IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

Between

PACIFIC GAS & ELECTRIC COMPANY,

Employer,

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

Union.

RE: Arbitration No. 282 -
&
Arbitration No. 283

OPINION AND AWARD

November 20, 2008

BOARD OF ARBITRATION - CASE NO. 282

Margaret Short and Carol Pound, Company Board Members
Kit Stice and Bob Choate, Union Board Members
Frank Silver, Neutral Board Member

BOARD OF ARBITRATION - CASE NO. 283

Margaret Short and Andrew Williams, Company Board Members
Bob Choate and Bob Brill, Union Board Members
Frank Silver, Neutral Board Member

APPEARANCES:

On behalf of the Union: Sanford N. Nathan, Leonard Carder, LLP

On behalf of the Employer: Stacey A. Campos, Attorney, Pacific Gas & Electirc Co.

INTRODUCTION

These two disputes arise under the Collective Bargaining Agreement between the above-named parties. Pursuant to the terms of the Agreement, this Arbitrator was selected as the chair of the Arbitration Boards in order to hear the evidence and to determine the issues.

The parties have agreed that the records of these to cases may be considered jointly with respect to the common issues relating to application of the parties' Positive Discipline Agreement to employees terminated for avoidable accidents while on Decision Making Leave (DML), while considering separately the particular circumstances leading to each termination. The hearing in Arbitration No. 282 was conducted on February 29 and March 13, 2008, and the hearing in Arbitration No. 283 was conducted on May 9, 2008. Both hearings were in San Francisco, California, and the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. Following preparation of the transcript, both counsel submitted post-hearing briefs and the matters were submitted for decision.

ISSUES

Arbitration No. 282: Was the Grievant N , discharged for just cause? If not, what shall be the remedy?

Arbitration No. 283: 1. Does the Grievant's retirement effectively deprive the Board of Arbitration jurisdiction to hear this case?

2. Was the Grievant V· , discharged for just cause? If not, what shall be the remedy?

PERTINENT PROVISIONS OF THE POSITIVE DISCIPLINE AGREEMENT

II. THE POSITIVE DISCIPLINE SYSTEM

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STEP THREE - DECISION MAKING LEAVE (DML)

The DML is the third and final step of the Positive Discipline System. It consists of a discusssion between the supervisor and the employee about a very serious performance problem. The discussion is followed by the employee being placed on DML the following work day with pay to decide whether the employee wants and is able to continue to work for PGandE, this means following all the rules and performing in a fully satisfactory manner.

The employee's decision is reported to their supervisor the workday after the DML. 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, the active period of the DML; except as provided in section III.B.

* * *

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. . . .

FACTS

A. **Arbitration No. 282 - N**

The Grievant was first hired by the Company in June 1983. At the time of the events leading to his discharge, he was a Troubleman headquartered in Red Bluff. As a Troubleman, he worked alone making service calls and responding to emergencies, and he was assigned a single-bucket truck. He estimated that he spent 50% of his time driving (Tr. 119).

On September 7, 2005, the Grievant received serious injuries when he had an accident while driving on a curvy rural road and went off the road, flipping over in the truck. He was off work for eight months, returning on light duty to an electrician crew, before being given a full release by his

physicians and returning to his Troubleman classification.[1] As a result of that accident he was given Decision Making Leave (DML) under the Positive Discipline program.

On August 4, 2006, the Grievant had another accident while driving his Company truck. He made a service call in a rural area, and while exiting the property he hit a tree stump on the side of the driveway, causing a dent in the fender behind the left, front wheel, and slightly scraping the door. Photographs taken subsequently show that the driveway area where the accident occurred was flat, with no obstructions, and that the tree trunk was plainly visible, at least one foot in diameter and 36 inches high (Jt. Ex. 5, Er. Ex. 1).

The Grievant reported the accident to supervisor Scott Goldschmidt. Goldschmidt testified that the Grievant first said that he was trying to avoid a burn pile in the driveway, but later retracted that and never provided a solid explanation for the accident. Goldschmidt asked if there was any medical condition that he should know about, and the Grievant responded that there was not (Tr. 48). At the arbitration, the Grievant testified that he could not understand why he didn't see the stump (Tr. 148).

Goldschmidt reported to his supervisor and to Labor Relations that the Grievant had been involved in an avoidable accident, and the decision was made, in view of his prior DML, that termination was the appropriate discipline.[2]

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[1] The Grievant was treated for his injuries by an orthopedic surgeon, Dr. Riico Dotson, and by a neurologist, Dr. Harveder Birk. Dr. Birk released the Grievant from his care on April 24, 2006, although his final report noted some continuing memory deficit, and thinking/concentration difficulties (Un. Ex. 9). Dr. Dotson released the Grievant to return to work on modified duty with restrictions on lifting and overhead work on April 17, and on June 2, released him to work without restrictions (Er. Ex. 2).

[2] Following the accident, the Grievant was referred to a therapist, Galyle Coons, LMFT, under the Employee Assistance Plan. In a report dated October 22, 2006, Ms. Coons diagnosed the Grievant as suffering from post-traumatic stress disorder relating to his September 7, 2005 accident, and described him as continuing to have symptoms such as short-term memory loss, difficulty concentrating, dizziness, and visual disturbances (Un. Ex. 1).

(continued...)

B. Arbitration No. 283 – V

The Grievant was first hired by PG&E in January, 1971, and he had been an electric crew foreman for 15 years at the time of his termination in February 2, 2007. On March 9, 2006, he was placed on Decision Making Leave (DML) for a conduct violation.

As a crew foreman, the Grievant drove an F250 pickup truck. On January 5, 2007 he and his crew were assigned to an emergency repair on Corralitos Ridge Road in a somewhat remote residential area near Watsonville. He described the road as narrow with room for only one vehicle (Tr. 109). As the crew was completing the job, he made the decision to turn his truck around in order to exit from the area. He decided to use a driveway which went down a slope from the street, going in forward into the driveway with the intention of backing out onto the street. As he was turning right into the driveway, he was concerned with objects to his right, causing him to make wider turn (Tr. 111). When he did so he misjudged the distance to an ornamental railing on the left, making contact with the railing and sightly bending approximately six vertical posts, which he described as hollow tubes. The Grievant testified that in making the turn his vision of the fence was obscured by the high front end of the F250. The damage to the truck was limited to scraped reflector tape on the left bumper.

The Grievant knocked on the customer's door, but there was no answer. He then reported the accident to his supervisor, Robert Cupp. He later called the customer's number and left a message. The customer called back a couple of days later, and he said that he did not consider the

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[2](...continued)
On June 14, 2007, the Grievant applied for Social Security disability benefits. He was subsequently found to be disabled by the Social Security Administration, as of his September 7, 2005 accident, although benefits were retroactive only to the date of his application (Un. Ex. 3).

bent railing to be a big issue, and he thanked the Grievant for calling.[3]

Cupp testified that when the Grievant described that accident to him, he "indicated that he was paying too much attention to the right-hand side of the truck, as he was making a right-hand turn, and the left side of the vehicle contacted the ornamental fence." (Tr. 20.) Cupp conducted an investigation with safety program consultant Doug Rodriguez by going to the scene and taking photos. Cupp concluded that the accident was preventable, and that the Grievant had failed to follow Rule 309(a) of the Code of Safe Practices, which states: "Before starting to move a vehicle either forward or backward, drives shall determine that no person or object is in the path of the vehicle." On the supervisor's incident report, Cupp explained, "Employee should have stopped, exited vehicle and looked at fence to see if there was enough room to proceed." (Jt. Ex. 3, p. 26). Cupp did not talk with the customer, but he did obtain an estimate for the repair and replacement of the existing fence panel, amounting to $1,460 (Tr. 28; Jt. Ex. 3, p. 32).

In Cupp's understanding, if an employee is on a DML, termination may be warranted for an incident that rises above a coaching and counseling matter, i.e. to the level of an oral reprimand or above. In this case, he considered the accident not to be minor, i.e. to go beyond a coaching and counseling, and he therefore recommended termination He did not think that it was relevant that the customer did not want repair work to the fence, that there was virtually no damage to the truck, that the Grievant drove extensively on the job including much emergency overtime, that he was one day short of completing his DML on the date of the termination, or that he had spent his entire adult life working for PG&E (Tr. 65-69). He testified that wet weather conditions or a muddy road might

[3] After he was terminated the Grievant asked the customer to sign a letter that the Grievant's wife drafted for him, confirming that he did not consider the damaged railing to be a big issue. The Grievant testified that he faxed the letter to the customer, who signed it and faxed it back. The letter was introduced at the LIC hearing.

mitigate an otherwise avoidable accident (Tr. 41). The weather conditions on this day were not a factor.

POSITIONS OF THE PARTIES

The Company

A. Mootness of V grievance. With regard to Grievant V , the Company argues that Review Committee Decision 1418-77-5 and 1419-77-6 determined that a grievant's retirement takes away the jurisdiction of the Board to resolve the termination grievance. Under Title 102 of the Collective Bargaining Agreement, decisions made at the Pre-Review/Review Committee and Arbitration levels of the grievance procedure are precedential and should be honored. Any change in a precedential decision must be negotiated by the parties. Therefore, the V grievance should be dismissed as moot.

B. Merits of the two grievances. The Company argues that under the PD agreement, the Grievants' failure to follow safe driving practices, resulting in avoidable accidents while on active DMLs, merited termination. Just cause requires that employee be warned adequately before being disciplined, and employees are frequently made aware that following safe driving practices is important to the Company to ensure the safety of employee and the public at all times. Safe driving practices are regularly reviewed in tailboard meetings and in the Company's Code of Safe Practices.

The Company conducted a full and fair investigations before making the decisions to terminate. The supervisors consulted their supervisor and a human resources/labor relations advisor before deciding on termination. Grievant N could have easily avoided the tree stump, as shown by the photographs of the area. Grievant V could have gotten out of his truck to determine if he had enough room to turn into the driveway without hitting the fence or other object.

Employer's position

The joint record of these cases shows that the Company treated both Grievants even-handedly and without discrimination. The Company has been consistent in disciplining employees for avoidable automobile accidents regardless of years of service, with the majority of employees receiving an oral or written reminder. IBEW business representative Kit Stice testified that he personally is aware of 50-75 employees with more than 20 years of service who had been disciplined for avoidable accidents.

While the Company considers mitigating factors, safety rules are serious and must be observed. These two incidents were not close calls worthy of mitigation. The supervisors reasonably concluded that they were each easily preventable. The Union's attempt to discredit the Company's policy by showing photos of eleven Company trucks with some level of damage is irrelevant without evidence of how the damage occurred or who caused it.

There is nothing in the signed PD agreement that requires a coaching and counseling – certainly not two or three coaching and counselings – between each disciplinary step. Nor is it mandated for employees on a DML. Union witnesses acknowledged that employees on a DML are often terminated for subsequent disciplinary infractions. Coaching and counseling is not a disciplinary step and is only used when an event is not worthy of formal discipline. The average years of service for field employees is 20 years, and such service cannot be used to mitigate avoidable accidents to coaching and counseling.

The PD agreement defines a DML as "an extremely serious step" which will probably result in termination if the employee fails to meet all work rules and standards for the next 12 months. The Grievants had been warned of the consequences when they were issued DMLs. Violation of safety rules is significant and rises to the level of seriousness to justify termination of employees on a

DML. Prior arbitration decisions confirm this principle. In Arbitration Case 167, Arbitrator Chvany upheld the discharge of a 16-year employee who unintentionally side-swiped a parked car, noting that the employee had clear notice that discharge could result from further violations. In Arbitration Case 215, Arbitrator Brand upheld the termination of an employee with 22 years of service who was involved in a minor fender-bender. In these cases, and in PRC Case No. 2056, the years of service of the employees did not mitigate the discipline. Absent powerful or compelling reasons, the Board should not ignore the previous precedential decisions regarding disciplinary treatment of employees on decision-making leave.

In addition, Grievant N had been fully released by his medical providers without driving restrictions following his 2005 accident. There was no basis for the Company to deny reinstatement in light of the medical releases. The post-termination diagnosis of post-traumatic stress disorder is irrelevant to whether he followed safe driving practices when he hit the tree stump. There is no evidence concerning his medical state at the time of the accident. There is also no evidence that the Grievant's return to work was mishandled through the workers' compensation process.

For these reasons, the Company argues that the Grievants' terminations should be upheld.

The Union

A. V **retirement.** The Union argues that Grievant V was terminated and he then applied for retirement because he needed money to survive. He was not advised that by withdrawing retirement funds he would jeopardize his right to reinstatement. Nor does the retirement application contain such information. When he was terminated, he was blackballed from working for a contractor on PG&E property, thus preventing him from working in the only trade he knew. The issue in the Review Committee decision was different than in the current grievance, since that

Union's position

grievant did not wish to have his job back. The gratuitous comment of the Review Committee was not part of the holding and does not constitute binding precedent. Further, in Pre-Review Committee No. 17417, San Francisco, it was noted that the grievant "elected to pension," but the Committee nevertheless decided the issue of his termination on the merits.

B. Merits of the two grievances. The Union argues that the PD Agreement requires the Company to consider mitigating factors before making a decision to discharge, and it provides no exception for minor, preventable vehicle accidents. While consideration of such factors is mandatory in all cases, it is particularly compelling where the actual infraction would warrant nothing more onerous than an oral reminder. The original idea of PD was to avoid a cookbook approach to discipline, and to treat employees as adults considering the employee's actual circumstance, rather than to take an automatic punitive approach.

Coaching and counseling is a contractually agreed means achieve this purpose. Yet the Company never considered C&C as an alternative to termination. Neither Goldschmidt, Grievant N 's supervisor, nor Cupp, Grievant V ' supervisor had working knowledge of the PD Agreement. Goldschmidt was not even aware that C&C was an option (Tr. 73), and Cupp's testimony showed that he considered nothing by way of mitigation.

In the case of Grievant N , he was a 23 year employee with a good work record. He concededly bore responsibility for the accident resulting in his DML, but the event resulting in his termination was harmless, causing little damage to the vehicle and no damage to a third party. He reported the accident promptly to his supervisor. In addition, he was still suffering the residual effects of his earlier accident. The Company was aware of this information following the accident and before completion of the grievance process. A minor accident of this nature, in these

circumstances, cannot suffice to warrant discharge under the PD Agreement, which specifically calls for consideration of Company service, the employee's record, and the seriousness of the accident. In addition, N 's forthright acknowledgment of the accident, with no witnesses and minimal damage, should also be considered. Compare also the Review Committee decision (Un. Ex. 6 in Arbitration No. 283) in which the grievant received coaching and counseling five times in a year. Here N was terminated for a second infraction, one of virtually no significance.

In the case of Grievant V , he was a 36 year employee, who was within one working day of completing his DML when he was discharged. His DML was unrelated to driving, and the event precipitating his termination was harmless, causing no damage to his vehicle and very little damage to the thirty party property. He reported the accident promptly and honestly. V had never had a prior accident, and there was no intentional misconduct. Nothing about the accident shows he was a poor employee with a problematic record.

Based on a comparison with other cases, the grievances should be upheld. Recent cases involving Martinez (Sacramento), Fitzgerald (Redding), and Bryan (Chico) all show proper application of the PD Agreement, in that Company supervision applied mitigation principles and did not impose termination. These examples show past practice, disparate treatment, and proper application of the PD Agreement. In comparison, the discharges of N and V were irrational and contrary to normal practice. Similarly, Goldschmidt gave preferential treatment of M , despite his claim not to know that M put the hole in the Grievant's bumper.

Photographic evidence of damaged vehicles introduced in Arbitration No. 283 (Un. Ex. 9) further reflects a lax and inconsistent approach to vehicle accidents, highlighting the fundamental unfairness of terminating Grievants N and V . Of the eleven vehicles for which reports were

Union's position

requested, there were only four incident reports connected to discipline, and only one where a third party was at fault. Cupp stated that incident reports were supposed to be filed whenever an employee bumped anything; yet, most accidents were not even reported. In view of the casual handling of other accidents at the Santa Cruz yard, these Grievants should not have been terminated.

The two arbitration decisions relied upon by the Company do not apply to the present facts. In Arbitration Case 215 (C . the Arbitrator noted that mitigation is required before discharge, and there are other material distinctions with the present facts. In particular, the Arbitrator noted that the final accident was not trivial, and in fact represented substantial misconduct. The distinctions with Arbitration Case 167 (G) are also substantial, and the Arbitrator noted that the particular facts and circumstances must be considered in any disciplinary action.

The Collective Bargaining Agreement requires just cause for any termination. On this property, just cause coexists with the PD Agreement. As originally agreed, PD was in harmony with just cause through the use of mitigation and the option for C&C when an employee is on a DML. As the Company has sought to use PD in the N and V grievances, however, it is not consistent with just cause, in that neither of the final incidents would have warranted termination based on these facts.

For these reasons, the Union argues that both Grievants should be reinstated and made whole. With respect to Grievant N . it asks that the Arbitrator retain jurisdiction with regard to questions arising from his medical condition.

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Union's position

DISCUSSION

A. The Board's jurisdiction in the V grievance.

The Company argues that based on a 1977 Review Committee Decision (Nos. 1418-77-5 and 1419-77-6), the fact that Grievant V officially retired from the Company deprives the Board of jurisdiction to resolve his grievance. In the Review Committee Decision in question, the facts relating to the destruction of property involving two grievants was discussed in some detail, and Committee concluded that both men were "at the very least, equally guilty of serious and gross misconduct." The Committee did not further consider the merits of the discharge for one of the grievants, G , noting that he had retired and the grievance was therefore "moot." Although the Committee commented that it lacked the power to reinstate him, it is not clear from the decision how it reached that conclusion. There is nothing in the decision to indicate that it reviewed the pension rules or received legal advice concerning the revocability of a retirement application. In addition, it is possible that the grievant did not seek reinstatement; the decision is unclear on this point.

The record in the current grievance is clear that V applied for retirement because he needed money to live on and to support his family after he was terminated. He testified also that he was unable to find work because the Company prohibited him from working for a contractor on PG&E property, and as a practical matter there was little if any work available from electrical contractors which did not involve PG&E. He does seek reinstatement, in spite of his retirement.

While the parties treat Review Committee decisions as precedential, given the lack of clarity in the decision relied upon by the Company as to whether the grievant wanted to be reinstated or whether Committee fully considered the possibility that a retired grievant could be eligible for reinstatement, this decision cannot be considered authoritative on the issue of whether the

Arbitration Board has jurisdiction to decide propriety of V ' discharge. Further, in PRC No. 17417, San Francisco (12/12/07), cited by the Union, the Review Committee in fact considered the issue of just cause with regard to a grievant who had retired. Any reinstatement remedy in this case would have to be conditioned upon compliance with appropriate pension rules, but it is concluded that the Board has jurisdiction to consider the V termination on the merits.

A. **The Positive Discipline Agreement.**

The grievances of N and V are being considered together due to the common circumstance that both employees were terminated following a minor, though avoidable vehicle accident during the one year active period of a Decision-Making Leave. DML is the final step of positive discipline before termination under the PD Agreement, first adopted by the parties in 1987. Positive discipline was proposed by the Company as a method for improving communication between supervisors and employees concerning conduct, attendance or work performance problems, stressing decision-making and individual responsibility, rather than punishment (see PD Agreement, Introduction). In negotiations, the Union expressed concerns about following a "cookbook" approach to discipline, but ultimately agreement was reached and the PD Agreement was signed and implemented.

The PD Agreement establishes coaching and counseling as the "expected method" for supervisors to communicate with employees regarding potential disciplinary problems. Coaching and counseling itself is not considered to be disciplinary, and the positive discipline steps may be initiated "(w)hen an employee fails to respond to counseling or a single incident occurs which is serious enough to warrant a formal step of discipline." (PD Agreement, sec. II.B.) There are three positive discipline steps: an oral reminder, written reminder, and DML. Termination occurs if there

is another disciplinary problem within the 12 month active period of a DML, except that "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..." (PD Agreement, sec. III.B.)

The Company takes the position that an avoidable accident represents an employee's failure to follow safe driving practices, and that it has a practice of disciplining employees for avoidable accidents regardless of years of service. Therefore, under this line of reasoning, an employee who has had an avoidable accident advances to the next level of positive discipline, and the Company cannot afford to give an employee a "pass" just because he or she is on a DML, i.e. the nature and seriousness of unsafe driving renders it more than a trivial event worthy of mitigation. In other words, the Company argues that Grievants N and V were subject to termination for their avoidable, and easily preventable, accidents, and that mitigation based on years of service or other considerations was not required. The Union, on the other hand, argues that Section III.B requires consideration of mitigating factors before making a decision to discharge, and that this is particularly compelling where the actual infraction would warrant no discipline beyond an oral reprimand.

Therefore, in simplest terms, the contractual issue to be determined is whether an avoidable accident is automatically a disciplinary event triggering termination for an employee on an active DML without consideration of mitigating factors. The difficulty with the Company's position is that Section III.B affirmatively requires consideration of mitigating factors when there is "a performance problem which normally would result in formal discipline" during the life of a DML. In other words, the mere fact that an avoidable accident would ordinarily trigger discipline does not override

the requirement to consider mitigating factors. One of the mitigating factors to be considered is the "nature and seriousness of the violation," and under the language of the Agreement, consideration of the nature and seriousness of the violation, along with other mitigating factors, comes *after* it has been determined that a violation has occurred, i.e. that an accident was avoidable. To conclude that a certain class of violations such as avoidable accidents is automatically serious enough to warrant termination would create an unnegotiated exception to the contractual requirement to consider mitigating factors. Such an exception cannot be accepted.

The prior arbitration awards relied upon by the Company are in fact consistent with the interpretation that mitigating factors must be considered when there has been an avoidable accident. In Arbitration Case 167 (G), Arbitrator Barbara Chvany upheld the termination of a 16-year employee who unintentionally side-swiped a parked car while on an active DML. The grievant claimed that he side-swiped the car while swerving to avoid an accident with an oncoming cement truck, but the Arbitrator carefully evaluated the evidence concerning the circumstances of the accident, and concluded that even accepting the grievant's account, he still had the opportunity to take preventative measures and avoid the accident. Therefore, she found that the accident resulted from the grievant's negligence, and that the circumstances and conditions "fail(ed) to provide mitigation, justification or excuse for the accident." In light of this finding, and his disciplinary status at the time of the accident, she concluded that his length of service was insufficient to warrant reduction of the penalty.

In Arbitration Case 215 (C , Arbitrator Norman Brand upheld the termination of a 22-year employee who, while on an active DML, rear-ended a vehicle, pushing that car into another car, "because he took his eyes off the road while driving." The Arbitrator noted that the Company was

required to consider mitigating circumstances and he accepted that the grievant's long service compelled close analysis of the facts. He concluded that the accident which precipitated the grievant's termination was "not so trivial that the Company was obliged to counsel him, rather than terminate him."

Although in both of these decisions, the arbitrators upheld the terminations of employees who had preventable accidents while on DML status, neither arbitrator concluded that termination was automatic, overriding the requirement to consider mitigating factors. In essence, both arbitrators recognized the requirement to consider mitigating circumstances (Chvany implicitly and Brand explicitly), and they concluded that the circumstances of the respective accidents were sufficiently serious so that length of service was insufficient to warrant a reduction of the penalty. Consistent with these decisions, it is concluded that despite the fact that both of the current Grievants had preventable accidents while on active DMLs, the PD Agreement, Section III.B, required consideration of mitigating factors, including length of service and the nature and seriousness of the accident before making the decision to terminate.[4]

B. Arbitration No. 282 – N

As shown by the photographs of the driveway where the accident occurred, the area was flat, with no obstructions, and the large tree stump was well to the side of the driveway and was plainly visible. Grievant N was unable to explain why he failed to see the tree stump, and the conclusion is inescapable that he hit the stump due to his inattention. The damage to the truck was not great,

[4] The Union submitted evidence related to a number of employees who were not terminated following avoidable accidents while on DML. This evidence was submitted to rebut the Company's claim that it has consistently disciplined employees for avoidable accidents without regard to mitigating circumstances such as years of service. Since it has been concluded that the PD Agreement requires consideration of mitigating circumstances for employees who have avoidable accidents while on a DML, it is not necessary to review in detail the evidence regarding the other employees.

but it was a significant dent to the fender behind the wheel well. There were no witnesses, and the Union argues the Grievant's prompt reporting of the accident to his supervisor should be considered in his favor. However, it is difficult to see how he could have failed to report it, since the damage would certainly have been noticed and he would have had to provide an explanation. There is nothing in the circumstances of the accident itself, other than the relatively slight damage to the vehicle, that can be seen as mitigating.

The Grievant's DML had involved a quite serious avoidable accident, which caused him to miss eight months of work while recovering from injuries, and another month on light duty assignment. The circumstances of this accident were such that his attentiveness while driving was an extremely serious concern, and the fact that he had another accident due to inattention soon after returning to full duty weighs heavily against discounting the seriousness of the tree stump accident.

The Union argues that the Grievant's post-termination diagnosis of post-traumatic stress disorder resulting from the earlier accident should be viewed as mitigating. For at least two reasons, this argument cannot be accepted. First, the Grievant was released from treatment by his neurologist and was subsequently released to return to full duty by his treating orthopedic surgeon. The Company was entitled to rely on these releases as showing that he could be expected to perform the full range of duties as a Troubleman; to find otherwise would be entirely inconsistent with the workers' compensation process. The Grievant did not inform his supervisors of any restrictions or ongoing medical problems, and they reasonably assigned him to return to his regular duties. Moreover, if the post-termination diagnosis by his therapist were accepted in full, it would show that he was not medically able to return to work, despite the releases by his physicians, and that he continues to be unable to perform the duties of his job. Therefore, reinstatement is not an option,

and he should not have been working at all. While his situation may merit sympathy, the fact that he was released to full duties and had another easily preventable accident shortly after returning to work shows that the Company reasonably determined that he could no longer perform the duties of his position and should advance to the next step following DML, i.e. termination.

For these reasons, it is concluded that nature and seriousness of the accident, in light of his prior driving history, was such as to warrant termination, notwithstanding his 23 years of service.

C. **Arbitration No. 283 – V**

Grievant V accident, in which he lightly contacted an ornamental fence with his left bumper while turning right into a driveway on a downhill slope, was avoidable. He could have taken more time to examine the potential obstacles in turning into the driveway, or he could have elected to drive further down the narrow road to find a better place to turn around. However, his error was not due to inattention; rather, rather it was an error in judging the distance to the fence on the left side of the truck while taking care to avoid obstacles on the right side of the truck. It was a difficult area to maneuver in his F250 pickup, and while he could have gotten out of the truck before making the turn, realistically, once he was actually turning into the driveway he had little if any opportunity to get out and check.

The fact that an accident is avoidable does not determine the degree of negligence. Not all avoidable accidents are equally serious. In some cases, the driver may have no excuse, such as in Arbitration No. 215 (C) in which the driver took his eyes off the road, rear-ending the car in front of him and pushing that car into another car. In Arbitration No. 176 (G), the grievant was in a somewhat more difficult position, since he had to avoid an oncoming cement truck, but the arbitrator concluded he had room to do so and she expressed skepticism at his explanation of how

the accident occurred. In both of these cases, the damage to third-party vehicles, and presumably to the Company vehicles as well, was significant.

The Grievant's accident in the current case was less serious both as to the degree of his negligence and as to the damage caused. As discussed above, he misjudged the distance to the fence while attempting to maneuver his truck in a narrow, hilly area. He informed the Company that the customer did not consider the damage to the fence serious enough to repair, and the Company has provided no evidence that the customer ever submitted a claim. The photographs of the bent fence posts are inconclusive as to the extent of damage, and the customer's failure to submit a claim demonstrates that the damage to the fence was quite minor. The damage to the truck – a scraped reflector decal – was negligible. In all, the accident, while avoidable, was less serious in terms of degree of negligence and damage caused than the accidents in the other arbitration cases.

The Grievant had 46 years of service with the Company, the last 15 years as an electric crew foreman. These years of service must be considered as a significant mitigating factor. His DML was for a conduct violation, not an avoidable accident. Although a DML is an extremely serious step under the PD program, the Grievant's minor avoidable accident was not an indication of an ongoing disregard of Company safety rules. He was assigned his own truck as a crew foreman, and he drove extensively on the job, often while performing emergency overtime, presumably in difficult conditions. Also, he was within a month of completing his DML when the accident occurred. It is concluded that the incident could have warranted an oral reprimand, but after consideration of mitigating factors as required by Section III.B, including years of service, the very minor nature of the violation, and the lack of prior accidents, it was not appropriate to advance to termination as the next step of positive discipline. Instead, the termination will be converted to an oral reprimand.

AWARDS

Arbitration No. 282:

1. The termination of the Grievant, N , was for just cause. The grievance is denied.

Frank Silver, Chair, Arbitration Board — date 11/20/08

Margaret Short, Company Board Member — Concur/Dissent — date 1/13/09

Carol Pound, Company Board Member — Concur/Dissent — date 1/13/09

Kit Stice, Union Board Member — Concur/Dissent — date 12/15/08

Bob Choate, Union Board Member — Concur/Dissent — date 12/15/08

AWARDS

Arbitration No. 283:

1. The Board of Arbitration has jurisdiction to consider the grievance.

2. The termination of the Grievant, V , was not for just cause; instead, the discipline is reduced to an oral reprimand.

3. As a remedy, the Grievant is entitled to be reinstated to his former position, with his seniority intact, together with back pay and other economic benefits provided in the Agreement, less interim earnings, from the date of his termination until his reinstatement pursuant to this Award, subject to the condition that said remedy is consistent with the rules and applicable law governing his retirement.

4. Calculation of the amount due the Grievant is remanded to the parties. Jurisdiction is reserved in the event of a dispute concerning implementation of the remedy, including consideration of an alternative remedy if reinstatement is not legally permissible as a result of his previous retirement.

Frank Silver, Chair, Arbitration Board — 11/20/08 date

Margaret Short, Company Board Member — Concur/Dissent — 1/13/09 date

Andrew Williams, Company Board Member — Concur/Dissent — 1/13/09 date

Bob Choate, Union Board Member — Concur/Dissent — 12/15/08 date

Bob Brill, Union Board Member — Concur/~~Dissent~~ — 12/[illegible] date