INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,	**Opinion & Decision**
Complainant,	**of**
and	**Board of Arbitration**
PACIFIC GAS AND ELECTRIC COMPANY,	
Respondent.	-oOo-
Re: Arbitration Case No. 256.	

BOARD OF ARBITRATION

Margaret A. Short, Company Board Member
Pat Medrano, Company Board Member
Sam Tamimi, Union Board Member
Lulu Washington, Union Board Member

Barbara Chvany, Neutral Board Member

APPEARANCES

On Behalf of the Union:

Tom Dalzell, Esq.
IBEW Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Employer:

Stacy A. Campos, Esq.
PG&E
Law Department
P.O. Box 7442
San Francisco, CA 94120

INTRODUCTION

This matter arises under the 1997 Collective Bargaining Agreement between the above-captioned Parties (JX 2; TR 6). Pursuant to the Agreement, the above-listed Board of Arbitration conducted an arbitration hearing on May 16, 2002, in San Francisco, California. At the hearing, the

Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. A verbatim transcript of the proceedings was taken.[1] The Parties presented oral closing arguments at the hearing, and the case was submitted for decision upon receipt of the transcript on June 11, 2002. The Parties executed a Submission Agreement in this matter (JX 1). It includes a stipulation that the prior steps of the grievance procedure have been followed (*Id.*; TR 5-6).

The Union filed the grievance at issue, No. 12704, when a dispute arose about certain conditions contained in an Agreement dated July 30, 1999 (referred to hereinafter as "the July 30 Agreement") (JX 3, pp. 1, 13-14). The issues before the Board of Arbitration for final and binding resolution are as follows:

ISSUE

> 1. Is the grievance untimely pursuant to Section 102.3 of the PG&E/IBEW Local 1245 collective bargaining agreement?
>
> 2. Has the Company violated the collective bargaining agreement by bypassing the grievant for Troubleman and Electric Crew Foreman positions? If so, what remedy?
>
> 3. Does the July 30, 1999 agreement executed by Company and IBEW Local 1245 regarding the Grievant's reinstatement bar the Grievant from bidding into Electric Crew Foreman, Troubleman, Underground Gas or Electric Crew Foreman?
>
> 4. Is the July 30, 1999 agreement executed by the Company and IBEW Local 1245 ("the parties") final and binding on the parties, unless otherwise mutually rescinded by the parties? (JX 1)

[1] References to the transcript are cited herein as (TR #); references to Joint Exhibits are cited as (JX #).

BACKGROUND

The Termination:

OM&C Superintendent John Parks decided, in concurrence with other Company personnel, to discharge Grievant H for post-DML misconduct, the particulars of which are irrelevant here (TR 28-29). The Company processed the necessary administrative steps for the termination (TR 29-30). Parks directed Distribution Supervisor Robert Trumbull to implement the discharge (TR 23, 20). Trumbull did so in a meeting held on the morning of July 30, 1999, in which the Grievant had the benefit of Union representation (TR 19-20, 30).

In the meeting, Trumbull followed the steps of the termination checklist and gave the Grievant a termination letter (TR 20, 23-24; JX 5). The Grievant's keys, identification and access cards were retrieved; and he was given his final paycheck and escorted off the property (TR 20, 21, 23-24). A Union representative was assigned to clean out the Grievant's trouble truck and return his personal effects (TR 20-21).

The July 30 Agreement:

On July 30, 1999, shortly after the termination meeting referred to above, Union representatives McCauley and Lockhart contacted Superintendent Parks about the possibility of reinstating the Grievant (TR 32-33, 36). Parks testified that they engaged in settlement discussions at the first step of the grievance procedure (TR 32).[2] The Parties discussed the matter and negotiated certain settlement terms, pursuant to which the Grievant was to return to work subject to enumerated conditions (TR 36-37; JX 3, pp. 13-14). The conditions include, but are not limited to, that the

[2] The Union had made earlier efforts to deter Parks from terminating the Grievant, but those efforts were unsuccessful (TR 33-34, 35-36).

Grievant "will accept a demotion to the position of Lineman" and "will not be eligible to work in the classification of Electric Crew Foreman, Troubleman, Underground Gas or Electric Crew Foreman for the rest of his career at PG&E" (JX 3, p. 13).

The settlement terms were set forth in writing in the July 30 Agreement (JX 3, pp. 13-14; TR 37-41). Both Parties had the opportunity to review the Agreement and to obtain appropriate authorization; and the Grievant also had the opportunity to review the terms before signing (TR 37-42, 58-59). The July 30 Agreement was signed by Union Representative Bernard Smallwood; by OM&C Superintendent John Parks and Distribution Supervisor Richard S. Jones on behalf of the Company; and by the Grievant, H (JX 3, p. 14). No timely effort was made to rescind or challenge the July 30 Agreement (TR 44; JX 2, §102.3).

Parks' unrebutted testimony was that he and the others who crafted this settlement had a clear understanding that the Grievant had been terminated (TR 54); and he regarded the July 30 Agreement as a grievance settlement (TR 42, 47-48). Absent the conditions incorporated in the July 30 Agreement, Parks would not have agreed to reinstate the Grievant to employment (TR 42, 55).

The first sentence of the July 30 Agreement states, in part, "... the termination of H was in progress ..." (JX 3, p. 13). On cross-examination, the Union asked Parks to reconcile that phrase with his testimony that the Grievant had been terminated (TR 45). Parks admitted he should have worded the letter differently (TR 47). He explained that he drafted the letter himself; this was not his area of expertise; and the phrase was included due to "grammatical error" on his part (TR 46-47).

Subsequent Events:

The Grievant returned to work in the demoted position (TR 41-42). He later bid for positions from which he was precluded under the July 30 Agreement (TR 42-43, 44). No grievance was filed when he was first deemed ineligible for a bid (TR 45). The instant grievance was filed in May 2001 when a dispute arose concerning the Company's continuing to bypass the Grievant for upgrade and promotional opportunities (JX 3, p. 12).

Other Evidence:

The record shows that the Company and the Union, collectively, as well as Boards of Arbitration, have authority to supersede the Positive Discipline Guidelines (PDG) in the resolution of grievances (TR 59-60. 62; JX 4, Letter Agreement 88-109 dated August 10, 1988). Under Section 102.6 of the Collective Bargaining Agreement, the first step in the grievance process for disciplinary matters is for representatives of the Union and the Company to meet and try to resolve the matter (JX 2; TR 60, 62).

In the past, the Parties have superseded the Positive Discipline Guidelines (PDG) in the resolution of grievances (TR 60-61, 62). Both before and after the PDG were agreed to by the Parties, other cases have been settled on terms that have included the preclusion of the employee from particular positions (*e.g.* JX 3, pp. 27-29; TR 61-62).[3]

[3] There may be an unresolved dispute between the Parties as to whether the Company may unilaterally impose discipline outside the PDG (TR 69). That question is not before the Board in this case.

Pre-Review Committee Decision No. 12553 was received in evidence (JX 6). In that matter, the Company agreed to make a preclusion condition temporary, instead of permanent, in light of the specific facts and circumstances of that case (*Id.*; TR 64-67).

There is no dispute that the Parties could mutually agree to rescind part or all of the July 30 Agreement, but no such agreement has been reached (TR 54).

POSITIONS OF THE PARTIES

The Union:

» Under the PDG, the Company could not unilaterally demote the Grievant and preclude him from bidding for more than a one-year period. Review Committee Decision No. 12553 affirms this.

» While the Parties and Boards of Arbitration may fashion remedies, in the context of a grievance settlement, other than those set forth in the PDG, the July 30 Agreement was not a grievance settlement.

» The July 30 Agreement reflects that the termination had not yet been imposed, but was "in progress." For there to be a grievance, there first had to have been a disciplinary action. There was none here.

» Because the July 30 Agreement did not occur in the context of a grievance, it may not supersede the PDG. Therefore, the grievance in this matter should be sustained.

The Company:

» The Union and the Grievant are belatedly attempting to renege upon a valid grievance settlement, set forth in the July 30 Agreement.

» The termination was implemented before the July 30 Agreement was negotiated and signed. The Union's argument to the contrary is without merit.

» Had the Parties not reached agreement upon the conditions set forth in the July 30 Agreement, the Grievant would not have been reinstated and his termination would have stood.

» The Union's case is without merit and the grievance should be denied.

» The challenge to the July 30 Agreement is untimely.

DISCUSSION

The central factual question in this case is whether the Grievant was terminated prior to the July 30 Agreement.[4] If not, the July 30 Agreement could not be deemed a grievance settlement of a termination. The Union's contention that this does not involve a grievance settlement rests principally on the phrase contained in the July 30 Agreement that the Grievant's termination was "in progress." According to the Union, this wording conflicts with Trumbull and Parks' testimony that the termination had occurred.

The Board accepts the Union's argument that the phrase in question, standing alone, suggests that the termination was not fully implemented. However, the words are vague and ambiguous. It is necessary and appropriate to resort to extrinsic evidence to resolve the ambiguity.

At the hearing, extrinsic evidence was presented concerning the context in which the July 30 Agreement was reached. The unrebutted evidence establishes, without question, that the Company had terminated the Grievant before the July 30 Agreement was reached. No aspect of the termination was pending implementation at the time the discussions leading to the July 30 Agreement commenced.

In addition, the record contains testimony by the individual who drafted the July 30 Agreement establishing that the wording, while perhaps inartful or in error, was not intended to

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[4] The Board of Arbitration addresses the merits before the issue of procedural arbitrability, with the concurrence of the Parties. This order of discussion is non-precedential and does not indicate any waiver by the Company of its defense of untimeliness.

reflect that the termination had yet to occur. Parks' unrebutted testimony was that the Parties reached agreement on July 30 in the context of a first step grievance settlement of the termination.

The Union does not dispute that the Parties may fashion remedies other than those set forth in the PDG in the context of a grievance settlement. Because that is what occurred here, the grievance lacks merit and may not be sustained.

The fact that discussions had occurred between the Parties prior to the imposition of the termination does not undermine this conclusion. The earlier discussions were an effort to forestall the termination. They were unsuccessful. The significant settlement discussions were those that occurred after the Grievant was terminated.

Pre-Review Committee Decision 12553 (JX 6) does not prohibit the Parties from reaching the settlement terms set forth in the July 30 Agreement. It shows only that the Company agreed to limit the preclusion based on the particular facts and circumstances of that case.

In light of the conclusions reached above, it is unnecessary to reach the Company's defense of procedural untimeliness. Accordingly, the Board of Arbitration renders the following decision:

DECISION

1. The July 30, 1999 Agreement executed by the Company and IBEW Local 1245 is final and binding on the Parties as a grievance settlement of a termination, unless it is otherwise mutually rescinded by the Parties.

2. The July 30, 1999 Agreement executed by the Company and IBEW Local 1245 regarding Grievant H 's reinstatement bars the Grievant from bidding into the positions of Electric Crew Foreman, Troubleman, Underground Gas or Electric Crew Foreman.

3. The Company has not violated the Collective Bargaining Agreement by bypassing the Grievant for Troubleman and Electric Crew Foreman positions.

4. In light of the above, the issue of whether the grievance is untimely, pursuant to Section 102.3 of the PG&E/IBEW Local 1245 Collective Bargaining Agreement, is moot.

5. The grievance is denied.

Barbara Chaney — Neutral Board Member — June 19, 2002 — Date

Lula Washington — Union Board Member — CONCUR / (DISSENT) — 6/21/02 — Date

Salim A. Hawwa — Union Board Member — CONCUR / (DISSENT) — 6-21-02 — Date

Margaret Short — Company Board Member — (CONCUR) / DISSENT — 6/21/02 — Date

Pat Mediano — Company Board Member — (CONCUR) / DISSENT — 6-21-02 — Date