IN ARBITRATION PROCEEDINGS

PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy	)	
	)	
Between	)	ARBITRATION NO. 283
	)	
PACIFIC GAS & ELECTRIC CO.,	)	SUPPLEMENTAL DECISION
	)	
Employer,	)	Frank Silver,
	)	Chair, Board of Arbitration
and	)	
	)	John Moffat
INTERNATIONAL BROTHERHOOD OF	)	Andrew Williams
ELECTRICAL WORKERS, LOCAL 1245,	)	Company Board Members
	)	
Union,	)	Bob Choate
	)	Bill Brill
RE: V - remedy	)	Union Board Members
	)	

By an Opinion and Award dated November 20, 2008, the Board of Arbitration concluded that the Grievant, V , had been discharged without just cause, and it directed that he be reinstated with an oral reprimand and with back pay and other benefits, less interim earnings, from the date of his termination until his reinstatement pursuant to the Award. He was subsequently reinstated and provided with back pay representing the wages he would have earned for all regularly scheduled, i.e. non-overtime, hours he would have worked during the backpay period. However, the parties dispute whether the Grievant is entitled to certain additional amounts under the Award, and have submitted those issues to the Board of Arbitration under its reserved jurisdiction. The issues to be determine in this phase of the proceeding are as follows:

1. Is the Grievant entitled to be compensated for overtime hours he would have worked during the backpay period?[1]

2. Is the Grievant entitled to reimbursement of the increased tax burden due to taxes paid on the withdrawal of money from his 401(k) plan following his termination? (Tr. 3-4.)

In addition to these issues, the parties reserved the right to arbitrate a question regarding his retirement date for purposes of the Retiree Medical Savings Account should the need arise (Tr. 4.)

A hearing was conducted on April 27, 2010, at which time the parties had the opportunity to examine and cross-examine witnesses and to present relevant evidence. After preparation of the transcript, both counsel submitted post-hearing briefs and the issues were submitted for decision.

PERTINENT PROVISIONS OF THE AGREEMENT

102.4 – 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. A resolution at a step below Step Five, while final and binding, is without prejudice to the position of either party, unless mutually agreed otherwise.

(a) If an employee has been demoted, disciplined or dismissed from the Company's service for alleged violations of a Company rule, practice or policy and the Company finds upon investigation that such employee did not violate a Company rule, practice or policy as alleged, Company shall reinstate the employee and pay the employee for all time and benefits lost thereby plus interest on such reinstated pay in the amount of 7 ½% annum.

FACTS

At the time of his termination in February 2007, the Grievant had been employed by the Company for 36 years, and for the previous 15 years he had been an electric crew foreman working out of Santa Cruz. In that position, he worked extensive emergency overtime during the rainy winter months. His payroll records reflect that for the years 2003 through 2006 he worked between 770 and 920 total overtime hours (at time and a half or double time) and that his yearly overtime

[1] The parties have agreed to submit the question regarding entitlement to overtime for decision, reserving the calculation of the amount of overtime to be determined by the parties in the event it is found that overtime should be included in back pay (Tr. 5).

earnings ranged between $46,600 and $65,000 (Jt. Ex. 2). The Union provided an exhibit with his reported W-2 earnings for 1997 through 2006, from which it calculated overtime earnings which differed somewhat from the payroll figures, but which reliably showed that he received substantial overtime pay each year for the entire 10-year period (Un. Ex. 1). In general, his yearly overtime earnings were roughly equivalent to 40% of his straight-time pay.

The parties, in the 57 year history of their collective bargaining relationship, have never included overtime in backpay calculations for employees reinstated through arbitration or at a lower step of the grievance procedure. According to the Company's grievance tracking system, between January 1, 2000 and February 9, 2009 there were 493 discharge grievances, of which 419 were closed without adjustment (discharge upheld). Of the 41 grievances in which the employee was reinstated, ten were reinstated with partial back pay, six with full back pay, and 25 with no back pay.

As testified by Local 1245 business manager Tom Dalzell, his understanding is that in prior years the issue of overtime was not raised because it was believed that arbitrators generally considered overtime to be speculative and therefore not properly a part of a backpay award. However, in 2005, in an arbitration proceeding with the Sacramento Municipal Utility District, the arbitrator ruled that overtime was appropriate because the employee had consistently worked a lot of overtime. After that, the Union looked for an appropriate case at PG&E in which to raise the overtime issue. The issue was raised in a case involving an employee named H at the Diablo Canyon Power Plant, but upon further investigation it was determined that he had stopped working overtime in recent years due to family commitments, and so the overtime claim was withdrawn and there was no decision on that point by the arbitrator. This is the second case in which the Union has argued that overtime should be included in the backpay calculation.

There are many PG&E employees who predictably work extensive amounts of overtime, including mandatory overtime. In addition to electric crews in rainy areas of Northern California, employees in call centers and at Diablo Canyon work extensive overtime. As noted by the Company, the Union has never proposed the inclusion of overtime in backpay for reinstated employees in contract negotiations, including during the 2008 negotiations which followed the S.M.U.D. case referred to by Dalzell.

POSITIONS OF THE PARTIES

The Union

The Union argues that a make whole remedy attempts to place the employee in the same position he or she would have been in but for the improper discharge. However, overtime has been excluded from back pay awards where it has been found to be speculative. Where it is not uncertain, employees are entitled to overtime and reimbursement for other losses. As discussed in Elkouri, arbitrators have great latitude in fashioning remedies appropriate to the circumstances.

In this case, the Grievant's overtime losses are obvious and undisputed. His other losses, resulting from the withdrawal of funds from his 401(k) plan, are just as real and are analogous to the "thin skull" cases taught in first year torts, i.e. when an actor commits a wrongful act, the actor must assume responsibility for the consequences of that decision. Here the Company had to foresee that a man suddenly deprived of his income after 36 years of employment, and blackballed from finding a job with an electrical contractor doing business with PG&E, would have to find another source of income and would have little choice but to withdraw the funds from his 401(k) plan. But for the Company's wrongful termination, the Grievant would not have had to withdraw the funds, suffering the tax consequences thereof, leaving him approximately $150,000 poorer than he otherwise would

have been. Making him whole necessarily includes compensation for these losses.

Regarding overtime pay, the Company failed to prove a past practice which would preclude inclusion of overtime in the Grievant's back pay. The Company relies exclusively on its Exhibit 1, showing four cases in the last decade where overtime was not included in a backpay award. No facts were presented regarding any of those cases, making it impossible to consider whether they were similar to the present case.

Moreover, the evidence showed that the parties have never discussed overtime in backpay cases, have not decided either way whether to include overtime, and have not established any precedents on that issue. If it was never considered or discussed, there cannot be a past practice. The issue is too important to be decided *sub silentio,* and it has come up too infrequently to be treated as a practice. As stated in Elkouri, when it is asserted that a past practice constitutes an implied term of a contract, strong proof of its existence will be required. There was no proof of an unequivocal practice, in that the Company offered no evidence that overtime was denied in any case with facts similar to those in this case. Nor was there a "clearly enunciated" practice; in fact, it was not enunciated at all. There was no proof of a mutually recognized past practice.

Section 102.4 confirms that an employee is entitled to "all time and benefits lost," and this includes overtime as well as the lost benefit from his 401(k) plan. Neither party negotiated to include or exclude any particular element of back pay.

The right to overtime as part of a backpay award is essentially a creature of arbitral law. There are many arbitration cases in which overtime was granted, or when it was denied as being speculative. In *University Medical Center,* 114 LA 28 (Bogue, 2000), the arbitrator concluded that the right to overtime is inherent under a just cause provision, trumping a past practice under which

overtime was not paid. Thus, even if the Company here had proven a past practice, the Grievant should still be awarded overtime.

In addition, the Grievant is entitled to consequential damages, in particular, the lost earnings and tax losses as a result of his being forced to withdraw the funds from his 401(k) plan. In *Homer Electric Assn. and IBEW 1547*, 119 LA 525 (Lumbley, 2003), the arbitrator reviewed a number of claims for consequential damages, allowing those for which he concluded that the grievant's termination was the "proximate cause of the loss." In the case of taxes and penalties in connection with converting the 401(k) loan to a distribution, the arbitrator found that the employer was not liable because these claims were related to choices the grievant had made before his termination occurred. In the present case, however, the Grievant was forced to withdraw the 401(k) funds only because of his termination. The Union has provided alternative methods of computing the losses suffered by the Grievant as a result of his withdrawal of 401(k) funds.

For these reasons, the Union asks that the Grievant be made whole with respect to lost overtime and consequential damages from his withdrawal of 401(k) funds.

The Company

The Company argues that many bargaining unit employees work substantial amounts of both mandatory and voluntary overtime, and the parties have arbitrated dozens of cases involving such classifications. Of those employees reinstated with back pay by an arbitrator, none has received estimated overtime as part of the award, let alone reimbursement for tax liability related to the withdrawal of 401(k) funds. The Grievant in this case is no different than any other employee reinstated through the grievance process, and he should be treated in the same manner.

The parties have an unequivocal, clearly enunciated, and longstanding past practice of not

considering overtime as part of back pay. The Union has not pointed to a single case in which these parties have included overtime, in spite of a half century of experience in implementing backpay and make whole awards by the Arbitration Board. Although the Union claims it has never consented to the exclusion of overtime, its conduct speaks louder than its advocacy. In the parties' 57 year history it has never objected to the exclusion of overtime as part of a backpay remedy. The failure to object constitutes implied consent. See *City of Alliance*, 121 LA 1352, 1355 (Franckiewicz 2005) ["By silently accepting the sick leave as calculated by the City, the Union signified that it likewise regarded the method as proper under the agreement. . . ."]

The Union cannot change the parties' longstanding past practice without bargaining with the Company. It had the opportunity as recently as 2008 to propose an amendment to section 102.4 to include overtime and tax liability reimbursement as part of a backpay remedy. Having failed to do so, it cannot be permitted to unilaterally change the parties' past practice.

For these reasons, the Company argues that the claims to include overtime and reimbursement of tax liability should be denied.

DISCUSSION

A. Issue #1 – Overtime.

The remedy provided in this case was that the Grievant should be reinstated to his former position, with full seniority and full back pay. This is the standard form of a make whole remedy, designed to provide the grievant with all of the contractual wages and benefits he would have earned but for the termination which was found to be without just cause. There is extensive arbitral authority for including lost overtime in make whole remedies, where the record shows that the grievant worked overtime on a regular basis in the past and where it can be determined with

reasonable certainty that overtime would have been available during the backpay period. Arbitrators have denied the inclusion of overtime where it would be speculative to assume the grievant would have worked a certain amount of overtime but for the termination.[2]

In the current case, there is no real dispute but that the Grievant would qualify for overtime under normal arbitral criteria as part of the make whole remedy. As an electric crew foreman working out of Santa Cruz he regularly worked extensive emergency overtime during the rainy winter months. As detailed above, in the four years prior to his termination, his yearly overtime earnings ranged between $46,600 and $65,000, and over a ten-year period his annual overtime pay was roughly equivalent to 40% of his straight-time pay.

The Company disputes the Grievant's entitlement to overtime in the backpay award, not on the basis that it would be speculative, but on the grounds that in the 57-year history of the parties' collective bargaining relationship, no grievant has been compensated for lost overtime as part of a backpay award. Business manager Dalzell conceded that the Union has never asked for overtime as part of backpay, except in one recent case from the Diablo Canyon Power Plant, where the claim was withdrawn based on an investigation which showed that the grievant had not worked overtime in recent years due to family commitments. Since the Union has not requested overtime in other cases, the issue has never been referred to arbitration. In addition, no evidence was introduced to show that an overtime request has ever been considered at the Review Committee level. Therefore, there is no precedential decision granting or denying overtime, but it is the Company's position that because many employees at PG&E work extensive overtime, including mandatory overtime, on a

---

[2] See, *Remedies in Arbitration,* 2d ed., Hill and Sinicropi (BNA Books 1991), pp. 198-200; *Discipline and Discharge in Arbitration,* 2d ed., Brand and Biren, eds., (BNA Books 2008), Chap. 12, Remedies for Inappropriate Discipline," pp. 482-483.

regular basis, the Union's failure to seek the inclusion of overtime during the parties' long history establishes a binding past practice that overtime is not to be included in back pay.

It is in fact quite surprising to the Chair that this issue has not previously arisen in the history of these parties' relationship. Certainly, there have been a number of grievants over the years who have been reinstated by Arbitration Boards, with the computation of back pay remanded to the parties subject to a reservation of arbitral jurisdiction. The award itself would not specify whether overtime would be included in back pay, and it is when the matter is remanded to the parties that the issue of overtime would normally arise. In virtually all cases, the parties settle on the amount of back pay, and one would assume that in cases where the reinstated employee has worked regular and predictable overtime, overtime would be included in the backpay settlement. In the unusual case where there is a dispute over whether overtime should be included, either as an appropriate part of back pay or as to whether it is speculative, the issue could be referred back to arbitration.

However, based on the record in this case, overtime has not been claimed in cases where employees have been reinstated through arbitration. Therefore, there is no precedent either for employees receiving overtime as part of a backpay settlement or as a result of an arbitrator's decision. This is particularly surprising because a number of classifications at PG&E predictably work substantial amounts of overtime due to weather-related outages or other emergencies. The Company notes in particular that line crews in northern California, call center employees, and employees at Diablo Canyon work substantial amounts of both mandatory and voluntary overtime.

In addition, the issue has not arisen in the presumably more numerous instances in which employees have been reinstated at earlier stages of the grievance procedure, and no precedential Review Committee decision has been cited. It is perhaps less surprising, however, that the issue of

overtime has not arisen in cases where employees have been reinstated short of arbitration because typically the employee would have been out of work for a much shorter period of time during which there would likely not have been substantial amounts of missed overtime. It is primarily in cases of employees reinstated through arbitration that one would expect the issue to have arisen.

In considering whether the parties' failure to include overtime in back pay for previous reinstated employees represents a binding past practice, it is necessary to consider carefully the specific evidence. The Company provided data from its grievance tracking system that of 493 discharge grievances between January 1, 2000 and February 9, 2009, there were 41 employees reinstated, ten with partial back pay, six with full back pay, and 25 with no back pay. These numbers include both arbitration cases and employees reinstated at a lower step of the grievance procedure. It is hard to evaluate the cases of the ten employees reinstated with partial back pay, since as Dalzell testified, under the positive discipline system there are no suspensions and those cases would have been "equity settlements." Of the six employees reinstated with full back pay, one of those cases was the H case from Diablo Canyon in which the Union withdrew a claim for overtime after finding that the grievant had not regularly worked overtime due to family commitments. One of the six cases may or may not have been the current case. (Tr. 59-60.)

Six employees reinstated with full back pay during a nine year period does not represent a large number of occasions during which the question of including overtime could have arisen. It is significant that in the Hamby case, the Union made a reasonable decision to withdraw the overtime claim upon learning that the grievant had not regularly worked overtime. Of the other four or five reinstated employees, there is no evidence whether they were in classifications which regularly worked overtime such that the Union's failure to claim overtime might arguably be

characterized as a concession that overtime is not properly a part of back pay. With regard to cases prior to 2000, the record is silent as to the number of employees reinstated with full back pay, and of those how many were in classifications which regularly worked overtime. For these reasons, the record does not provide a basis for determining how often the Union might have legitimately claimed overtime for employees reinstated with full back pay.

Dalzell testified that in 2005 an arbitrator ruled in a Local 1245 case with the Sacramento Municipal Utility District that a reinstated employee was entitled to overtime because he had consistently worked a lot of overtime in the past, and that the Union then decided to look for a good case in which to raise the issue with PG&E. However, according to Dalzell there were not a lot of opportunities, and other than the H case, the current case was the first time in which a reinstated employee had consistently worked substantial overtime.

Considering that there have only been six employees reinstated with full back pay in the 2000-2009 period, it appears correct that there have not been many opportunities to raise the issue. Presumably, the opportunities were no more frequent prior to 2000, and, as discussed above, there is no evidence as to reinstated employees who were in classifications working regular and substantial overtime. Despite these parties' long history of grievance arbitration, it has not been shown that there is a clear and unequivocal past practice such that the Union can be said to have accepted the principle that overtime may not be included in back pay awards in appropriate cases.

It bears emphasis that the Union was not obligated to claim overtime in every case in which an employee has been reinstated with back pay. The arbitral doctrine is *not* that overtime is automatically included in backpay awards; rather, it is included only when it can be demonstrated that the grievant has regularly worked overtime in the past and would have had the opportunity to

do so during the backpay period. In the absence of such a showing, a claim for overtime would be considered speculative. The Union has asserted that its belief that arbitrators would tend to find overtime claims to be speculative deterred it from raising the issue in the past. While it seems likely that there must of been some cases in the past when there could have been credible claims for overtime, the fact that the Union has not claimed overtime in any particular case does not suggest that it agrees that overtime may not be appropriate where the circumstances warrant.

There is an additional analytical problem with concluding that there is a binding past practice to exclude overtime from back pay. It is not argued that there has been any affirmative recognition or agreement by the Union that overtime may not be included in back pay in an appropriate case. In essence, the Company's position is that there has a negative past practice, i.e. that the Union by failing to claim overtime in the past has waived its right to do so in the future. However, the Company has not been prejudiced by the lack of previous overtime claims, i.e. it has not given up anything of value to avoid prior overtime claims. In other words, since under arbitral doctrine the Union has the right to claim overtime as part of back pay in an appropriate case, there is a lack of consideration, in the contractual sense, to support a binding agreement by the Union to give up its right to claim overtime when the circumstances may warrant. This is not a situation where the parties have a settled past practice which accommodates each parties' interests. Rather, there has been the mere absence of a claim that might be asserted by the Union.

In this sense, the situation is similar to when management fails to assert an inherent management prerogative for a period of time, and then decides to do so. As quoted in Elkouri and Elkouri,[3] Arbitrator Whitley McCoy wrote:

---

[3] *Elkouri & Elkouri, How Arbitration Works*, 6th ed, Ruben, ed. (BNA Books 2003), p. 612.

> "But caution must be exercised in reading into contracts implied terms, lest arbitrators start re-making the contracts which the parties themselves made. The mere failure of the Company, over a long period of time, to exercise a legitimate function of management, is not a surrender of the right to start exercising such right. If a Company had never, in 15 years and under 15 contracts, disciplined an employee for tardiness, could it thereby be contended that the Company could not decide to institute a reasonable system of penalties for tardiness? Mere non-use of a right does not entail a loss of it."[4]

Similarly, in this case, the Union as the inherent right to claim overtime as an element of back pay, where such a claim is not speculative. The fact that it has not done so previously, despite the parties' long relationship, does not mean that it has given up the right to do so. In the absence of some positive agreement or decision that overtime may not be claimed, the Union has the ability to make the claim in appropriate cases.

As discussed at the outset, factually this is an appropriate case in which to include overtime in back pay. As demonstrated in the record, the Grievant regularly worked substantial overtime in each of the ten years prior to his termination. The parties undoubtedly have access to records to establish the amount of overtime which was worked by electric crews in his area during the approximate two years before he was ordered to be reinstated. As stipulated by the parties, the matter will be remanded for purposes of determining the amount of overtime to be included in the backpay award.

B. <u>Issue #2 – Reimbursement of tax burden due on 401(k) withdrawal.</u>

The second issue in this phase of the proceeding is whether the remedy should include monetary losses suffered by the Grievant as a result of the fact that he was required to pay taxes on the funds he withdrew from his 401(k) plan in 2007 following his termination. The Union argues that the Grievant was forced to withdraw the money in order to live and support his family following

---

[4] *Esso Standard Oil Co.*, 16 LA 73, 74 (1951).

his termination, and it has provided certain alternative methods for computing his actual monetary loss as a result of having to withdraw all of the money in a single year.[5]

The remedy in the case included "back pay and other economic benefits provided in the Agreement, less interim earnings." It is entirely normal for a back pay award to be limited to lost earnings provided under the collective bargaining agreement, and it is within the contemplation of the parties when they enter into a CBA that back pay will be limited in this manner.

> "With few exceptions, arbitrators follow the common-law requirement that 'damages' are not recoverable unless they arise naturally from the breach or were contemplated by the parties as a probable result of the breach at the time the contract was made."[6]

The tax burden claimed by the Union is not a contractual loss, nor was it demonstrated that such losses were proximately caused by the Company's decision to terminate the Grievant. An employee who is terminated may have various options for supporting himself and his family, and it is not a necessarily foreseeable consequence that he will make a lump sum withdrawal of his retirement funds. Certainly, such a withdrawal does not automatically occur when an employee is terminated, and there is no precedent for including these claimed damages in a backpay remedy.

Further, there is no evidence in the record to demonstrate that the Grievant was forced to make such a withdrawal, i.e. that he had no other option. Any tax burden as a result of the withdrawal was not shown to be proximately caused by the termination; rather, the Grievant's decision to make the withdrawal was an intervening cause of any tax loss. Thus, the claimed damages were not a foreseeable result of the termination, nor was it shown that such non-contractual

---

[5] His 2007 W-2 from the investment company managing the retirement account showed a gross distribution of $182,000, with $32,000 plus withheld in federal taxes and $3,000 plus withheld in state taxes.

[6] Hill & Sinicropi, *Remedies in Arbitration*, 2d ed., 493 (BNA Books, 1991); and see *Discipline and Discharge in Arbitration,* Brand and Biren, eds, *supra* at 472.

damages were within the contemplation of the parties as part of a backpay remedy. Therefore, this claim must be denied.

SUPPLEMENTAL AWARD

1. The backpay remedy includes lost overtime which the Grievant would have worked during the period between his termination and his reinstatement under the original Award.

2. The matter is remanded to the parties to calculate the amount due the Grievant as a result of lost overtime. Jurisdiction is reserved in the event that the parties cannot agree on such amount.

3. The remedy does not include the claimed tax burden as a result of the Grievant's withdrawal of funds from his 401(k) account.

4. As stipulated by the parties, jurisdiction is reserved with respect to a potential dispute over the retirement date for purposes of the Grievant's Retiree Medical Savings Account.

Frank Silver, Chair, Arbitration Board — date: 2/21/11

John Moffat, Company Board Member — Issue #1 - concur/dissent; Issue #2 - concur/dissent — date: 3/18/11

Andrew Williams, Company Board Member — Issue #1 - concur/dissent; Issue #2 - concur/dissent — date: 3/18/11

Bob Choate, Union Board Member — Issue #1 - concur/dissent; Issue #2 - concur/dissent — date: 3/23/11

Bill Brill, Union Board Member — Issue #1 - concur/dissent; Issue #2 - concur/dissent — date: 3/28/11