Concur/~~Dissent~~	April 27, 1990 Date