

In the Matter of an Arbitration between

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,**

Complainant,

and

PACIFIC GAS & ELECTRIC COMPANY,

Respondent.

Re: Arbitration Case No. 259.
Discharge

Opinion & Decision

of

Board of Arbitration

-oOo-

BOARD OF ARBITRATION

Company Members:

Margaret A. Short

Deborah Sargent

Union Members:

Gary Hughes

Sam Tamimi

Barbara Chvany, Neutral Chairperson

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 dispute arises under the Labor Agreement (“the Agreement”) between the above-captioned Parties, I.B.E.W. Local 1245 (“the Union”) and PG&E (“the Company”) (JX 2; TR 6). The above-referenced Board of Arbitration (“the Board”) was appointed to hear the grievance regarding the discharge of H consistent with the provisions of a Submission Agreement entered by the Parties (JX 1; TR 4-5). The hearing was held on January 28, 2003, 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 stipulated that the grievance procedure has been followed (JX 1, Paragraph (b); TR 5). The matter is properly before the Board of Arbitration for final and binding decision (TR 5). Post-hearing briefs were filed by the Parties and the matter was submitted as of August 12, 2003.

H (“the Grievant”) was hired by the Company on January 11, 1971 (TR 7; JX 4, p. 31). He was terminated effective May 13, 2002 for diversion of energy (TR 7; JX 4, p. 33). At the time of the events at issue, he was a Troublemaker (TR 7, 14, 181). The discharge was grieved. The dispute was not resolved in the lower steps of the grievance procedure, leading to this arbitration proceeding. (JX 4, pp.1, 2)

ISSUE

Was the Grievant, H , discharged for just cause? If not, what shall be the remedy? (TR 5; JX 1)

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

REMEDY REQUESTED

The Union seeks removal of the discipline, and the Grievant's reinstatement to his former position with full seniority, back pay and benefits (TR 7; Un. Brf. 12). The Company seeks denial of the grievance in its entirety (TR 8; Er. Brf. 18).

BACKGROUND

History of Voltage Problems:

In 2000, the Grievant advised his supervisor, Ted Albrigo, that he was having momentary outages and voltage trouble at his home, resulting in damage to some appliances. He requested a recording voltmeter ("RVM") to test for the problem. (TR 15-17, 182) Albrigo gave the Grievant permission to install an RVM in an outlet in his home (TR 18, 182-183).

The Grievant testified that, before installing the RVM, he removed his meter to check the transformer connections (TR 183). He did not find anything (TR 183-184). He installed the RVM, later taking it back to the office to download the information it had recorded (19, 184). The RVM showed no abnormal conditions, only "typical sags" (TR 19) or "flicker" falling within P.U.C. specs (TR 184).

In 2001, the Grievant continued to complain about his electrical service and the impact on appliances at his house (TR 19, 185-186). He again approached Albrigo for a RVM, and Albrigo authorized the Grievant to install another type (TR 19-20, 186). This RVM required removing the meter, plugging the RVM into the house panel, and then plugging the meter into the RVM (TR 20, 186). The Grievant installed it and waited several days, but then discovered that he had forgotten to turn it on (TR 20, 186-187). With Albrigo's permission, the Grievant reinstalled the RVM

(TR 20-21, 187). The results were similar to the first effort; the RVM showed some sags and minor flicker but no momentary outages or more serious interruptions in power (TR 21, 188).

In or around March 2001, the Company changed out a transformer that was leaking oil. This measure improved the quality of electricity at the Grievant's residence (TR 15-16, 22, 29, 45, 189-191; JX 4, p. 24).

Meter Installed Upside Down:

According to the Grievant, on the morning of January 19, 2001 when he pulled out the second RVM, he reinstalled his meter upside down by accident and affixed an outer seal (TR 28, 187, 192, 198; JX 4, p. 35). He denies that he intentionally inverted his meter or that he ever stole electricity from the Company by any method (TR 202).

Events of February 8, 2001:

On February 8, 2001 a meter reader, W , came to the Grievant's house to take a routine reading (TR 191). The Grievant was at home on vacation (TR 191). According to the Grievant's account of this conversation,² W informed him his meter was upside down (TR 192). The Grievant thought the meter reader was joking (TR 192), but he then saw that the meter was upside down, with the outer seal intact (TR 192).³ The Grievant immediately cut off his

² The record contains only the Grievant's direct testimony about this conversation. Although interviewed in the investigation (JX 4, pp. 44-47), the meter reader, W , did not testify. To the extent W 's statements are offered for the truth of the matter asserted, they are hearsay. Hearsay is admissible in arbitration, but uncorroborated hearsay is not relied upon by the Board to reach any significant factual conclusions.

³ A meter has an outer and inner seal. The inner seal is affixed by the manufacturer and protects the integrity of the device (TR 92-93). The inner seal contains the manufacturer's name and the year the meter is manufactured (TR 95). When an inner seal is broken, the integrity of the meter is in question; the meter should be changed and/or tested by a meter tester to verify its accuracy (TR 94).

electricity, obtained equipment from his trouble truck parked at the house, cut the outer seal, reinstalled the meter in the correct position, resealed it, and turned the power back on (TR 192-193).

The meter reader was present during these activities, and the Grievant described the following discussion:

Well, when I was turning my meter – he told he that – I said – I told him, “Well, we need to turn this in. In need to – we need to turn this in.

He [the meter reader] said, “Oh don’t worry about it. I’ll take care of it.”

As far as I’m concerned, that was – he took care of it. (TR 193)

Reporting the Incident:

The meter reader reported to a bargaining unit senior meter reader that he had found the Grievant’s meter upside down (Pre-Review Committee No. 13285), but the senior meter reader apparently failed to report it to his immediate supervisor because it did not come to the attention of management until approximately a month later, through an anonymous tip (TR 37, 51). The Grievant never reported the incident to any of his superiors, including Albrigo, with whom he had almost daily contact and who had important knowledge of the circumstances leading the removal and reinstallation of the meter (TR 22-23, 149, 161, 163, 194, 216).

In hindsight, the Grievant admits he should have reported the incident (TR 194, 218). He testified that he “thought it was taken care of” by the meter reader (TR 194). He conducted no follow up to determine what action, if any, the meter reader had taken to report the incident (TR 232-233). The Grievant explained that he left the reporting to the meter reader because he [Grievant] did not have an open and trusting relationship with his immediate supervisor, Albrigo (TR 194). This problem did not prevent the Grievant from working with Albrigo to try to resolve the power problem at his resident, however. No such issues were present with others to whom the Grievant could have

reported the incident, such as Deborah Sargent and Steve Fotheringham (TR 215). He had spoken with Sargent, a Human Resources assistant, numerous times on other issues and had a positive relationship with her (TR 143, 216); and he had spoken with Fotheringham in the past about other matters (TR 162, 170, 217). As Fotheringham described it, the Grievant “has always been one to come forward with his issues or concerns” (TR 162-163).

Second Meter Reader:

When another meter reader came to his house on or about February 9, the Grievant called the Company and spoke to a supervisor, Steve Cook, whom he described as the head of the meter department (TR 237). The Grievant demanded to know “what was going on, because this man was out checking my meter” (TR 237). Cook told him nothing was going on other than a periodic check of the meter reader’s service work (TR 237-238). The Grievant was insistent, stating “ ‘Well, I want to make sure that nothing’s going on there,’ because – why would that – why would they be out reading the meter? It sent a red flag to me, ‘What’s going on?’ ” (TR 237).

When asked on cross-examination if he told Cook his meter had been found upside down the day before, the Grievant answered that he thought Steve Cook was the supervisor to whom the meter reader had reported the incident (TR 238-239). He admitted, however, that he made no mention of the subject (TR 238-239). If the Grievant really believed Cook already knew about the upside down meter found the day before, there is no reason he would not have mentioned it and offered his explanation for that event, particularly when he knew the discovery of an inverted meter at his residence could place his job in jeopardy. He did not even inquire directly if the second meter reader was sent out because his meter had been found upside down on February 8. His silence in these circumstances is evidence that he intended to conceal the incident from the Company, but he was

trying to find out what the Company knew. This behavior is inconsistent with a candid report of inadvertent error. Further, in these circumstances, the contrived indignation at the visit by the second meter reader and the demand for an explanation were disingenuous, at best.

General Evidence regarding Energy Diversion:

An expert in energy diversion called by the Company, Revenue Protection representative Roy Metzler, Jr., testified that his investigations have often determined that diversion has occurred for many years (TR 87, 97). One diversion method is inverting the meter for periods of time. When a meter is properly installed, it registers the energy flowing into the residence (TR 92). When it is installed in an inverted position, it not only prevents energy usage from being recorded, but causes the meter to run backwards thereby erasing previously recorded energy usage (TR 99, 106). A negative energy usage in a month may occur if the meter is left inverted for too long, thereby triggering an investigation (TR 106-107). With repeated inversion of the meter, a pattern of cross-wear becomes apparent on the meter prongs (TR 100).

More sophisticated and difficult to detect methods exist for stealing energy (TR 99). One way is to install another meter for periods of time during the month, so the energy usage is not recorded on the meter seen by the meter reader (TR 138, 141). Thus, the condition of the meter prongs can provide significant forensic evidence in diversion cases (TR 99). Excessive wear on the prongs is indicative of energy diversion occurring over a long period of time (TR 1010).

Management Learns of Upside Down Meter:

In March 2001, through an anonymous tip, Revenue Protection and Corporate Security became aware of possible energy diversion involving the Grievant (TR 37, 39-40, 50-51; JX 4, p. 34). The Company decided to leave the Grievant's meter in place and observe the energy

consumption at the Grievant's residence for a period of months, without alerting him (TR 39, 51). Investigators periodically drove by the home in an effort to check the meter, but were unable to examine it without revealing the surveillance (TR 51-52, 55-57). The monitoring took place from March through December 2001, yet the pattern of consumption did not provide additional evidence of diversion (TR 55, 57). The Grievant was unaware of the ongoing surveillance (TR 195).

Events in December 2001:

On December 10, 2001, Revenue Protection informed Corporate Security of the identity of the meter reader who had found the Grievant's meter inverted on February 8, 2001 (JX 4, p. 34; TR 51). On December 26, 2001, the Company had Metzler go to the Grievant's residence and take possession of the meter (TR 40, 50, 57, 88).

Condition of Meter.

Metzler examined the Westinghouse meter removed from the Grievant's residence and had it tested. The meter was recording accurately (TR 74-76, 83, 94, 104, 115). Upon analyzing the meter, Metzler noted several unusual conditions:

- The meter had a plastic cover (TR 102). This Westinghouse meter, purchased in 1978, originally had a glass cover (TR 103). It was unusual for such a meter to have a different cover, because they ordinarily did not require replacement (TR 104-105).⁴
- The inner seal on the meter was broken. The condition of the inner seal placed the integrity of the meter in question. (TR 95-96, 115)

⁴ Some plastic covers, particularly on meters exposed to the elements, become discolored over time, glass covers do not yellow and typically last well through the years (TR 103-104, 112).

- The meter prongs showed “excessive wear,” consistent with the meter having been in and out of the electric panel 80 to 120 (TR 101, 117-118).⁵ However, the prongs did not show the distinctive “cross-wear” pattern indicative of frequent meter inversion (TR 101, 125, 166-167).
- The 1,000ths dial was “off-scale”, a few degrees ahead of the correct position vis a vis the 100ths dial, indicating the 1,000ths dial had been moved at some point when the cover was off the meter (TR 102, 115, 117).

History of Meter at Grievant’s Residence.

The meter at the Grievant’s residence was purchased in 1978, and was set at his residence in April of that year (TR 107).⁶ The Company records show that the meter did not have an initial set read of 00000 at the time it was installed, though a zero reading is typical for a new meter (TR 110). The meter set read was 60,052 (TR 122-123, 206; JX 4, p. 68). Nonetheless, for the following reasons, Metzler concluded the meter was brand new when it was installed at that location on April 18, 1978 (TR 111, 122, 123). Given this history, Metzler testified, the meter prongs showed a surprising amount of wear (TR 107). Metzler concluded, “In my experience, the wear pattern

⁵ Metzler did not quantify the wear in the information he provided to Perry in the investigation, and this specific range is not contained in Perry’s report of his interview with Metzler. There is clear reference, however, to excessive wear on the prongs (JX 4; pp. 49-50; TR 118-120). The record also shows that Metzler provided this information to Deborah Sargent, who was consulted on the issue of the appropriate level of discipline to impose on the Grievant (TR 145-147).

⁶ The investigative report concerning the Grievant states, in part, that the excessive wear on the prongs cannot be attributed completely to H because the meter had been placed at that residence two years prior to his having purchase the home (JX 4; p. 35). However, Metzler testified this statement was incorrect. The meter was set at H’s residence two years after services at that location went into his name (TR 121; see, also, JX 4, p. 49).

that's on this meter would be indicative of one thing, and one thing only, and that's energy diversion" (TR 107; see also TR 127, 140).

With respect to the set read at the time of installation, Metzler testified that, on 20 to 30 occasions, he has run across new meters installed with a reading other than 00000 (TR 110). The dates of the purchase and installation at the location in question support a finding that the meter was not used elsewhere first. The records do not reflect that the meter was installed at any other location previously (TR 107-108, 110). Given these facts, he concluded that it was highly implausible that this meter was installed elsewhere first, recorded over 60,000 kilowatt-hours, removed and returned to the shop for testing, and then installed at the Grievant's residence (TR 124, 137-138).

The Grievant testified he had no knowledge of the condition of the prongs when the meter was installed at his house in 1978 (TR 206). The Grievant denies pulling out and reinserting his meter more than four times (TR 205). According to the Grievant, a new set read should be zero, unless the meter is a refurbished or used meter (TR 201).

Analysis of Past Energy Consumption.

Analyzing past recorded usage can provide evidence of energy diversion (TR 138). Metzler analyzed the energy consumption at the Grievant's residence for the period 1994 to 2001 (TR 57).⁷ Although this information was reviewed by Corporate Security and several Revenue Protection agents, the data did not independently establish the Grievant had received unmetered electricity or gas (TR 57-58, 78, 108, 129-130, 136, 150, 169; JX 4, p. 35). The Company did not issue the Grievant a back bill (TR 131-132).

⁷ Records prior to 1994 were not available (TR 111).

Past usage records do not always reflect that energy diversion has occurred, because many factors affect patterns of consumption. There are numerous ways to steal electricity without being detected, for example by removing one meter and installing another for a period of time during the month. (TR 59, 78, 105, 108, 126, 130, 135-136, 138, 206-207) Thus, the absence of evidence in past recorded usage does not rule out the occurrence of energy diversion or receipt of unmetered electricity. For example, the fact that the Grievant's meter was inverted for the 19 days between January 19 and February 8 did not show up in his record of usage because the meter reader added 800 kilowatts to the read specifically to conceal the resultant drop in metered electricity (TR 114-115, 135-136; JX 4, pp. 34, 43, 46).

Investigatory Interviews.

The Grievant and W , the meter reader who found the inverted meter on February 8, were interviewed (among others) by Michael Perry, a Corporate Security representative (TR 41-44; JX 4, pp. 34-35, 37-41, 44-47). The Company's investigation in December 2001 ultimately resulted in a investigation report (JX 4, pp. 34-36).

In his interview on January 4, 2001, the Grievant admitted that W had found his meter upside down on February 8, and he described the voltage problems that had led him to remove and replace his meter (TR 41, 42-43, 76; JX 4, pp. 37-41). Perry asked the Grievant if he had ever changed the cover on his meter, or broken the inner seal, and the Grievant replied in the negative to both questions (TR 45-46). The Grievant's interview statement, dated January 24, 2004 states, in pertinent part, as follows:

I was unaware that my residential electric meter was a Westinghouse and that the glass and inner seal came from a Schlumberger meter. I did not break the inner seal and did not place the Schlumberger glass and seal on the meter.

(JX 4, p. 40)

Perry testified the Grievant later contacted him to tell him he had replaced the meter cover because the plastic had yellowed (TR 46). The Company questions the credibility of this statement because the original cover on the meter was glass.

The Grievant explained that he did not recall this information in his interview because he was tired after working all night (TR 203, 228; JX 4, p. 40). In a later conversation, his son reminded him that he [Grievant] had changed the meter cover, whereupon he immediately called Perry to inform him of that fact (TR 44, 46, 203, 230-231). In his arbitration testimony, the Grievant stated he replaced the cover in 2000, when he first removed the meter to check the connections before installing the RVM, because it was "all fogged up" (TR 195, 203).

In his interview, the Grievant stated he removed his meter approximately six times (TR 47). When he contacted Perry after the interview, the Grievant clarified he had removed it three times and reinstalled it three times, for a total of six (TR 47). In his arbitration testimony, the Grievant described a total of four occasions on which he both removed and reinserted the meter (TR 197, 204-205).

The conclusions reached by Perry in the investigation report were that the Grievant inappropriately and in violation of Company policy (a) removed and replaced his electric meter at least three times; (b) broke the inner seal and replaced the meter cover causing damage to two meters; and (c) allowed his electric meter to run backwards for 19 days, resulting in the receipt of unmetered electricity in violation of Standard Practice 735.6-1 (JX 4, p. 36). On cross-examination, Perry testified that he did not conclude that the Grievant was guilty of theft of energy (TR 84). On

the other hand, the investigation report is clear that he concluded the Grievant engaged in energy diversion (JX 4, pp. 34-36).

Meter Reader.

W_____ was also investigated in connection with this incident (TR 47-48; JX 4, pp.42-47). His account about discovering the inverted meter is similar to the Grievant's. Where their accounts diverge is that W_____ told the investigator that he volunteered to conceal the incident, telling the Grievant he would enter more kilowatts than the meter showed so his usage would "even out by the next read" (JX 4, pp. 43, 46). W_____ 's stated motive was that, if he "helped out" the Grievant, maybe it would be reciprocated by the Grievant helping him become a permanent employee (JX 4, pp. 43, 46-47).⁸

The Grievant denies discussing with the meter reader the addition of kilowatts to his bill to cover up the impact of the upside meter (TR 212), and denies any knowledge that W_____ did this until Perry interviewed him (TR 240). The Union contends W_____ s statements to the contrary are unreliable hearsay that fail to overcome the Grievant's denials.

W_____ did, in fact, add 800 kilowatts to the Grievant's read, a significant undisputed fact tending to corroborate W_____ s hearsay interview statement (TR 49-50, 135; JX 4, pp. 42-43). It is also undisputed that the Grievant did not report the incident, a failure to act that is inadequately explained if he intended the incident to come to light, but which makes more sense in the context of W_____ 's cover-up. It is also plain that the Grievant, not W_____, stood to gain by the addition

⁸ As noted above, W_____ did not testify. Some aspects of W_____ 's interview statement are corroborated by direct testimony or other reliable evidence in the record. Those portions that are not corroborated, and are in dispute, are weighed accordingly.

of kilowatts to the read in that his receipt of unmetered energy would be hidden. Any benefit to W would inure *only if* the Grievant was aware that he owed the meter reader a favor.

W reported the discovery of the inverted meter to a senior meter reader, but he did not report that he entered a false read (Pre-Review Committee No. 13285). W was ultimately terminated for curbing in this incident (TR 175). A grievance was filed and processed through to the Pre-Review Committee level, where the discharge was upheld (TR 176-177; Pre-Review Committee No. 13285).

Work on Own Meter:

Although the Company's investigation concluded that it was a violation of policy for the Grievant to remove and replace his electric meter (TR 67-68; JX 4, p. 36), it was later determined there is no specific written policy on this subject, or prohibiting a supervisor from giving an employee permission to work on his or her own meter (TR 68, 83; see also TR 26, 29-33; JX 4, p. 48). Notwithstanding any material in the investigation report to the contrary, the Company stated at the hearing that it was not relying upon any work Albright authorized the Grievant to perform on his meter as a basis for the termination (TR 164).

Decision to Terminate:

Human Resources assistant Deborah Sargent reviewed the investigation report and reached the conclusion that the Grievant had received unmetered energy and had engaged in theft of energy (TR 148, 151, 154-155). She also spoke personally with a number of individuals, including Metzler, who informed her that the Grievant's meter had been removed from the panel over 100 times (TR 144-148). After conferring with Senior IR representative Molly Williams, Sargent recommended termination to Steven Fotheringham, Superintendent of Operations, Maintenance and

Construction (TR 148-149, 160, 165). Fotheringham concurred, relying mainly on the investigation report to reach his conclusions (TR 158, 160, 163).

The Grievant's termination was approved at the appropriate levels of authority, resulting in his discharge effective May 13, 2002 (TR 7, 158-159, 163-165; JX 4, p. 33). The basis for discharge, set forth in the termination letter of that date, is inverting his electric meter, resulting in energy diversion; and removing the inner seal and replacing the cover on his meter (JX 4, p. 33). The termination letter does not include charges based upon any work authorized by Albrigo.

Margaret Short, the Manager of Industrial Relations Services, testified concerning precedent-level arbitration awards sustaining discharges of employees for diverting energy. Terminations have been sustained in cases in which employees denied diverting energy, or professed ignorance, when that testimony was not found to be credible. (TR 178) Short was unaware of any precedent-level arbitration decision holding that the accidental receipt of unmetered energy, or truly unintentional receipt of unmetered energy, by an employee is grounds for termination (TR 177, 178-179).

POSITIONS OF THE PARTIES

The Company:

- » The Company had just cause to terminate the Grievant under the Collective Bargaining Agreement.
- » Energy diversion is a terminable offense, without mitigation. The Company reasonably concluded that the Grievant engaged in energy diversion by inverting his meter and receiving unmetered electricity.

- » The evidence supports the Company's conclusions. The investigation it conducted was fair and thorough.
- » The evidence shows the Grievant's meter was discovered upside down. The Grievant admittedly placed it in the panel in that manner.
- » The meter prongs showed excessive wear, indicative of energy diversion by repeatedly removing and reinserting the meter. No reasonable or credible explanation was provided for this condition.
- » The Grievant had the knowledge, tools and skills to divert energy without being detected. He was caught only because the meter was discovered upside down by the meter reader.
- » An inverted meter is energy diversion in its purest form, in that energy usage is not only unrecorded, but erased.
- » The Union's contention that the Grievant unknowingly received unmetered electricity for 19 days because he accidentally installed his meter upside down is not worthy of belief.
- » The Grievant's conduct following the meter reader's discovery of the inverted meter supports a finding of intentional energy diversion. His failure to report the condition and continued silence about the matter demonstrates he was attempting to escape detection.
- » The Grievant's asserted reliance on the meter reader to report the inverted meter is not credible. The Grievant kept silent expecting the meter reader to cover up the incident.
- » The Grievant's over-reaction to the arrival of a second meter reader within a two-day period further undermines his claim of accident.
- » There is no doubt the Grievant received unmetered electricity for 19 days. Even assuming, *arguendo*, that this was accidental (which the Company disputes), it is a terminable offense.

» Even if the Board were to find just cause lacking, there is no basis for an award of back pay and benefits.

The Union:

» The Parties agree that theft of energy is an offense that subjects an employee to immediate termination without mitigation. However, this case presents unique and extraordinary facts. The Company fired the Grievant for stealing energy, an offense that the Corporate Security investigation concluded he did not commit, following a lengthy investigation.

» Perry courageously testified that he did not conclude the Grievant was stealing energy. Confronted with this testimony, the Company attempted to recharacterize it, expressed surprise or shock, but failed to admit management erred.

» The evidence demonstrating the Grievant's innocence is crushing and supports Perry's conclusion.

» The Grievant flatly denied that he placed his meter upside down intentionally, or that he stole energy in any way.

» The Grievant lacked a motive to steal electricity, particularly in light of his level of earnings and his status as a PG&E employee.

» Although reviewed by several Revenue Protection representatives, the Grievant's past recorded energy consumption showed no energy diversion had occurred in the period between 1994 and December 2001.

» The inversion of a meter is a simple and easily detected method of diversion. There was no evidence that the Grievant engaged in more sophisticated, difficult to detect methods of stealing energy that would be expected if someone of the Grievant's technical skill were to steal energy.

- » The Grievant's meter was inverted for 19 days, a period well in excess of what an energy thief would do intentionally.
- » The presence of the outer seal on the meter when it was discovered upside down was unusual and indicates inadvertent error, not intentional inversion.
- » Although extensive testing was performed, no internal tampering with the meter was detected.
- » There was no cross-wear on the prongs indicative of a pattern of inverting the electric meter.
- » In hindsight, the Grievant should have reported the fact that his meter was found upside down. The fact that he did not do so does not prove energy theft. The Grievant reasonably assumed that the meter reader would report the incident, and he did so, to a senior meter reader.
- » The Grievant denied having been told by the meter reader that he [Willhite] intended to add 800 kilowatts to his recorded usage. The Company presented no non-hearsay evidence to challenge that denial.
- » The investigation report concluded there was an absence of proof that the Grievant was responsible for the excessive wear on the meter prongs (JX 4, p. 50). Metzler's statements on this point were inconsistent, and reflect embellishment of his testimony at the hearing. The record also shows the Grievant legitimately removed his meter at least four times, producing some wear on the prongs.
- » The Company has fallen dreadfully short of meeting its burden in the termination of an employee with 31 years of service.
- » The Grievant was not disciplined for just cause. The remedy requested should be granted.

DISCUSSION

Under the Labor Agreement, Management has the right to discharge employees for just cause (§7.1, JX 2). Energy diversion by an employee constitutes grounds for termination, without mitigation, under the Parties' negotiated Positive Discipline Agreement (JX 3; TR 164, 173, 174-175). The Union stipulated that termination is the appropriate level of discipline for theft of energy (TR 149); and there are precedential decisions so holding (TR 174). It is common knowledge among employees that engaging in energy diversion is a terminable offense (TR 23, 173). Those who work in the field, such as the Grievant, are particularly aware of this rule and the consequences of a violation (TR 155, 173). Accordingly, if the charges against the Grievant are proven, termination is the appropriate penalty, notwithstanding his length of service.

In this case, there is no dispute that the Grievant installed his meter in an inverted position at his residence. As a consequence, his electric meter ran backwards for 19 days, not only failing to record the electricity he was using, but rolling back previously recorded usage (TR 85; JX 4, p. 36). As an experienced Troubleman, the Grievant clearly knew inverting his meter would have this effect, and would be regarded as a terminable offense by the Company. Further, as an experienced Troubleman, the Grievant knew how to install a meter properly. These proven elements constitute strong evidence of energy diversion, sufficient in most cases to sustain a termination. This evidence meets the Company's *prima facie* burden to show just cause for the discharge. The burden then shifts to the Union to establish a credible defense.

The defense proffered by the Union in this case is that the Grievant did not intend to install his meter upside down; rather that he did so due to inadvertent error. Because the act was unintentional, the Union asserts, just cause is lacking for termination. According to the Union,

certain unusual factors are present, rendering this case is unique and extraordinary. This case does present some unusual features, for example, that the Grievant had permission from his supervisor to perform activities involving his own equipment. At bottom, however, the case presents a straightforward credibility issue: is the Grievant's testimony that he inverted his meter by accident believable? Both Parties point to numerous factors that they assert support their assessment of the Grievant's credibility. The main task of the Board is to sort through those factors and reach a credibility resolution.

The Board does not find the Grievant's assertion of inadvertent error credible, for several compelling reasons. First, the law holds that persons are presumed to have intended the reasonable consequences of their acts. The reasonable consequence of installing a meter upside down is receiving unmetered energy. The Grievant knew this.

Second, the assertion that the Grievant mistakenly installed the meter upside down is inherently incredible. The Grievant was an experienced Troubleman. Setting meters was among his routine functions (TR 15, 109, 160). He would reasonably be expected to install a meter correctly (TR 33). He had never been disciplined for setting a meter upside down at any other residence (TR 234). No evidence was presented to show this was a common mistake. To state the obvious, meters are designed to be read. The face prominently displays if it is upside down. This particular meter had a recently replaced cover, according to the Grievant to improve visibility. It was installed at a readable height, in a readable location.

Typical human behavior, particularly when troubleshooting a problem, is to verify a task has been performed properly. In the case of installing a meter, this would normally involve looking at the meter after inserting it to check that it was recording properly. The Grievant, himself, testified

that it was a regular part of his job to check if a meter was registering correctly (TR 244). This finding is also supported by the Grievant's description of his thoroughness (TR 184, 210).

Four Company witnesses testified that accidental inversion of the meter is highly implausible. Metzler testified it was surprising (TR 109-110). Deborah Sargent and Steven Fotheringham found it hard to fathom how a professional meter installer could install his home meter upside down (TR 155, 159-160). Margaret Short testified, "It does challenge the imagination" (TR 179).

Third, the Grievant's conduct after his meter was discovered upside down is consistent with guilt of energy diversion, not innocent error. Most damaging in this category is his admitted failure to bring the issue promptly to the attention of his supervisor, or anyone in management, when this serious condition was discovered by the meter reader (TR 216). The Grievant would normally be expected to report an inverted meter, or other forms of energy diversion he discovered (TR 23-24, 86, 160-161, 220, 231). The Grievant's silence in these circumstances casts a dark cloud on his credibility. Promptly reporting the alleged error, offering his explanation, and offering to make restitution for any unmetered energy would be actions consistent with innocence. He did none of these things. To the contrary, even when speaking with a supervisor the next day about the visit by the second meter reader, he remained silent. The excuses the Grievant offers for failing to come forward are weak and unpersuasive.

The argument that the Grievant reasonably relied upon the meter reader to report his inverted meter strains credulity to the breaking point. The Board does not believe that the Grievant expected or intended the incident to come to light through W It is simply not believable that a Troubleman with lengthy service would leave it in the hands of an entry-level meter reader – someone the Grievant referred to as "a kid" (TR 240) – to report and explain a serious incident that

placed his job in jeopardy. His explanation that he wanted it reported through a different line of supervision is belied by his own failure to raise it with that supervisor in the telephone call about the second meter reader. This assertion is also suspect because the Grievant's supervisor had authorized him to work on his own equipment, while the meter reader's supervisor would be unaware of this. As to the Grievant's testimony that he assumed the Company made an adjustment to his bill, the record shows he never bothered to verify this (TR 212, 215, 240).

Finally, the Grievant's demeanor as a witness does not impress the Board as candid and credible. Key portions of his testimony were evasive, hesitant, or vague. His version of events does not square with the weight of the credible evidence. In his investigatory interview, he made prior inconsistent statements on certain key points regarding the unusual condition of his meter.

The Union advances multiple arguments it claims support the Grievant's credibility. A number of these points are addressed below:

- ▶ *The Grievant lacked a motive to steal electricity, particularly in light of his level of earnings and his status as a PG&E employee.* This could be argued in all similar cases, yet energy diversion does occur.
- ▶ *The Grievant's past recorded energy consumption showed no energy diversion had occurred in the period between 1994 and December 2001.* The record shows energy diversion is not always reflected in usage records; and that there are methods of obtaining unmetered energy that are not reflected in usage records, for example the insertion of a second meter for part of the month. In addition, while the Union points out the Grievant was unaware of the ongoing surveillance in 2001, he was aware that a meter reader had discovered the meter upside down on February 8, and that a second meter reader had been sent to his house the next day.
- ▶ *The inversion of a meter is a simple and easily detected method of diversion unlikely to be used by a Troubleman of the Grievant's technical skill if he were to divert energy.* This argument fails to overcome the fact that he inverted his meter and was caught. This

argument based upon his high skill level is inconsistent with the contention that he inadvertently installed the meter upside down.

- ▶ *There was no evidence that the Grievant engaged in more sophisticated, difficult to detect methods of stealing energy.* This assertion is controverted by the condition of the Grievant's meter, including but not limited to the excessive wear pattern on the meter prongs and the broken inner seal. Metzler's testimony is credited that the physical condition of the meter was strong evidence of intentional energy diversion. Further, the evidence as a whole supports a finding the prong wear is attributable to the meter while installed at the Grievant's residence. The Board finds it extremely unlikely that the wear shown on the meter prongs (80 to 120 removals and insertions) would have occurred during a maximum possible installation elsewhere of less than three and a half months.⁹
- ▶ *The absence of a cross-wear pattern on the meter prongs.* It is unnecessary for the Company to show a pattern of inverting the meter. Once is enough.
- ▶ *The wear on the prongs is explained by the work the Grievant was authorized by his supervisor to perform.* The authorized activities, which resulted in no more than four removals and insertions of the meter, do not explain the excessive wear on the meter prongs.
- ▶ *The Grievant's meter was inverted for 19 days, a period in excess of what an energy thief would do intentionally.* While this point is accepted as true, it does not undermine the Company's case. The factor is neutral. For example, the Grievant could have intentionally inverted the meter and simply forgotten to return it to the proper position.
- ▶ *The presence of an outer seal.* While this condition was unusual, the Grievant had ready access to outer seals (TR 113). The fact that he took the time to affix an outer seal makes it even more likely he would have noticed the meter was upside down.
- ▶ *Although extensive testing was performed, no internal tampering with the meter was detected.* The Company does not need to prove this to support termination when it is relying upon the upside down meter to establish energy diversion.

⁹ This evidence is discussed here in connection with addressing the Union's arguments and in connection with assessing the Grievant's credibility. The excessive wear pattern was not cited as an independent basis for the termination and is not treated as such by the Board.

- ▶ *The investigation report mistakenly concluded the Grievant violated Company policy by working on his own equipment, work that his supervisor had authorized him to perform.* The record shows the presence of some erroneous facts and conclusions in the investigation report.¹⁰ However, they were not shown to undermine the Company's case. As shown by the termination letter, and as stated on the record at the hearing, the Company did not rely on this mistaken conclusion to support the termination.
- ▶ *Perry testified on cross-examination that he did not conclude the Grievant engaged in theft of energy.* The Union makes much of this statement, asserting it undermines the Company's case. A review of the investigation report shows his conclusions are not stated in those words (JX 4, p. 36). Perry's report does clearly conclude that the Grievant inverted his meter and received unmetered electricity in violation of Standard Practice 735.6-1. The inverted meter resulting in energy diversion is the main charge set forth in the termination letter, and that is the charge the Company has the burden of proving here. Perry's testimony, therefore, is more a matter of semantics than substance.

In conclusion, the various points raised by the Union fail to persuade the Board that the meter inversion occurred as the result of inadvertent error.

For all the foregoing reasons, the Board renders the following decision:

¹⁰ Another error involved when the meter was installed at the Grievant's residence, noted hereinabove, and corrected on the arbitration record.

DECISION

Grievant H was discharged for just cause. The grievance is denied.

Margaret Shor
District Board Member
COMPANY MS

CONCUR / ~~DISSENT~~

4/1/04
Date

Deborah A. Sargent
District Board Member
COMPANY MS

CONCUR / ~~DISSENT~~

4/7/04
Date

Gas Hy/L
Union Board Member

CONCUR / DISSENT

4-5-04
Date

Salim A. Lamin
Union Board Member

CONCUR / DISSENT

March-31-04
Date

Amma Umay
Neutral Board Member

CONCUR / DISSENT

March 26, 2004
Date