

In the Matter of an Arbitration

between

IBEW LOCAL 1245

Complainant,

and

PACIFIC GAS & ELECTRIC COMPANY

Respondent

Re: Termination
Arbitration Case No. 186

Opinion & Decision

of

**Barbara Chvany
Arbitrator**

-oOo-

San Francisco, California
June 8, 1992

BOARD OF ARBITRATION

Barbara Chvany
Neutral Board Member

Roger Stalkup and Mike Haentjens
Union Board Members

Margaret Short and Joseph DeMartini
Employer Board Members

APPEARANCES

On Behalf of the Union:

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On Behalf of the Employer:

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INTRODUCTION

This dispute arises under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). Pursuant to the Agreement, the Board of Arbitration was duly constituted and an arbitration hearing was conducted on October 15 and 16, 1991. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as TR ____). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (TR 7). The Parties submitted post-hearing briefs and the matter was submitted for decision on February 26, 1992.

ISSUE

Whether the discharge of the grievant, T , was for just cause; and if not, what shall the remedy be? (TR 6).

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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; (JX 1)

RELEVANT PROVISIONS OF THE POSITIVE DISCIPLINE GUIDELINES

II. THE POSITIVE DISCIPLINE SYSTEM

A. Coaching and Counseling

Coaching/counseling is the expected method for the supervisor to inform an employee about a problem in the areas of work performance, conduct, or attendance. The objective of performance coaching/counseling is to help the employee recognize that a problem exists and to develop effective solutions to it.

B. Positive Discipline Steps

When an employee fails to respond to counseling or a single incident occurs which is serious enough to warrant a formal step of discipline, the supervisor will have several options, depending on the seriousness of the performance problem. These options or steps of the Positive Discipline system are:

* * *

STEP ONE - ORAL REMINDER

1. Application

The supervisor discusses the conduct, attendance, or work performance problem with the employee in a private meeting

2. Documentation

- (a) The supervisor will prepare a hand written memo documenting the basic conversation, date it, and keep it in his/her operating file. The employee is entitled to and will be given a copy of this memo.

- (b) The supervisor will also make a notation of this discussion on the Employee Performance Record Sheet
- (c) An oral reminder is active for six (6) months.

STEP TWO - WRITTEN REMINDER

A written reminder is a formal conversation between a supervisor and employee about a continued or serious performance problem. The conversation is followed by the supervisor's written letter to the employee summarizing the conversation and the employee's commitment to change their behavior. It is the second step of the Positive Discipline System.

1. Application

This step is applied when:

- An employee's commitment to improve is not met within the six (6) month active time period for an oral reminder; or
- An employee commits a serious offense whether or not any previous disciplinary action has been taken.

2. Documentation

- (a) After the conversation with the employee, the supervisor will then write a letter to the employee summarizing the discussion.

* * *

- (d) The written reminder is active for twelve (12) months.

STEP THREE - DECISION MAKING LEAVE (DML)

The DML is the third and final step of the Positive Discipline System. It consists of a discussion 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.

* * *

1. Application

This step is applied when:

- An employee's commitment to improve is not met during the twelve (12) month active time period for a written reminder; or
- An employee commits a very serious offense whether or not previous discipline has taken place.

2. Documentation

* * *

- (d) A DML is active for twelve (12) months.

In the event an employee at a discipline step is placed on an approved leave of absence or is on the Compensation Payroll in excess of ten consecutive workdays, the active periods referred to above will be suspended until the employee returns to the active payroll. . . .

III. TERMINATION

- A. Termination occurs when Positive Discipline has failed to bring about a positive change in the employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML. Termination may also occur in those few instances when a single offense of such major consequence is committed that the

employee forfeits his/her right to the Positive Discipline process, such as:

Theft . . .
Striking a member of the public
Energy Diversion
Curb reading of meters

* * *

IV. ADMINISTRATIVE GUIDELINES

* * *

. . . termination of a bargaining-unit employee may be grieved by that employee's Union on the grounds that such action was without "just cause," the degree of discipline was too severe, or there was disparity of treatment, pursuant to the provisions of the appropriate grievance procedure.

- B. The following list, which is not intended to be all inclusive, gives examples of rule violations and general categories they fall into:

Attendance:

Absenteeism
* * *
Unavailability
* * *

Conduct:

Leaving Assigned Work Area/Location
Without Permission

* * *

Falsification of any Company Document or
Record

**Conducting Personal Business on Company
Time Without Permission**

* * *

Work Performance:

* * *

**Excessive Time away from Work Station
(JX 2)**

**RELEVANT PROVISIONS OF THE
COMPANY'S STANDARD PRACTICE**

**EMPLOYEE CONDUCT SUMMARY
(Standard Practice No. 735.6-1)**

STATEMENT OF POLICY

It is the policy of Pacific Gas & Electric Company that employees shall at all times continue to practice fundamental honesty. Employees shall not nor attempt to: deceive, defraud, or mislead the Company, . . . withhold their best efforts to perform their work to acceptable standards

* * *

Violation of these policies will subject any employee to disciplinary action, up to and including discharge. In addition, supervisors and working foremen who knowingly allow others to engage in acts of misconduct are subject to appropriate disciplinary action.

Examples of misconduct include, but are not limited to, the following:

- Entering false or misleading information on time reports . . . or in any other Company . . . records . . .
- Using or loaning, for personal reasons, Company tools, equipment, materials, vehicles or Company labor. . . . (JX 5)

SUMMARY OF THE FACTS

I. BACKGROUND

Grievant T was hired by PG&E to work at its Hunter's Point facility in 1984. He transferred to the Moss Landing facility in 1985, and to the Diablo Canyon facility in 1986 (TR 32-33). The Employer discharged the Grievant effective June 4, 1990. At the time of the termination, Grievant was employed as a machinist (TR 8). The basis of the termination is set forth in a June 4, 1990 letter from the Employer to the Grievant:

This letter will confirm our meeting on May 30, 1990 concerning falsification of time card records. . . .

Based on a concern over the accuracy of your time records, an investigation was conducted. It was determined that from March 12, 1990 to April 30, 1990, you left early from your assigned work area a total of thirty-one times. On each of these occasions you charged the Company for overtime till the end of your assigned shift.

Falsification of time reports is a violation of Standard Practice 735.6-1 on Employee Conduct. . . .

Due to the seriousness in which we view this violation, your employment with PG&E will Be [sic] terminated effective today, June 4, 1990. (JX 7 - Exh. 3)

II. THE PHYSICAL LAYOUT OF THE FACILITY AND GENERAL PRACTICES AND PROCEDURES

A portion of the Diablo Canyon facility, including the power block, is in a protected area separated from the rest of the facility by a security fence. To enter the protected area, employees must go to the Security Building, pass through metal and bomb protectors, get their personal key cards from the guard, identify the key cards as their own, and then key themselves

into the protected area. When employees leave the protected area, they deposit their key cards with the guard. The time at which each employee enters or leaves the protected area is maintained in a computerized record. A training building located outside the protected area includes a cafeteria.¹ Area 10, a fabrication shop, is located outside the protected area, at a substantial distance from the Security Building (TR 119-120, 333; JX 3).

The work planning center generates work packages which constitute the work assignments to be performed on a given shift. The work packages are assigned to specific employees by foremen. Approximately 99% of the work is governed by work packages, and almost all the work packages for a given shift are generated before the start of the shift (TR 196).

Because work normally is not assigned on an *ad hoc* basis, it is not unusual for there to be slack time at the end of a shift (TR 193-195). When an employee is not working on a specific work package, it is generally understood the employee should remain available to the foreman for additional work assignments, if any. An employee is considered to be "available" if the foreman knows where the employee is, or how to contact the employee. During slack time, employees frequently go to offices or shops near their work areas to read or work on personal projects (sometimes referred to as G-jobs). They either tell the foreman where they will be, or give that information to other employees so they can be contacted by the foreman, if necessary (TR 68-69, 124, 192-193, 226, 298, 352-356, 391, 394-395, 400, 403-404, 410-414, 428, 434-435, 437).

¹ Unless otherwise noted, references to the cafeteria in this decision are to the training building cafeteria. The training building is also referred to as the simulator building.

There is no written rule prohibiting employees from leaving the protected area during slack time (TR 122, 191, 243). Although there is some dispute among the witnesses as to the propriety of leaving the protected area during slack time, it appears to have been unusual for employees to do so. Employees, foremen, and general foreman testified that if employees leave the protected area during slack time, they are difficult to locate and are not available for work unless they clearly notify either a foreman or a co-worker where they will be (TR 110-112, 171, 200-201, 113-224, 229, 233, 305-306, 357, 400-404, 413-414, 418, 424, 444).

The record establishes that there is a recurring problem of employees leaving work shortly before the end of their shifts. General Foreman William Ryan testified that whenever he notices groups of employees gathering in the parking lot five or ten minutes before the end of a shift, he tells the foremen to talk to the employees (TR 136).

Mechanical Maintenance Foreman Hurless testified that it is generally understood employees have a ten minute "walk out" period.² Periodically, employees begin to stretch the rules. When he notices that employees are leaving the shop more than ten or fifteen minutes before the end of a shift, he cautions them (TR 295-297).

Richard Kluve, Grievant's foreman at the time of the discharge, testified it is "almost a general practice" that employees would be in the parking lot ready to leave fifteen minutes before the end of the shift, but that the practice is "not condoned" (TR 199).

² That is, they leave their work sites ten minutes before the end of a shift to shower and/or head for the exit (TR 296-297).

III. PRIOR DISCIPLINE

The Company relies, in part, on prior discipline imposed on the Grievant to support the discharge. On September 5, 1989, Grievant was given a Written Reminder regarding poor attendance (JX 7 - Exh. 2). The reminder was based upon Grievant's excessive time off work from 1985 through 1989, including paid sick leave, unpaid sick leave, personal time off with permission, and personal time off without permission. The reminder imposes specific limitations on Grievant:

In our discussions you have made commitments to improve your attendance. By receipt of this letter, I again need your commitment that you will take the necessary steps to improve and maintain a satisfactory level of attendance. Additionally, in the future, you are required to 1) call in prior to your shift if you are sick; 2) arrange vacation time in advance; and 3) provide 24 hours notice for floating holidays. All time off must be approved by your supervisor. I cannot stress enough the seriousness of this problem and the need to meet your commitments, as failure to do so within the 12 month active period of the Written Reminder may result in further disciplinary action up to and including discharge.

On October 3 and October 18, 1989, Grievant took personal days off without the permission of a supervisor. As a result, on October 23, 1989, Grievant was given an oral counseling.³ Roy Willis, the Mechanical Maintenance General Foreman, advised Grievant that: (1) in the future he would be required to contact Willis or Ryan for any time off; (2) if he could not contact Willis or Ryan, he could speak to another management person or foreman, but had to continue his efforts to reach Willis or Ryan; and (3) he had to tell the other manager or

³ The Parties stipulated that the oral counseling was still active when Grievant was discharged (TR 361).

foreman that he had tried to contact Willis and Ryan (TR 100-101, 363-366; JX 7 - Exh 2; EX 2, 3).

IV. THE EVENTS LEADING TO THE DISCHARGE

From the time Grievant transferred to Diablo Canyon in 1986, until December, 1989, he normally worked on a back shift crew supervised by Hurless (TR 293). Grievant was off work due to an injury from December 14, 1989 through March 12, 1990.⁴ When Grievant returned to work, he was assigned to a back shift crew under the supervision of Richard Kluve, who had been temporarily upgraded to the Foreman position during a Unit 2 outage then in effect.⁵ During the outage, Kluve's crew was assigned to Unit 1, and worked six ten-hour shifts each week, with a 1:00 am quitting time (TR 193-194).

At the beginning of the shift on March 24, Foreman Michael Gibbons called Kluve and asked for additional help on his crew. Kluve loaned Grievant to Gibbons, and expected Grievant to report back to him (Kluve) when he finished working for Gibbons (TR 179, 240-241; JX 7 - Exh 4). When Grievant completed the project for Gibbons, he asked Gibbons if he could go to the Unit 2 shop to do a small project before he reported back to Kluve. Gibbons gave Grievant permission to do so (TR 241). Grievant did not report back to Kluve during the remainder of the shift (TR 179).

At approximately 10:30 pm, Gibbons called Kluve and asked for additional help. Kluve thought Grievant was still working for Gibbons, but Gibbons explained that Grievant had finished

⁴ All dates hereafter refer to 1990, unless otherwise noted.

⁵ For the previous four years, Kluve and Grievant had worked together on Hurless' back shift crew (TR 190-191).

the original assignment and had been released to return to Kluve (TR 180, 242). Kluve searched for Grievant but could not find him. At approximately 12:15 am, Kluve called security and was advised that Grievant had checked out of the protected area. Security was unable to tell him the time at which Grievant had left. On Monday, March 27, Kluve was advised by security that Grievant had left the protected area at 11:03 pm (one hour and fifty-seven minutes before the end of his shift) on March 24 (TR 182).

Kluve reported the incident to Ryan and, at Ryan's request, prepared a written summary of the events (TR 98, 183; JX 7 - Exh 4). Ryan testified that he considered the incident to be a violation of the previous instructions given to Grievant regarding leaving work without prior permission, and that he asked Kluve to make sure Grievant was aware of Ryan's position (TR 143, 151). Kluve does not recall Ryan asking him to counsel Grievant. He testified he believed the matter was in Ryan's hands after he reported it to Ryan (TR 217-219). However, Kluve did ask Grievant where he had been at the end of the shift on March 24. According to Kluve, Grievant stated he had been "in the shop" (TR 182-183). Grievant testified he told Kluve he had been in the Unit 2 shop part of the night, but did not tell him he had been there all night (TR 474-475). Kluve did not tell Grievant he had acted improperly or that he should not leave the protected area before the end of his shift (TR 475, 183, 217-220).

As a result of the March 24 incident, Ryan decided to investigate Grievant's practices. Ryan examined Grievant's time cards and found that, since returning to work on March 12, Grievant had left work before 1:00 am on two occasions: March 17 (9:45 pm) and March 31 (11:45 pm). Kluve told Ryan he had permitted Grievant to leave early both times (TR 141, JX 5 - Exh 5). According to Kluve, Grievant asked to leave early once due to his wife's illness,

and another time when his brother was visiting from out of town. Prior to these facts coming to Ryan's attention, no one from management had advised Kluve that Grievant needed permission from Ryan or Willis to leave early (TR 141, 185, 221).

After reviewing the time cards, Ryan obtained copies of security records showing when Grievant checked out of the protected area, and compared the security records to Grievant's time cards. Between March 12 and April 30, Grievant's time cards show a normal 1:00 am or 1:45 am (for Saturdays) quitting time on 35 out of 39 days.⁶ The security records show that Grievant was regularly leaving the protected area substantially earlier than the time indicated on his time card as the time he left work. Grievant left the protected area between 15 and 30 minutes earlier than his indicated quitting time on 13 occasions; between 30 and 40 minutes earlier than his indicated quitting time on 6 occasions; between 40 and 50 minutes earlier than his indicated quitting time on 4 occasions; and more than 50 minutes earlier than his indicated quitting time on three occasions (JX 7- Exh. 5).

On May 30, the Company interviewed the Grievant. Grievant stated that, on March 24 he was performing personal work in Area 10 (outside the protected area). He also stated that he normally went to the cafeteria to wait for Don Cain, a janitor employed by a contractor working at the site, because they car pooled together (TR 256, 279, 285; JX 7 - Joint Statement of Facts).

Cain's normal shift is from 4:00 pm to 12:30 pm (TR 256-259). A comparison of Cain's security records with those of the Grievant shows that, on days they both worked between March

⁶ The time card shows earlier than normal quitting times on March 17 (9:45 pm), March 31 (11:45 pm), April 6 (11:00 pm), and April 20 (4:30 pm).

12 and April 29, they often left the secured area at approximately the same time. However, there are also many occasions when Grievant left the protected area more than 10 minutes before or after Cain (EX 5).

Human Resources Representative Gregory Boiles interviewed Cain on May 31. Cain is not a member of the Union, and no Union representative was present at the interview (TR 285). Boiles prepared 6 written questions prior to the interview, and attempted to record Cain's answers *verbatim*. According to Boiles' notes, and his testimony at the arbitration hearing, Cain confirmed that he frequently car pooled with Grievant, and gave the following responses:

5. What was your work schedule?

Answ 4:00 p.m. to 12:30 a.m. Mon-Thurs

6. What time did you usually leave from work?

Answ We usually left at my quitting time (12:30 am) from the simulator building. Once in a while I had to wait till [about] 1:00 a.m. but that was O. K., it gave me time to study for my class. (JX 7 - Exh 8; TR 281-288)

Cain was interviewed by the Local Investigating Committee (L.I.C.). According to the Joint Statement of Facts, Cain stated he car pooled with Grievant; he was scheduled to work until 12:30 am; he usually worked late and knew that the Grievant worked until 1:00 am; he usually left the protected area to go to the training building at 12:45 am; Grievant was usually waiting in the training building reading a book; he and the Grievant usually left the training building before or at 1:00 am; and they sometimes left as early as 12:50 or 12:55 am (JX 7 - Joint Statement of Facts ¶ 14).

Human Resources Manager Cher Anthony interviewed Cain in her office shortly before the arbitration hearing. According to Anthony, Cain stated that when he left the protected area

he would go to the training building to meet Grievant and that they would then leave. Anthony asked if Cain and Grievant ever waited for a while before leaving, and Cain said they did not (TR 385-388).

At the arbitration hearing, Cain testified that he would go to the cafeteria in the training building at the end of his shift; Grievant was always the cafeteria when he arrived; and they would leave "if it was time to leave" (TR 257-260). If he (Cain) got off work fifteen or twenty minutes early, he and Grievant would sit and talk until it was time to go. They usually left the training building at 12:50 or 12:55 am (TR 263).

V. GRIEVANT'S EXPLANATION OF HIS END-OF-SHIFT ACTIVITIES

According to Grievant, from 1986 when he first arrived at Diablo Canyon, it was a common practice for him to leave the protected area substantially before the end of his shift if he had completed his work assignment. Grievant testified he is not aware of any rule prohibiting employees from leaving the protected area without the permission of a foreman (TR 80); and he has never been told that he should not leave the protected area before the end of a shift (TR 472).

When he worked on Hurless' back shift crew, and when he worked on a back shift crew under temporary foreman Michael Gibbons, he would leave the protected area after completing his assigned tasks. It was generally his practice to tell other employees on his crew where he would be if he left the immediate work area (TR 69-72). He did not always tell Hurless or Gibbons when he was leaving the protected area, but he still considered himself available for work (TR 78-79). Grievant admits his foremen might not have known where he was after he left the protected area:

Q: When you worked for Hurless did you spend your off time, your down time, inside the secured area?

A: Not always, no.

Q: Did you ever tell Hurless where you were going?

A: No.

Q: When you worked for Gibbons did you spend your time after you had completed your tasks inside the secured area?

A: Not always.

Q: Do you have any way of knowing whether Gibbons or Hurless, either one of them, knew where you were when you left the secured area?

A: I only knew they knew where they could get ahold of me.

Q: How was it you knew that they knew that they could get ahold of you?

A: Because I was always available for work.

Q: You were always available for work, but you never told your foreman where you were?

A: Correct.

Q: And you don't know to this day whether your foreman ever knew that you came over here to the cafeteria, correct?

A: No, I don't know that. (TR 78-79)

Hurless testified most employees on his crew have good work ethics. When they complete their work packages, they wait in a nearby area and are available for additional work. However, the work ethics of some employees, including Grievant, irritate him (TR 297-298). When Grievant completes an assignment, he does not usually report back to Hurless for

additional work, and Grievant generally avoids additional work assignments near the end of the shift (TR 302-303).⁷

Hurless was unaware of any situation in which Grievant left the protected area for as long as 45 minutes at the end of the shift. If he had been aware that Grievant left the protected area that early, he would have reprimanded him. Hurless finds it hard to believe Grievant could have consistently engaged in such a practice over a four year period without his knowledge. An employee in the cafeteria would not be available for work, according to Hurless. He does not recall any employee ever telling him that Grievant had gone to another building during slack time (TR 299-301, 305-306).

Kluve worked with Grievant on Hurless' crew for four years. According to Kluve, when work is completed, Grievant is usually one of the first to leave the work area and go to the locker room. In 1987 or 1988, Kluve car pooled with Grievant. It was Grievant's practice to leave the work area and go to the showers about one-half hour before quitting time. Grievant sometimes pressured Kluve to leave before the end of the shift (TR 167-169).

Grievant also worked the back shift under temporary foreman Gibbons, at times. Gibbons expects employees to be available at all times. He is not aware of any policy specifically requiring employees to remain in the protected area. If employees leave the immediate work area, he expects them to ask his permission and to let him know where they are going and how long they will be gone. Gibbons does not recall having any particular problem with Grievant's availability, when Grievant worked for him (TR 229-232).

⁷ There are other employees on the crew who also do not volunteer for additional assignments after completing their work packages (TR 323).

Grievant testified that during the 1990 Unit 2 outage, while he was working on Kluve's crew, he usually finished his last work package by between 9 and 10 pm. There was enough work to keep him busy until the end of the shift only one or two per cent of the evenings. Kluve told the crew that, after they complete their work, they should "stay out of sight so [they] wouldn't get in trouble" (TR 464-465). If Grievant finished his last work package at 8 or 9 pm, he would sit in a vacant office and read a book. At about 11:00 pm, if there had been no work for the past few hours, he would:

. . . just get lost, I would either normally go to the Unit 2 shop to dig up a government job . . . If I didn't have a government job, I would try to stay out of sight, as per my off-the record instructions, and I'd probably roam over [to the cafeteria] and do some reading and studying. (TR 465)

Kluve testified that employees are expected to be within the protected area. When employees leave the protected area, they either get the foreman's permission, or let the foreman know where they will be (TR 171, 185).

According to Kluve, during the 1990 Unit 2 outage, his crew was normally done with its work assignments at about 10:30 pm (TR 194). He did not tell his crew where to stay after they completed their work packages, but if they were not in the turbine building he expected them to be in the Unit 2 shop (TR 198).

It was not Grievant's practice to tell Kluve he was going to the cafeteria at the end of the shift, and he did not consider this to be necessary as long as Kluve knew where he would be. Grievant testified he would generally let other members of the crew know where he was going

to be, and gave them the phone number of the cafeteria so that Kluve could contact him, if necessary (TR 68-73).⁴ But, Grievant admits Kluve might not have known where he was:

Q: So as far as you are aware, Kluve may have been unaware of your whereabouts during the whole time you worked for him after you left the secured area?

A: That was his job, not mine. I was always available to him.

Q: It was his job to find you, not your job to let him know where you were going, right?

A: No, that's a wrong statement.

* * *

Q: Do you know whether Kluve knew where you were after you left the secured area at any time during the time you worked for him?

A: I can only hope he did.

Q: Do you know?

A: I don't know. (TR 70-71)

If Kluve had known Grievant was going to the cafeteria at the end of every shift, he would have "asked him to stick around the shop until our quitting time or at least until everybody else was leaving." He does not consider an employee in the cafeteria to be available for work, and does not know the phone number for the cafeteria. Kluve does not recall Grievant ever giving him a phone number where he could be reached, and does not recall any other employee telling him where Grievant was. If Grievant had asked him for permission to spend the last hour and a half of a shift in the cafeteria, he would not have allowed it. There were times Kluve had

⁴ At the L.I.C., Grievant gave an incorrect phone number for the phone near the cafeteria (TR 73-74).

to search for Grievant, and he often wondered where Grievant was. Grievant, according to Kluve, was not readily available for work, and though he could usually find Grievant, it took some effort to do so (TR 175-176, 189, 192, 208-109, 217).

A. has worked at Diablo Canyon as a journeyman machinist since 1986. He is normally assigned to Hurless' back shift crew, and worked with Grievant on Kluve's crew during the 1990 Unit 2 outage (TR 390). A. testified he has never been told, in so many words, that employees should not leave the protected area. But, he believes it is generally true that employees were not supposed to leave the protected area without a foreman's permission. According to A. , employees are free to move around, as long as people know where to reach them. It is generally his practice to let his foreman know if he is going outside the protected area during work time; if he can't find a foreman he tells a co-worker. A. recalls a few occasions on which Grievant passed through the shop and stated he was going to the cafeteria or the showers. A. sometimes knew Grievant was in the cafeteria (TR 395, 400, 403-406).

J. has worked at Diablo Canyon as a machinist since 1981. He worked on Hurless' back shift crew from 1985 to 1990, with Grievant. He did not work on Kluve's crew during the 1990 Unit 2 outage (TR 410). According to J. , Hurless instructed the crew to "be available, be there" at the end of the shift, but never told the crew to stay in the shop or in the protected area. There is frequently as much as several hours of slack time at the end of a shift. When there is no work, he sometimes reads in the shop or in the nearby Unit 2 shop. He sometimes goes to the cafeteria near the end of the shift. If Hurless is available, he tells Hurless where he was going, if not, he tells someone else on the crew. J. commonly leaves the protected area 10 to 15 minutes before the end of the shift. He understands that, if

he leaves the protected area, it is his duty to tell a foreman. According to J, it is common knowledge that if you get caught leaving the protected area without letting someone know, it is "your responsibility" (TR 410-414, 418-419, 424).

J testified that other employees, including Grievant, sometimes tell him where they are going. Grievant has told him he was going to the cafeteria. At one time, J had the phone number for the cafeteria. He believes he may have called Grievant at the cafeteria, but is not sure (TR 417).

K has worked at Diablo Canyon as a journeyman mechanic since 1986; he normally works on Hurless' back shift crew, and worked on Kluve's crew during the 1990 Unit 2 outage (TR 426-427). According to K, Hurless instructed the crew to "be where I can find you" (TR 427-428). He does not recall Hurless or any other foreman instructing employees not to leave the protected area before the end of the shift (TR 429). Employees generally let other employees know where they are going if they leave the immediate work area (TR 437). If there was no work thirty minutes before the end of a shift, it is his practice to tell other employees he is going to do his "turbine building walk." The employees understand this to be a euphemism for going to take a shower (TR 429).

K does not know of anyone who routinely left the protected area 45 to 50 minutes before the end of a shift, or of anyone who does so as often as every-other day for a month and one-half. He would not leave the protected area 45 minutes before the end of the shift without letting the foreman know (TR 440-446).

POSITIONS OF THE PARTIES

I. THE COMPANY'S POSITION:

The Company argues that the discharge was for just cause and the grievance should be denied because:

- » Grievant was well aware of the rules regarding starting and leaving times for work, the need to be "available" for work, and that time card falsification could lead to discharge. In 1989, he was given a Written Reminder and later a formal counseling regarding a long series of abuses relating to attendance.
- » By October, 1989, a fully developed picture had emerged of an employee who simply would not or could not bring himself to adhere to the rules of his Employer. Ryan specifically instructed Grievant that all time off had to be approved by his supervisors, and Willis later instructed Grievant that only he or Ryan could approve time off.
- » When Grievant returned to work in March, 1990, he immediately embarked upon a consistent program of making himself unavailable for work and falsifying his time cards in violation of general and specific work rules and the special restrictions placed upon him by Ryan and Willis.
- » Supervision got its first clue that Grievant was abusing and misusing time when he left work 117 minutes early on March 24. Grievant's time card falsely states he left work at 1:00 am that day.

- » In addition to irrefutable evidence from the security computer that Grievant left the protected area early every day, there is ample evidence that he actually left the plant site and went home. When first interviewed by Boiles, Cain stated he and Grievant usually left at Cain's quitting time of 12:30 am. Cain said essentially the same thing to Anthony, when he spoke to her shortly before the arbitration hearing. Cain's statements at the L.I.C. and his testimony at the arbitration hearing conflict with his statements to Boiles and Anthony. But, the fact that security computer records show a history of Cain and Grievant leaving the protected area at the same time, and the fact that Cain repeated the same story to Boiles and Anthony, favor the truth of that version of the events.
- » It is not true that Grievant had a practice of leaving the protected area near the end of his shift from the time he began working at Diablo Canyon. His testimony is rebutted by the testimony of both Hurless and Gibbons.
- » It is not true that Grievant's foremen always knew where he was. Grievant admitted at the hearing that Hurless, Gibbons and Kluve may not have known his whereabouts.
- » The testimony of Grievant's co-workers does not support his testimony that he let them know where he was at the end of each shift.
- » Grievant's position he was available for work when he was outside the protected area without the knowledge of a supervisor is "silly on its face" and refuted by every witness.

- » The penalty of discharge is appropriate. There is a consistent practice at Diablo Canyon of discharging employees who knowingly falsify time records.

II. THE UNION'S POSITION

The Union argues that the discharge was not for just cause and the grievance should be upheld because:

- » There is no evidence, direct or circumstantial, of a Company rule prohibiting employees from leaving the protected area before the end of their shifts. In the absence of a clear, direct rule on the subject, different supervisors had differing expectations of what their crew members would do once they completed their assigned work.
- » Willis considered an employee "available" if the foreman knew where the employee was and could contact him. Hurless expected his crew to "stick around" the machine shop or the Unit 2 Shop until 10 or 15 minutes before the end of the shift. Gibbons took a more relaxed approach. He simply told certain employees they would get caught by the plant's computerized security system if they left the protected area too early. Kluve felt an employee was available if he knew where the employee was, or if he could locate the employee by asking other crew members where the employee was.

- » The Grievant's testimony was consistent with that of every other witness; he was never told he could not leave the protected area before the end of his shift.
- » In light of the vague nature of the Company's policies, it is not surprising that the crew members felt relatively unrestrained once they finished their work.
- » Kluve admits it was "almost a general practice" for back shift employees to be in the parking lot, ready to leave the plant, 15 minutes before the end of the shift.
- » Every Company witness testified he would counsel an employee not to leave the protected area before the end of the shift if he learned the employee was doing so. In light of this testimony, the Company's actions with respect to the events of March 24 are difficult to understand. Ryan claims he instructed Kluve to counsel Grievant, but Kluve did not do so because he believed Ryan would handle the matter. The Company's inaction led the Grievant to believe his actions on March 24 were not improper. In addition, Ryan's subsequent evaluation of the Grievant's conduct was based upon the incorrect assumption that Kluve had warned the grievant not to leave the protected area.
- » There was a significant amount of free time at the end of a shift for the maintenance crew assigned to the operating unit during an outage. The

night's work was usually completed by 10:30 pm, leaving two and one-half hours with nothing to do.

- » Different employees had different ways to pass the exorbitant amount of slack time. Employees had their favorite places to read, do crossword puzzles, or otherwise relax, operating under the general premise of staying out of sight so that the foreman would not get in trouble for not keeping the crew fully occupied.
- » Employees were permitted to work on G jobs during slack time. Ryan's testimony to the contrary was far from forthright. Ryan himself had asked employees to work on G jobs at the beginning of their shifts. During the 1990 Unit 2 outage, on approximately 6 occasions, Kluve assigned Grievant to work full-shift G jobs.
- » Between March 12 and April 29, Grievant left the protected area at 12:45 or later eight times, between 12:30 and 12:44 12 times, and earlier than 12:30 a total of 14 times. On average, Grievant left the protected area at 12:30 am. Grievant candidly admits that he left the protected area and went to the cafeteria near the end of his shifts. Back shift crew members corroborate Grievant's testimony that he told them when he was going to the cafeteria.
- » Testimony from Company witnesses conclusively establishes that, with the exception of March 24, the Grievant could be and was found when needed. Hurless testified that most of the time he knew exactly where

Grievant was. Both Gibbons and Kluve testified they had never been unable to locate Grievant. Kluve added that on several occasions he had been able to locate Grievant after Grievant finished his night's work. Ryan testified that both Gibbons and Kluve had told him they had never had a problem locating the Grievant.

- » The Company's position that Grievant left the plant site considerably before the end of his shift is based exclusively upon the statements allegedly made by Cain to Company officials in private meetings.
- » Cain's statements to Company investigators suggesting that he and Grievant left the plant as early as 12:30 am should not be believed. There was no representative of the Union present during the interviews, the interviews were not taped, Cain was not asked to sign a written statement, and he was not under oath.
- » The June 4 termination letter sets forth the sole reason for Grievant's termination. Evidence with respect to Grievant's failure to comply with the earlier Written Reminder and oral counseling is not relevant. The Company did not take that information into account when deciding to discharge the Grievant.
- » The fact that Grievant left the protected early is not sufficient to establish misconduct warranting disciplinary action, let alone misconduct warranting discharge.

- » The Grievant was not forewarned of the possible consequences of his conduct because there is no clear Company rule prohibiting employees from leaving the protected area. Grievant was not aware he was subject to discharge because he was not at the DML stage of positive discipline.
- » Because the Company failed to counsel Grievant with respect to the March 24 incident, he was led to believe that leaving the protected area as early as 11:03 am was appropriate. Having given Grievant the impression that it condoned his conduct, the Company's subsequent punishment of Grievant for the same conduct is inherently unfair.
- » The discipline is also unfair because Ryan incorrectly believed Grievant been warned, and had ignored the warning by continuing to leave the protected area before the end of the shift.
- » What might, in another setting, appear to be industrially disapproved conduct is not, at Diablo Canyon, disapproved conduct. The Company's condonation of employees leaving early, and the practice of doing personal projects during working time, undermine any argument of industrially disapproved conduct. "Lax" is too generous a word to describe the operation of the back shift.
- » The Company has not established Grievant falsified his time card. No one on the back shift was working until the end of the shift. The Company's argument that employees, even if not working, must remain available for work is not supported by the evidence. The Company could have told

employees to remain in the protected area until the end of the shift, but did not do so.

- » The Company has not proven Grievant left the work site before the end of his shift.
- » A recent arbitration decision involving Southern California Edison involves similar facts. In that case, a termination was reduced to a warning.

DISCUSSION

The basic facts upon which the Company relies are undisputed. Between March 12 and April 30, 1990, Grievant regularly left the protected area substantially before the end of his shift. On at least 13 occasions he left the protected area more than 30 minutes before the time indicated on his time card; on at least 4 occasions he left the protected area more than 40 minutes before the time indicated on his time card; and on at least three occasions he left the protected area more than 50 minutes before the time indicated on his time card. In a traditional employment setting, these facts, standing alone, would provide strong justification for serious discipline.

However, as the Union points out, the employment setting at Diablo Canyon is not traditional. Frequently, there are substantial amounts of slack time at the end of a shift. There are no specific written rules regarding practices during slack time. Supervisory employees describe a relatively formal practice by which employees were to keep foremen advised of their whereabouts during slack time. Not surprisingly, bargaining unit employees describe more informal practice. Nonetheless, witnesses agree that employees are required to be available for work until close to the end of the shift; and all witnesses, including Grievant, agree that

employees are expected either to tell a foreman or their co-workers where they will be if they leave the immediate work area substantially before the end of the shift.

Employees find various ways to occupy their idle time. It is not unusual for employees to leave their work areas as much as fifteen minutes before the end of their shifts, so that they have time to shower before leaving the site. A certain amount of flexibility in that regard is condoned. Employees periodically take advantage of the situation and attempt to leave the site shortly before the end of the shift. When such abuses occur, the Company admonishes employees not to leave early.

Grievant's assertion that his practice of regularly leaving the protected area substantially before the end of the shift is within the accepted norm is not supported by the evidence. The evidence fails to establish that other employees remained outside the protected area for prolonged periods of time before the end of the shift without notifying the foreman. Although other employees testified it is acceptable to leave the protected area on occasion, they clearly recognize the need to keep a foreman advised of their whereabouts, either directly or by advising other employees. Grievant's own testimony shows he generally disregarded this obligation and did not take it seriously.⁹

Grievant's testimony that, since transferring to Diablo Canyon in 1986, he has regularly left the protected area substantially in advance of the end of his shift is not accepted. Hurless' testimony makes it clear that he would not have tolerated such long disappearances by Grievant, and that he would not have permitted Grievant to leave the protected area substantially before the end of the shift, if he had known Grievant was doing so.

⁹ See Grievant's testimony quoted at Page 17 and Page 20, above.

Grievant's testimony that, during the 1990 outage, he always advised other employees where he would be when he left the protected area is also not supported by the evidence. Other employees testified that they occasionally knew Grievant was in the cafeteria at the end of a shift. But, there is no evidence that Kluve or his co-workers knew Grievant was regularly leaving the protected area as early as reflected in the security records.

Grievant's conduct on March 24 shows he willingly took advantage of opportunities to leave the protected area and to avoid work. He was released by Gibbons at least two hours before the end of the shift. He did not notify Kluve of his availability, and did not make any effort to find out if he was needed. Instead, as Grievant admits, he left the protected area without notification to anyone.

There is a strong likelihood that, as argued by the Company, Grievant was in fact actually leaving the Diablo Canyon site before the end of the shift. However, Cain's statements and testimony are inconsistent, and Grievant denies he left the plant site early. In the absence of any hard evidence that Grievant regularly left the Diablo Canyon site before the end of his shift, a finding that he did so is not warranted.

The Union suggests that the performance of G jobs by employees during working time, and particularly the fact that G jobs are sometimes performed at the request of supervisors, provides a defense for the Grievant. However, the performance of G jobs is clearly known to and approved by management, and is distinguishable for that reason.

Reliable evidence clearly establishes Grievant exceeded the acceptable bounds of conduct, as the Company alleges. He regularly made himself unavailable for work by leaving the

protected area without the permission or knowledge of his foreman, and he did not take adequate steps to ensure that his foreman knew where he was, or could find him if needed.

The Union's argument that Grievant believed his conduct was acceptable is not persuasive. The Positive Discipline Guidelines specifically describes "Unavailability", "Leaving Assigned Work Area/Location Without Permission", "Falsification of any Company Document or Record", and "Excessive Time away from Work Station" as rule violations. Standard Practice No. 735.6-1 provides that employees "shall not nor attempt to deceive, defraud, or mislead the Company, . . . withhold their best efforts to perform their work to acceptable standards". The Standard Practice warns employees that violations of the policies will subject them to disciplinary action, up to and including discharge. Grievant is charged with knowledge of these rules and policies. He admits employees are required to be available for work, and that they must make reasonable efforts to keep their foremen advised of their whereabouts.

The Union's argument that the failure of the Company to Counsel Grievant after the March 24 incident led him to believe his conduct was condoned is not supported by the record. When questioned by Kluve the following Monday, Grievant said he had been in the Unit 2 shop, a proven falsehood. The security records clearly show he left the protected area at 11:03 pm. At the arbitration hearing, Greivant testified he believed he remained under Gibbon's authority until the end of the shift and that he indicated to Gibbons he was going to the Unit 2 shop. He also testified that, when questioned by Kluve the following Monday, he told Kluve he had first done a G-job in the Unit 2 shop, and then went to Area 10 (TR 84). He testified he probably remained in Area 10 for one and one-half hours. But, he does not recall telling Gibbons he was going to Area 10 (TR 85). His varying explanations of his conduct lack credibility. It is not

believable that he thought he was under Gibbon's authority until the end of the shift. But, if he did have that belief, then he has failed to explain why he did not keep Gibbons apprised of his activities, especially if he went to Area 10 - the farthest possible location from the protected area. He also misrepresented his actions to Kluve. Grievant's lack of truthfulness about the events of March 24 establishes that his conduct was not acceptable. It was purely fortuitous that he was not disciplined at that time.

The Union also argues that because Grievant was not at the DML discipline stage, he was not forewarned that his conduct might lead to discharge. The Positive Discipline Model anticipates that, in most situations, employees will be placed on DML before they are terminated. But, it recognizes that an employee who has not reached the DML stage may be terminated "in those few instances when a single offense of such major consequences is committed that the employee forfeits his/her right to the Positive Discipline process . . .". This is such a case.

The September, 1989, Written Reminder put Grievant on notice that the Company was concerned about his excessive absences from work, and that he was required to obtain advance supervisory approval for future absences. The Written Reminder advised him that failure to comply "may result in further disciplinary action up to and including discharge."

In spite of this clear mandate, Grievant took two personal days off in October, 1989, without permission of supervision. As a result, he was orally counseled that future time off could be approved only by Willis or Ryan; that he had to make special efforts to obtain their approval; and, that if he sought approval from other supervisors he had to advise them he was trying to obtain approval from Willis or Ryan.

Yet, shortly after returning to work in March, 1990, Grievant twice sought and obtained permission for personal time off from Kluve. He made no effort to get permission from Willis or Ryan; and did not tell Kluve of the special restrictions which had been placed on him. It is true, as the Union argues, that neither of these incidents is relied on by the Company as a basis for the discharge. But, where the Union is arguing that discharge is an excessive penalty, the presence of prior discipline is relevant to assessing appropriateness of the penalty. The Grievant's failure to abide by the restrictions placed on him in connection with prior discipline shows Grievant took advantage his new assignment to ignore previous instructions and to avoid work.

Grievant had been clearly advised that further abuse of working time could result in discharge. With actual knowledge of the possible consequences, he consciously avoided work by frequently leaving the protected area substantially before the end of his shift without either the permission of or notice to his foreman. Grievant's conduct far exceeded the practices condoned by management at Diablo Canyon. Although it has not been established that Grievant actually left the Diablo Canyon site before the times indicated on his time cards, his repetitive avoidance of work while claiming a full day's pay is substantially equivalent to having done so.¹⁰ Because Grievant had an active Written Reminder and an active Oral Counseling at the

¹⁰ The Union correctly notes that the conduct of the grievant in the Southern California Edison arbitration award submitted with its brief is similar to the Grievant's conduct in the present case. However, the arbitrator in that case found that much of the grievant's conduct was condoned by the company, a finding which is not warranted here. Moreover, unlike the present case, it does not appear that the grievant in Southern California Edison had active discipline relating to unavailability for work at the time of the discharge. For those reasons, Southern California Edison is not persuasive. To the extent the decision of the arbitrator in that case is inconsistent with this opinion and award, the Board of Arbitration respectfully disagrees.

time of discharge, both related to his availability for work, the penalty of discharge is appropriate.

DECISION

The discharge of the Grievant, T , was for just cause.

Roger Statcup ~~CONCUR~~ DISSENT 6/26/92
Union Board Member Date

Mike Hansen ~~CONCUR~~ DISSENT 6-22-92
Union Board Member Date

Margaret A. Short ~~CONCUR~~ DISSENT 6/24/92
Company Board Member Date

John Q. Martin CONCUR ~~DISSENT~~ 6/29/92
Company Board Member Date

Salma Alvarez CONCUR ~~DISSENT~~ 6-8-92
Neutral Board Member Date