

IN ARBITRATION PROCEEDINGS PURSUANT TO THE
COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

INTERNATIONAL BROTHERHOOD OF]	
ELECTRICAL WORKERS, LOCAL 1245,]	
]	
Union,]	
]	
and]	
]	
]	
PACIFIC GAS & ELECTRIC COMPANY,]	
]	
Employer.]	
]	
Re: Case No. 298, M discharge]	

OPINION AND DECISION

OF

BOARD OF ARBITRATION

CAROL QUINNIE, Company Member

JOHN MOFFETT, Company Member

JOE OSTERLING, Union Member

BOB CHOATE, Union Member

JOHN KAGEL, Chair

APPEARANCES:

For the Union: Jennifer Marston, Esq., IBEW 1245, Vacaville, CA

For the Employer: Stacy Campos, Esq., PG&E, San Francisco, CA

ISSUE:

Was M terminated for just cause; if not, what should be the remedy?

BASIS FOR DISCHARGE:

The Grievant, employed on June 19, 1989, was terminated on May 4, 2009, at which time he was a Crew Foreman.

His termination notice, dated May 5, 2009, read:

“... After an investigation by Corporate Security on April 2, 2009, it was determined you made racial slurs to an employee, physically assaulted him and challenged him to a fight.

You have violated USP [Utility Standard Practice] 1, the Employee Conduct Policy and the Compliance and Business Ethics Policy....” (Jt. Ex. 2)

BACKGROUND:

G_____:

The Grievant had been on vacation. When he returned to work he met his colleagues in the bull room and asked who had been using his truck in his absence.

G_____ testified that the Grievant asked him if G_____ had dirtied his truck like he always had. G_____ responded that he had pissed in the truck. The Grievant responded, “You would do that, you dirty Mexican....You and your 10 kids.” The Grievant said something about hurting G_____’s shoulder which had been previously injured, although G_____ could not remember if he told that to Management later. (Tr. 65-66) G_____ said, “If you’re going to do it, go ahead and do it or if you’re going to

come and hit me, come and hit me.” The Grievant responded something like “I might do that.” The Grievant told him Jesus was not going to save him this time. (Tr. 54-55)

As the crew went into the yard to get into their trucks G , wearing a hoodie sweatshirt, was told by the Grievant, “You better keep walking down with your hoodie on, you little Bitch.” On the Grievant referring to his hood as a hat, G said, “One, it’s not a hat, it’s a hood from a sweatshirt and, two, I’m not afraid of you.” On repeating the last comment, the Grievant approached him and “we had kind of a chest bump.” (Tr. 58) The Grievant started cussing in his face, “You better start respecting me, you motherfucker, you have to respect me, I have twenty fucking years with the company and you think everyone is like you who has five years.” According to G , the Grievant started rambling as to how he would kick G ’s butt after work or at work. The Grievant was pulled away by another employee. (Tr. 59)

G received a “written reminder” concerning his remark about pissing in the Grievant’s truck. (Tr. 87)

B and O

B heard the Grievant say something about a “dirty Mexican” and “Oh, you guys having a bunch of kids,” (Tr. 94) In the yard B heard the Grievant

“mentioned something about better respect me, you know, I have so many years or so much time over you; otherwise, you know, if you don’t do that, I can kick your ass.

You know, so some words again, it kind of heated up. So I was just like, oh, something serious has got to be going on.

Then he was talking, G was just, you know, what’s wrong, whatever? And then they got kind of close and kind of

bumped chests or chest-bumping but there was no punches, none of that....

...it was used for more like getting close, probably touched, but it was more words, you know, about being respectful or disrespectful.

...he got close but I don't know if he was just more showing him, I'm just telling you to show me respect,It was just more words, I'd say." (Tr. 95-96)

G , who was assigning work in the yard, testified:

"...As I was walking out, I looked up, I observed G and M kind of like pretty much close, just taking or interacting ...

As far as I could see, there was no contact or anything but they were pretty close and at that point, I decided to go see what was going on. I separated them, I asked them what was going on and they were just like, they were arguing or something." (Tr. 122)

Grievant:

The Grievant testified that on coming to work he asked who used his truck.

G said, "Don't worry, all I did was piss in your bin and move your tools around."

(Tr. 128) A year and a half earlier the Grievant and another employee had been accused of urinating in their truck bins. Because the Grievant did not know G knew about

that accusation the Grievant became upset. He did not recall any remarks he made to

G until a co-worker told him later that he had said inappropriate things in the bull

room (Tr. 134-135, 140-141) and that he should apologize to G and B . (Tr.

149) Although a supervisor had made a note that the Grievant told him that the Grievant

told G "that God wasn't going to save his job or going to save his mortgage," the

Grievant did not remember saying that. (Tr. 147)

In the yard the Grievant was inspecting his truck bins when G came by. The Grievant mentioned something about his hood "And he had his head down walking shamelessly." (Tr. 131) The Grievant told G , "Keep your head down and just keep walking." G "kept mumbling, 'What are you going to do,' antagonizing me." (Tr. 132) "Why are you talking to me like this? I thought we're friends, you know. Why are you antagonizing me?" (Tr. 139) He did not challenge G to a fight, threaten him, nor remember bumping him with his chest or belly. (Tr. 132) They did get close. (Tr. 158) He denied referring to G as a bitch (Tr. 142), or did not remember doing so or calling G a motherfucker. He told the LIC that G would not talk to him like he did if they were not at work. (Tr. 163)

According to the Grievant, his normal cordial relationship with G , whom the Grievant described as his friend, was different that day: "I had a bad day. I had a bad morning." He denied having any other bad day similar to this one. (Tr. 160)

Apology

G testified that later in the day the Grievant apologized to G , which G believed to be sincere.

"I need to talk to both of you guys [G and B]. I apologize for what I said, I wasn't thinking, I was upset. I have stuff going on in my life that I'm dealing with and I didn't mean to say what I said earlier so I apologize to you, B , for racial remarks, and I apologize to you as well." (Tr. 79-80)

Both said they forgave him.

The Grievant then talked to G , according to G :

"[A]bout the chest-bump ordeal and he said he didn't want to lose his job, he said he was sorry, just something snapped in him and he jumped....

I forgave him and I was like, you know, we had this tension. He just spilled out his guts to me and I had all this and I forgave him and I was trying to break the tension, fooling around, and he asked if I could talk to Bob [supervisor] for him and, you know, we talked things out and we are on even grounds now. It's not like I don't like M and M doesn't like me. We can work together now as we did that night...." (Tr. 80)

Work extended late that day and the pair ate together. (Tr. 81) There were no further problems between them as there had been none before. (Tr. 74-75) They worked together on and off from the date of the incident, April 2, 2009 until the Grievant was terminated on May 5. (Tr. 75)

The Grievant in his apology gave G

"a kind of brief scenario of what was going on at home, he knows my wife so he kind of understands what was happening and he fully understands now—that he did—as to what I got a little bent out of shape over something really stupid." (Tr. 135)

Decision to Discharge:

In making his determination to discharge the Grievant his Superintendent talked to corporate security. Corporate security had done an investigation to resolve whether an "actual chest-bumping" had occurred, given disagreement among witnesses concerning that issue. Discharge was appropriate in his view because physical contact is inappropriate and,

"there was a piece about meeting him after work and they would clear the air then which, to me, meant we were going to have follow-up problems. So I just felt that this was never going to resolve itself." (Tr. 26)

The Superintendent knew there were no further problems between G and the Grievant for the remainder of the time that the Grievant was employed, even though they worked together. (Tr. 42-43) Nonetheless:

“I thought about it a lot but I was convinced that this would happen again, that if we didn’t remove Mr. M out of the workplace, that at some point we were going to have this problem again. So to me, when people get caught at things, there’s this kind of cooling-off period and all’s well but it’s going to come back once you get to physical confrontation. My feeling is that will comeback into play again in the future.

Q. [by Ms. Campos, Employer Counsel] Is that based on your 40 years of experience at PG&E?

A. Yes, it’s seeing—there have been many things over the years where we’ve had crews that we have had confrontation about.” (Tr. 46-47)

The Superintendent maintained that view notwithstanding that there was neither any confrontation after work on the day in question nor in the month that followed. He was convinced that somewhere down the line that the Grievant was “going to take G on...I think this will flare back at him.” (Tr. 49) This view was not based on something in the Grievant’s character but “more my life experience.” The Superintendent had had no major problems with the Grievant before. (Tr. 49-50) He had talked to the Grievant who told him the Grievant was going through some problems at home; “that he just lost it.” (Tr. 51)

POSITION OF THE PARTIES:

Position of the Employer:

That the Union's attempt to downplay the seriousness of the Grievant's conduct must be rejected; that the Company is entitled to provide all employees a harassment-free

and safe workplace with no place for individuals to engage in racist and physically violent behavior towards others, especially those they are assigned to lead; that the Grievant had every opportunity to avoid physical confrontation but did not do so; that on notice that physical contact occurred the Grievant was immediately removed from duty; that discharge is the appropriate level of discipline was based on the physical contact that accompanied the Grievant's racial slurs; that the precedential authority of the Parties dictates termination for engaging in acts of physical violence; that the weight of the evidence supports a finding that the Grievant chest-bumped G and told him he would physically injure him; that the seriousness of the Grievant's misconduct justified termination; that the Superintendent was concerned that the serious misconduct could arise again in the future even if the two employees were currently getting along based on 40 years of field experience; that as a Foreman the Grievant was a leader and if he could get away with his misconduct it would send the wrong message to others who had less service than he did; that there had been training as to what kinds of behaviors were not allowed; that while it is clear that G was not afraid of the Grievant, it is unclear how other members of the crew perceived him and what they took away from the incident; that the Grievant's misconduct is exactly the type of behavior the Company is trying to eliminate, one employee harassing and threatening another based on race and seniority; that the Company's desires are well communicated and documented and either were known or should have been known to the Grievant; that in this case the Grievant even after leaving the bull room had the opportunity to cool down but did not, reigniting the exchange involved;; that this case is like a Case 227 where the dispute started with a

verbal altercation and then one of the parties crossed the line and turned the verbal altercation into a physical one, and it is more aggravated than in Case 227 for the Grievant also simultaneously threatened to physically harm his victim after working hours; that the Grievant's claimed excuses of having a bad day does not relieve him of his responsibility for stress does not give anyone the right to engage in racist rants and physically bump his victim and most reasonable people would expect to be terminated in such a situation; that Grievant was not entitled to react to G 's comment in response to the Grievant accusing him of dirtying his truck "like always"; that the Grievant showed that he believed he could treat G with disrespect yet demanded others respect him because of his years of service; that the Grievant could not explain what he meant by the comment that G was walking "shamelessly" through the yard and that the victim did not fear him; that the Grievant's chest bumping and demand for respect based on his years of service is troubling as the Company is not the military and operates on the principle that all voices are equal and deserve respect, not that employees with less seniority are somehow inferior; that the Grievant's apology came only after he and others were interviewed by supervision and accompanied by a request that G speak with the supervisor to let him know that he apologized and that G was not concerned about working with the Grievant; that the Grievant knew that his conduct could result in termination; that if Grievant is reinstated he should be denied back pay for the Grievant should not be welcomed back to the Company with a hero's welcome and a large check.

Position of the Union:

That the Company's failure to seriously consider all facts and circumstances, discharge was excessive; that the decision was made with no suggestion of continued animosity between the Grievant and G that the factors of lack of severity of the comments, past history and apology on the same day as the incident were not considered appropriately; that there was no identification of a single concern about the Grievant that he was likely to repeat similar behavior; that Arbitration Case 227 is inapplicable given the far more egregious facts of that case where the employee in that case exhibited extreme behavior and there was sufficient reason to fear repetition; that the Employer has the burden of proof that the discharge is reasonably related to the seriousness of the proven offence in all of the circumstances of the case as held in Arbitration 293, a case concerning USP-1, the same policy involved here, and the Employer has not done so.

DISCUSSION:

Just Cause:

For the Company to establish just cause for termination it must show that the claimed misconduct of the Grievant occurred, that the Grievant either knew or should have known that he could be disciplined for it, and whether under all of the circumstances the discipline of the Grievant was reasonable.

Grievant's Misconduct:

The record established that the Grievant used racist epithets in the bull room and profanities directed towards G in the yard. The Grievant did not contend otherwise.

The Company knew that but it was not until the corporate security investigation was completed did it conclude that there was a physical assault by the Grievant.

No Workplace Violence Proven:

Whatever the basis for corporate security's conclusions, whether there was such an assault must be based on the evidence presented at the arbitration hearing. That evidence is ambiguous at best as to whether there was anything but incidental accidental contact as opposed to intentional physical force directed by the Grievant toward G as the Company contends. The basis for this conclusion is the testimony of the two persons not directly involved in the confrontation, B and O as well as that of G quoted above. Their testimony was that either no bump occurred or it was "kind of" one. This evidence is insufficient to show that the Grievant engaged in workplace violence as opposed to being involved in the Grievant-caused verbal confrontation.

That the Grievant either know or should have known that his verbal misconduct violated Company standards and would be grounds for discipline was clearly shown by his past training, his own apology as well as plain common sense.

Appropriate Discipline:

In this case the decision to discharge the Grievant was based in major part on the Company conclusion, not supported in this record, of physical assault which in its view was workplace violence. The Superintendent emphasized that his conclusion to discharge depended on the conclusion that there was such an assault and his further conclusion that once there was such an assault that it would at some point be repeated in the future. The

Superintendent did not draw that latter conclusion from anything specific about the Grievant, as opposed to his general experience.

To the extent that the Company relies on Case 227, and while the general statements of that Panel concerning workplace violence is beyond dispute, the employee there picked up a table and struck a co-worker with it after leaving the room and then coming back into it to carry out the assault. It was not the result of close but minimal touching, if there was touching at all, during the verbal confrontation in this case.

Accordingly, with the negation of the alleged physical violence in this case, the question remains as to what the appropriate discipline of the Grievant is. As noted, that he was subject to discipline is clear given his racial and profane comments, as well as his statements concerning potential fighting with G . As the Company points out, in addition the Grievant was a Foreman who had some obligation to demonstrate leadership notwithstanding his claim of having a "bad day." Finally, as a 20-year employee he had to know of the unacceptability of such conduct.

In this case the Grievant was terminated in May 2009. The case was not referred to arbitration until March 2010. The hearing was in June 2010 and the briefs were due in September, although for unrelated reasons the Company's was not received until November. The Company agrees that that latter delay does not affect any back pay award.

To reinstate the Grievant without back pay would amount to an 18-month suspension. Instead, what needs to be evaluated is what the appropriate suspension would have been in this case given that the allegation of physical assault and workplace violence

cannot be sustained because of insufficient evidence to show that such occurred. Weighing all of the circumstances of this case, a 60-day suspension is reasonable in this case for the serious verbal misconduct of the Grievant that was established.

DECISION:

1. The discharge of the Grievant was not for just cause.

2. A 60-day suspension of the Grievant was for just cause. The Grievant shall forthwith be reinstated without loss of seniority and receive the pay and benefits he would have received, less 60-days' pay and benefits and less outside earnings. The computation of the pay and benefits due the Grievant, if any, is remanded to the Parties, the Board of Arbitration retaining jurisdiction in the event the Parties cannot agree thereon.


Chair, Neutral Member

Concur/Dissent Decision 1
Concur/Dissent Decision 2

4/9/11
date


Union Member

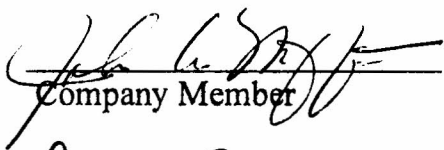
Concur/Dissent Decision 1
Concur/~~Dissent~~ Decision 2

4/7/11
date


Union Member

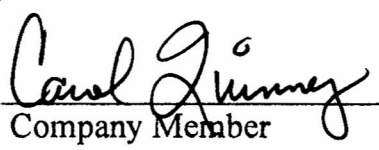
Concur/~~Dissent~~ Decision 1
Concur/~~Dissent~~ Decision 2

4-4-2011
date


Company Member

Concur/~~Dissent~~ Decision 1
Concur/~~Dissent~~ Decision 2

3/23/11
date


Company Member

Concur/~~Dissent~~ Decision 1
Concur/~~Dissent~~ Decision 2

3/29/11
date