BEFORE AN ARBITRATION BOARD

IN ARBITRATION PURSUANT TO

THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245 Union, & PACIFIC GAS & ELECTRIC, Company.	DECISION AND ORDER ON SUBSTANTIVE ARBITRABILITY IN GRIEVANCE NO. 25738: O[redacted] UAA Revocation

APPEARANCES

For the Union:

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For the Employer:

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Procedural History

This arbitration arises under the Collective Bargaining Agreement ("CBA" or "Agreement") between the International Brotherhood of Electrical Workers, Local 1245 ("IBEW Local 1245" or "Union") and Pacific Gas and Electric ("PG&E," "Employer," or "Company"). I was selected as the impartial Chair of the Arbitration Board. The Union's Board members are

E[redacted] M[redacted], IBEW Local 1245 Business Representative, and D[redacted] S[redacted], IBEW Local 1245 Assistant Business Manager; the Company's Board members are K[redacted] L[redacted], PG&E Labor Relations Manager, and D[redacted] H[redacted], PG&E Principal Labor Relations Negotiator.

The Company asserts that the operative grievance is not substantively arbitrable. It moved that the issue of substantive arbitrability be bifurcated. On August 4, 2023, I ruled that the matter should be bifurcated. The evidentiary hearing regarding the issue of substantive arbitrability in this matter was held via Zoom on August 23 and 24, 2023. At the outset of the hearing, the parties stipulated that the Board had the authority pursuant to the CBA to decide the issue of substantive arbitrability, as there is no dispute that there is a valid CBA between the parties and that the CBA authorizes the Board, as opposed to a court, to decide issues of substantive arbitrability. A Certified Shorthand Reporter attended the hearing to record the proceedings and testimony, and the reporter subsequently produced a verbatim transcript thereof. Each party had a full and adequate opportunity to call, examine, and cross-examine witnesses and to introduce relevant evidence. All witnesses testified under oath. The parties submitted post-hearing briefs on October 16, 2023.

ISSUE

The parties stipulated to the following issue:

Is the Grievance substantively arbitrable?

RELEVANT CONTRACTUAL PROVISIONS

Title 7: Management of Company

Section 7.1 Management of Company

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

Title 102: Grievance Procedure

Section 102.1 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.

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.

The parties are in agreement with the policy expressed in the body of our nation's labor laws that the mutual resolution of disputes through a collectively bargained grievance procedure is the hallmark of competent industrial self-government. Therefore, apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure.

Union agrees to provide grievant(s) with a copy of any settlement reached at the grievant's last known address. Such copy shall be sent by certified, U.S. mail, or handed to the grievant, within 30 calendar days of the signing of the settlement.

Section 102.2 GRIEVANCE SUBJECTS

Disputes involving the following enumerated subjects shall be determined by the grievance procedures established herein:

(a) Interpretation or application of any of the terms of this Agreement, including exhibits thereto, letters of agreement, and formal interpretations and clarifications executed by Company and Union.
(b) Discharge, demotion, suspension or discipline of an individual employee.
(c) Disputes as to whether a matter is proper subject for the grievance procedure.

. . .

Section 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 Four, while final and binding, is without prejudice to the position of either party, unless mutually agreed to otherwise. (Amended 1-1-09)

Section 102.6 STEPS

STEP ONE
SHOP STEWARDS

Except for disputes involving an employee's discharge, demotion, suspension, discipline or qualifications for promotion or transfer, the initial step in the adjustment of a grievance shall be a discussion between Union's shop steward (or grievant or Business Representative if no shop steward is assigned to the work area) and the foreman or other immediate supervisor directly involved.
. . .

STEP TWO
LOCAL INVESTIGATING COMMITTEE

Immediately following the filing of a timely grievance, a Local Investigating Committee will be established. The Committee will be composed of the *Labor Relations Representative*, the Business Representative, the exempt supervisor whose decision is involved in the grievance, and the shop steward representing the department involved. (Amended 8-15-17)
. . .

STEP THREE
FACT FINDING COMMITTEE

The Fact Finding Committee shall be composed of the Chairman of the Review Committee or his/her designee, the Secretary of the Review Committee or his/her designee, and the *Labor Relations Representative* and the Business Representative involved in the preceding step. (Amended *8-15-17)*

. . .

STEP FOUR (Title Amended 1-1-00)
REVIEW COMMITTEE

The Review Committee shall consist of four representatives designated by Company's *Senior* Director of Labor Relations, one of whom shall serve as Chairman of the Committee, and four representatives designated by the Union, one of whom shall serve as Secretary of the Committee. Company will not assume payment of any expense or lost time incurred by Union members of the Review Committee. (Amended *8-15-17*)

. . .

A. PRE-REVIEW COMMITTEE PROCEDURE

After the Labor Relations Department receives a Business Manager's Grievance or the file from the Local Investigating Committee or Fact Finding Committee as provided for in the foregoing, four copies shall be submitted to the Union's Business Office. Thereafter, and prior to docketing, the Chairman and the Secretary of the Review Committee shall meet at a mutually agreeable time and place for the following purposes: (Amended 1-1-09)

. . .

B. REVIEW COMMITTEE PROCEDURE

After the Pre-Review Committee meeting, referrals not disposed of shall automatically be added to the Review Committee Agenda.

. . .

ARBITRATION
A. TRIPARTITE BOARD

Either Company or Union may request, within the time limits provided in the foregoing steps, that a grievance which is not settled at one of the steps provided above be submitted to arbitration.

. . .

STIPULATED FACTS

The parties stipulated to the following facts: PG&E is an investor-owned utility in the state of California, with headquarters in Oakland, California. PG&E owns and operates the

Diablo Canyon Power Plant, a Nuclear Power Plant located in San Luis Obispo County, California. IBEW Local 1245 is a labor organization that represents employees of PG&E, including employees at Diablo Canyon Power Plant. IBEW Local 1245 and PG&E are parties to a collective bargaining agreement, dated January 1, 2016, and extended with certain modifications through 2025, in effect during all relevant times. That agreement includes provisions on grievances and arbitration.

The Nuclear Regulatory Commission ("NRC") regulates nuclear power plants. The NRC requires nuclear licensees to adopt access authorization programs. NRC regulations state that those programs "must provide high assurance that the individuals [to which those programs apply] are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security, including the potential to commit radiological sabotage." 10 C.F.R. § 73.56(c). Those programs "must provide for an impartial and independent internal management review" of a licensee's initial decision to revoke an employee's access. 10 C.F.R. § 73.56(l).

Grievant G[redacted] O[redacted] ("O[redacted]") is an employee of PG&E. O[redacted] has been an employee of PG&E since 2011, when he was hired to work at Diablo Canyon as a Nuclear Operator. PG&E requires Nuclear Operators to maintain unescorted access authorization ("UAA") to continue working at Diablo Canyon. On March 16, 2021, PG&E's Corporate Security Department ("CSD") issued a Corporate Security Report regarding O[redacted]. On April 6, 2021, the Diablo Canyon Power Plant Access Department suspended the UAA for O[redacted] and two other Nuclear Operators. On April 26, 2021, PG&E revoked O[redacted]'s UAA. PG&E did not revoke the UAA of the other two Nuclear Operators. On May 14, 2021, CSD issued an addendum to the March 16th Corporate

Security Report. C[redacted] appealed the revocation of his UAA to PG&E's internal management review committee on or around May 9, 2021. On May 19, 2021, the Access Appeals Review Committee issued a letter denying C[redacted]'s appeal. On June 18, 2021, PG&E sent C[redacted] a letter stating that, because of the revocation of his UAA, he had been removed from his position as a Nuclear Operator and would be demoted in accordance with Section 206.15 of the parties' collective bargaining agreement. C[redacted] was assigned to the position of Power Plant Assistant in the Carothers Solar O&M Headquarters in Fresno, California, at $51.08 per hour, a lower wage rate than C[redacted] had earned as a Nuclear Operator. This grievance, No. 25738, was filed by Local 1245 on C[redacted]'s behalf on June 25, 2021. That grievance has been processed through all applicable steps of the grievance procedure short of arbitration. The Company's original answer to the grievance was provided on July 7, 2021. On December 9, 2021, the Company provided an amended answer to the grievance.

ADDITIONAL RELEVANT FACTS

Pre-Review Committees ("PRCs") are part of the grievance process as laid out in the operative CBA. There are historic examples of PRCs hearing UAA revocation matters. For instance, a 2001 PRC found that "the loss of access to the protected areas of DCPP has been and continues to be just cause for discharge. There is a separate Company appeals process for access denial. The grievant did appeal her loss of access but the denial was upheld."[1] The 2001

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[1] Company Ex 1 (PRC 12434).

PRC discussed the efforts for reassigning the individual and noted that she had the opportunity to seek to be rehired in the future. On that basis, the 2001 PRC closed the case.

Two 2013 PRCs noted the following:

> At the time of the grievant's suspension, SP 432 was designated as a safeguarded document, which precluded the Company from providing the document to the Union. Recently, the document's safeguarded designation was rescinded, allowing the Company to provide the document to the Union. The Pre-Review Committee reviewed SP 432 and the reason for the suspension of the grievant's UAA. The grievant's arrest met the criteria for automatic suspension of UAA. The Committee also noted that there is no provision in the Labor Agreement which provides for these suspensions to be with pay. The Committee agrees the suspension of the grievant was in accordance with SP 432 and was not a violation of the Labor Agreement.[2]

Another 2013 PRC found the following:

> The Pre-Review Committee reviewed SP 432 and the reason for the revocation of the grievant's UAA. The grievant's conviction met the criteria for automatic termination of UAA. The Committee also noted that the grievant appealed the access revocation decision, as provided for in SP 432, and that his appeal was denied. The Committee agrees the discharge was for just cause and closes this case without adjustment.[3]

OPINION

A matter will be deemed substantively arbitrable unless "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute."[4] Any doubts about the scope of arbitrable issues should be resolved in favor of arbitration.[5] In *AT&T Technologies v. Communication Workers*, the Supreme Court observed

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2 Company Ex 2 & 3 (PRC 20389 & 20479).
3 Company Ex 4. (PR 20567)
4 AT&T Technologies, Inc. v CWA (1986) 475 U.S. 643, 650.
5 Moses H. Cane Memorial Hosp. v Mercury Const. Corp. (1983) 460 U.S. 1, 24-25.

that "[s]uch a presumption is particularly applicable where the clause is . . . broad [and] . . . provides for arbitration of 'any differences arising with respect to the interpretation of the contract or the performance of any obligation hereunder.'"[6] Only an "express provision excluding a particular grievance from arbitration [or] the most forceful evidence of a purpose to exclude the claim from arbitration" is sufficient to avoid arbitration under such a broad provision.[7] "This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining."[8]

Moreover, in determining whether a matter is substantively arbitrable, one does not look at the underlying merits of the claim; rather, one "is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation" to be decided on the merits.[9] This is the case even if the claim is arguably frivolous: "Indeed even if it appears to the court to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided not by the court asked to order arbitration."[10]

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6 475 U.S. 643, 650 (1986).
7 Id at 650.
8 Id at 650 (internal citations and quotations omitted)
9 Steelworkers v. American Manufacturing Comp. (1960) 363 U.S.564, 567-568.
10 AT&T Technologies, Inc. v CWA (1986) 475 U.S. 643, 649-650.

A. The Arbitration Provision In The CBA Is Clear And Broad

It is a well-known rule that "if the words [of an Agreement] are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used."[11] Section 102.1 of the CBA states that "apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure." It is hard to think of language that more clearly conveys the distinct idea that disputes between the parties that are not otherwise explicitly excluded are subject to the grievance and arbitration process.

PG&E acknowledges that a literal reading of Section 102.1 defeats its arbitrability claim: "a literal reading of the second above-quoted sentence of Section 102.1 is an absurd reading that would render every conceivable subject in dispute into an arbitrable subject."[12] It, therefore, argues that Section 102.1 cannot mean what it says. PG&E attempts to apply various contractual interpretation principles to argue that Section 102.1 really means that only those issues enumerated in Section 102.2 are arbitrable. However, PG&E ignores the fact that contractual interpretation principles such as avoiding absurd results, looking to specific language over general language, and *expressio unius est exclusio alterius*, are only utilized to help interpret ambiguous language. As a first step, an arbitrator determines whether the

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11 How Arbitration Works, Elkouri & Elkouri, Eighth Edition (Arlington, VA: Bloomberg BNA Books, 2016), 9-8 to 9-9.

12 PG&E Closing Brief pg. 31.

disputed language is clear and unambiguous. If it is, the arbitrator's analysis ends and the clear and unambiguous language controls.

Put differently, PG&E is essentially asking me to rewrite the CBA to say only disputes enumerated under Section 102.2 are subject to the grievance process rather than applying the language as written, which clearly says ""apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure." Arbitrators do not and should not rewrite CBA language, and I will not do so here.

B. **Broad Arbitration Language Covers UAA Revocation Disputes**

PG&E argues that the Union is seeking to gain something that it did not get at the bargaining table. "PG&E submits that the most important rule to be applied in this case is the following: a party cannot gain through arbitration what that party has failed or neglected to obtain at the bargaining table."[13] PG&E asserts that, for UAA issues to be arbitrable, IBEW Local 1245 had to bargain for language that explicitly stated UAA issues were arbitrable. PG&E notes that no such language exists in the CBA. PG&E supports its position by pointing to *Public Service Electric & Gas Co. v. Local 94, IBEW,* 140 F. Supp. 2d 384, 393 (D.N.J. 2001) ("*PSE&G*") where a court found that a UAA issue was *not* arbitrable because the contract did not contain any specific language indicating that UAA issues *were* arbitrable.[14]

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13 PG&E Closing Brief, pg. 18.
14 140 F. Supp. 2d. at 390-91, 404.

To its credit, PG&E acknowledges that there is caselaw holding otherwise. It specifically notes that the 7th Circuit, in *Exelon Generation Co., LLC v. Loc. 15, Int'l Bhd. of Elec. Workers, AFL-CIO*,[15] found that a collective bargaining agreement without explicit UAA language allowed for arbitration of UAA issues. PG&E attempts to distinguish *Exelon* by arguing that, in *Exelon,* the scope of the parties' contractual grievance and arbitration language was extremely broad, as it provided for grievance/arbitration with respect to "any dispute" over "working conditions."

As discussed above, I find the arbitrability language in the operative CBA to be incredibly broad, as Section 102.1 provides that "apart from those matters that the parties have specifically excluded by way of Section 102.2, all disagreements shall be resolved within the scope of the grievance procedure." I find the operative CBA's arbitrability language to be just as broad as the language in *Exelon*; therefore, the *Exelon* analysis is more on point than the *PSE&G* analysis.

Moreover, the purpose of contractual interpretation is to determine the mutual intent of the parties at the time the agreement was reached. There is nothing in the record that would allow me to conclude that the bargaining parties believed that a New Jersey district court ruling would control or be used to help interpret the contractual language when they agreed that "all disagreements shall be resolved within the scope of the grievance procedure." I must also assume that the parties, who operate in this field, knew that at least some legal authority had found that broad grievance language would cover disputes over UAA revocations.

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[15] 676 F.3d 566, 568-69 (7th Cir. 2012),

Therefore, once the parties agreed to such broad arbitrability language, it would have been PG&E's responsibility to bargain an arbitrability carve-out for UAA issues if it so desired one.

Put differently, were I to rule that UAA disputes are not arbitrable in the face of broad arbitrability language, I would give PG&E something it did not seek or obtain at the bargaining table.[16]

C. Past Practice Supports A Finding That UAA Revocation Decisions Are Subject to the Grievance/Arbitration Process

It is clear that the parties have submitted UAA revocation issues to PRCs for review. It is equally clear that PRCs are part of the grievance/arbitration process. PG&E argues that the PRCs have only engaged in perfunctory reviews of such access revocations:

> There is no analysis or discussion of *why* the arrest or conviction met the standards for UAA revocation or SP 432, or what those UAA revocation standards were *or should be*. It is apparent, from the face of PRC decisions 20389, 20479, and 20567, that the parties simply *looked at* SP 432 to confirm that the criteria for *automatic* UAA suspension (or termination) were met in each case.
>
> Notably, just like in PRC 12434, the parties called out the separate and extra-contractual UAA appeals process in PRC 20567. (EX 4, p. 2 ["The Committee also noted that the grievant appealed the access revocation decision, as provided for in SP 432, and that his appeal was denied"].)[17]

But arguments about what standard should be applied in the grievance/arbitration process is a merits issue. I anticipate and encourage the parties during the merits phase to

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[16] Given the broad arbitrability language in the CBA, I also reject PG&E's argument that Local 1245 should have bargained for the arbitrability of UAA revocation disputes when the parties bargained the UAA policy if it wanted such disputes to be arbitrable. It is PG&E who needed to bargain an exclusion to the broad CBA arbitrability language, not *vice versa.*

[17] PG&E Closing Brief pg. 27-28.

argue whether a "just cause" or some other standard applies to this case. For purposes of deciding the issue of substantive arbitrability, it is important to note that UAA revocation cases have, as a matter of past practice, been submitted to the grievance process for some type of review.

ORDER

For the foregoing reasons, the matter is substantively arbitrable. The operative CBA language regarding arbitrability of disputes is extremely broad. In bargaining the broad arbitrability language, the parties knew or should have known that at least some courts have found the issue of UAA revocations to be arbitrable in the face of broad arbitrability language. Therefore, the onus was on the party seeking a carve out from the broad arbitration language to negotiate for such language. PG&E did not negotiate such UAA carve-out language to the broad arbitrability language.

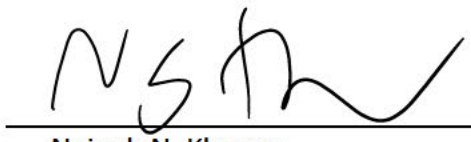
It is also clear that the parties have submitted UAA revocation cases to PRCs, which are part of the grievance process and, by extension, the arbitration process.

The question of which standard to apply when an arbitrator reviews a UAA revocation dispute is a merits issue and cannot defeat an argument that a matter is substantively arbitrable. Indeed, this ruling on substantive arbitrability in no way limits PG&E from arguing that the past practice of the parties indicates that the arbitrable review should be limited to a determination of whether the UAA policy and internal appeal process was followed.

Conversely, the Union, at the substantive hearing, can argue that the case should be handled as a standard disciplinary one.

IT IS SO ORDERED

Date: November 29, 2023
La Crescenta, California



Najeeb N. Khoury

Arbitration Board Signatures
Arbitration No. 396
Grievance No. 25738

Company Board Members

[redacted]
K[redacted] L[redacted]

Concur Dissent

11/30/2023
Date

[redacted]

Concur Dissent

11/30/2023
Date

Union Board Members

[redacted]
D[redacted] S[redacted]

Concur Dissent

12/05/2023
Date

[redacted]
E[redacted] M[redacted]

Concur Dissent

12/05/2023
Date