

1 ALEXANDER COHN  
2 Arbitrator - Mediator  
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6  
7 IN ARBITRATION PROCEEDINGS PURSUANT TO  
8 AGREEMENT BETWEEN THE PARTIES  
9

10 In the Matter of a Controversy

11 between

12 **INTERNATIONAL BROTHERHOOD OF**  
13 **ELECTRICAL WORKERS, LOCAL 1245, AFL-CIO,**

14 and

15 **PACIFIC GAS & ELECTRIC COMPANY.**

16 Involving a grievance contesting a written warning;  
17 **██████ V. ██████**, Grievant.

18 }  
19 } **OPINION AND AWARD**  
20 } **OF**  
21 } **BOARD OF ARBITRATION**  
22 }

23 This Arbitration arises pursuant to Agreement between INTERNATIONAL  
24 BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, AFL-CIO, hereinafter  
25 referred to as the "Union," and the PACIFIC GAS & ELECTRIC COMPANY,  
26 hereinafter referred to as the "Employer," under which CAROL POUND and DOUG  
27 VEADER were appointed as Employer Board Members on the Board of Arbitration  
28 ("Board"), DARRYL NORRIS and F. E. DWYER were appointed as Union Board  
Members, and ALEXANDER COHN was appointed Neutral Board Member and  
under which a decision by Board majority shall be final and binding upon the parties.

Hearing was held on April 20 and June 29, 2011, in Vacaville, California. The  
parties were afforded full opportunity for the examination and cross-examination of  
witnesses, the introduction of relevant exhibits and for closing argument. Post-  
hearing briefs were received on or about October 7, 2011, and the matter was  
submitted.

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1 APPEARANCES:

2 On behalf of Union:

3 SANFORD N. NATHAN, Esquire, 1766  
4 Chisholm Road, McPherson, Kansas 67460.

5 On behalf of the Employer:

6 VALERIE SHARPE, Esquire, Law  
7 Department, Pacific Gas & Electric  
8 Company, P.O. Box 7442, San Francisco,  
9 California 94120.

10 **ISSUE**

11 Was Grievant, F█████ V█████, given a Written Warning for  
12 just cause? If not, what shall be the remedy?

13 **RELEVANT PROVISIONS OF AGREEMENT**

14 . . . .

15 **7.1 MANAGEMENT OF COMPANY**

16 The management of the Company and its business and the direction of its working  
17 forces are vested exclusively in the Company, and this includes, but is not limited to,  
18 the following: to direct and supervise the work of its employees, to hire, promote,  
19 demote, transfer, suspend, and discipline for just cause...

20 . . . .

21 **FACTS**

22 Grievant, employed by the Employer for about 20 years, was a Lineman for  
23 approximately eight years working out of Woodland. On May 7, 2009, Grievant was  
24 issued a Written Reminder based on an incident at a bowling alley in West  
25 Sacramento, in which he backed his truck into a water cage.

26 Grievant alleges that his supervisor, Darryl Williams, was waving him back as  
27 he collided with the cage, which Williams denies. The Written Reminder, drafted by  
28 Williams, states, in pertinent part:

29 You are receiving this written reminder in the work performance of  
30 positive discipline.

31 The following summarizes the behavior on your part that lead (sic) to  
32 this action.

33 On 3/23/2009 at approximately 6:05 pm you backed a 1/2 ton F150

1 short bed pickup into a customer's back flow preventer damaging the  
2 concert pad and a 1/4 bleed valve used to test the back flow preventer.  
3 Another employee went to the left rear side of the pickup to act as your  
4 observer.

5 You began to back the pickup. When the pickup truck was about three  
6 feet from back flow preventer. The Spotter gave you the signal to stop  
7 with his hands. You continued to back the pickup truck. The observer  
8 thought you were going to stop. You continued to back and when you  
9 were about six inches from the back flow preventer the observer ran to  
10 the driver side window and banged on the window. You stopped but it  
11 was too late and struck the back flow preventer.

12 Code of Safe Practices section 3. Motor Vehicle Operation 309(b)  
13 states: Before backing a vehicle that has restricted vision to the rear,  
14 drivers shall request a passenger or other nearby Company employees  
15 (if available) to act as observer during the backing of the vehicle. Even  
16 though you had an employee acting as an observer. You did not utilize  
17 him in this capacity. Once you lost sight of your observer you should  
18 have immediately stopped the vehicle and re-established contact.<sup>1</sup>

19 . . . .

20 At all times relevant herein, Williams was the Electric Distribution Supervisor  
21 in Woodland and Grievant's direct supervisor. He has worked for the Employer for  
22 approximately 27 years, and has been a supervisor in various capacities for  
23 approximately 18 years. Williams testified that on March 23, 2009, several of the  
24 Employer's crews were called at approximately 2:00-2:30 p.m., to a bowling alley in  
25 West Sacramento, which had experienced a loss of power; that approximately seven  
26 to nine employees reported to the scene; that he was responsible for overseeing the  
27 job; that there were two foremen on the scene, Gas Crew Foreman R. E. [REDACTED]  
28 and Electric Crew Foreman J. V. [REDACTED] that many of the employees who reported  
to the scene brought trucks; and, that C. V. [REDACTED] had a bucket truck, J. [REDACTED]  
V. [REDACTED] had a pickup truck, T. D. [REDACTED] had a single-bucket truck, E. [REDACTED] had  
a Gas Crew Foreman truck, and Grievant had a pickup truck.

29 The bowling alley has a four row parking lot south of the main structure.<sup>2</sup>  
30 There is a long, narrow building (the Old Town Inn) to the east of the parking lot and

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31 <sup>1</sup>JX 3, p. 11.

32 <sup>2</sup>EX 1.

1 the bowling alley. There is a narrow alley between this building and the bowling alley  
2 starting at the spot where the parking lot ends and the bowling alley begins.<sup>3</sup>

3 According to Williams, prior to the backing accident, he was parked in a  
4 normal parking space in the first (south) row of parking spaces. He testified that there  
5 were numerous large (more than six) trucks in the lot; that C [REDACTED] V [REDACTED] had his  
6 bucket truck parked in the vicinity alleyway between the bowling alley and the Inn;  
7 that J [REDACTED] V [REDACTED]s and D [REDACTED]s trucks were also parked in the vicinity of the alley;  
8 that E [REDACTED]'s truck was parked perpendicular to the stalls in the southwest corner  
9 of the lot (opposite from the alley); that Grievant's truck was parked behind (to the  
10 east of) his own truck, adjacent to the Inn and was parked perpendicular to the  
11 parking stalls and the Inn, facing east towards the Inn;<sup>4</sup> and, that the power line that  
12 required work ran underground along the alley from the Inn to the bowling alley,  
13 where Grievant's, V [REDACTED]s and D [REDACTED]s trucks were parked.

14 Williams further testified that shortly before 6:00 p.m., the owner of the  
15 bowling alley, Ross Amin, asked him to clear the Employer's vehicles out of parking  
16 lot due to a party that was scheduled at the bowling alley that evening at 6:30 p.m.;  
17 that shortly beforehand, he had sent Grievant back to the Woodland yard to retrieve  
18 some wire on a spool in order to help set up a temporary above-ground power line;  
19 that when Grievant returned, the crew was having a meal; that based on Amin's  
20 request, Williams asked the crew to move their vehicles while they were still eating;  
21 that he did not give any directions as to where specifically to move the vehicles; that  
22 the various trucks the crew had brought were taking up most of the parking spaces in  
23 the center of the lot; that he directed all of the employees parked in the lot, including  
24 Grievant, to move their trucks; that in order to facilitate Grievant moving his truck, he  
25 sent another Lineman, R [REDACTED] C [REDACTED] to be Grievant's "backer" as he moved his  
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27 <sup>3</sup>CX 1.

28 <sup>4</sup>See CX 1. All other witnesses testified that Grievant parked parallel to the Inn.

1 vehicle; and, that he likewise directed C [REDACTED] V [REDACTED] and D [REDACTED] to spot for  
2 another as they backed up their trucks.

3 Employees are required to comply with the Employer's Code of Safe  
4 Practices, which includes a section pertaining to vehicle operation. Section 309,  
5 entitled "Movement of Vehicles" states, in pertinent part:

- 6 (a) Before starting to move a vehicle either forward or backward,  
7 drivers shall determine that no person or object is in the path of  
8 the vehicle...
- 9 (b) Before backing a vehicle, drivers shall request a passenger or  
10 other nearby Company employees (if available) to observe  
11 during the backing of the vehicle. Vehicles equipped with back-  
12 up cameras shall utilize the camera as a tool in addition to rear  
and/or side mirrors as well as observers (when available.)  
Additionally, when looking over your shoulder (and utilizing  
mirrors, cameras, etc.) does not clearly depict potential backing  
hazards, drivers shall park and get out to visually verify the area  
is free of hazards before proceeding to back...<sup>5</sup>

13 The Employer also maintains a "Motor Vehicle Backing Policy," which provides  
14 that:

15 Employees should attempt to avoid backing vehicles, if possible, by  
16 choosing a parking space or planning a route which requires no  
backing...<sup>6</sup>

17 In addition, the Employer distributes<sup>7</sup> a "Smith System" pamphlet entitled "Avoiding a  
18 Backing Accident," which states:

19 As you probably know, there is a solution to the backing accident  
20 problem... and it always works: DON'T BACK. If you don't back you  
21 won't have a backing accident. You won't find a more effective yet  
22 simple solution. Begin to think about how you will leave as you are  
arriving. As an alternative to backing later, enter the parking area  
looking for ways to avoid backing. Look for a pull through situation.  
Look for curb-side parking. Look for a way to beat the odds by steering  
clear of the backing maneuver whenever you can.<sup>8</sup>

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25 <sup>5</sup>EX 2, p. 4.

26 <sup>6</sup>UX 7.

27 <sup>7</sup>Grievant never received Smith System training. JX 3, p. 13.

28 <sup>8</sup>UX 8.

1 According to Williams, after asking C [REDACTED] to be Grievant's backer, they walked  
2 off towards Grievant's truck. He testified that at that time, he was standing in the  
3 vicinity of the middle row of parking spaces on the side closest to the Inn;<sup>9</sup> that the  
4 Employer uses "tailboarding," which is a crew meeting prior to the start of a job,  
5 where the details of the job are discussed; that it would have been a good idea to  
6 have a tailboard prior to moving the vehicles concerning the importance of  
7 communication between drivers and spotters;<sup>10</sup> that as Grievant prepared to move  
8 his truck, he (Williams) was engaged in a conversation with Amin; that Amin was  
9 standing to the north of him;<sup>11</sup> that during this discussion, he was facing north,  
10 towards Amin (and away from Grievant's truck), and Amin was facing south, where  
11 Grievant's truck was in Amin's line of sight; that he was therefore not looking at  
12 Grievant's vehicle as he was backing up; that when backing, drivers are supposed to  
13 look behind them, and the designated backer is supposed to stand behind the  
14 vehicle; that Grievant began driving east, and then made a sharp turn to the north in  
15 order to park parallel to the Inn; that C [REDACTED] was standing behind Grievant's vehicle as  
16 he backed up;<sup>12</sup> that while backing up, Grievant struck a water cage at the southwest  
17 corner of the parking lot; that he did not make any hand signals or in any way  
18 facilitate Grievant's movement of his truck; and, that Grievant did not immediately get  
19 out of his truck and ask Williams why he had backed him into the cage.

20 Williams also testified that when Grievant struck the water cage, it caused a  
21 valve on the water pipe inside the cage to break, which led to a "geyser" of water

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23 <sup>9</sup>See EX 1, 7.

24 <sup>10</sup>The Employer's tailboarding guidelines provide that:

25 Employees shall participate in tailboard briefings given by the employee-in-charge of the  
26 job. Conduct a tailboard before performing a job to discuss task involved, hazards and  
related safety precautions. Conduct a tailboard; once per shift, prior to performing work,  
after extended delays in activity, anytime the jobsite activities change... (UX 12.)

27 <sup>11</sup>See EX 1.

28 <sup>12</sup>Amin stated in the LIC that C [REDACTED] was standing at the front driver's side of Grievant's vehicle. JX 3, p.  
5.

1 streaming upward from the pipe; that the water cage itself did not sustain any  
2 damage; that he then proceeded to the area, and turned a valve which shut off the  
3 flow of water, including the flow of water to the bowling alley; that the valve was  
4 damaged, and was replaced by E [REDACTED] with a \$6 part; that Grievant's truck did not  
5 sustain any damage; that the power was still out at the bowling alley, so he did not  
6 immediately investigate the backing accident; that several hours later, at  
7 approximately 10:00 p.m., he summoned Grievant and C [REDACTED] to ask what had  
8 occurred with respect to the accident; that Grievant stated that he (Williams) had  
9 backed him into the cage, and he replied that he had not; that he wanted additional  
10 witnesses to the accident because he had had "issues with Grievant.... telling the  
11 truth before;" that he did not wind up asking C [REDACTED] for his account that night; and,  
12 that he told Grievant that he would conduct an investigation the following day, after  
13 which they left the bowling alley for the evening.

14 The following day, Williams contacted Health and Claims Representative Tom  
15 Crawford and Union Steward J [REDACTED] S [REDACTED] to assist him in the investigation. He  
16 testified that he returned to the site, where he, Crawford, and S [REDACTED] interviewed  
17 Grievant; that Grievant again stated that Williams had backed him into the water  
18 cage by making hand motions; that they took photographs of the scene, including  
19 photographs from the perspective of a driver in a truck similar to Grievant's in the  
20 spot where the accident occurred;<sup>13</sup> that he, Crawford, and S [REDACTED] also interviewed  
21 Amin; that S [REDACTED] asked the questions; and, that Amin made a statement that he  
22 (Williams) recorded as follows:

23 I Ross Amin did not see PG&E Supervisor [Williams] directing or  
24 waving at the driver when he hit the anti backflow preventer. [Williams]  
and I where (sic) discussing the work in progress.<sup>14</sup>

25  
26 <sup>13</sup>EX 3, 4. C [REDACTED] testified that Grievant was closer to the Inn than the truck depicted in these photographs.

27 <sup>14</sup>Williams subsequently asked Amin to sign a copy of the statement, which he did on April 7, 2009. JX  
28 3, p. 18. Williams testified that Amin could not have known the full extent of the damages that he ultimately  
attributed to the Employer on April 7. However, Amin submitted a claim of damages of \$55,000 to \$60,000  
(based on the original power surge) on April 8, 2009, the following day. UX 5.

1 On May 25, Grievant produced a written statement, which states:

2 We were blocking rear entrance of the bowling alley parking lot.  
3 [Williams] instructed us to move our vehicles. As I was backing the  
4 pickup I lost sight of R [REDACTED] C [REDACTED] in my mirrors & noticed [Williams] was  
waving me back from in front of me. I struck a cage on a water main  
with rear bumper of the pickup.<sup>15</sup>

5 On June 9, E [REDACTED] also submitted a statement which states:

6 I saw [Williams] backing multiple vehicles at the West Sacramento  
7 Bowling alley on 3/23/09 at the same time. I saw [Williams'] arms  
8 moving, directly (sic) [Grievant] vehicle back. I am pretty sure that  
[Williams] was standing at the rear of [Grievant's] vehicle.<sup>16</sup>

9 Williams testified that he subsequently interviewed C [REDACTED] about the incident;  
10 that C [REDACTED] told him that he walked over to the area of Grievant's vehicle to serve as  
11 his spotter; that C [REDACTED] stated that as Grievant was backing up, he motioned for him  
12 to stop, but Grievant did not stop, at which point he yelled; that C [REDACTED] stated that  
13 Grievant still did not stop after he yelled, and he began to hit the side of Grievant's  
14 truck with hand; that C [REDACTED] said that it was too late by that point, as Grievant had hit  
15 the water cage; and, that C [REDACTED] was not sure if he had maintained eye contact with  
16 Grievant as he was backing up.

17 Williams also testified that the investigation team ultimately concluded that the  
18 backing incident was a preventable accident and that Grievant was at fault; that he  
19 produced a Supervisor's Incident Packet detailing the investigation, produced with  
20 Crawford and S [REDACTED]<sup>17</sup> that Grievant failed to use his spotter properly; that backing  
21 incidents involving collision with a stationary object automatically result in the  
22 issuance of a Written Reminder; and, that he (Williams) ultimately received a

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24 <sup>15</sup>EX 4.

25 <sup>16</sup>JX 3, p. 20. Williams testified that he believes that E [REDACTED] was "mistaken," as C [REDACTED] was wearing  
26 similar clothing to himself, and at the time of the accident, E [REDACTED] was on the opposite side of the parking  
lot. See EX 7.

27 <sup>17</sup>JX 3, p. 13-17. The "Root Cause Explanation" of the accident provided was "Not Following Procedure  
28 or Work Standards--Code of Safe Practices: Section 3... Even though employee had an employee backing  
him up, once driver lost sight of backer he should have immediately stopped the vehicle and re-established  
contact."



1 disciplinary letter in part based on his handling of the power outage at the bowling  
2 alley, including the backing accident.<sup>18</sup>

3 On March 23, Grievant testified that Williams summoned him to the bowling  
4 alley and he arrived at approximately 3:00 p.m.; that he arrived in a large bucket  
5 truck; that shortly, a decision was made to run a temporary power cable along the  
6 alley, and Williams sent him back to the Woodland to pick up two reels of cable; that  
7 he returned with the cable, driving a pickup, approximately one and one half hours  
8 later at around 6:00 p.m.; that he parked facing north, parallel to the Inn;<sup>19</sup> and, that  
9 when he arrived, the crew was eating, and C█████ V█████ gave him a hamburger and  
10 french fries.

11 According to Grievant, he began to eat in the parking lot, took one bite, and  
12 then was informed by Williams that he and others in the crew needed to move their  
13 trucks. He testified that Williams told him and two other employees who had trucks  
14 parked in the alley, parallel to the Inn, that they needed to back up their trucks in  
15 order to clear a path for the bowling alley's customers to access the rear parking lot,  
16 which could only be reached by driving down the alley; that Williams wanted them to  
17 back their trucks up south enough that the entrance to alley was clear; that the trucks  
18 ahead of Grievant (V█████'s and D█████'s) were blocking the alley, and his truck  
19 was blocking the backward path of those trucks;<sup>20</sup> that approximately six trucks total  
20 needed to be moved; that Williams's directive to move the trucks was "urgent," as  
21 Williams had been talking to Amin, who was concerned about customers arriving for  
22 a 6:30 p.m. party being able to park; that he is aware of the Employer's policy that  
23 drivers must walk in a circle around their vehicles prior to engaging in a backing  
24 maneuver; that Williams stated that the trucks needed to be moved "right now;" that

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25  
26 <sup>18</sup>The letter does not cite the backing accident specifically as a reason for discipline, but rather his  
handling of the entire situation.

27 <sup>19</sup>See UX 4.

28 <sup>20</sup>See UX 4.

1 he therefore did not feel like he had enough time to walk in a circle around his truck  
2 prior to backing it up; and, that he was not aware of the water cage behind his truck.

3 Grievant further testified that he would have been able to move his truck out of  
4 the way by driving around the parking lot, but did not because Williams directed him  
5 to back up; that he got in his truck and started the engine; that he had not  
6 communicated with C [REDACTED] prior to getting into his truck; that he looked for C [REDACTED] both  
7 to the left and to the right in the rear of his vehicle, and did not see him; that he then  
8 looked forward and saw Williams making hand motions indicating that he should  
9 back up; that he is aware of the Employer's policy that spotters should stand at the  
10 rear of a backing vehicle; that Williams was standing next to Amin, and both of them  
11 were facing his direction (south); that he concluded that Williams had taken  
12 responsibility for backing him up instead of C [REDACTED] that he began idling back in  
13 reverse, keeping eye contact with Williams; that he kept backing up in this manner  
14 until he collided with the water cage; and, that he felt C [REDACTED] hitting the side of his  
15 truck at about the same time as the collision.

16 Grievant also testified that when he collided with the water cage, he stopped  
17 his truck, and drove a few feet forward; that he then got out, approached Williams,  
18 and asked him why he had backed him into the water cage; that Williams responded  
19 "I didn't;" that he then said "okay, I see how this is going to go;" that a few hours later,  
20 Williams approached him, along with C [REDACTED] and said that he needed his side of the  
21 story for his investigation; that he proceeded to explain that he had looked for C [REDACTED]  
22 and then started backing up when Williams gave him hand motions; that Williams  
23 said "no, that's not what happened;" that he responded, "if you're not going to listen  
24 to my side of the story, why tell it?;" that Williams then asked him to proceed, but  
25 continued to interrupt him as he gave his account, and he (Grievant) eventually  
26 walked away; that the following day, he returned to the site, and Amin asked him if  
27 he was the one who had collided with the water cage; that he confirmed that he was  
28 and asked Amin if he had seen Williams motioning to him; and, that Amin said he

1 had not, because he was watching Grievant back up, knowing that he was in danger  
2 of colliding with the water cage.

3 C [REDACTED], a Journeyman Lineman who has worked for the Employer for  
4 approximately eight years, testified that, on March 23, he drove a bucket truck to the  
5 bowling alley; that he arrived at approximately 3:00 p.m.; that he parked in the alley  
6 between the bowling alley and the Inn; that there were other bucket trucks parked in  
7 the alley; that he was taking direction primarily from his Crew Foreman, J [REDACTED] M [REDACTED]  
8 rather than from Williams; that shortly before 6:00 p.m., he was eating a hamburger  
9 when Williams directed the crew to move the trucks out of the alleyway; that Williams  
10 had previously given them the option of moving the trucks either before or after their  
11 meal; that the alley needed to be cleared so that customers could use it to access a  
12 parking lot behind the bowling alley; that Williams directed them to move the trucks  
13 "right now;" that Williams wanted the three trucks parked in the alleyway to be  
14 "backed up... along the fence" out of the alley; that Grievant had room to drive his  
15 truck forward, but did not do so because Williams wanted the trucks backed up; that  
16 he does not recall Williams using the specific words "back your truck up;" and, that  
17 Williams had originally wanted the three trucks parked where they were because that  
18 was where the work was going to be performed.

19 C [REDACTED] also testified that he went to the rear of Grievant's truck as Grievant got  
20 in the cab, in order to act as Grievant's spotter; that the overall actions of the crew to  
21 move their trucks were "rushed;" that he did not see Grievant walk around the  
22 perimeter of his truck prior to getting in the cab; that Grievant did not have time to  
23 walk around his truck given the "rushed" atmosphere; that he does not recall Williams  
24 instructing him to be Grievant's spotter; that Grievant's truck was parked alongside  
25 the Inn, facing north toward the bowling alley;<sup>21</sup> that there were two bucket trucks  
26 parked in front (to the north) of Grievant's truck; that Williams was standing in the  
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28 <sup>21</sup>See UX 4.

1 parking lot north and slightly west of Grievant's truck;<sup>22</sup> that he did not make eye  
2 contact with Grievant before Grievant began backing up his truck; that he did not  
3 communicate at all with Grievant prior to Grievant getting into his truck; that as  
4 Grievant began to back up, he became concerned that he might hit the water cage;  
5 that he therefore put up his hands to make a "stop" signal; that Grievant continued to  
6 back up, and he hit the side of the truck with his hand as Grievant was colliding with  
7 the water cage; that Grievant was backing up very slowly, and not using the gas  
8 pedal; and, that he is not aware of anyone besides himself serving as Grievant's  
9 spotter.

10 C [REDACTED] further testified that he did not see Williams make any hand signals to  
11 Grievant while Grievant was backing his truck, but that he was not looking at  
12 Williams, and so would not have seen if he had been making any motions; that  
13 Williams did not hold a tailboard prior to moving the trucks; that his training indicates  
14 that drivers should stop if they lose sight of their spotter; that he was also trained that  
15 the first rule regarding backing is to avoid backing whenever possible; that all three of  
16 the trucks in the alley could have been moved without backing, by driving to the back  
17 lot and turning around; that after Grievant collided with the water cage, he got out of  
18 his truck, looked at Williams, and asked Williams "why did you back me into that;"  
19 that he does not recall if Williams responded at that time; that Grievant again stated  
20 that Williams had backed him into the cage several hours later, and Williams denied  
21 having done so; that Williams interrupted Grievant as he was giving this account and  
22 did not let him finish; and that he (C [REDACTED]) did not receive any discipline arising from  
23 the March 23 incident.

24 On March 23, C [REDACTED] V [REDACTED], an Electrical Crew Foreman who has worked for  
25 the Employer for approximately ten years, was a Lineman. He testified that, when  
26 Williams first took over as supervisor at the Woodland yard, he held a meeting at  
27

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28 <sup>22</sup>See UX 4.

1 which he told the assembled employees: "if it's going to be between my job and your  
2 job, it's going to be yours; it's not going to be mine;" that on March 23, he drove a  
3 large bucket truck to the bowling alley; that between 5:00 and 5:45 p.m., he went to  
4 pick up food for the crew; that when he returned, he parked his truck in the  
5 southeasternmost space in the bowling alley parking lot;<sup>23</sup> that as they were eating,  
6 Williams directed the crew to "back our trucks out of the alleyway;" that Williams told  
7 them to "move the trucks right now;" that he is certain that Williams used the word  
8 "back;" that Williams told him specifically to back his truck out of the alleyway; that  
9 Williams wanted the trucks blocking the alley to be backed up along the fence  
10 parallel to the Inn; that the trucks could have been moved by driving forward to the  
11 back lot and then turned around; that he could not move his own vehicle until  
12 D[REDACTED] moved his, so he spotted for D[REDACTED] and D[REDACTED] then spotted for him  
13 as they backed up their trucks; that later in the evening, after the collision, Williams  
14 asked him to back up his truck again, and he joked that "I don't want you backing me  
15 up;" and, that Williams responded, "Well, if [Grievant] was watching me, he wouldn't  
16 have ran into that."

17 The parties have agreed to "Positive Discipline Guidelines" which guide the  
18 application of progressive discipline. Written Reminders are the second step of  
19 positive discipline. The Positive Guidelines provide that:

20 A written reminder is a formal conversation between a supervisor and  
21 employee about a continued or serious performance problem. The  
22 conversation is followed by the supervisor's written letter to the  
23 employee summarizing the conversation and the employee's  
24 commitment to change their behavior. It is the second step of the  
25 Positive Discipline System.

26 1. Application

27 This step is applied when:

- 28 ○ An employee's commitment to improve is not met within the six (6)  
month active time period for an oral reminder; or
- An employee commits a **serious offense** whether or not any

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<sup>23</sup>See UX 4.

1 previous disciplinary action has been taken.<sup>24</sup> (Emphasis added)

2 Carol Pound, a Labor Relations Manager for approximately sixteen years, is  
3 responsible for making recommendations on disciplinary matters and processing  
4 grievances. Pound testified that for the past seven or eight years, employees have  
5 "typically" been issued a Written Reminder for backing a vehicle into a stationary  
6 object; that the facts of a particular situation may warrant mitigating that level of  
7 discipline or imposing a more serious level of discipline; that on a previous occasion,  
8 an employee who backed a vehicle into a stationary object concealed by shrubbery  
9 was issued an Oral Reminder instead of a Written Reminder because it was  
10 determined that the employee walked around the vehicle prior to backing and there  
11 was no way to see the object concealed by the shrubbery; that Grievant did not have  
12 an Oral Reminder on his record at the time he received the Written Reminder for the  
13 backing incident; that Grievant's backing accident was considered a "serious offense"  
14 pursuant to the Positive Discipline Guidelines; that it is considered a "serious  
15 offense" because the Employer made a decision to "raise the bar" by considering  
16 backing accidents generally to be "serious offenses;" that the Employer has invested  
17 significant resources in training its employees to drive safely; that Written Reminders  
18 are the "starting point" for discipline in cases of backing accidents; and, that in the  
19 majority of cases, Written Reminders issued for backing accidents are resolved prior  
20 to arbitration, with the Union accepting that the discipline is appropriate.

21 The Union introduced several documents related to discipline arising from  
22 backing accidents. In a 2010 case, the grievant was put on Decision Making Leave  
23 (he already had a Written Reminder) for backing his truck into a streetlight. His  
24 Foreman was serving as his spotter and took full responsibility for the accident. The  
25 Union grieved the discipline, and the dispute was ultimately mooted without prejudice  
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28 <sup>24</sup>JX 1, p. 4.

1 to either party's position.<sup>25</sup> In another 2010 case, a "backer" was issued a Written  
2 Reminder for his role in a backing accident, in part based on the decision to back up  
3 the vehicle rather than move it by driving forward.<sup>26</sup> In a 2008 case, an employee who  
4 backed into a pole was issued an Oral Reminder instead of a Written Reminder.<sup>27</sup>

#### 5 **POSITION OF EMPLOYER**

6 The grievance must be denied because the Employer had just cause to issue  
7 Grievant a Written Reminder for his role in a preventable backing accident in which  
8 he collided with a stationary object. Grievant admits that he engaged in the alleged  
9 conduct that led to the discipline, and that he was aware of the policies and  
10 procedures regarding the operation of motor vehicles, which he failed to follow. The  
11 Employer routinely issues Written Reminders to employees who back into stationary  
12 objects, and there are no facts present in this case which warrant a departure from  
13 that practice.

14 It is undisputed that Grievant engaged in the conduct for which he was issued  
15 a Written Reminder. He admits that when he got into his vehicle, he understood that  
16 C [REDACTED] was acting as his backer, that he lost sight of C [REDACTED] and that he nevertheless  
17 continued to back up until he collided with the water cage. This admitted conduct  
18 violated Rule 309 of the Employer's Code of Safe Practices.

19 The penalty of a Written Reminder was clearly proportionate to the  
20 seriousness of the offense. Pound testified that the Employer has committed  
21 considerable resources to training employees to drive safely, and that as a result,  
22 failure to comply with safe driving procedures is considered a "serious offense."  
23 Grievant violated several of these procedures. In addition to losing visual contact with  
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26 <sup>25</sup>UX 9.

27 <sup>26</sup>UX 10.

28 <sup>27</sup>UX 11.

1 his spotter, he failed to do a 360 degree walk around of his vehicle, and failed to  
2 identify objects in his intended path of travel. He caused a preventable accident by  
3 expressly disregarding the appropriate policies and procedures. In this context, a  
4 Written Reminder—the second lowest level of discipline—is clearly appropriate, and  
5 cannot be characterized as unreasonably harsh.

6 Grievant's excuses for his failure to follow the Employer's safety policies are  
7 unavailing. The Union contends that holding Grievant accountable for his failure to  
8 follow appropriate safety procedures is unreasonable based on alleged conduct by  
9 Williams. First, Grievant's claim that Williams backed him into the water cage is not  
10 credible. He admitted that he knew C [REDACTED] was his spotter when he got into the  
11 vehicle, and indeed looked for him in his mirrors prior to allegedly seeing Williams  
12 waving his arms. The weight of this evidence does not support this allegation.  
13 Williams testified that he was not waving his arms, and Amin provided a written  
14 statement indicating that he did not see Williams waving his arms. C [REDACTED] likewise  
15 testified that Williams was not serving as Grievant's spotter and that he did not see  
16 him waving his arms. The only "evidence" that Williams was doing so is Grievant's  
17 own testimony—grievants have a well-known motive to fabricate testimony—and a  
18 hearsay statement by E [REDACTED], who was on the other side of the parking lot, and  
19 claimed that Williams was behind Grievant's vehicle when every other witness placed  
20 him in front. The allegation that Williams was backing Grievant up is therefore simply  
21 not supported by the record.

22 More significantly, even if Williams had been waving his arms in the manner  
23 Grievant claims, it does not exonerate his conduct. Grievant's alleged assumption  
24 that Williams was acting as his backer was wholly inconsistent with his knowledge of  
25 the Employer's policies regarding backing. Rule 309 states that drivers should  
26 request that someone act as their backer, and that the backer should stand **behind**  
27 the vehicle, not in front. Thus, even if Williams had been waving his arms, Grievant  
28 was in violation of Rule 309 by letting him serve as his backer. Grievant is thus



1 responsible for the accident whether or not Williams was backing him up.

2 The Union further attempts to excuse Grievant's conduct by alleging that  
3 Williams instructed Grievant to back up his truck when it would have been safer to  
4 move it by circling it in the parking lot. Even if Williams did instruct Grievant to back  
5 up his vehicle (the evidence supports the conclusion that Williams simply told the  
6 crew to move their trucks), Grievant nevertheless had a duty to follow the Employer's  
7 procedures for safe backing, and it is undisputed that he did not follow these  
8 procedures. Likewise, the excuse that it was a rushed situation is unavailing,  
9 because rushed conditions do not allow employees to disregard mandatory safety  
10 procedures. Employees must abide by applicable policies and procedures even in  
11 stressful conditions.

12 Accordingly, the Employer has met its burden of demonstrating both that  
13 Grievant engaged in the alleged conduct for which he was disciplined, and that the  
14 discipline imposed was reasonably related to the seriousness of the offense.

#### 15 **POSITION OF UNION**

16 The grievance must be sustained because the Employer did not have just  
17 cause to issue Grievant a Written Reminder. The Employer failed to meet its burden  
18 of proving that Grievant engaged in conduct warranting discipline. The record reflects  
19 that the primary responsibility for the backing incident rests with Williams, not with  
20 Grievant or his spotter. Grievant was ordered by his supervisor to back his vehicle,  
21 and followed his supervisor's direction while doing so. Even if Grievant's actions  
22 warranted some discipline, the Written Reminder should have been mitigated to no  
23 more than an Oral Reminder. In addition, the Employer's default policy of imposing a  
24 Written Reminder for any backing incident violates the parties' Positive Discipline  
25 Agreement as well as the just cause provision of the Collective Bargaining  
26 Agreement and must be rescinded.

27 It is undisputed that the Employer decided to issue Grievant a Written  
28 Reminder for a very minor accident by virtue of its decision to treat all backing

1 incidents as "serious offenses." By doing so, the Employer has unilaterally re-written  
2 the Positive Discipline Agreement, and in some cases has ended up violating the just  
3 cause provision of the Agreement as well whenever it issues a Written Reminder for  
4 a backing incident that does not rise to the level of a "serious offense." A minor  
5 backing accident cannot be converted into a "serious offense" just because the  
6 Employer has chosen to characterize all such offenses as "serious." When the  
7 original Positive Discipline Agreement was signed, backing incidents were not  
8 automatically treated as serious offenses. By deciding to treat all such incidents as  
9 "serious," the Employer improperly changed a collectively bargained agreement  
10 unilaterally.<sup>28</sup>

11 In addition, the specific Written Reminder issued to Grievant must fall on its  
12 own merits as well. Even disregarding all of Williams's actions which caused the  
13 backing incident, and assuming that Grievant was solely responsible, there is  
14 nevertheless no rational basis by which this minor incident can be characterized as a  
15 "serious offense." There was no damage to Grievant's truck, and the part that he  
16 broke caused \$6 to replace. The just cause standard also requires that discipline  
17 imposed be reasonable in light of the nature of the offense and any mitigating  
18 circumstances. The Written Reminder here cannot be considered reasonable when it  
19 was issued on the basis of an artificial conclusion that a "serious offense" occurred.  
20 The Employer cannot override the just cause provision of the Agreement by  
21 instituting a blanket policy.

22 Even if the Employer's default Written Reminder was deemed to be generally  
23 proper, just cause did not exist for such discipline on the facts of this case. The  
24 backing incident was largely caused by Williams' actions. It is virtually undisputed  
25 that Williams violated Company policy by hurriedly directing Grievant and the other  
26 employees to back up their vehicles quickly against the fence and the motel. The

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27 <sup>28</sup>The Union seeks a ruling from the Arbitrator that the Employer's blanket policy violates the Positive  
28 Discipline Agreement.

1 core of the Employer's backing policy is to avoid backing wherever possible, and it  
2 was Williams, not Grievant, who was responsible for the decision to move the  
3 vehicles by backing. The purpose of the severe discipline imposed for any backing  
4 incident is to create a disincentive for employees to back up when there is any  
5 possibility of driving forward. This purpose is inapplicable however, when the  
6 employee concerned was not responsible for the decision to back up. Williams also  
7 failed to satisfy his obligation to tailboard prior to moving the vehicles. The primary  
8 cause of the accident was Williams's hasty decision to have the vehicles back up.  
9 Had he not made the decision, no accident would have occurred. Grievant's failure to  
10 observe some of the backing policies is of no moment. He did not do so because of  
11 Williams's order that all the trucks be backed up immediately. It is therefore  
12 inappropriate to discipline Grievant for the incident.

13 Discipline is also unwarranted because Williams signaled to Grievant to back  
14 up his vehicle immediately prior to the accident. The issue of whether Williams did so  
15 essentially comes down to his word against Grievant's. Neither Amin nor E [REDACTED]  
16 were available to testify, and their hearsay statements do not tip the scales one way  
17 or another. Grievant's testimony was far more credible than Williams's for a variety of  
18 reasons. Grievant almost certainly had reason to think he saw Williams signaling to  
19 him that he could back up. If he had not thought so, he would not have been backing  
20 up blindly without any guidance, and without knowing where he was going or how  
21 long he would be backing. It is illogical to think that Grievant would have done so. In  
22 addition, Grievant's spontaneous utterance (corroborated by C [REDACTED]—asking why  
23 Williams backed him into the cage—suggests that he is being truthful, as no one  
24 would be quick-witted enough to make such a statement in the heat of the moment if  
25 he did not believe that that is what had happened.

26 By contrast, there are many reasons to doubt Williams's credibility. He  
27 undoubtedly knew that he had made a serious error when he decided to order the  
28 employees to back their vehicles, in view of the Employer's strict backing policies. As

1 the discipline letter suggests, he was already on thin ice with management at the  
2 time. The last thing he needed was responsibility for a backing incident. Williams's  
3 testimony was also evasive, and he claimed not to be able to recall key details. In  
4 view of the foregoing, Grievant should be given the benefit of the doubt. The  
5 Employer has not met its burden of proving that Grievant was fully and solely  
6 responsible for backing his truck into the water cage.

7 Finally, the Written Reminder should have, at the very least, been mitigated.  
8 Precedential Review and Pre-Review Committee decisions confirm that there is a  
9 practice of mitigating Written Reminders for backing incidents in certain  
10 circumstances. Indeed, in PRC Decision No. 18280 (the Starbucks case), a Written  
11 Reminder was mitigated to an Oral Reminder based on the fact that the accident at  
12 issue was minor. This was despite the fact that the employee in question could have  
13 avoided backing altogether, was determined to have credibility problems, and was  
14 only a five-year employee (whereas Grievant is a 20-year employee.) This  
15 precedential decision clearly shows that minor backing accidents warrant no more  
16 than an Oral Reminder. Similarly, Grievant was subject to disparate treatment as  
17 C [REDACTED] who served as Grievant's spotter, did not receive any discipline based on the  
18 incident.

### 19 **OPINION**

20 The Employer bears the burden to demonstrate that Grievant was issued the  
21 Written Reminder for just cause. The just cause standard, generally, requires  
22 persuasive proof that the rules and/or policies alleged were violated and, if so, that,  
23 under the totality of circumstances, the penalty imposed is not excessive; i.e., outside  
24 the zone of reasonableness for the proven misconduct. Generally, the just cause  
25 standard favors progressive discipline which affords an employee the opportunity to  
26 modify behavior before more serious discipline up to and including discharge is  
27 imposed. Progressive discipline, however, does not always have to follow the oral  
28 warning, written warning, suspension and discharge path in lockstep order. The facts

1 and circumstances in each case determine the appropriate level of discipline.

2 Moreover, progressive discipline concepts do not apply in the face of proven gross  
3 misconduct which warrants summary dismissal in the first instance.

4 Without question, for what appeared to be a fairly minor, garden variety "back-  
5 up" accident, the parties left no stone unturned to demonstrate the merits of their  
6 respective positions. Notwithstanding the parties' vigorous arguments, the Arbitrator,  
7 on this record, finds no need to unduly lengthen the analysis.

8 It is often said that foresight is better than hindsight by a darn sight. Using  
9 20X20 arbitral hindsight, this was clearly a situation wherein a quick tailboard  
10 meeting should have been conducted. The job site activities changed.<sup>29</sup> Assuming for  
11 argument's sake only that Williams had the discretion to determine whether a fast  
12 tailboard briefing should have been held since the trucks needed to be moved  
13 quickly, on this record, the failure to do so was an abuse of any such discretion. After  
14 all, he knew – or should have known – the Smith System's "DON'T BACK"  
15 admonition.

16 More specifically, and outcome determinative, the resolution of the Williams-  
17 Grievant credibility issue resolves most of the case. Put simply, Grievant says  
18 Williams was signaling (guiding) him while backing up; Williams says he did not  
19 assist Grievant in backing up.

20 Naturally, as the Employer notes, Grievant had a clear motive to fabricate the  
21 Williams backing him into the water cage excuse. Yet, Williams had a similar motive  
22 to bury the facts. Both of them had every reason to expect discipline if they were  
23 determined to be at fault in a backing incident. It is, therefore, necessary to examine  
24 the evidence supporting both Grievant's and Williams' accounts.

25 Clearly, neither of the hearsay statements introduced by the parties – from  
26

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27 <sup>29</sup>See footnote 10, *supra*, quoting from UX 12. For example, just telling the crew "be sure to spot your  
28 backer if you are backing up" may well have taken 1-2 minutes and prevented the accident.

Amin and E[REDACTED] – are particularly reliable or probative.<sup>30</sup>

1 Amin's statement has limited evidentiary value. He indicated in the signed  
2 statement that he "did not see [Williams] directing or waving at the driver." This  
3 statement leaves open the possibility that Amin was simply not looking at Williams at  
4 the time (there is testimony indicating that both Williams and Amin were facing  
5 Grievant's vehicle), and Amin was not available to clarify his statement at the instant  
6 hearing. Estenson's statement is simply unreliable. According to his statement,  
7 Williams was standing at the back of Grievant's vehicle, whereas every other witness  
8 testified that Williams was in front of Grievant's truck. Redundantly, neither hearsay  
9 statement is helpful in resolving the issue.

10 On the other hand, Criner's testimony supports Grievant's account in a critical  
11 respect. C[REDACTED] corroborated Grievant's testimony that, immediately after the contact  
12 with the backflow preventer, he exited his vehicle and spontaneously said to  
13 Williams: "Why did you back me into that?" If Grievant had not seen Williams waving  
14 him back, it is highly implausible that he would have been able to make up a false  
15 story blaming Williams out of whole cloth almost simultaneously with the contact  
16 (accident). Grievant's spontaneous remark is, therefore, compelling evidence that he  
17 believed that Williams was waving him back. In addition, both Grievant and C[REDACTED]  
18 testified that they did not discuss the backing maneuver prior to Grievant entering his  
19 vehicle, and that they did not make eye contact after Grievant entered his vehicle.  
20 Here again, it is simply implausible that Grievant would have started to back up his  
21 truck without believing that he had anyone to assist him. A more likely explanation is  
22 that he thought C[REDACTED] would serve as his backer, but then saw Williams motioning  
23 him once he got into his truck. Accordingly, on this record, it is concluded that  
24 preponderant evidence demonstrates Williams was waving Grievant back at the time  
25 of the contact with the backflow preventer.

26 Despite these findings, Grievant cannot be completely excused for his part in

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28 <sup>30</sup>While hearsay is admissible in arbitration, fundamental conclusions are not based on hearsay. However, from time to time, hearsay may buttress other direct evidence.

1 the accident. As the Employer points out, he clearly lost sight of C [REDACTED] and knew, or  
2 should have known C [REDACTED] was his backer; i.e., drivers are trained to look for the  
3 backer behind them. In addition, the Code of Safe Practices, Section 309(a) requires  
4 the driver, before starting to move the vehicle forward or backward, to determine that  
5 "no person or object is in the path of the vehicle ..." Grievant did not comply with this  
6 safety practice. Put simply, on this record, while Grievant was at fault, the conduct of  
7 Williams mitigates the penalty in this minor "back-up" accident.

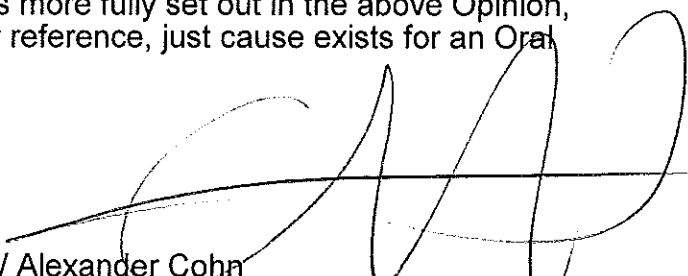
8 Although each accident case turns on its own discrete facts and  
9 circumstances, the following Award will put Grievant on notice that he must be more  
10 careful when operating an Employer vehicle, especially if – contrary to the "DON'T  
11 BACK" admonition – he is required to back up under the particular circumstances.

12 The grievance is sustained in part and denied in part.<sup>31</sup>

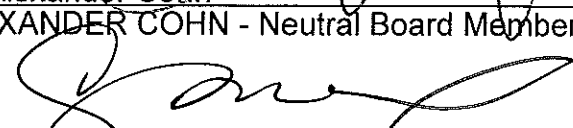
### 13 AWARD

14 Grievant, F [REDACTED] V [REDACTED], was not given a Written Warning for just  
15 cause. For the reasons more fully set out in the above Opinion,  
16 incorporated herein by reference, just cause exists for an Oral  
17 Reminder.


18 DATED: December 3, 2011

19   
20 /S/ Alexander Cohn  
21 ALEXANDER COHN - Neutral Board Member

22 (concur/dissents)

23   
24 CAROL POUND - Employer Board Member

25 (concur/dissents)

26   
27 DOUG VEADER - Employer Board Member

28 (concur/dissents)

29  12/7/11  
30 DARRYL NORRIS - Union Board Member

31 (concur/dissents)

32  12/6/2011  
33 F. E. DWYER - Union Board Member

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<sup>31</sup>So there is no misunderstanding, the Arbitrator does not address the Union's argument concerning the Employer's so-called default policy of imposing a Written Reminder for any backing incident in any manner in this decision. The issue is left to the parties to negotiate and/or litigate at another time.