In the Matter of an Arbitration

between

IBEW LOCAL 1245,

Complainant,

and

PACIFIC GAS & ELECTRIC COMPANY,

Respondent

Involving the Arbitration Case No. 190

Opinion & Decision

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San Francisco, California
April 22, 1994

BOARD OF ARBITRATION

Barbara Chvany	Chairperson
Rick Doering and Steve Rayburn	Company Board Members
Roger Stalcup and Manny Guzman	Union 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).[1] Pursuant to the Agreement, a Board of Arbitration was appointed and an arbitration hearing was conducted on February 16 and September 20, 1993 in San Francisco, California. 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 were followed or waived and the matter is properly in arbitration (TR 1; JX 1).

C , the Grievant, was hired by PG&E in November, 1985. His employment was terminated effective May 15 or 16, 1991. At the time of the termination, he was employed as a journeyman transmission mechanic.

ISSUES

1. Did the Company terminate the employment of C without just cause?

2. Is C entitled to the reinstatement of his employment, together with all the accrued benefit(s) that he would have been entitled to, absent the termination, including back pay? (JX 1)

REMEDY REQUESTED

The Union requests that the grievance be granted and that the Grievant be reinstated with full back pay and benefits. The Company requests that the grievance be denied in its entirety.

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[1] Joint Exhibits are cited herein as "JX," Company Exhibits as "CX,", and Union Exhibits as "UX."

RELEVANT PROVISIONS OF THE 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; . . ..

* * *

500.5 CONFLICT OF LAW

Any provision of this Agreement which may be in conflict with any Federal or State law, regulation or executive order shall be suspended and inoperative to the extent of and for the duration of such conflict.

In the event any provision of this Agreement is suspended or declared inoperative by reason of the operation of this Section, the parties shall meet within 30 days to negotiate a substitute provision which will, as nearly as possible, reflect the intent of the suspended clause in a lawful manner.

BACKGROUND

The Drug Free Pipeline Program:

In 1989, the United States Department of Transportation (D.O.T.) issued a final ruling requiring that pipeline operators such as PG&E institute pre-employment, post-accident, random, reasonable cause, and post-rehabilitation urine drug testing effective April 20, 1990.[2] IBEW Local 1245 and several other unions sought judicial review, contending that the regulation was unconstitutional. The Court of Appeals for the Ninth Circuit eventually upheld the D.O.T. regulations in their entirety. *IBEW, Local 1245 v. Skinner*, 913 F.2d 1454 (9th Cir., 1990).

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[2] See 53 Fed.Reg. 47,095 and 54 Fed.Reg. 14,922.

Pending resolution of the litigation, the Union and the Company entered into negotiations for a drug testing program to comply with the D.O.T. regulations, with the understanding that if the regulations were found to be unlawful any agreements reached with respect to drug testing would be null and void. The negotiations resulted in Letter Agreement No. R3-90-86-PGE describing in detail all aspects of a Drug Free Pipeline Program, including procedures for collecting urine, chain of custody requirements, the types of laboratories to be used for testing, the appointment of a Medical Review Officer (MRO) to review the results of positive drug tests, and the consequences of positive tests for employees (UX 1). The following provisions of the Letter Agreement are relevant to the issues in this case:

ITEMS OF UNDERSTANDING

* * *

2. Company will meet and confer with Union on the selection of HHS-certified laboratories and Medical Review Officers used in the Drug Free Pipeline Program.

* * *

10. Union may request reanalysis of a specimen if it is an issue in the grievance procedure.

* * *

Appendix F

Random Drug Testing

* * *

15. An employee who has a verified positive drug test result will be immediately removed from their work responsibility and be considered as a first time offender under the First Time Offender program. They will be required to complete the required rehabilitation program as specified by the MRO. At the MRO's

discretion, they can return to work while completing the rehabilitation program's requirements.

Appendix G

Post-Rehabilitation Testing

1. The Company representative will obtain recommendations from the Medical Review Officer (MRO) for the duration and frequency of post-rehabilitation drug testing for employees returned to duty upon completion of rehabilitation. The duration will not exceed 60 months.

* * *

Appendix H

Medical Review Officer

1. The Medical Review Officer (MRO) is a licensed physician responsible for receiving laboratory results generated by an employer's drug testing program. . . .

* * *

2. Requirements for Review and Notification of Test Results

   A. The MRO must review and evaluate all "positive" test results, as described in Section 4, prior to notifying the Program Coordinator.

   B. Any "positive" test result received from the laboratory shall be considered a "confirmed positive" test until the MRO has completed his/her evaluation. If the MRO determines that the result is positive, only then shall the result be considered to be "verified positive." A confirmed positive will require an interview process as described in Paragraph 3A.

* * *

3. Interview of Individuals

   A. The main element in the review and evaluation of a positive test result received by the MRO from the laboratory is a confidential interview by the MRO with the

individual who tested positive in order to examine possible alternate medical explanations for the positive test result.

* * *

4. Evaluation and PG&E Notification of Test Results

* * *

B. If the MRO determines that a positive result for drugs can be attributed to the use of DOT prohibited drugs not prescribed to the individual (e.g., prescription drugs for relatives), in such cases the MRO shall declare the test result as "verified positive".

* * *

D. In his/her evaluation and interpretation of the positive test result from the laboratory the MRO shall not consider the results of any tests that were not obtained or processed in accordance with the PG&E Drug Testing Program.

* * *

Appendix I

"Verified" Positive Test Procedure

1. The Medical Review Officer (MRO) shall notify the Program Coordinator of all "verified" positive tests.

* * *

6. If an employee does not agree to the MRO's decision of a verified positive test, he/she can request that the MRO authorize the lab to conduct another analysis of the original specimen or an analysis of the second part of the "split sample" being held by the laboratory. This analysis will be performed by another PG&E contracted laboratory. The specimen is tested for the presence of the drug(s) for which a positive result was obtained in the test of the first part. . . .

* * *

8. If the results of the test on the second part of the "split sample" are negative, the "verified positive" test will be changed to a negative test result and reported to the Program Coordinator.

* * *

Attachment I

Collection Site Procedures

Instructions for Specimen Collection

* * *

M. Specimen Splitting, Sealing and Identification

The splitting, sealing and identification labeling of urine specimens must be performed in full view of the individual and the Collection Site Person as follows:

1. The splitting of a urine specimen (split samples) into two specimens for analysis will only occur when testing for reasonable cause, post-rehabilitation, pre-transfer or random. Pre-employment will only have one specimen sample collected and will not be split.

2. All specimens collected, which includes both parts of the "split sample", will be forwarded to the contracted HHS-certified laboratory for storage and analysis.

3. The individual will be requested to select two individually wrapped shipping packages for his/her urine specimen.

   NOTE: At a minimum, 10 shipping packages shall be available for selection.

4. The Collection Site Person unpacks the shipping package, prepares the shipping bottle . . . that has been previously selected when specimen was collected and transfers the specimen into the two bottles.

5. The first bottle is to be used for the DOT-mandated test, an 60 ml of urine shall be poured into it. If there is no additional urine available for the second specimen shipping bottle, the first

specimen bottle shall nevertheless be processed for testing.

6. Up to 60 ml of the remaining urine shall be poured into the second specimen shipping bottle.

(UX 1)

The Parties disagree as to the meaning of Paragraph 4-D of Appendix H which states that the MRO "shall not consider the results of any tests that were not obtained or processed in accordance with the PG&E Drug Testing Program." According to Rick Doering, the Company's current Director of Labor Relations and its chief negotiator for the drug testing Letter Agreement, the purpose of the language was to preclude the MRO from relying on drug tests obtained by employees from their personal physicians (TR 366-368). David Bidwell, the Company's Senior Program Coordinator for the Drug Free Pipeline Program, testified that he understands Paragraph 4-D to refer to drug tests not performed as part of the D.O.T. testing program, such as tests privately obtained by an employee, and tests not in conformance with D.O.T. standards (TR 52).

Jane Brunner, the Union's chief negotiator for the drug testing Letter Agreement, testified that, during negotiations, Doering expressed the above reason for wanting Paragraph 4-D. According to Brunner, the Union desired the language to ensure that the Company followed the negotiated procedures when testing employees and, in the Union's view, Paragraph 4-D precludes the Company from considering a drug test if there are significant deviations from the negotiated procedures. However, Brunner is not certain that the Union's intentions, as described above, were communicated to the Company during negotiations (TR 284-290).

With respect to the split sample requirement, Brunner testified the Union originally proposed that urine samples be split at the collection site, and the Company opposed the proposal on the

grounds that it would not be feasible to store all the samples. The Union informed the Company that it would not sign a drug testing agreement without a requirement that the sample be split at the collection site. Near the end of the negotiations, the Company agreed to the Union's proposal (TR 257-259).

According to Bidwell, a split of the sample at the collection site achieves a higher level of security than a split at the testing laboratory, because it eliminates any argument that the laboratory contaminated the urine (TR 40). Dr. Martha Harkey, an expert called as a witness by the Union, concurred in this opinion (TR 234-238, 246).

The Grievant's Drug Tests:

The Grievant was given a random drug test on January 14, 1991.[3] On January 17, Pharmchem, the laboratory selected by the Parties to perform urine screens, reported that the test was positive for THC (marijuana), amphetamine and methamphetamine (CX 23). When questioned by Dr. David Smith, the MRO, the Grievant admitted he had used marijuana and methamphetamine, but stated that he did not "use this shit all the time." Smith referred the Grievant to rehabilitation, and told him that he would not be allowed to return to work until he had a clean urine sample. Smith also advised the Grievant that he would have only one chance for rehabilitation, and that if he had a second positive urine screen it would have job consequences (TR 149-157, CX 24).

Pursuant to Smith's directions, the Grievant entered an outpatient rehabilitation program which commenced on January 21 and was scheduled to end on April 10. On January 31, the Grievant was given a return to work drug test. Unlike the prior random drug test, the date of the

[3] All dates hereafter refer to 1991, unless otherwise noted.

return to work test was known to the Grievant in advance. The test was negative for prohibited drugs. As a result, the Grievant was returned to work while he continued to participate in the rehabilitation program. (CX 25-31, TR 63-64, 157). As a condition of returning to work, the Grievant signed a return to work agreement which provides, *inter alia*,

> I understand that pursuant to DOT regulations, I am subject to unannounced post-rehabilitation drug testing as defined by the Medical Review Officer for up to sixty (60) months following my return to work. I further understand that such post-rehabilitation drug testing is in addition to my continued participation in random drug testing, and that I also remain subject to reasonable cause and post-accident testing where applicable.
>
> I understand that if I test positive for any prohibited drugs, including legal drugs for which I do not have a prescription, during the next sixty (60) months, I am subject to immediate termination. (CX 7)

The Grievant was given a random drug test on April 1, which was negative for all prohibited drugs (CX 31). Dr. Smith was suspicious of the results because the urine sample had a specific gravity of 1.003 which, according to Dr. Smith, suggests that the Grievant intentionally drank large amounts of water prior to the test to dilute his urine and defeat the test. Dr. Smith was particularly concerned because he had observed what he believed to be a pattern of volume diluting among PG&E employees. Dr. Smith described volume diluting as a fairly sophisticated method of defeating urine tests (TR 160-163). In spite of his suspicions, Dr. Smith did not take any action with respect to the test (TR 186-187).[4]

[4] Dr. Harkey disagreed with Dr. Smith's conclusion that a 1.003 specific gravity indicates volume diluting. According to Dr. Harkey, 1.003 to 1.010 is the normal range of specific gravity for urine, and factors other than volume diluting could account for a specific gravity at the low end of normal (TR 233-234).

The April 29 Drug Test:

The Grievant was scheduled to take his first post-rehabilitation drug test on Thursday, April 25.[5] Jim Soden, his supervisor, told him that he would be tested after he completed his work. When it appeared that the work would take longer than expected, Soden told the Grievant to call the collection site and reschedule the test for later that afternoon. The Grievant did so, but then asked whether he would receive overtime pay if he was not able to return to the work site by his normal quitting time.[6] The Company did not agree to pay him overtime, so the test was rescheduled for Tuesday, April 29, the Grievant's next work day (TR 330-331, 345-348).

Collection of the Sample:

On April 29, the Grievant went to the Mojave Medical Center to give a urine sample. Linda Herrick, the technician, had not collected samples for PG&E employees before (TR 109, 117), and she had not received any written instructions from PG&E prior to collecting the Grievant's sample (TR 106). Herrick testified that, in accord with her normal procedure for collecting samples for D.O.T. tests, she first asked the Grievant what type of test it was, and he said it was a pre-employment test. After collecting the sample, she marked "pre-employment" on the chain of custody form, went over every item on the form with him, and had him sign the form. She then sealed the sample in a shipment bag and sent it to PoisonLab laboratory for testing (TR 106-112).[7]

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[5] Although the dates for post-rehabilitation tests are determined in advance, the employee is not advised of the test until a few hours in advance (TR 64)

[6] The Grievant initially testified that his shop steward raised the overtime issue, when he told the shop steward he would be tested (TR 345). He then testified that he may have been the one who raised the issue (TR 346).

[7] The Parties had agreed that Pharchem laboratory would be the testing lab under the Drug Free Pipeline Program. However, there is no dispute that PoisonLab was qualified to perform the required tests.

Herrick did not split the sample before sending it to the laboratory, although a split is required for post-rehabilitation tests under the Drug Free Pipeline Program and the Letter Agreement. There is a dispute between Herrick and the Grievant as to whether the question of splitting the sample was discussed during the collection procedure. At the arbitration hearing, Herrick testified that the Grievant did not tell her the sample should be split, and that, had he done so, she would have called the Company for advice (TR 113-114). However, in its investigation of the underlying grievance in this case, the Local Investigating Committee delegated a Union representative and a Company representative to interview Herrick. Their joint notes of the interview on June 7 state, *inter alia*, as follows:

> Q: Why did you use your forms for Poison Lab instead of Pharmchem?
> A: Linda stated that she was familiar with her forms and had not yet received the PG&E forms at the time of this particular test on 4/29/91. Plus she stated that she just really forgot about the PG&E procedure even though she had talked with Donna on the procedure a few days, or a week, before.[8]
>
> Q: Why was the preemployment box checked?
> A: Linda stated that the Grievant had told her that this was a preemployment test.
>
> * * *
>
> Q: Did Mr. Cranney ask why you were not taking a split sample?
> A: Yes, he did ask for a split sample and I told him that normally we don't take split samples and that I was using my package in this case which only contains one bottle. (Two days later Linda claimed that the PG&E package with two sample bottles arrived.)
>
> (JX 3, minutes of Local Investigating Committee, page 4)

The Grievant testified he told Herrick he was there for a post-rehabilitation test, not a pre-employment test. He further testified that he was aware the sample should be split because the

[8] "Donna" apparently refers to Bidwell's assistant Donna Sluot (TR 98).

samples in each of his three prior tests had been split, and that he told Herrick a split sample was required. According to the Grievant, Herrick told him she only had one specimen package (TR 332-334). It is undisputed that, when the Grievant returned to the work site, he immediately advised Soden that the sample had not been split. Soden said he would check into it, and that they might not be able to use the test (TR 335-336).[9]

Processing of the April 29 Sample:

Bidwell learned that the sample had not been split, and he intended to cancel the test and schedule another one. However, on or about May 6, before a new test could be scheduled, PoisonLab reported that the sample had tested positive for THC, amphetamine and methamphetamine (TR 97-99, 121-122, CX 32). Bidwell consulted with Dr. Smith, and they decided that they could not disregard the positive finding, because the failure to split the sample at the collection site did not violate D.O.T. regulations (TR 70-71, 163-170). Bidwell directed PoisonLab to send the sample to Pharmchem for testing. PoisonLab poured off an aliquot of the sample which had already been tested, and sent it to Pharmchem with a letter describing its findings (CX 37, letter dated May 9, 1991).

Bidwell asked Pharmchem to treat the sample as if it were coming from a collection site, rather than from another lab. Samples from collection sites are first tested by the EMIT (immunoassay) procedure which detects prohibited drugs above a relatively high cutoff level. If the EMIT test is negative, no further testing is done. If the EMIT test is positive, the sample is tested by the Gas Chromatology / Mass Spectrometry (GC/MS) method. The GC/MS test is more sensitive

[9] The Grievant's contemporaneous notes are consistent with his testimony that he told Herrick the sample should be split (JX 3).

and can detect the presence of lower levels of prohibited drugs. Bidwell was aware that the Grievant's sample had been stored and refrigerated at PoisonLab for several days, and that this would normally cause the quality of the sample to deteriorate. He wanted Pharmchem to perform an EMIT test first, because he thought it might result in a negative finding and "we could come up with another reason to throw it out" (TR 71-75).

Contrary to Bidwell's instructions, Pharmchem did not test the sample as if it had come from a collection site. Rather, it performed only the GC/MS test, as it would to confirm a finding by another lab. Pharmchem's test also showed that the sample was positive for THC, amphetamine and methamphetamine (CX 37).

On May 13, Dr. Smith interviewed the Grievant as required by the Drug Free Pipeline Program. He determined that there was no explanation for the positive result, other than the use of prohibited substances, and reported to the Company that the test was a verified positive (CX 34, 170-177).[10] The Grievant was terminated effective May 15 or 16.

POSITIONS OF THE PARTIES

The Union:

☐ The requirement that urine samples be split at the collection site was negotiated by the Parties. But for the Employer's agreement to split samples, the Union would not have agreed to the urine testing program.

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[10] As a result of concerns raised by Dr. Harkey after the Grievant was terminated, it was determined that the positive results for amphetamine and methamphetamine might not be reliable (CX 38, 39; TR 208). That evidence is not discussed in detail here, because there is no dispute that the sample tested positive for THC (TR 190, 202, 243).

☐ Appendix H, Section 4(D) of the drug testing program is clear and unambiguous, and requires that the MRO not consider the results of any tests that were "not obtained or processed in accordance with the PG&E Drug Testing Program." The testimony of Jane Brunner and Rick Doering establishes that the Parties had different reasons for accepting that language. But, a party's motivation for accepting clear and unambiguous contract language is not relevant to subsequent interpretation of that language. Appendix H, Section 4(D) means what it says, nothing more or less.

☐ Even if the language of Section 4(D) is ambiguous, the Union's interpretation is preferable to the Employer's interpretation. Under the Union's interpretation, only substantial deviations from the negotiated procedures would trigger the application of the "shall not consider" language. On the other hand, the Employer's interpretation would limit the application of Paragraph 4-D to two specific factual situations.

☐ The Grievant's sample was not split at the collection site. PoisonLab poured off an aliquot of the sample, after testing it. This does not provide the same protection as a split at the collection site, because if the sample was contaminated by PoisonLab, then the aliquot sent to Pharmchem would also be contaminated.

☐ The April 29 testing was flawed in other ways. The sample was sent to PoisonLab instead of Pharmchem. Bidwell directed PoisonLab to send the sample to Pharchem as if it were coming from the field; instead, PoisonLab sent a cover letter to Pharmchem explaining the results of its testing. Then, instead of testing the sample for screening cut-off levels, as directed by Bidwell, Pharchem tested at the lower limits of detection applicable to confirmation tests. Finally, after the Grievant was terminated, it was discovered that the positive finding with respect to amphetamine and methamphetamine was not reliable.

☐ As a result of these flaws, the test should have been disregarded because it was "not obtained or processed in accordance with the PG&E Drug Testing Program." This result is supported by Bidwell's attempts to cancel and then disregard the April 29 test. Had he learned of the failure to split the sample earlier, he would have found a way to cancel the test before receiving the results.

☐ The fact that the D.O.T. does not require a pipeline operator to remove an employee permanently from a covered position after a second positive -- a fact not known to or understood by the Employer when the Grievant was terminated -- supports the Union's position in this grievance.

☐ The Employer has not established that the Grievant intentionally diluted his urine by water loading prior to the April 1 test. Dr. Smith testified only that the specific gravity of the specimen suggested the possibility of dilution. But, Dr. Harkey's testimony and the applicable regulations support the conclusion that a specific gravity of 1.003 is normal.

☐ The Employer has not established that the Grievant intentionally delayed the testing originally scheduled for April 25. The record establishes that it was the Union's shop steward who insisted that the Grievant be paid overtime if the urine collection took place after the end of the shift. Faced with this demand, the Employer had the option of continuing with the test and paying the Grievant overtime, or rescheduling the test. The fact that the Employer elected to reschedule the test should not be held against the Grievant.

☐ The Employer has not shown that the Grievant sabotaged the April 29 test by telling Ms. Herrick that it was a pre-employment test. The major flaw in this argument is the fact that the Grievant advised Ms. Herrick that the sample should be split. Ms. Herrick's testimony that the Grievant did not tell her to split the sample is discredited, because it is inconsistent with her statement to the Local Investigating Committee.

☐ The record does not support the Employer's argument that the Grievant would represent a clear and present danger if reinstated. Dr. Smith characterized the Grievant as a chronic episodic (weekend) user. Dr. Harkey testified that the levels of marijuana metabolite found in the Grievant's urine did not indicate a high level of use. This testimony does not support the conclusion that the Grievant, who had no safety or disciplinary record during his five-plus years of employment, would represent any danger if returned to work.

☐ While the April 29 test may be considered a valid test for D.O.T. purposes, the D.O.T. regulations do not require that an employee be discharge or permanently removed from a covered position after a second positive test result. The Employer could have complied with both the negotiated agreement and D.O.T. regulations by treating the test as invalid under the negotiated agreement, but valid for D.O.T. purposes.

☐ If the Employer had acted diligently, when it first learned that the sample had not been split at the collection site, the test would have been cancelled immediately, and the Grievant would have continued working without loss of pay or benefits. Accordingly, the grievance should be sustained and the Grievant should be reinstated with full seniority, backpay and benefits.

The Employer:

☐ The evidence establishes that the Grievant used illegal substances on two separate occasions and was under the influence on the job.

☐ The Union's argument that the test results should be disregarded because the sample was not split at the collection site is without merit, because the Grievant created the problem when he tried to sabotage the test. In addition, the negotiated agreement does not obligate the Employer to throw out positive test results if the sample is not split at the collection site.

☐ The Grievant executed and understood the return to work agreement, which provides that another positive test would result in automatic discharge.

☐ The evidence is overwhelming that the April 29 test was positive for amphetamine, methamphetamine and THC. The Grievant's denial that he used illegal drugs is not credible.

☐ When the Grievant learned that he was going to be tested on April 25, he claimed an entitlement to overtime pay to delay the test. His testimony that the shop steward, rather than he, raised the overtime issue is not credible.

☐ On April 29, the Grievant took advantage of Herrick, who had not received any paper work describing the reason for the test, by misrepresenting to her that it was a pre-employment test which does not require a split sample. Herrick is a disinterested person who has no reason to distort the Grievant's statements to her. The Grievant's signature on the chain of custody form contradicts all of his testimony about what he said to Herrick.

☐ The only way to explain the incongruous behavior of allegedly vociferous complaints on the job about the failure to split the sample, and his passive submission at the collection site, is that the Grievant had a plan. He did not complain to Herrick, because he wanted an un-split sample to go to the lab. But he wanted to stop the testing, so he complained about the lack of a split sample when he returned to work. If the Grievant was truly concerned about his rights, he would have called his shop steward and supervisor from the collection site, and he would not have certified the test as a pre-employment test.

☐ The negotiated agreement does not require that a positive test result be discarded because of a significant departure from the collection procedure. Brunner's testimony that Paragraph 4-D of H-4 requires the MRO to disregard a test if there is a significant problem with the collection process

alters the meaning and language of that provision. The plain meaning of Paragraph 4-D is apparent when read in the context of the entire program. The MRO's function is to investigate possible medical explanations for a positive result. He does not have discretion to disregard a test result on the basis of a complaint, supportable or not, that the collection procedure was not followed.

☐ The Union's interpretation of Paragraph 4-D is vague; there is no certainty as to what would constitute a significant departure from collection procedures which would require that a test result be disregarded.

☐ D.O.T. regulations prohibit the Company from "knowingly using any employee who fails a drug test required by this part." Because the D.O.T. regulations do not mandate a split, the Company would have violated this regulation if it had disregarded the test.

☐ The Union's interpretation of Paragraph 4-D should also be rejected because the Union did not communicate its purported understanding of the language to the Company during negotiations.

☐ The Union has not established that any harm resulted from spliting the sample at the lab instead of at the collection site. PoisonLab followed D.O.T. procedures when it tested the sample, and the positive result was confirmed by Pharmchem. As a result, the Union received the complete benefit of a split sample and independent testing.

☐ Reinstatement of the Grievant would put others at risk. According to Dr. Smith, the Grievant is a chronic abuser and his addiction disease is characterized by relapse. If he his reinstated to a safety sensitive position, he probably will not be able to refrain from using. Arbitrators have refused to reinstate employees in similar circumstances.

☐ The grievance should be denied.

DISCUSSION

Resolution of the issues in this case requires a two step analysis. First, it must be determined whether, under the terms of the Letter Agreement, the failure to split the sample at the collection site prohibits the Company from taking disciplinary action based upon the results of the test.[11] If the Company is so prohibited, the appropriate remedy must be determined in light of the Letter Agreement and D.O.T. requirements.

Application of the Letter Agreement:

The Company argues that the failure to split the sample at the collection site should not be relied upon to provide relief to the Grievant because he intentionally sabotaged the test. As in any discharge case, the Company bears the burden of proof on that issue. A careful review of the record shows that the Company has not established this claim by a preponderance of the evidence. In support of its argument that the Grievant intentionally sabotaged the April 29 test, the Company first points to Dr. Smith's conclusion that the Grievant may have engaged in volume diluting to defeat the April 1 random test. However, the evidence on that point is in conflict. Dr. Smith did not testify that the Grievant, in fact, engaged in volume diluting; rather, he testified that the low specific gravity of the urine was suspicious, but could also be explained by other factors (TR 161-162). Significantly, in spite of Dr. Smith's suspicions, the Company did not treat the April 1 test as invalid nor did it take any other action against the Grievant based upon the alleged volume diluting.

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[11] Other problems relied on by the Union are not significant enough to warrant the conclusion that the test should be ignored. Although the sample was sent to the wrong laboratory, PoisonLab was properly certified to perform the test and there is no direct evidence that the initial tests were performed improperly. Pharmchem's failure to test the sample as if it had come from a collection site does not arguably violate any provision of the Letter Agreement. The questionable results of the positive findings for amphetamine and methamphetamine do not provide a basis for relief, because the positive finding for THC is not disputed.

Dr. Harkey disagreed with Dr. Smith's conclusion that a specific gravity of 1.003 is below normal and a sign of volume diluting. In these circumstances, a conclusion that the Grievant attempted to defeat the April 1 test by engaging in volume diluting is not warranted by the evidence.

Next, the Company argues that the Grievant attempted to delay the scheduled April 25 post-rehabilitation test by asserting a claim for overtime pay if the test required him to work beyond his normal shift ending time. Regardless of whether the Grievant or his shop steward initially raised the overtime issue, the Company cannot hold the Grievant responsible for the rescheduling of the test. Faced with the overtime claim, the Company had three alternatives: (1) order the Grievant to take the test and pay the overtime; (2) order him to take the test and resolve any dispute concerning his overtime claim through the grievance procedure; or (3) postpone the test to avoid any issue regarding overtime pay. Because the Company clearly had authority to order the Grievant to take the test as scheduled, regardless of his overtime claim, the Grievant may not be held responsible for delaying the test.

Finally, the Company argues that the Grievant was responsible for the failure to split the sample at the collection site, because he misled Herrick by telling her that he was there for a pre-employment test. This argument fails for the reasons set forth below.

First, the record supports a finding that the Grievant specifically told Herrick that the sample should be split. He so testified at the hearing, and he immediately complained to his supervisor about the failure to split the sample when he returned to work. Herrick's denial at the arbitration hearing that the Grievant told her the sample should be split is not credited in view of her specific prior admission to the LIC that he did so. It is noted that the LIC testimony was closer in time to

the actual events, and it was accepted as true by both the Union and Company representatives on the LIC.

Second, it has not been shown that Herrick's failure to split the sample is attributable to her misunderstanding about the type of the test involved. It is apparent from the record that Herrick was not familiar with PG&E testing procedures under the Drug Free Pipeline Program. She had not previously collected a sample for a test under the Program, and she had not received any written instructions or the split-sample kits from the Company when she collected the Grievant's urine. She admitted to the LIC investigators that she had forgotten about the PG&E procedures, even though she had apparently been orally advised of them by Bidwell's assistant at an earlier time.

Finally, given the inadequate instructions given collection site personnel and the absence of the required sample kits, the record does not support a conclusion that the Grievant was responsible for the confusion which occurred at the collection site. The fact that the Grievant signed the chain of custody form, which included an incorrect reference to a pre-employment test and showed that the sample had not been split, fails to warrant a different conclusion.

For all of the above reasons, the conclusion is required that the Company has failed to establish the Grievant intentionally attempted to sabotage the April 29 test or that he was responsible for Herrick's failure to split the sample.

The Company's argument that Paragraph 4-D of Appendix H is inapplicable to this situation is not accepted. As the Union argues, the provision that "the MRO shall not consider the results of any tests that were not obtained or processed in accordance with the PG&E Drug Testing Program" (emphasis supplied) is clear and unambiguous. If the language referred only to tests not "obtained" in accordance with the Company's drug testing program, it might be susceptible to the Company's

interpretation that it precludes the MRO from considering tests obtained from an employee's private doctor or other sources. But, the language on its face includes the term "processed." The clear meaning of that additional reference is that, where the process involved in a test violates the Letter Agreement in any meaningful and significant respect, the MRO should not consider the test. The Company is bound by the negotiated Letter Agreement.

Because the language is clear and unambiguous, it is not necessary to consider the bargaining history to determine its meaning. However, it is noted that the bargaining history is not inconsistent with this result. The fact that the Union may not have expressed its interpretation of the language across the bargaining table does not preclude it from relying upon the clear and ordinary meaning of the words adopted by the Parties. Moreover, as argued by the Union, application of the language to preclude consideration of flawed tests is consistent with the fact that the requirements of the Drug Free Pipeline Program were the result of collective bargaining negotiations to comply with existing law. If, as the Company argues, tests obtained by the Company could be relied upon even if they were not in compliance with the Letter Agreement, the Letter Agreement would provide little or no protection for bargaining unit employees, and would be rendered superfluous.

As the Union admits, not all violations of the procedures required by the Letter Agreement necessarily warrant application of the preclusive effect of Paragraph 4-D. But, this case does not require the Board to draw a fine line between violations which do or do not require that result. Rather, the Board must determine only whether the failure to split a sample at the collection site, in the circumstances presented here, warrants the application of Paragraph 4-D.

The uncontradicted evidence establishes that the requirement that samples be split at the collection site was of paramount importance to the Union in negotiations over the drug testing

policy. The Union advised the Company it would not enter into a drug testing agreement without that protection. It is also undisputed that sample splitting at the collection site provides a higher level of protection for employees than sample splitting at the testing laboratory. The significance of splitting the sample at the collection site is demonstrated by the fact that, under the Letter Agreement, either an employee or the Union may request testing of the split to challenge an initial positive result. This protection is diminished when the split is not made as required by the negotiated collection procedures.

For all of the above reasons, it is found that Paragraph 4-D of Appendix H to the Letter Agreement prohibited the Company from relying upon the results of the April 29 test to impose discipline on the Grievant. Because consideration of the test violated the Letter Agreement, the termination of the Grievant's employment was without just cause.

Remedy:

The April 29 test must be treated as valid under D.O.T. regulations, because D.O.T. regulations do not require that samples be split at the collection site.

29 CFR §199.9 provides:

> (a) An operator may not knowingly use as an employee any person who -
>
> (1) Fails a drug test required by this part and the medical review officer makes a determination under §199.15(d)(2); . . .
>
> * * *
>
> (b) Paragraph (a)(1) of this section does not apply to a person who has -
>
> (1) Passed a drug test under DOT Procedures;
>
> (2) Been recommended by the medical review officer for return to duty in accordance with §199.15(c); and
>
> (3) Not failed a drug test required by this part after returning to duty.

It was clear when the Grievant was terminated that the D.O.T. regulations did not require employers to terminate employees who failed post-rehabilitation drug tests (TR 372-374):

> Question: May an operator terminate a reinstated employee for subsequent failure of a drug test?
>
> Answer: In such circumstances, 199.9 (b) (3) requires that the employee be removed from the covered position without an opportunity for future reinstatement. Part 199 does not require that operator to terminate employment of the individual; if possible, he or she could be shifted to a non-covered position. If an operator decides to terminate employment, it cannot rely on Part 199 for authority to do so. (UX 3).

The D.O.T. currently interprets the regulation to permit reinstatement to a covered position where an employee fails a drug test after returning from rehabilitation (TR 88-89):[12]

> Under §199.9(a)(1), an employee who tests positive must be removed from the covered position. It is at the operator's discretion whether to terminate the employee, move the employee to a non-covered position, or offer the employee the opportunity for rehabilitation and subsequent return to duty. If the employee subsequently returns to duty and again tests positive, the operator must again remove the employee from the covered position. However, it was not RSPA's intention in drafting §199.9(b) to limit the number of times that an employee could test positive, and subsequently be reinstated to that or any other covered position, after a negative retest and return-to-duty recommendation from the Medical Review Officer. Upon a subsequent positive test, the operator has the same alternatives available in dealing with the employee, i.e., termination, moving the employee to a non-covered position, or offering an opportunity to return to duty. (UX 4)

Because D.O.T. regulations do not require the termination of covered employees who fail drug tests, the right of the Company to terminate employees in that situation is governed by the collective bargaining Agreement and the Letter Agreement. It has been found, above, that the failure to split the sample at the collection site constituted a significant violation of the Letter Agreement;

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[12] It is not clear when the interpretation quoted below was issued. The document from which it is taken appears to bear the date 12/5/91 in the lower left hand corner. However, the quoted paragraph bears the date 7/24/90 (UX 4).

for that reason, the Company is prohibited from relying upon the April 29 test as a basis for discipline. Therefore, the termination of the Grievant was not for just cause. Accordingly, an order reinstating the Grievant is appropriate.

However, the Union's argument that the Grievant is entitled to full back pay and benefits is not accepted. There is no showing that the Company acted in bad faith or with improper intent. Indeed, its attempts to cancel or otherwise invalidate the April 29 test show that it was making a good faith effort to comply with the Letter Agreement. As described by Bidwell, receipt of the positive finding from PoisonLab put the Company in a "tight place." Professional considerations precluded the MRO from ignoring the results once they were received; and the D.O.T. regulations required the Company to treat the test as valid, even if it did not comply with the Letter Agreement.

In addition, the evidence establishes that the positive finding with respect to THC is reliable, regardless of the collection site's failure to split the sample. This means that the Grievant failed two drug tests within a period of approximately three months, and used a prohibited drug after completing rehabilitation. While the Company, for the reasons stated above, is prohibited from relying upon the test results for purposes of imposing discipline, the Board is not precluded from considering this evidence in fashioning the appropriate remedy. The Grievant's own actions are responsible for setting these events in motion, and the Company could not have continued to employ him in a covered position in violation of the D.O.T. regulations. Further, he is not entitled to a presumption that he would have passed a test processed in compliance with the Letter Agreement. In these circumstances, the equitable remedy of backpay and benefits is not warranted.

AWARD

The Company terminated the employment of C without just cause. The grievance is granted.

As a remedy, the Company shall reinstate Mr. C without loss of seniority, but without backpay or other benefits. Reinstatement shall be conditioned upon Mr. C satisfying normally applicable D.O.T. and Company requirements for return to a covered position after failing a drug test. The period of time between the termination and the Grievant's reinstatement shall not be considered a disciplinary suspension, nor may the results of the April 29, 1991 test be considered in reaching any future decisions involving discipline.

Barbara Chvany	Concur / Dissent	April 22, 1994 Date
Roger Stalcup	Concur / Dissent	5/2/94 Date
Manny Guzman	Concur / Dissent	5/2/94 Date
Rick Doering	Concur / Dissent	5/9/94 Date
Steve Rayburn	~~Concur~~ / Dissent	5/9/94 Date

In the Matter of an Arbitration

between

IBEW LOCAL 1245,

Complainant,

and

PG&E,

Respondent

Involving the Arbitration Case No. 190.

Supplemental Opinion & Decision

of

Board of Arbitration

-oOo-

San Francisco, California

BOARD OF ARBITRATION

Barbara Chvany	Chairperson
Rick Doering and Steve Rayburn	Company Board Members
Roger Stalcup and Manny Guzman	Union Board Members

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INTRODUCTION

This dispute arose under the Collective Bargaining Agreement between the above-captioned Parties (JX 1). The Board of Arbitration issued an Opinion & Decision on the merits of Arbitration Case No. 190, holding that the discharge of the Grievant was not for just cause.[1] The Decision included the following remedial language:

> As a remedy, the Company shall reinstate Mr. Cranney without loss of seniority, but without backpay or other benefits. Reinstatement shall be conditioned upon Mr. Cranney satisfying normally applicable D.O.T. and Company requirements for return to a covered position after failing a drug test. The period of time between the termination and the Grievant's reinstatement shall not be considered a disciplinary suspension, nor may the results of the April 29, 1991 test be considered in reaching any future decisions involving discipline.

A dispute arose between the Parties concerning the conditions applicable to Mr. C 's reinstatement. The Parties stipulated that the Board retained jurisdiction over implementation of the remedy in the event a dispute arose (TR 10). Accordingly, an Executive Session was convened on October 20, 1994 to resolve the dispute. What follows are the supplemental findings and decision of the Board of Arbitration on this remedial issue.

ISSUE

Is the Company, through the Substance Abuse / Mental Health Plan, required to pay for the rehabilitation program required as a condition of the Grievant's reinstatement pursuant to the May 1994 Decision of the Board of Arbitration?

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[1] The cover page of the Decision bears the date April 22, 1994. It was fully executed by the Board of Arbitration as of May 9, 1994.

REMEDY REQUESTED

The Union seeks a finding that the Company be required to pay for the rehabilitation program, through the Plan. The Company takes the position that the Grievant should be required to pay for the program.

BACKGROUND

As the remedial language quoted above reflects, the Grievant's reinstatement to employment pursuant to the Board's Decision in Arbitration Case No. 190 was conditioned upon his "satisfying normally applicable D.O.T. and Company requirements for return to a covered position after failing a drug test." The Grievant was evaluated by the Medical Review Officer (MRO) and the Employee Assistance Program (EAP), and it was determined that successful completion of an in-patient drug rehabilitation program would be the necessary condition of his reinstatement. The cost of the in-patient treatment is approximately $7,500.

In the Company's view, the Grievant should be required to pay for the program at issue. The Grievant was ineligible for membership in the Plan after his termination. Further, the Company points out, the Board denied the grievance, in part, by refusing to award the Grievant back benefits and back pay. Therefore, according to the Company, it would be inconsistent with the Decision to require the Company to pay for this benefit. Requiring the Company to pay the cost of rehabilitation for a second positive test would send the wrong message, the Company concludes.

The Union takes the position that requiring the Grievant to pay for the rehabilitation program would undermine the remedy awarded in the Decision, *i.e.*, reinstatement of Mr. C. Mr. C cannot afford to pay for the program, without which he will not be reinstated. The

reinstatement remedy was awarded as a result of the Company's breach of the Agreement with respect to the handling of the drug test which led to the termination. According to the Union, had Mr. C. not been terminated, or had he been directed to participate in in-patient treatment at the time of his termination, the cost of such treatment would have been covered by the Company's Substance Abuse / Mental Health Plan. Under the circumstances, the Union argues that the Company should be held responsible for the cost of the program.

DISCUSSION

Because the drug test relied upon to support the Grievant's discharge was found to have been conducted in a manner which violated Letter Agreement No. R3-90-86-PGE, the termination was found to lack just cause (May, 1994 Opinion & Decision, pp. 24-27). As a remedy for the improper termination, the Grievant was found to be entitled to reinstatement, conditioned upon satisfying normally applicable D.O.T. and Company requirements for return to a covered position after failing a drug test. There is no dispute here that the requirement that he successfully complete an in-patient rehabilitation program is consistent with the conditions on reinstatement allowed by the Decision. The issue is who must pay for it.

The conclusion is required that the Company is required to pay for rehabilitation program, through its Substance Abuse / Mental Health Plan. The reasons for this conclusion are the following:

First, the Company contends that the Grievant was ineligible for membership in the Plan after his termination. However, as noted above, the Grievant's termination was found to lack just cause under the Agreement, and his reinstatement was ordered. Had he not been improperly terminated, he would have continued to be eligible for Plan benefits.

Second, the denial of an award of back benefits to the Grievant under the May 1994 Decision does not preclude a finding in his favor on the remedial issue here. The rehabilitation program does not constitute a "back benefit" as that term is normally used and understood. It is not a request for benefits which accrued in the interim between the Grievant's termination and the date of the Decision. Rather, the rehabilitation program at issue is a prospective component of the Grievant's reinstatement pursuant to the Decision. For example, it is more comparable to a return to work physical or other screening that may be required by an employer processing employees for return to work after a lengthy absence, as opposed to a reimbursement to the Grievant of medical expenses which occurred in the interim between his termination and the May 1994 Decision. The former are typically paid for by the employer.

Third, conditions were included for the Grievant's reinstatement under the May 1994 Decision in order to allow the Company the ability to comply with any applicable laws and to protect workplace safety. Given this underlying purpose, requiring the Company to pay for the cost is more reasonable that requiring Mr. C to do so. There is no question that the rehabilitation program also redounds to Mr. C. 's benefit, however, that peripheral benefit was not the reason the conditions were included in the Decision.

Fourth, disallowing Company payment for this rehabilitation program would have the practical result of eviscerating the remedy awarded under the May 1994 Decision: the reinstatement of the Grievant. Since he cannot afford to pay for the in-patient rehabilitation, requiring that he do so would effectively result in the termination of his employment.

Finally, the conclusion reached above is consistent with the underlying purpose of the remedy ordered in the May 1994 Decision. The remedy awarded was intended to place the Grievant in the

position he would have been in but for the Agreement violation, minus backpay and benefits for the interim period because of the role his own actions played. Had he not been terminated, and had he been required to undergo this in-patient treatment program at the time the test results in question became known to the Company, he would have been covered by the Plan.

By the findings reached herein, the Company is not required to pay for benefits which exceed those covered by the Substance Abuse / Mental Health Plan. In this Supplemental Opinion & Decision, the Board does not purport to modify or amend applicable terms or provisions of the Plan. Finally, the Grievant shall release to the Company any and all pertinent medical information requested that reasonably bears upon a determination of his entitlement to coverage for this rehabilitation program under the Plan.

For all the foregoing reasons, the following supplemental decision is rendered:

SUPPLEMENTAL DECISION

1. The Company is required to pay for the in-patient rehabilitation program required as a condition of C 's reinstatement pursuant to the May 1994 Decision of the Board of Arbitration, which payment shall occur in the amounts and manner prescribed in the Substance Abuse / Mental Health Plan. This Decision does not require the Company to pay for benefits which exceed those covered by the Substance Abuse / Mental Health Plan, nor is this Decision intended to modify or amend applicable terms or provisions of the Plan.

2. As a condition precedent of the remedy awarded in Paragraph 1, above, Mr. C. shall release to the Company any and all pertinent medical information requested that reasonably bears upon a determination of his entitlement to coverage for this rehabilitation program under the Plan.

3. The Board continues to retain jurisdiction in the event any dispute arises concerning the implementation of this Supplemental Decision.

Barbara Chvany	Concur / Dissent	11-2-94 Date
Roger Stalcup	Concur / Dissent	11/10/94 Date
for Mr. Guzman Manny Guzman	Concur / Dissent	11/14/94 Date
Rick Doering	Concur / Dissent	11/9/94 Date
Steve Rayburn	Concur / Dissent	11/10/94 Date