ARBITRATION
OPINION & AWARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKS, LOCAL 1245,

Union,

and

PACIFIC GAS & ELECTRIC COMPANY,

Employer

Re: Arbitration Case No. 237
(Pay Stations)

ARBITRATION BOARD

Kenneth N. Silbert: Neutral Member

Roger Stalcup and Dorthy Fortier: Union Members

Kathy Price and Stephen Rayburn: Employer Members

APPEARANCES

On Behalf of the Union:

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On Behalf of the Employer:

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INTRODUCTION

The Arbitration Board was appointed by the Parties pursuant to the terms of a collective bargaining agreement (JX 1). The prior steps of the grievance procedure were complied with or

waived and the matter is properly in arbitration. A hearing was conducted on June 4, 1999, in San Francisco, California, at which the Parties had a full opportunity to examine and cross-examine witnesses and to present other evidence and argument in support of their positions.[1] The matter was submitted for decision upon the receipt of post-hearing briefs.

This arbitration involves eight grievances (JX 2-1 through 2-8) in which the Union protests the creation of new pay stations or the replacement of existing pay stations by PG&E. The grievances were not resolved at the lower steps of the grievance procedure, leading to this arbitration.

ISSUES

1. Does the Company have the right to continue contracting out clerical bargaining unit work to pay stations after November 2, 1998? If not, what is the remedy?
2. Does the Company have the right to replace those pay stations that existed prior to November 2, 1998? If not, what is the remedy?

RELEVANT PROVISIONS OF THE CLERICAL AGREEMENT

TITLE 9. GRIEVANCE PROCEDURE

9.1 STATEMENT OF INTENT - NOTICE

The provisions of this Title have been amended and supplemented from time to time. Company and Union have now revised and consolidated this Title in its entirety to provide a concise procedure for the resolution of disputes.

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[1] The official transcript is cited as (TR __); Joint Exhibits, Employer Exhibits, and Union Exhibits are cited as (JX __), (EX __) and (UX __).

It is the intent of both Company and Union that the processing of disputes through the grievance procedure will give meaning and content to the Collective Bargaining Agreement.

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9.4 FINALITY

The resolution of a timely grievance at any of the steps provided herein shall be final and binding on the Company, Union and the grievant.
. . .

* * *

TITLE 24. MANAGEMENT OF COMPANY AND MISCELLANEOUS

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24.5 CONTRACTING

It is recognized that the Company has the right to have work done by outside agencies. In the exercise of such right Company will not make a contract with any company or individual for the purpose of dispensing with the services of employees who are covered by the Clerical Bargaining Agreement. The following guidelines will be observed:

(a) Where temporary services are required for a limited period of time, such as an emergency situation or for a specific special function.

(b) Where the regular employees at the headquarters are either not available or normal workloads prevent them from doing the work during the time of the emergency or special function situation.

(c) The Union Business Representative in the area should, if possible, be informed of Company's Intentions before the agency employees commence work. (Added 1-1-80)

(JX 1)

SUMMARY OF THE FACTS

For the last fifty years, PG&E has been using pay stations to provide a payment alternative for its customers. Pay stations are independent businesses such as chain stores or "mom and pop" grocery stores that agree to accept customer payments on behalf of PG&E. A majority of the pay stations accept payments for other utilities. At the present time, PG&E contracts with APS which in turn contracts with the various pay stations. PG&E pays a per transaction fee to the pay stations. The collection of payments at pay stations is essentially the same type of work performed by clerical bargaining unit employees at PG&E customer service offices. At the time of the arbitration hearing, PG&E had 83 customer service offices and 434 pay stations. Some pay stations exist in remote areas where there is not easy access to a customer service office; others exist in the same communities as customer service offices. Approximately 10% of customer payments are collected at pay stations.

The grievances at issue here represent the Union's third effort to challenge the use of pay stations through the contractual grievance procedure. Arbitration Case #183 (Walter L. Kintz, 1991) involved five grievances which protested the continued use of pay stations in communities in which existing customer service offices had been closed or consolidated with customer services offices in other communities, and in a community in which employees at a customer service office had been laid off and transferred to another customer service office. At the time of those grievance, the practice of using pay stations had been in existence for 40 years,[2] and PG&E had approximately 400 pay stations. Kintz noted that there was clear arbitral precedent for the strict application of Section 24.5 (Arbitration Case #128 (Barbara Chvany, 1986)). Nevertheless, Kintz found that the Union's

[2] The historical use of pay stations is set forth in the Kintz award and need not be repeated here.

acquiescence to PG&E's use of pay stations over an extended period of time, together with the absence of a demonstrated causal relationship between the use of pay stations and the displacement of bargaining unit employees, precluded the remedies sought by the Union: (1) a cease and desist order prohibiting PG&E from contracting with pay stations in the affected communities; and (2) return of the bargaining unit work performed by pay stations in those communities (*id.* at 14). Kintz explained:

> Whatever may be said concerning the appropriate role of past practice in contract interpretation, a collective bargaining relationship is not enhanced by imposing extensive remedies for conduct which has long been indulged. For these reasons the question of Contract violation is largely academic as the usual remedies would not be appropriate in any event. (*ibid.*)

In Arbitration Case #198 (Gerald R. McKay, 1994), the Union asserted that PG&E violated Section 24.5 by implementing a computerized bill payment system in existing pay stations. The Union argued that the Kintz award was distinguishable because it was based, in part, on Kintz' finding that there was no demonstrated loss of current or prospective work flowing from the conduct challenged in that case, while, in Case #198 it was able to establish such a loss. The Union requested a remedy requiring (a) PG&E to cease and desist from contracting with the agency then used for contracting with pay stations utilizing the computerized bill payment system, and (b) PG&E to return bargaining unit work to the bargaining unit (*id.* at 9-12).

McKay rejected the Union's arguments and found that there was no contract violation:

> At no point, apparently, until the issue was raised with arbitrator Kintz, has the Union ever questioned the Employer's right to use pay stations. For the Employer to continue to use pay stations as it has creates a convenience for the Employer and for the Employer's customers that would be significantly harmed by the Union's assertion of its rights at the present time. That is what arbitrator Kintz appears to say but which he did not say directly. It is for this reason this arbitrator agrees with arbitrator Kintz. One cannot sit on one's rights for forty years and then expect to enforce them. If the

> Union wants at the present time to change the system of using pay stations, then, given the decision of arbitrator Kintz and the inclination of this arbitrator, it must do so at the collective bargaining table.
>
> * * *
>
> . . . It is this arbitrator's opinion that the Employer has the right to continue to use pay stations as arbitrator Kintz stated, not on the basis that the Employer has established a past practice since it cannot do so in the face of existing Contract language prohibiting subcontracting, but on the basis that the Union is estopped by laches from asserting its rights under the Contract having sat on its hands for over forty years. If the Union wants to change the use of pay stations and require that they be manned by bargaining unit personnel, then it must achieve that result at the collective bargaining table. For these reasons, the grievance is denied.
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> (*id.* at 20-21)

The Parties renewed the Agreement in 1994 and 1997 without either side proposing changes to Section 24.5. On October 30, 1998, the Union sent the following letter to PG&E:

> Due to the potential negative impact on our bargaining unit, IBEW Local 1245 is hereby formally notifying PG&E that Union no longer acquiesces to Company's past practice of contracting certain clerical bargaining unit work that was addressed in arbitration cases 183 and 198.
>
> Accordingly, Title 24 of the Agreement is to be applied as written, in the future. The combination of reduced hours at customer service offices, the outright closure of customer service offices, and the expansion of pay stations all threaten to produce a negative impact on the clerical bargaining unit. We therefore place the Company on notice that we will not acquiesce to the use of pay stations regardless of any acquiescence on Local 1245's part in the past. We will regard any expansion of the pay station practice or deletion of bargaining unit work from local customer service offices as a violation of Title 24. (JX 4)

The eight grievances at issue in the present case assert that contracts entered into by APS for new pay stations and to replace existing pay stations, after PG&E received the above letter on November 2, 1998, violate Section 24.5.

POSITIONS OF THE PARTIES

The Union:

» The central issue is the extent to which "past practice" may impinge upon the "plain language" of the Agreement.

» Section 24.5 of the Agreement has been interpreted by arbitrators to preclude the contracting out of clerical unit work except in the narrowly defined circumstances set forth in subsections (a) and (b). Arbitrator McKay specifically found that the use of pay stations constitutes subcontracting of bargaining unit work in violation of Section 24.5.

» The use of pay stations has a significant impact on bargaining unit work and the Union's status as exclusive bargaining representative. The inability of the Union to stem the growing use of pay stations or to reclaim work previously lost to this subcontracting substantially undermines its ability to bargain on behalf of unit employees and to protect and preserve bargaining unit work.

» The overwhelming weight of arbitral authority is that a practice, no matter how well established, may not modify the clear and unambiguous language of an agreement (*How Arbitration Works, 5th Edition*, Elkouri & Elkouri, at 652). More specifically, McKay held that PG&E's long established practice of using pay stations could not prevail over the clear language of Section 24.5. Neither Kintz nor McKay found that the past practice modified Section 24.5. Rather, they applied the equitable doctrines of estoppel or laches to prevent enforcement of Section 24.5 at the time of their decisions.

» Even when estoppel or laches applies as a result of a party's failure to protest prior violations, that "does not bar that party after notice to the violator, from insisting upon

compliance with the clear contract requirement in the future." (*ibid.*) For instance, in Arbitration Case #130, Arbitrator Sam Kagel sanctioned the right of PG&E to unilaterally terminate a 20 year consistent practice when PG&E notified the Union by letter that it was cancelling the past practice and considering it to be null and void.

» Arbitrators Kintz and McKay misconstrued the effects of estoppel and laches with the effects of waiver. Waiver is the formal relinquishment of a known right. Waiver must be substantiated by a written agreement or clear documentary evidence. The only method of regaining waived rights is the collective bargaining process. Laches is a severe form of estoppel resulting from an unconscionable delay in asserting a right, such that it would be impossible, inequitable or grossly unreasonable to restore the claimed right for the term of the then current collective bargaining agreement. The difference in the remedies for estoppel and laches is that, in the case of simple estoppel, future conduct must immediately be conformed to the express language of the agreement, while, in the case of laches, the party is barred from enforcing those rights for the term of the collective bargaining agreement. However, if the right is included in consecutive agreements, then each ratification causes a rebirth of those rights, regardless of whether any party is disadvantaged as a result.

» McKay incorrectly applied a waiver remedy to a laches case. He essentially amended the Agreement to carve out an exception, not agreed to by the Parties, to the language of Section 24.5. He lacked jurisdiction to amend the agreement, even though he may have had equitable power to bar enforcement pursuant to the laches doctrine for the unexpired term of the 1994-1997 agreement.

» Had the Union notified PG&E, after the Kintz decision, of its non-acquiescence to the use of pay station employees to do bargaining unit work, neither estoppel nor laches could have been applied by McKay consistent with arbitral authority.

» Section 24.5 of the Agreement was incorporated in the 1997-2000 Agreement, despite PG&E's knowledge that McKay had held that, but for the Union's acquiescence, that language barred the subcontracting of unit work to pay stations. The result is that the rights and obligations of Section 24.5 were reborn. Whatever equitable protection may have shielded PG&E's clear violation of that provision terminated upon its receipt of the Union's November 2, 1998 letter. This is consistent with the general rule that a party's failure to file grievances or protest past violations of a clear contract rule does not bar that party, after notice of the violations, from insisting upon future compliance of a clear contract right.

» PG&E is not being "blind sided" by the Union. Rather, PG&E sat on its hands by not attempting to change the language of Section 24.5 to conform to its practice. PG&E is not entitled to rely upon the sympathy of arbitrators or their insinuation into the collective bargaining process to obtain a benefit it has been unable or unwilling to negotiate.

» The Arbitrator should grant the grievance. As a remedy, the Arbitrator should order PG&E to cease and desist, on and after November 2, 1998, from causing APS to enter into new or renewed pay station agreements which have the effect of subcontracting bargaining unit work; to rescind any such contracts entered into on and after November 2, 1998, and to make the unit whole in damages.

The Employer:

» The issue is whether PG&E has the right to continue its 50 year practice of allowing customers the option of paying their monthly bills at pay stations. The use of pay stations has been upheld in two previous arbitrations and there is no doubt that the Union has waived its right to protest the use of pay stations.

» Kintz held that the Union had acquiesced in the use of pay stations for over 40 years and had waived it right to protest the practice. McKay reached a similar result, and correctly summed up the situation by noting that the Union could not sit on its rights for 40 years and then expect to enforce them. He concluded that, if the Union wanted to change the system of using pay stations, it must do so at the collective bargaining table.

» These precedential decisions preclude the Union from attempting to use the grievance process for the third time to protest the use of pay stations.

» The Union's acquiescence in the use of pay stations constitutes a waiver of its right to grieve that issue. The Union's position that it may reactivate its rights by simply informing PG&E that it no longer acquiesces to the use of pay stations ignores the fact that it has already waived any rights it had to protest present and continued use of pay stations.

» The Union is estopped from asserting its rights under the Agreement to the disadvantage of PG&E. Failure to object to a practice, within a reasonable period of time, estops the aggrieved party from asserting its rights at a later time. The doctrine of estoppel bars a remedy if retroactive assertion of a right would prejudice or disadvantage the other party. In addition, the doctrine of laches precludes reinstatement of a right where there has been an

unconscionable delay in the enforcement of the right, such that it would be impossible, inequitable, or grossly unreasonable to restore the right.

» The use of pay stations is a well established, binding past practice that has attained the status of a contract right. The practice is unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties. Past practice may be relied on in an arbitration to establish that the clear language of a written agreement has been amended by mutual action or agreement representing the intent of the parties. As a result of the Union's long-standing acquiescence to the practice, the right of PG&E to use pay stations has become an implied amendment of the Agreement.

» The remedies sought by the Union are unreasonable.

» The grievance should be denied.

OPINION

The Union bears the burden of proving that the challenged conduct violates the Agreement. As set forth above, the underlying facts are not in dispute. However, the Parties sharply dispute the effects of the past practice, the Union's acquiescence in that practice, and the prior arbitration awards dealing with pay stations. Interestingly, both Parties rely on the extensive discussion of past practice, waiver, estoppel and laches in *How Arbitration Works, 5th Edition*, (Elkouri and Elkouri) at pages 575-579 and 651-654 to support their positions and to reach diametrically opposed conclusions.

Distilled to its essence, the Union's argument is that (1) the Union has never explicitly waived its right to enforce Section 24.5; (2) past practice, no matter how lengthy, notorious or

pervasive, may not nullify or amend a clear and unambiguous provision of a collective bargaining agreement, such as Section 24.5; (3) the Union's acquiescence in the practice justified the application of the doctrines of estoppel and/or laches by Kintz and McKay; (4) estoppel and laches bar the Union from seeking a retroactive remedy but do not bar the Union from seeking a prospective remedy; (5) Kintz and McKay incorrectly applied the doctrines of estoppel and/or laches to bar future enforcement of Section 24.5; (6) inclusion of Section 24.5 in the 1994-1997 and 1997-2000 agreements constituted a re-birth of the Union's rights; and (7) the Union's October 30, 1998 letter to PG&E clearly ended any acquiescence in the practice.

Distilled to its essence, PG&E's argument is that (1) the precedential decisions by Kintz and McKay preclude the Union from attempting to use the grievance procedure to challenge the use of pay stations; (2) the well established use of pay stations constitutes a binding past practice that has attained the status of an implied amendment of the Agreement; and (3) the doctrines of estoppel and laches bar the Union from obtaining a remedy for the use of pay stations.

As frequently is the case in labor arbitrations, there is some support for the arguments of both Parties regarding the effects of the Union's long silence in the face of the well established practice of using pay stations. As the Elkouri's indicate, different arbitrators have differing views regarding waiver, past practice, estoppel and laches (*ibid.*). But, there is little disagreement among arbitrators regarding the preclusive effects of prior arbitration awards between the same parties on the same subject. The following quotes from *How Arbitration Works, 5th Edition*, supra, are illustrative:

> Where a new incident gives rise to the same issue that is covered by a prior award, the new incident may be taken to arbitration but it may be controlled by the prior award. The destiny of a party's claim thus may be governed by a prior award that either precludes the claim under res judicata concepts or controls the decision on the claim by stare decisis concepts. . . . However, regardless of whether the arbitrator speaks in terms of res

judicata, collateral estoppel, or stare decisis, ordinarily the prior award by some procedure will have been the governing factor in the disposition of the present claim. (*id.* at 609-610)

* * *

. . . An award interpreting a collective bargaining agreement usually becomes a binding part of the agreement and will be applied by arbitrators thereafter.

This was emphasized by Arbitrator Whitley P. McCoy, who declared that where a "prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision." [citations omitted] . . . . This was held to be particularly true in another case were the contact language was not changed after the award and it had been followed in contract administration. For a second arbitrator to change a prior decision that the parties have not seen fit to change, would encourage repetitive arbitrations of the same issues, unless there has been a substantial change in the facts or the case or in the pertinent language of the contract. [citations omitted]

* * *

It seems obvious that the binding force of any award ordinarily should not continue after the provision upon which it is based is materially changed or eliminated entirely from the parties' agreement. [citations omitted] However, if the agreement is renegotiated without materially changing a provision that has been interpreted by arbitration, the parties may be held to have adopted the award as part of the contract. [citations omitted] Indeed, the binding force of an award may even be strengthened by such renegotiation without change. [citations omitted]. In this regard, Arbitrator Edgar A. Jones, Jr. explained:

> [T]he arbitration process would hardly survive the erosion of confidence in its effectiveness were second-thought arbitrators freely to set aside first-impression arbitral awards so that awards would lose their acceptability as being final and binding. It is not surprising, therefore, that it is unusual, indeed rare, for a later arbitrator to find the earlier award not final and binding. . . .
> (*id.* at 613-615)

The Board of Arbitration finds the above discussion to be on point, persuasive and dispositive of the grievances at issue in this arbitration. Both Kintz and McKay declined to find that Section 24.5 provided either a retroactive or prospective remedy with respect to PG&E's use of pay

stations. The Union's argument that neither estoppel nor laches extinguishes future rights was implicitly rejected by both Kintz and McKay. Had they agreed with the Union's position regarding the effects of estoppel or laches, they could have found a violation, awarded no retroactive remedy, and ordered PG&E to cease and desist from the challenged use of pay stations in the future on the grounds that the Union's grievances constituted notice that it would no longer acquiesce in the practice. Neither did so. Both Kintz and McKay specifically rejected the Union's request for a cease and desist order, and McKay found that the only way for the Union to reassert its rights was at the collective bargaining table. Pursuant to Section 9.4 of the Agreement, those awards are "final and binding" on the Parties.

In light of the prior arbitration decisions, the Union's argument that its rights under Section 24.5 were reborn each time the Agreement was renewed is misplaced. As indicated in the quotes from *How Arbitration Works*, supra, "every principle of common sense, policy, and labor relations demands that [the prior awards] stand until the parties annul [them] by a **newly worded contract provision**" (emphasis supplied). The Union was on notice, since the Kintz award, that Section 24.5 would not be interpreted to bar future use of pay stations, and, since the McKay award, that its rights could be reestablished only at the bargaining table. Thereafter, when the Agreement was renegotiated twice "without materially changing a provision that has been interpreted by arbitration, the parties may be held to have adopted the award as part of the contract." (*ibid.*) Indeed, that concept has been incorporated specifically by the Parties in Section 9.1 of the Agreement: "It is the intent of both Company and Union that the processing of disputes through the grievance procedure will give meaning and content to the Collective Bargaining Agreement." Accordingly,

the onus was on the Union to propose and obtain changes in the Agreement limiting the use of pay stations.[3]

While the specific conduct challenged by the Union in the grievances at issue in this arbitration is somewhat different than the conduct at issue before Kintz and McKay, there is no showing that PG&E's use of pay stations has changed materially since those awards were issued. Accordingly, those awards preclude finding of a contract violations with respect to the grievances at issue in this case.[4]

Based upon the foregoing and the record as a whole, the Arbitration Board issues the following award:

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[3] The award of Sam Kagel in Arbitration Case #130 is not on point. In that case Kagel permitted PG&E to rescind a long standing practice. However, unlike the present case, there were no prior final and binding arbitration awards or final and binding grievance decisions regarding the practice at issue (Case #130, slip opinion at pages 8-9). Thus, Kagel did not have to deal with the question of whether final and binding arbitration awards or grievance settlements affected the contractual rights of the Parties.

[4] This decision is based upon the well established past practice regarding the use of pay stations. A different case might be presented if there were a material change in PG&E's use of pay stations, such as a dramatic increase in the use of pay stations resulting in the loss of bargaining unit work or the tangible threat of such a loss.

AWARD

1. The Company has the right to continue contracting out clerical bargaining unit work to pay stations after November 2, 1998, consistent with the well established past practice.

2. The Company has the right to replace those pay stations that existed prior to November 2, 1998, consistent with the well established past practice.

3. The grievances are denied.

Kenneth N. Silbert	November 10, 1999	Concur / Dissent
Kathy Price	12/3/99	Concur / ~~Dissent~~
Stephen Rayburn	11/29/99	Concur / ~~Dissent~~
Roger Stalcup	11/16/99	~~Concur~~ / Dissent
Dorthy Fortier	11-17-99	~~Concur~~ / Dissent