DAVID A. CONCEPCION
Arbitrator

Arbitrator's Case No. 05-27-92
IBEW Grievance No. 3-2211-91-36
Parties' Arbitration Case No. 188

IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and PACIFIC GAS AND ELECTRIC COMPANY, Involving Termination	BOARD OF ARBITRATION OPINION AND AWARD

This Arbitration arises pursuant to Agreement between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO hereinafter referred to as "Union," and PACIFIC GAS AND ELECTRIC COMPANY, hereinafter referred to as "Company," under which a Board of Arbitration was selected consisting of DAVID A. CONCEPCION, Impartial Chairperson, Roger Stalcup and Joel Ellioff, Appointees for the Union, and Steve Rayburn and John Moffat, Appointees for the Company, and under which the Award of the Board of Arbitration would be final and binding upon the parties.

Hearing was held in San Francisco, California on May 27, 1992 at which time the parties were afforded the opportunity, of which they availed themselves, for examination and cross-examination of witnesses, for introduction of relevant exhibits, and for argument. Further, the parties agreed to submission of post-hearing briefs which were received in a timely manner.

APPEARANCES:

On behalf of the Union

Tom Dalzell
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On behalf of the Employer

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CONTRACT PROVISIONS

Title 7

Management of Company

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. (Emphasis Added)

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Title 102

Grievance Procedure

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.

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 clarification's 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.

102.3 TlME LIMlTS

(a) Filing

It is the intent of Company, Union and the employees that timely filed grievances shall be settled promptly. A grievance is timely filed (i) when submitted by the Union Business Representative or his/her alternate (hereinafter either is referred to as "Business Representative") in writing on the form adopted for such purpose to the Division or Department Human Resources Manager or his/ her alternate (hereinafter either is referred to as "Human Resources Manager"): and (ii) within the following time periods: (Amended 1-1-91)

(1) A grievance which involves the discharge of an employee must be filed not later than 14 calendar days after the employee is notified in writing of the discharge. Whether or not a grievance is filed, Company shall, at Union's request, state in writing the reasons therefore within two workdays of such request. (Amended 1-1-91)

(2) A grievance which does not involve the grievant's discharge must be filed not later than 30 calendar days after the date of the action complained of, or the date the employee became aware of the incident which is the basis for the grievance, whichever is later. The Company shall, at Union's request, state in writing the reason for an employee's discipline, demotion or suspension within seven calendar days of receipt of such request by Union.

(b) Steps One Through Five
Extension of Time limits

Either the Company or Union members of any of the Committees provided for in each of the following grievance Steps One through Five may, if they agree that further determination of fact is required, request an extension of time which may be granted by the other. In no event shall any extension by either or both parties exceed one additional time period provided for at the step where the extension is granted.

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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 to otherwise. (Emphasis Added)

(a) If an employee has been demoted, disciplined or dismissed from Company's service for alleged violations of a Company rule, practice or policy and 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 1/2% annum.

(b) In the event of a "continuing grievance" as set forth in Section 102.9 and Attachment A, a retroactive wage adjustment shall be made as provided therein.

(c) Provided further that nothing contained herein shall restrict or inhibit the parties or the Board of Arbitration from reducing the amount of a retroactive wage adjustment to an otherwise successful grievant where, in their absolute discretion, the equities of the situation do not call for the employee to receive a full retroactive wage adjustment.

102.5 ADJUSTMENTS

Company will make a reasonable effort to effectuate remedies provided for in a grievance settlement within 30 calendar days of such settlement.

102.6 STEPS

STEP ONE

SHOP STEWARDS

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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 Human Resources Manager, the Business Representative, the exempt supervisor whose decision is involved in the grievance, and the shop steward representing the department involved. (Amended 1-1-91)

(1) The Human Resources Manager and Business Representative will arrange for meetings of the Committee at times and places convenient for the persons involved. (Amended 1-1-91)

(2) The Committee shall meet as soon as reasonably possible and shall make a full and complete investigation of all of the factors pertinent to the grievance. If necessary to gain all of the information required to resolve the grievance, the Committee may hold investigative interviews with other persons involved in the dispute. Except for good cause to the contrary, the grievant shall be permitted to be present during these interviews. The grievant will not be a party to the disposition of the grievance, nor is the grievant's concurrence required for the Committee to reach a settlement of the grievance. Grievant, however, does have the right to point out the existence of other facts or witnesses favorable to grievant's case.

Notwithstanding the foregoing prohibition, with the written consent of the Union's Business Manager, or designee, the members of the Local Investigating Committee may include the grievant where such employee is also the shop steward representing the department involved in the grievance. In this limited situation, the shop steward/grievant may be a party to the disposition of the grievance. (Amended 1-1-91)

(3) (a) Within 30 calendar days following the filing of a grievance which does not concern an employee's qualifications for promotion or transfer (except as provided in the next paragraph for Inter-regional or General Office Departmental prebids or transfer applications), or the employee's demotion, suspension or termination of employment, the Local Investigating Committee shall prepare a report of its findings, which shall include: (i) a mutually agreed-to brief narration of all the events and factors involved in the dispute, and (ii) the Committee's mutually agreed-to findings with respect thereto. If the Committee has reached an agreeable disposition of the grievance, the report shall also contain a statement to that effect and the reasons therefore. (Amended 1-1-88)

Inter-regional or General Office Departmental prebids or transfer applications shall be subject to the further limitation, however, that the report of the employee's present Regional or General Office Departmental Local Investigating Committee shall be forwarded within 15 calendar days from the date a report was

requested by the bypassing Region or General Office Department and further, the latter Committee must dispose of the grievance, in the manner described above, no later than I5 calendar days thereafter. (Amended 1-1-88)

If the grievance is not resolved in 30 calendar days following its being timely filed, either Company or Union may request "Certification to Fact Finding." If "Certification to Fact Finding" is not requested by either party, the grievance shall be automatically referred to the Region or General Office Department Joint Grievance Committee. (Amended 1-1-88)

The referral in either event shall be accompanied by the report referred to above. The referral shall also include either an agreed-to summary or separate summaries of the reasons (facts or factors in dispute) why the Local Investigating Committee could not resolve the grievance.

If either party requests "Certification to Fact Finding," copies of the report and the request shall be forwarded to the Chairman and the Secretary of the Review Committee. If the Chairman and the Secretary of he Review Committee have rejected referral of the grievance to Fact Finding within seven calendar days following receipt of the request, or if the request is not received within the seven calendar days following the expiration of time limits stated for resolution by the Local Investigating Committee, the grievance will be automatically referred to the Joint Grievance Committee.

(b) Within 15 calendar days following the filing of a grievance which does concern an employee's qualifications for promotion or transfer (except as provided above for Inter-regional or General Office Departmental prebids or transfer applications), or an employee's demotion, suspension or termination of employment, the Local Investigating Committee shall prepare a report of its findings as set forth in Subsection (a) above.

If such grievance is not resolved in 15 calendar days following its being timely filed, the grievance must be referred to and accepted by the Fact Finding Committee. The referral shall also include the report referred to above and either an agreed-to summary or separate summaries of the reasons (facts or factors in dispute) why the Local Investigating Committee could not resolve the grievance. (Amended 1-1-88)

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STEP THREE

FACT FINDING COMMITTEE

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STEP FOUR

REGION OR GENERAL OFFICE DEPARTMENT

JOINT GRIEVANCE COMMITTEE

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STEP FIVE

REVIEW COMMITTEE

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STEP SIX

ARBITRATION

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PACIFIC GAS AND ELECTRIC COMPANY

POSITIVE DISCIPLINE GUIDELINES

I. INTRODUCTION

It has been the policy of Pacific Gas and Electric Company to enhance and to improve work performance in all areas by means of clear communication and understanding of performance requirements by all employees. To this end, Company will utilize Positive Discipline to:

1. Improve communications between supervisors and employees.

2. Improve knowledge and understanding by individuals of performance expectations.

3. Communicate the expectation of change and improvement through coaching and counseling.

In order to ensure that customers are served effectively and Company business is conducted properly and efficiently, employees must meet certain standards of performance and perform their jobs in a safe and effective manner. Supervision is responsible for establishing employee awareness of their job requirements, and employees, in turn, are responsible for meeting these standards and expectations. Positive Discipline is a system that emphasizes an individual's responsibility for managing their performance and behavior. It focuses on communicating an expectation of change and improvement in a personal, adult, non-threatening way; while at the same time, maintaining concern for the seriousness of the situation. Key aspects of this system include recognizing and encouraging good performance, correcting performance problems through coaching and counseling, and building commitment to effective work standards and safe work practices.

If an employee has a conduct, attendance or work performance problem. disciplinary action may be necessary to correct the situation. Positive Discipline is designed to provide the opportunity to correct deficient performance and build commitment (not merely compliance) to expected performance in a manner that is fair and equitable to all employees. Each step is a reminder of expected performance, stressing decision making and individual responsibility, not punishment.

The Positive Discipline Program applies to all regular employees. It does not apply to probationary employees. The performance of probationary employees shall continue to be monitored utilizing performance reviews and counseling. The Employee Assistance Program will continue to play a very important role and should be utilized when appropriate.

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. Since it is the

supervisor's approach to a performance problem that often brings about the employee's decision to change behavior, it is critical that the supervisor be prepared. Coaching/counseling is intended to be a deliberation and discussion between the supervisor and employee. Normally, performance problems can be resolved at this step. Coaching/counseling memos or notes kept in the supervisor's operating file should be deactivated In the same manner as oral reminders (Section VI.A). If a bargaining-unit employee requests a shop steward prior to or during coaching/counseling, such request shall be granted.

B. Positive Discipline Steps

When an employee falls 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:

NOTE: ALL BARGAINING UNIT EMPLOYEES ARE ENTITLED TO APPROPRIATE UNION REPRESENTATION DURING ANY STEP OF POSITIVE DISCIPLINE.

STEP ONE - ORAL REMINDER

1. Application

The supervisor discusses the conduct, attendance, or work performance problem with the employee in a private meeting. The supervisor reminds the employee of the importance of commitment to follow work rules and Company standards. In this problem-solving discussion, the supervisor informs the employee that this is the first step of the discipline process and restates the employee's need to live up to his/her commitment. The meeting closes with the supervisor expressing confidence in the employee's ability to change.

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 (Attachment 1).

(c) An oral reminder is active for six (o) 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. It should contain the exact performance problem, the date of casual, and/or oral reminders, what offense caused the reminder, the employee's commitment and need to change in the future, and whether further steps of Positive Discipline could follow.

(b) The original copy of the letter is given to the employee. The immediate supervisor retains a copy of the letter and a copy is placed in the employee's Personnel (701) file.

(c) The supervisor will make a notation of this discussion on the Employee Performance Record sheet (Attachment 1).

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

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STEP THREE - DECISION MAKING LEAVE (DML)

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

The employee's decision is reported to their supervisor the workday after the DML. It is an extremely serious step since. in all probability, the employee will be discharged if the employee does not live up to the commitment to meet all Company work rules and standards during the next twelve (12) months, the active period of the DML; except as provided in Section III.B.

Because the DML is a total performance decision by the employee, there is only one active DML allowed.

1. Application

This step is applied when:

- o An employee's commitment to improve is not met during the twelve (I2) month active time period for a written reminder; or

- o An employee commits a very serious offense whether or not previous discipline has taken place.

2. Documentation

(a) Notes are to be written covering the key points of the conversation. The exact date and offenses should be included.

(b) When the employee returns from the Decision Making Leave, the employee will be given a letter summarizing the Decision Making Leave incident and the employee's decision. This letter should be written by the supervisor using the notes mentioned in (a) above. The letter will advise the employee that termination could follow should they fail to live up to their commitment to maintain total performance and abide by all Company rules.

(c) The original copy of the letter is given to the employee. The immediate supervisor retains a copy of the

letter and a copy is placed in the employee's Personnel (701) File. The supervisor will also make a notation of this discussion on the Employee's Performance Record sheet (Attachment 1).

(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. However, if an employee is off the active payroll in excess of twelve consecutive months, any discipline will be deactivated upon their return to the active payroll.

C. Reviewing Performance Record Sheet

Upon advance notice given to the supervisor allowing a mutually agreeable time to be determined, an employee will be allowed to review their performance record sheet kept in the supervisor's operating file.

III. TERMINATION

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML. 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 (See Review Committee Decisions 1651 and 1452)
Striking a member of the public
Energy Diversion
Curb reading of meters

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider mitigating factors (such as Company service, employment record, nature and seriousness of violation, etc.) before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. In addition, a summary of the decision not to terminate should be documented and placed in the employee's Personnel (701)

File, and the employee should be given a copy of the summary.

IV. ADMINISTRATIVE GUIDELINES

A. Rule infractions are generally divided into three categories. These are (1) work performance, (2) conduct, and (3) attendance. The maximum number of oral reminders that may be active at one time is three (3), and these must be in different categories. Should another performance problem occur in a category where there is already an active oral reminder, the discipline step must escalate to a higher level of seriousness; usually a written reminder. The maximum number of written reminders that may be active at one time is two (2), and these must be in different categories. Should another performance problem occur in a category where there is already an active written reminder, the discipline step must escalate to a DML.

The above language refers to escalation to the appropriate disciplinary step once a decision to formally discipline has been made. In lieu of taxing formal disciplinary action, the supervisor may opt to coach/counsel an employee, taking into consideration mitigating factors.

In addition, where appropriate, such as an employee who exhibits an inability to work in a classification that is not directly supervised, consideration for demotion should be made.

Placement of a bargaining-unit employee at a Positive Discipline step or 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.

Because the Decision Making Leave is a total performance decision on the employee's part, there is only one DML. Additionally, while the DML is active, no other formal steps of Positive Discipline may be administered; except as provided for in Section III.B.

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

Tardiness

Sick Leave Abuse (Positive Discipline will not circumvent or supersede sick leave abuse sections of any Labor Agreement)

Unavailability

Extended Lunches/Break Periods

No Call/No Show

Conduct:

Violation of the Employee Conduct Standard Practice

Carrying Firearms on Company Property or in Company Vehicles

Leaving Assigned Work Area/Location Without Permission

Insubordination:

Refusal to Follow Supervisor's Instruction

Refusal to Work Overtime in an Emergency Situation

Fighting or Provoking a Fight on Company Property

Falsification of any Company Document or Record

Conducting Personal Business on Company Time Without Permission

Reporting a False Reason for an Absence

Congregating

Verbal and/or Sexual Harassment

Initiating, Encouraging, or Participating in a Walk-Out or Work Slowdown

Allowing Guests on Restricted Company Property Without Permission

Work Performance:

Unsatisfactory Work Performance (Quality/Quantity, Effort, and/or Negligence)

Sleeping on the Job

Poor Housekeeping Excessive

Time Away from Work Station

Backing Accidents

Failure to Adhere to Safe Work Practices and Accident Prevention Rules

Note: For some types of performance problems, caused by an ability deficiency, demotion to a lower classification may be the appropriate action rather than implementing any step of Positive Discipline.

C. Offenses in each of the three categories are normally assigned a level of severity. Their level of severity can be minor, serious, or major in nature. As a general rule, the seriousness of the offense dictates which step of the Positive Discipline process would apply.

D. The above list is not totally inclusive. In addition, Company Standard Practices, Safety, and Procedural Rules, along with sound judgment and common sense should govern individual conduct and actions. Individual departments and locations also have rules and standards which must be adhered to or met.

V. CRISIS SUSPENSION

As has been past practice, a crisis suspension should be used when an employee's inappropriate behavior is so serious immediate removal from the workplace is necessary because the employee's actions indicate that remaining on or returning to the job may be detrimental to the employee, fellow employee,

customers, or the Company. The employee shall be required to leave Company property pending investigation. Some examples would be theft, insubordination, threat of violent action, destruction of Company property, or reporting to work under the influence of alcohol or drugs. These situations will be handled in the following manner:

1. If, upon completion of its investigation, Company finds that there is insufficient evidence to support the alleged misconduct, the employee will be placed back to work and will be paid for the investigating time off.

2. If, upon completion of its investigation, Company finds that there is sufficient evidence to support termination, the employee's employment will be terminated and the investigatory time off will be without pay.

3. If, upon completion of its investigation, Company finds that there is sufficient evidence to support disciplinary action but not termination, the appropriate step of Positive Discipline will be administered and the employee will be reimbursed for the investigatory time off without pay. However, should an employee be unfit for work or otherwise unavailable, the employee shall not be reimbursed for such time.

VI. DEACTIVATION

A very important step of the Positive Discipline system which recognizes improved performance is the deactivation process. If an employee has maintained fully satisfactory performance during the active period of a disciplinary action and the employee's attendance, conduct, and/or performance improves, it is imperative that the supervisor acknowledge the improvement. The administrative process of deactivation is summarized below:

A. Oral Reminder

At the end of the six month active time period, the immediate supervisor meets with the employee and informs the employee of the inactive status of the oral reminder, and commends the employee for improved performance. The supervisor notes the inactive status on the Employee's Performance Record sheet. The original memo should be removed from the supervisor's operating file and be returned to the employee. A copy shall also be forwarded to the Regional/Department Human Resources Office.

B. Written Reminder/DML

At the end of the 12-month active time period for the written reminder and the 12-month active time period for the DML, the supervisor initiates a typed memo advising the employee of the inactive status of the step, commends the employee's improved performance, and removes all reference from the 701 File. Copies are distributed to all who were previously copied on the written reminder or DML letters with the exception of the 701 file. The supervisor also notes the inactive status on the Employee's Performance Record sheet. A copy of the original written reminder and Letter confirming the DML shall be forwarded to the Regional/Department Human Resources Office.

RECOGNIZING GOOD PERFORMANCE

The supervisor is a very important member of the work group. Since the supervisor's job is to get work done through others, it is essential that energies be concentrated on helping employees be as successful as possible. What a supervisor expects of an employee and the way the employee is treated to a large extent determines that employee's performance. Good performance is a shared responsibility.

The supervisor has an opportunity to foster a working environment that is based on mutual respect and trust, a collaborative team effort that is mutually beneficial to the supervisor, the employee, and the organization. Positive Discipline is intended not only to resolve performance problems, but also to focus on improvement in performance and recognize exceptional performance. Reinforcement of this type of behavior will help to ensure its continuation and should be used under the following circumstances:

A. When an employee's attendance, conduct, and/or performance improves, it is imperative that the supervisor acknowledges the improvement in a way that encourages the employee to maintain the improvement. Such changes in behavior that are ignored often disappear.

B. When an employee deserves recognition and commendation for performance, above and beyond the call of duty, such as:

- Taking immediate action in a crisis or emergency situation.
- Developing a cost saving or work saving idea.

- o Providing special training or assistance to other employees.

C. When an employee deserves recognition and commendation for performing competently and diligently over a period of time. Examples would include:

- o Maintaining a good attendance record over a significant period of time.
- o Maintaining a record of working safely.
- o Maintaining a spirit of teamwork that is demonstrated through specific actions.

In a discussion of this nature, the supervisor must refer to the specific improvement or incident with which the supervisor is pleased. The supervisor must be specific and sincere. These positive contacts should be noted on the employee's performance record. If the employee's performance is exceptional, or the supervisor is deactivating a step of Positive Discipline, a memo to the employee should be prepared by the supervisor recognizing this exceptional or improved performance. A copy should also be placed in the employee's Personnel File (701) unless it is a deactivation memo/letter. This type of recognition can by highly successful in establishing and maintaining a motivating, productive work environment.

ISSUES

Is the grievance arbitrable? If so, was the termination of the Grievant, [redacted], on April 13, 1990 for just cause? If not, what remedy?

BACKGROUND

The Grievant was hired by the Company in 1985 as a Painter Helper. Subsequently, the Grievant progressed through a training program and was promoted to Painter "A" which is the journeyman painter classification.

On August 22, 1989 the Grievant received a Step One "Oral Reminder" under the Company's Positive Discipline Guidelines for attendance problems. Nevertheless, the Grievant's attendance continued to be a problem and on November 8, 1989 the Grievant was given a Step Two "Written Reminder." After the latter action, the problem still persisted and on December 12, 1989 the Grievant was given a paid day off under Step Three "Decision Making Leave" to contemplate the situation. The Grievant understood that he was on the verge of being terminated for poor attendance.

Beginning on Monday, February 26, 1990 the Grievant performed work on his knees in the crawl space of one of the Company's buildings. As a result of the latter work the Grievant experienced a pain in his right knee. On Thursday, March 1, 1990 the Grievant was directed to see Dr. Barahona, a Company doctor. Dr. Barahona concluded that the Grievant pulled the cartilage in his right knee. The Grievant's right knee was placed in a brace and he was given crutches to assist him with his movement. Dr. Barahona told the Grievant to keep his feet elevated and to keep ice packs on this knee. Dr. Barahona prescribed "Vicodin" for pain management, one pill every six hours. The "Work Status Report" issued by Dr. Barahona stated that the Grievant was "unable to return to work." Nevertheless, the Grievant reported to work of his own volition but given the doctor's instructions did not perform any duties for the balance of the week.

On Monday, March 5, 1990 the Grievant fell and hurt his left foot as he was leaving his home for work. When the Grievant arrived at work his left foot was swollen and he was sent to see Dr. Barahona. Dr. Barahona concluded that the Grievant had sprained his left foot. An elastic bandage was applied. Dr. Barahona prescribed the use of anti-inflammatory medication and application of ice packs. Dr. Barahona completed the Company's "Medical Referral Form for Industrial Injury" on which he stated that the Grievant could return to work in a light duty status so long as he kept his left leg elevated.

On Tuesday, March 6, 1990 the Grievant saw Dr. Barahona on a follow-up visit. Dr. Barahona noted in his log that the Grievant "May do light duty answering phone; left leg elevated. Called d/w foreman and he agrees to proved light duty for [the Grievant]."

A week later, on Tuesday, March 13, 1990 the Grievant was again examined by Dr. Barahona. As a result of further examination, Dr. Barahona concluded the Grievant left foot was fractured and a cast was applied. Dr. Barahona noted, on the Grievant's return to work slip, that the Grievant should continue light duty for another week.

On Wednesday, March 21, 1990 the Grievant again examined by Dr. Barahona and the Grievant's light duty status was extended. Likewise, following a visit to Dr. Barahona on Wednesday, April 4,

1990, the Grievant's light duty status was continued and the Grievant was referred to an orthopedic surgeon named Dr. Wood.

According to the Grievant, throughout the latter period his supervisor was assigning him work beyond his handicapped ability and although the Grievant believed he was being harassed he sought to do the work without challenging the propriety of the assignment. The Grievant contends that he sought to avoid the latter situation by using sick leave, a floating holiday and vacation.

The Grievant was scheduled to see Dr. Wood on Friday, April 13, 1990 but he did not keep that appointment. Further the Grievant did not come to work on Monday, Tuesday or Wednesday of the following week, April 16, 17 and 18, 1990. However, the Grievant was seen by Dr. Barahona on the morning of Wednesday, April 18, 1990 and he renewed the Grievant's prescription. The Grievant also went to see an Employee Assistance Program (EAP) Counselor on April 18, 1990 about "family problems" and the Grievant was referred to a psychiatrist. After meeting with the EAP Counselor the Grievant called his General Foreman. The General Foreman informed the Grievant that because the Grievant did not come to work and did not call in that he had been terminated.

The Grievant challenged his termination. The Grievant asserted that he was taking two Vicodin pills every four hours

rather than one pill every six hours and that the latter usage affected his actions. That is, the Grievant knowingly exceeded the prescribed dosage. The Grievant's termination was considered by the Local Investigating Committee and it disposed of the matter as follows:

> The Committee after reviewing the facts of the case determined that the Company followed the intentions of the agreed to positive discipline. Because of the Grievant's failure to call-in on all three days claiming medication problems and refusal to contact the employer because he was unwilling to deal with the consequences of his actions the Company has no other recourse but to discharge the Grievant for cause.
>
> Case is closed with adjustment.

The latter settlement was signed by both the Company and the Union on June 7, 1990. The settlement was executed; however, the Grievant challenged the propriety of his being terminated while in industrial injury status. Consequently, the Grievant was reinstated to pay status for the latter purpose and remained in that status until April 4, 1991, when he was placed back in terminated status. The latter action was retroactive to September 4, 1990, the day on which the Grievant's status relative to his industrial injury was considered permanent and stationary.

On April 16, 1991 the Union filed a new grievance (3-2211-91-36) asserting that since the Grievant's discharge back on April 13, 1990, "additional information has surfaced which states that on the days when the employee was a no call/no show, he was not fit to work according to medical records."

Grievance 3-2211-91-36 was processed and the matter proceeded to this Arbitration.

POSITION OF COMPANY

The grievance is not arbitrable. The grievance arising from the Grievant's discharge on April 13, 1990 (Grievance No. 3-2099-90-44) was resolved at Step Two of the grievance procedure with the discharge of the Grievant being upheld by the Local Investigating Committee. Title 102, Section 102.4 is absolutely clear that "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." In matter of Grievance No. 3-2099-90-44 the parties, as represented by their respective members on the Local Investigating Committee clearly state the "Case is closed without adjustment." The latter resolution at Step Two is final and binding on the Company, Union and the Grievant, Kenneth Meyer.

In any event, the Grievant's discharge was for just cause. The Grievant was on the final step of the Positive Discipline procedure due to consistent excessive absenteeism and failure to call in. The Grievant was on notice that any further behavior of this type would result in termination. Nevertheless, the Grievant failed to call in during three consecutive days of absence. The Grievant admitted that his failure to call in was due to his unwillingness to engage his supervisors. The Grievant's failure to call in was deliberate and willful in the face of the

admonition that such conduct would result in his termination. Thus, for the reasons stated, Grievance 3-2211-91-36 should be denied if the matter of the Grievant's discharge is re-considered on the merit of the case.

POSITION OF UNION

The grievance is arbitrable. The matter of whether the disposition of a grievance by mutual agreement of the parties at some step of the grievance procedure is final and binding is a subject which has previously been submitted to arbitration. In Arbitration Case No. 153 (1987), heard by Arbitrator Harvey Letter, the issue was "Whether the Parties' alleged agreement to deny the grievance at the Fact Finding Committee step of their grievance procedure is final and binding on the Company, the Union and the Grievant?" The Union sought to resurrect the grievance because the Union had a "change of heart" about the matter. That is, the Union wanted to pursue the grievance further after having disposed of the matter in favor the Company's position at the Fact Finding Committee step. There was no new evidence which prompted the Union's decision. Accordingly, Arbitrator Letter held that there was "no circumstance ... which warrants alteration of the clear language of the Parties' Agreement."

Arbitrator Letter's decision is not dispositive of the matter of arbitrability in the instant case. In the instant case the matter of newly discovered evidence is the basis of the Union's demand that propriety of the Grievant's termination on April 13,

1990 be reconsidered in this Arbitration. After the Local Investigating Committee sustained the Grievant's original discharge, a number of medical records, which the Local Investigating Committee had not considered, were uncovered. The Local Investigating Committee which investigated the second termination grievance stipulated that "The Union presented additional information which was not made available to the Local Investigating Committee handling the discharge, Grievance No. 3-2099-90-44 (Exhibit 3). Many of these documents were in [the] Company's possession, but were not made available to the LIC. Others were secured by the grievant after the conclusion of he LIC, having been obtained from various medical professionals or from the attorney who was handling the grievant's Workers' Compensation case."

The newly discovered medical evidence is clearly relevant and of considerable importance to the case. Not only do the records strongly corrobrate the Grievant's testimony to the initial Local Investigating Committee, the records go further, demonstrating the degree to which the Company ignored medical advice in forcing the Grievant to perform work assignments beyond his physical ability. Moreover, the subsequent stipulation by the Company that the Grievant was disabled on April 16, 17, and 18 is certainly a critical piece of evidence.

The functional principle, as established in California Civil Code, Section 1577, is that where there is a harmful mistake as to

some basic or material fact which induces a party to enter into an agreement, that agreement is voidable and subject to rescission. Clearly here there was a harmful mistake as to material facts which induced the Union to agree to the Grievant's termination at the initial Local Investigating Committee. Under the unique circumstances of this case, which should not be construed as warranting repudiation of agreements made in the grievance procedure in anything but the most exigent circumstances, the decision of the initial Local Investigating Committee should not be deemed final and binding and Grievance No. 3-2211-91-36 should be deemed arbitrable.

Allowing Grievance No. 3-2211-91-36 is arbitrable, the termination of the Grievant on April 13, 1990 was not for just cause. The Grievant's testimony in the only evidence, regarding the events that gave rise to the Grievant's wrongful termination, which is before the Board of Arbitration in the instant case.

The chain of events which led to the Grievant's absence from work on April 16, 17 and 18 began in February when the Grievant injured his knee. The Company sent the Grievant to a Company panel physician who confirmed the Grievant's asserted injury. The physician initially directed that the Grievant should be kept off the job completely and then later indicated that the Grievant could only answer the telephone with his leg elevated. The Grievant's supervisors ignored the physician's directions and assigned the Grievant work not only beyond the physician's

directions but work beyond the Grievant's diminished physical ability. No incident illustrates more the Company's attitude towards the Grievant than the plywood cutting incident. The incident, as described by the Grievant, was as follows:

> It was a full sheet of plywood, about three quarter inch plywood. And he [supervisor Howell] come up there and he said, "K , I have something that I think you can do."
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> So I got up. I went out there. He said, "There's the plywood. I want you to put that up there and I want you to cut three by two or three by three foot square sections out of it to stencil signs.
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> He handed me a handsaw and said, "Here, cut it with this." And he turned around and walked off.
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> At the time, I had a cast on one leg, a brace on the other leg and I'm on crutches. Finally, after struggling with the plywood, I get it up on two 55 gallon drums with one leg out like this and leaning on the crutch like this cutting the plywood with the handsaw, which took me all day to do.
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> At the end of the day, I told him, "Charlie, I can't finish this. My foot is starting to swell up." I showed him my foot.
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> He looked out and said, "Well, can't you finish these last couple of pieces?" And I went ahead and finished them.

Pressured by the Company to get back to work as soon as possible, the Grievant acquiesced in the work assignments which exceeded his doctor's release. Further, afraid of becoming a lost time accident and thus further incurring the wrath of the Company, the Grievant used his contractual time off rather than temporary disability when his injuries prevented him from reporting to work.

Not surprising, the Company's actions aggravated the Grievant's injuries. Torn between his fear of Company reprisal and the pain produced by his injuries, the Grievant turned to self-medication, and over Easter weekend tripled the prescribed dosage for his painkiller. Again not surprisingly, the increased medication had the effect of dramatically diminishing the Grievant's ability to function; physically he was either in pain or asleep, while emotionally he was alienated and drained. It was under the foregoing circumstances that the Grievant missed work and did not call to report his absences on April 16, 17 and 18.

The Company concedes that the Grievant was physically disabled and temporary unable to work on April 16, 17 and 18. What the Grievant faced, if he had come to work, was the Company's hard-line insistence that he perform more aggravating make-work assignments beyond the scope of his medical release.

The Grievant's only offense was his failure to telephone the Company on April 16, 17 and 18 to report his inability to work. However, given the mitigating circumstances described in the foregoing, The Grievant's failure to telephone the Company does not justify termination. Thus, for the reasons stated, the grievance should be sustained and the Grievant should be made whole in all respects.

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DISCUSSION

The threshold issue is whether the matter of the Grievant's discharge on April 13, 1990 is arbitrable. The Company contends the matter of the Grievant discharge is not arbitrable because the propriety of the discharge was settled, as a final and binding decision, at Step Two in the Company's favor. That is, the Local Investigating Committee closed the case without adjustment.

The thrust of the Union's position is that the agreement that decisions at the various steps of the grievance procedure are final and binding, is predicated on an unstated presumption that such decisions will be fair and informed. Thus, the Union seeks to overcome the clear language of Section 102.4 by asserting that the decision in the Grievant's case was neither fair nor informed in light of the evidence discovered after the Local Investigating Committee closed the case without adjustment.

A review of the Joint Statement of Facts by the Local Investigating Committee regarding the first grievance, Grievance No. 3-2099-90-44, shows that the explanations presented by the Grievant and evaluated by the Local Investigating Committee are the same as in the instant case. Thus, the Union asserts that, not only does the "new evidence" strongly corroborate the Grievant's testimony to the initial Local Investigating Committee, but that the new evidence demonstrates the degree to which the Company ignored medical advice in forcing the Grievant to perform work assignments beyond his physical ability. In other words, the

different if the "new evidence" had been present at the initial Local Investigating Committee hearing. However, the "new evidence" does not clearly demonstrate that the decision of initial Local Investigating Committee was either unfair or uninformed.

The foregoing noted, the matter of arbitrability turns on the language of Section 102.4 where it states that "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." As previously determined by Arbitrator Letter, and concurred with by this Arbitrator, the language is clear and unambiguous and therefore not subject to interpretation. The principle of contract application applicable in this case is that where the contract is absolutely clear, it will be applied in accordance with its terms, even if the outcome is not equitable to both parties. Therefore, for the latter reason, as well as the reasons contained in the foregoing, the grievance is not arbitrable and the matter of whether the termination of the Grievant on April 13, 1990 was for just cause shall not be considered.

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AWARD

The grievance is not arbitrable. Therefore, the matter of whether the termination of the Grievant, [redacted], on April 13, 1990 was for just cause shall not be considered.

Dated: 10-12-92

D. A. Concepcion

DAVID A. CONCEPCION, Arbitrator

Roger Stalcup

Roger Stalcup
Union Appointee

Concurs ___ Dissents ✓ Abstains ___

Dated: 10/5/92

Joel Ellioff

Joel Ellioff
Union Appointee

Concurs ___ Dissents ✓ Abstains ___

Dated: 10-5-92

John Moffat

John Moffat
Company Appointee

Concurs ✓ Dissents ___ Abstains ___

Dated: 9/23/92

Steve Rayburn

Steve Rayburn
Company Appointee

Concurs ✓ Dissents ___ Abstains ___

Dated: 9/22/92