DECISION AND AWARD

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

And

PACIFIC GAS AND ELECTRIC COMPANY

Re: K[redacted] S[redacted] Discharge

Arb. Case No. 305

APPEARANCES

PACIFIC GAS AND ELECTRIC
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BOARD OF ARBITRATION

Fred D'Orazio, Neutral Chairperson
Ed Dwyer, Union Representative
Hunter Stern, Union Representative
Doug Veader, Company Representative
Carol Quinney, Company Representative

INTRODUCTION

This arbitration arises from a Collective Bargaining Agreement ("CBA" or "Agreement") between the International Brotherhood of Electrical Workers, Local 1245 ("Union" or "IBEW") and Pacific Gas and Electric Company ("Company" or "PG&E") and involves the discipline of a mechanic for discarding a personal automobile transmission in a PG&E recycling bin and later termination for threatening a co-worker who reported the incident with violence. The undersigned arbitrator was selected by the parties as the Chairperson of a Board of Arbitration ("Board") to conduct a hearing and render a decision. IBEW Assistant Business Manager Ed Dwyer and IBEW Business Representative Hunter Stern served as Union representatives on the Board. PG&E Director of Labor Agreements Doug Veader and PG&E Senior Labor Relations Specialist Carol Quinney served as Company representatives on the Board.

A hearing was conducted in Vacaville, California, on August 17, 2011. At the hearing, the parties stipulated that the matter is properly before me and that I have jurisdiction to hear and decide the dispute. The parties were afforded the opportunity to examine and cross-examine witnesses, and to introduce relevant exhibits. A hearing transcript was prepared. With the receipt of the final post-hearing brief on or about October 25, 2011, the matter was deemed submitted.

ISSUE

Was K[redacted] S[redacted] terminated for just cause? If not, what is the appropriate remedy?

STATEMENT OF FACTS

At the time of his termination in July 2010, K[redacted] S[redacted] was employed as an equipment mechanic in the Company's Eureka Service Center and had worked 26 years for PG&E. As a mechanic, he performed preventative maintenance on PG&E vehicles. His supervisor was Jim Griffis, who worked out of the Redding office and went to Eureka every four or five weeks.

Company shop materials and other items are discarded in dumpsters of various sizes at the Eureka Center. Items are taken from the dumpsters and recycled by ALCO, a private salvage service. PG&E receives a credit from ALCO for the salvage value of the material, which is applied against any cost that ALCO incurs in recycling.

On the morning of June 14, 2010, Griffis was informed that two non-PG&E auto transmissions were discovered in a dumpster at the Eureka Center and that the dumpster was leaking oil. A concern of Griffis and Aquilla Doudna, the Company's environmental specialist in Eureka, was that oil had leaked from the dumpster and was entering a storm drain which led to a public waterway. The storm drain was about 40 feet from the dumpster. PG&E is required by law to report such incidents to the Coast Guard and the Humboldt County Health Department, which it did in a timely fashion. An oil spill or leak could result in a citation of fine to the Company.

One of the transmissions was a Dodge and the other was a Toyota. S[redacted] owned the Dodge transmission. The Company never determined who discarded the Toyota

transmission.

The Dodge transmission was initially put by S[redacted] in a small hopper or bin. The contents of the hopper were later transferred to a larger dumpster, where it was eventually discovered. When the transmission was transferred to the larger container, it landed upside down. Later, yet another hopper containing a large amount of water was dumped into the larger dumpster (which contained the Dodge transmission), flushing oil out of that dumpster.

Griffis, who did not visit the Eureka Center during the relevant period and thus had no first-hand knowledge of the incident, testified that he believed the Dodge transmission was the source of an oil sheen on the blacktop leading to a storm drain in part because the Dodge transmission was found upside down in the dumpster. In his view, if the Dodge transmission had been properly drained pursuant to Company policy, there would have been no oil spill.

In contrast, S[redacted] testified that he drained the Dodge transmission for about eight hours before he put it in the dumpster, and, in any event, the fact that the Dodge transmission was upside down would have prevented any oil from leaking. According to S[redacted], the transmission would not have leaked oil if placed in the dumpster upside down because there is no outlet from which the oil could have escaped given this position. He said the oil would "drain into the housing. Everything else is closed on each end." (RT 100) A subsequent investigation by the Company (discussed below) confirmed that the

amount of oil observed at the site was consistent with S[redacted]'s testimony. S[redacted] testified further that the Toyota transmission also used oil and that he observed oil on that transmission after it was removed from the dumpster.

When the transmissions were removed from the dumpster, they were placed on a pallet. When S[redacted] arrived at work and noticed the Dodge transmission on the pallet, he immediately reported to the Company that it was his and he had placed it in the hopper.

It was not uncommon for employees to discard personal items in the dumpster for recycling. Doudna, who investigated the incident, stated in his report that "I know using PG&E resources for disposal of items from outside is a huge problem throughout PG&E and needs to be stopped. I am not trying to soften our policy at all on this, but I want to make it clear that there is another issue here in that we need better guidance regarding (PG&E's) drained equipment." (Jt. Ex. 1, Ex. 3) Griffis testified that "in our facilities we see employees, retirees dispose of household items, and [Doudna] was looking for guidance going forward of putting something really concrete about making sure the employees understand the liability when they dispose of hazardous materials in our company facilities." (RT 46) In addition, S[redacted] testified that he has discarded items from the shop with oil on them in the hoppers, and that they were eventually transferred to a larger dumpster.

Griffis's incident report stated as part of the "background" to the incident that some water had been dumped into the dumpster containing the transmissions and

> . . . the water was enough to flush oil residue from the transmission and

> create a flow of water with oil sheen to the storm drain. A faint oil sheen was observed in the storm drain. A spill response vendor was procured to remove the oil sheen from the bin, clean the pavement and pull water (about 30 gallons) from the storm drain. All of the oil was recovered. The spill clean-up debris and contaminated water was placed into 55 gallon drums and was managed as hazardous waste at the Eureka Service Center." (Jt. Ex. 1, Ex. 3)

The report submitted by Doudna states:

> K[redacted] S[redacted] stated that he did drain the oil from the transmission. His statement was consistent with the amount of oil that was observed at the incident site. I only saw an oil sheen. Unfortunately, I was not sure that the sheen made it to the storm drain. The Coast Guard did come out, and they did not think it was a concern for them. However, the county rep visited the site as well and was somewhat concerned about the potential sheen in the storm drain. I had the spill response vendor pump out the water from the drain; however, I personally did not see any oil sheen within the recovered water. (Jt. Ex. 1, Ex. 3)

No citations were issued as a result of the incident.

In discussions on June 15 and 21, Griffis told S[redacted] he may lose his job over the incident. These conversations created considerable stress for S[redacted]. He again admitted to Griffis that he discarded the Dodge transmission in the recycling bin, and he offered to pay for any costs associated with the clean-up in an attempt to save his job.

In a brief June 24 conversation with co-worker C[redacted] B[redacted], S[redacted] said that if he lost his job over the incident he would kill W[redacted] P[redacted] (an employee in the Eureka Service Center who apparently had reported the incident), and was prepared to spend the rest of his life in prison for doing so. A subsequent investigation confirmed that S[redacted] said specifically: "If I get fired over this, I will kill W[redacted] P[redacted]. I will spend the rest

of my life in prison and I am not afraid to do this." (Jt. Ex. 1, Ex. 9; RT 104)

Later in the day on June 24, the PG&E security office was notified of S[redacted]'s statement to B[redacted]. Investigating officer Jim Moore informed Griffis that he would conduct an investigation to determine if S[redacted] had violated the Company's zero tolerance policy prohibiting threats of violence to co-workers. For confidentiality reasons, Griffis was not told the specifics of the threat or its target at that time. Moore took no steps to remove S[redacted] from the workplace or limit his interaction with P[redacted], even though their shifts overlapped. In fact, S[redacted] had brief interactions with P[redacted] at work without incident after the alleged threat.

On July 2, Moore interviewed S[redacted]. S[redacted] admitted making the comment, but said he regretted it and did not intend that it be taken literally: "I told him I didn't mean the comment that was made. It was out of frustration, and that I wish I could take it back." (RT 105-107) S[redacted] also told Moore that he had talked with P[redacted] and interacted with him at work without incident after he made the comment to B[redacted]. S[redacted]'s testimony in this regard is corroborated by shop steward W[redacted] H[redacted], who represented S[redacted] at the interview. H[redacted] testified that Moore (who did not testify at hearing) conceded that he too had talked to P[redacted], that P[redacted] believed S[redacted] did not intend his comment as a threat, and that "he [P[redacted]] didn't have a problem with it." (RT 90, 107) At the end of the interview, Moore did not remove S[redacted] from the workplace, nor did he restrict further contact with P[redacted]. If Moore believed S[redacted]

made a credible threat of violence against P[redacted], he had the authority to remove him from the workplace and place him on "crisis suspension."

Meanwhile, the handling of the transmission incident was proceeding on a separate track. On July 6, Griffis and S[redacted] met to discuss whether S[redacted] should be placed on Decision Making Leave ("DML"), the third and final step before termination under the parties' Agreement on Positive Discipline ("APD"), as a result of the incident. On July 8, Griffis confirmed in writing that S[redacted] would be issued a DML for placing the Dodge transmission in the recycling bin. PG&E did not give the transmission back to S[redacted] for recycling but rather recycled it through ALCO and accepted the salvage credit.

The Company cited the following factors in deciding to issue S[redacted] a DML. The clean-up cost the Company $2,000, which PG&E sought in restitution; the oil spill put the Company at risk of being cited by the Humboldt County Health Department and the Coast Guard; and discarding the transmission in a Company dumpster was an improper use of Company assets for personal gain.

On July 9, Griffis was given a copy of Moore's report. This was the first time Griffis was made aware of the specific statement made by S[redacted]. The report concluded that S[redacted] made the statement referred to above, and that although S[redacted] "denies that he meant it, his comment was disruptive, inappropriate, and created a negative work environment," in violation of the Employee Code of Conduct (Jt. Ex. 1, Ex. 9) Griffis concluded that S[redacted] violated the Company's zero tolerance policy prohibiting threats of

violence in the workplace.

On July 12, the Company placed S[redacted] on crisis suspension. Because of the conditional nature of S[redacted]'s comment - that he would kill P[redacted] *if* he was terminated - PG&E retained Dr. Stephen Raffles, a psychiatrist who is an expert in assessing workplace violence threats, to evaluate S[redacted] for the purpose of determining if S[redacted]'s comment was a credible threat to kill P[redacted] at the time of his termination. Dr. Raffles interviewed S[redacted] for two hours and administered psychological tests for another two hours. On July 26, Dr. Raffles concluded: "The employee can safely perform [his] job without posing a threat of violence to [himself] or others. The employee is FIT for duty." (Jt. Ex. 1, Ex. 12, emphasis in original)

On July 30, PG&E terminated S[redacted] for violating its zero tolerance policy, which had been adopted in April 2010 without negotiating with the Union. The Union filed a grievance challenging both the DML and the termination. The grievance was not resolved and the Union moved it to arbitration.

DISCUSSION

PG&E has the burden of proving that S[redacted] was issued a DML and terminated for just cause. It must establish that he committed the allegedly wrongful acts, and that termination is the "just" discipline. (*How Arbitration Works*, Elkouri and Elkouri, 6th ed., 2003, pp. 958-959) Although arbitrators differ with respect to the quantum of proof required in a discharge case, in my view it is appropriate to apply the "clear and

convincing" standard where, as here, the Company's allegations of misconduct involve stigmatizing behavior such as using Company equipment for personal gain, placing the Company at risk of a citation for an environmental violation, and threatening to kill a fellow employee who reported it. (*Id.*, pp. 949-950)

The grievance in this matter alleges that S[redacted] was improperly given a DML for discarding his Dodge transmission in a PG&E dumpster and terminated soon thereafter for threatening a fellow employee with violence because he reported the incident to the Company. S[redacted] was terminated based on the threat. Because the issue is whether S[redacted] was terminated for just cause, the threat will be considered first.

The Threat

PG&E points out that workplace violence is an increasing problem and employers are obligated to protect their employees by preventing it. In this case, S[redacted] was at all relevant times aware of the Company's zero tolerance policy, and he admitted he made the statement in question. Thus, there is no need under a zero tolerance standard to consider whether the penalty is proportionate to the offense, PG&E contends. Even absent the policy, the Company continues, the statement was the kind of gross misconduct that justifies termination. According to PG&E, there is no evidence that its policy has been applied in a disparate fashion, and the termination should be upheld.

The Union recognizes that the Company has a legitimate concern about workplace violence and threats of violence, and there is no dispute that S[redacted] made the comment

upon which the Company based his termination. However, the Union contends the Company's unilaterally adopted zero tolerance policy does not supersede the just cause standard in the CBA. In the Union's view, S[redacted]'s termination does not comport with principles of just cause, because the evidence does not establish that S[redacted] threatened P[redacted]e, the zero tolerance policy ignores the obligation under the just cause standard and the APD to consider mitigating circumstances, and the zero tolerance policy has not been uniformly applied in the field.

The zero tolerance policy provides:

> PG&E is committed to maintaining a safe and secure workplace and working environment. Acts or threats of physical violence, intimidation, harassment or coercion, stalking, sabotage, and similar activities are not tolerated. Employees who engage in acts or threats of violence will be terminated. (Jt. Ex. 1, Ex. 11)

There is no dispute that S[redacted] was at all relevant times aware of the policy.

However, contrary to the position advanced by the Company, the zero tolerance policy is not controlling here because it was never negotiated with the Union, and it runs counter to the principle of just cause and the corrective purpose of discipline underlying the APD, provisions collectively bargained with the Union as the standard under which employees are to be disciplined and terminated. (See, e.g., *Interstate Brands Companies* 120 LA 356, 358-359 [Zero tolerance policies do not mean "absolute inflexibility" because they run "counter to the well established doctrine of 'just cause' imbedded in labor agreements and applied by labor arbitrators"])

Specifically, the parties have agreed that the Company may "discipline or discharge employees for *just cause* . . . provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement." (Jt. Ex. 2, sec. 7.1; italics supplied) Further, the APD generally recognizes that in most instances discipline is to be corrective and progressive, in consideration of mitigating factors. The APD includes no reference to the zero tolerance policy. (Jt. Ex. 3) A unilaterally adopted zero tolerance policy simply may not trump these bargained for provisions under the guise of management's right to adopt work rules or direct, control and supervise employees. Therefore, the question is whether S[redacted]'s termination for threatening a fellow employee was for just cause.

There is no question that an employer has an obligation to provide for the safety of its employees. It is widely accepted that violent acts by employees or threats of violence in the workplace undermine an employer's duty to satisfy its obligation, and discipline up to and including termination may be justified. However, it is also recognized that not every emotional outburst or intemperate comment made in the heat of the moment is a credible threat that supplies just cause for termination. Whether a specific statement is truly a threat depends on the context in which the statement was made, the way the words are used, and the overall circumstances existing at the time the words are used. The more specific and credible the threat, the more serious the misconduct. (*Discipline and*

Discharge in Arbitration, 2nd ed., 2008, Norman Brand editor, BNA Books, p. 350) Accordingly, not all threats should result in discharge. (See, e.g., *Albion Manor Care Center* 116 LA 1386, 1393 [A "critical element" in cases where threats have supported discharge is that the grievant "possessed and/or displayed a clear propensity to carry out the threats, *an intention borne out by something more than momentary frustration of the day, and with some overt physical act manifesting intent.*" original italics])

Indeed, the Company recognizes this approach to evaluating workplace statements to determine if they constitute legitimate threats for which an employee may be disciplined. PG&E senior corporate security representative Edwin Kenney testified about the Company's protocol when investigating an alleged threat. He said a threat assessment team is assembled for the purpose of "judging the *totality of the case* with the evidence they have at the time and make a determination of whether or not the threat is credible and whether or not the person should be immediately removed from the job." (RT 79; italics added) Kenney said each case is assessed on its "individual merit" and "surrounding factors," such as the employee's age, family connections or lack thereof, use of alcohol or drugs, presence of weapons or discussion of weapons, history of violence, and history of criminality. (*Id.*) In this case, PG&E did not follow this approach, nor did it consider mitigating factors as required under the just cause standard and the parties' negotiated scheme of discipline. The Company chose instead to terminate S[redacted] on the basis of its zero tolerance policy. For the following reasons, the Company has not

established that S[redacted]'s termination was for just cause.

Admittedly, S[redacted] made the threat at issue here, and there may be circumstances in which it might be construed as the kind of credible threat that constitutes just cause for termination. However, those circumstances are not present here. Given the totality of the circumstances outlined below, S[redacted]'s isolated comment to B[redacted] cannot reasonably be considered the kind of credible threat that will support a discharge.

It is important to note at the outset that after S[redacted] was placed on crisis leave PG&E hired Dr. Raffles to evaluate if he issued a credible threat, and the Company had the benefit of his opinion before the actual termination date. If any doubt existed as to whether S[redacted] posed a threat to P[redacted], Dr. Raffles' expert opinion dispelled that notion. After two hours of interviews and two hours of testing, Raffles concluded that S[redacted]'s comment regarding P[redacted] was not a credible threat and that he was fit for duty.

In addition, the Company's delay in taking any action after it learned of the threat undermines its claim that S[redacted] made a credible threat to kill P[redacted] if he was terminated. Moore learned on June 24 that S[redacted] had issued a threat, but did not interview him until July 2. S[redacted] admitted to Moore on that date that he made the comment, but Moore's report was not given to Griffis until July 9. S[redacted] was not placed on crisis suspension until July 12, ten days after the interview where S[redacted] admitted making the statement. If Moore had any indication whatsoever that S[redacted] was a threat to P[redacted], it seems likely that he would have interviewed S[redacted] immediately (on June 24 or

shortly thereafter) and provided Griffis with his report sooner. Nor did the Company instruct S[redacted] to have no contact with P[redacted], despite the fact that their shifts overlapped. The time between Moore learning of the alleged threat and the placement of S[redacted] on crisis leave is especially significant in view of Kenney's testimony that "now, we are much quicker about removing an employee if we believe that employee has made a threat on another employee's life." (RT 81-82)

I recognize that S[redacted]'s was a so-called conditional threat. According to the Company, when a threat is conditioned on the occurrence of a subsequent act, immediate removal of an employee from the workplace is not standard protocol. Once the decision to terminate S[redacted] for violating the zero tolerance policy was made, he was removed from the workplace. PG&E argues that not suspending S[redacted] immediately upon learning of the threat was consistent with protocol because the threat was conditioned on his being terminated and he was not informed of the termination until July 30. Therefore, PG&E contends, the delay in placing S[redacted] on crisis leave should be given little weight here.

I find this argument unpersuasive. The "crisis suspension" provision in the APD states that immediate suspension "*should* be used when an employee's inappropriate behavior is so serious immediate removal from the workplace is necessary because the employee's actions indicate that remaining on or returning to the job *may* be detrimental to the employee, fellow employee, employee's customers, or the Company." (Jt. Ex. 3, section V; italics added) This provision suggests immediate action be taken in the face of

serious misconduct that carries the potential of harm to a fellow employee. As noted above, however, Moore learned of the threat on or about June 24 and S[redacted] admitted making the statement in question to Moore at least as early as their July 2 interview, yet Moore took no immediate action. It seems likely that if Moore truly believed S[redacted]'s statement was a legitimate or serious threat he would have acted in accord with the crisis suspension provision, quickly reported to Griffis and taken some action, even though the threat was conditional. Not only did the Company take no action, it permitted S[redacted] and P[redacted]e to interact at work. Given the Company's general concern about violence in the workplace and its position here that S[redacted] issued a credible threat to kill P[redacted]e, the decision to not place S[redacted] on crisis suspension immediately or at least prohibit him from interacting with P[redacted]e seems like a risky proposition if the Company truly believed S[redacted]'s threat was credible.

Several other factors are relevant in determining whether the comment was a credible threat that constitutes just cause for termination. S[redacted] had worked at PG&E for some 26 years, and he had been told by Griffis that he may lose his job as a result of the transmission incident (which, as discussed below, was not the most egregious offense). While the threat cannot be condoned, it's clear that S[redacted]'s state of mind temporarily impacted his judgment. He credibly testified that the prospect of losing his job because of the transmission incident upset him, he regretted making the statement, he wished he could take it back, and he immediately told Moore as much upon being confronted during

the investigation. The statement was a one-time occurrence, there is no evidence of any lingering anger or resentment toward P[redacted], S[redacted] had no history of violence or threatening conduct, he owned no guns, and there is no evidence of alcohol or drug abuse. And it bears repeating that P[redacted] did not feel threatened, and Dr. Raffles pronounced S[redacted] fit for duty.

PG&E has cited several arbitration decisions in support of its position that the threat at issue here constitutes just cause for termination. It is unnecessary to address each of these cases. However, one stands out because it illustrates the importance of considering alleged threats in context, and PG&E describes the case as "strikingly similar" to the instant case. In *Hamilton Caster and Mfg. Co.*, 114 LA 1341, an arbitrator upheld the discharge of an employee who said words to the effect that if he was discharged "there would be three dead people," "I have a plan," and "I'll go to prison and [my wife] will be taken care of the rest of her life." The arbitrator rejected the claim that the grievant was merely "blowing off steam" or "just kidding," especially given the statement that the grievant was prepared to go to prison.

However, despite any similarity in the actual statements of that case and the instant case, the context of the statement in *Hamilton Caster* was strikingly different from the context in which the threat was made in this case. For example, during an interview in that case the grievant told the employer that he did not mean his comments as threats and he wasn't serious, but if he got mad enough he could shoot someone. The grievant had

brought a used (shot through in the head and chest) silhouette target to work a few weeks earlier. After four hours of testing, a psychologist found that there was ongoing "intense conflict" and "stress" in the workplace, and the grievant had the means (numerous weapons) to carry out the threat. And the psychologist could give no guarantee that there would be no "significant risk" to the safety of others if the grievant was returned to work. Suffice to say, the context of the threat in *Hamilton Caster* does not resemble the context in which S[redacted] made the threat at issue here.

I am not persuaded that S[redacted] issued a credible threat to harm P[redacted], and, therefore, just cause does not exist to terminate him. This is not to say that S[redacted] should receive no discipline. His comment to B[redacted] simply cannot be overlooked. It was irresponsible and improper, especially in today's work setting where sensitivity to threats is elevated. As Moore correctly determined in his report, S[redacted] admitted making the statement and the statement was "disruptive, inappropriate, and created a negative work environment," in violation of the Employee Code of Conduct. (Jt. Ex. 1, Ex. 9)

According to the issue statement, if just cause does not exist to terminate S[redacted], the next question is what shall be the appropriate penalty. In fashioning a remedy under the progressive discipline scheme set out in the APD, it is necessary to consider the DML, the second part of the instant grievance.

The DML

PG&E asserted throughout the grievance procedure and at hearing that discarding

a personal transmission in a Company dumpster constitutes an improper use of Company property for personal gain. It required the Company to treat the oil leak as an environmental hazard that risked citation by the Humboldt County Health Department and the Coast Guard. And it cost the Company $2,000 to have the oil removed. Therefore, the DML was for just cause and should be upheld.

The Union takes the position that the DML was not issued for just cause. Although S[redacted] admitted that he discarded the transmission, the Union contends PG&E failed to prove any oil sheen that led into the storm drain came from the Dodge transmission. In fact, the Union contends, there is no competent evidence that there was an oil sheen in the storm drain at all. According to the Union, the Company failed to establish that it cost PG&E $2,000 to clean up any oil, that any environmental laws were violated by S[redacted], or that S[redacted] used Company property for personal gain. Therefore, no just cause existed to issue S[redacted] the DML.

It should be noted at the outset that Griffis was the only PG&E witness who testified about the transmission issue, but he had no personal knowledge of the incident. He did not go to Eureka during the investigation, and thus he did not see the transmissions or an oil sheen on the blacktop or in the storm drain. In determining that just cause existed for the DML, Griffis relied on reports from Doudna and others in concluding that S[redacted] discarded his Dodge transmission in a Company dumpster, and that oil from the Dodge transmission leaked into the storm drain, created an environmental

violation that risked a citation from Humboldt County and the Coast Guard, and required a clean-up.

Although Griffis's testimony is largely hearsay, there was enough concern about the presence of oil in the storm drain to pump out approximately 30 gallons of water. Absent some evidence of oil in the storm drain, there would have been no reason to pump water out of the drain. But even if there was oil on the blacktop or in the storm drain, the amount was described as "faint." In fact, it was so minimal that Doudna could not see it after the water was pumped out, and the Company received no citation.

However, it is not clear in this record that the source of any oil was S[redacted]'s Dodge transmission. S[redacted] credibly testified that he drained the transmission for eight hours before discarding it in the hopper, and, in any event, oil could not have leaked from the upside down transmission because it would have dripped instead into the housing, which was sealed. I credit S[redacted]'s testimony because it is consistent with Doudna's report, which stated that S[redacted]'s claim that he drained the oil from the transmission was consistent with the amount of oil observed at the site.

In addition, it is plausible that oil residue in the dumpster came from another source and was flushed out of the dumpster when water and materials from another dumpster were emptied into it. The prohibition against discarding personal items in Company dumpsters was not strictly enforced, and there was a problem with employees improperly discarding items which contained oil residue in the dumpster, such as the

Toyota transmission. Thus, the Company has not met its burden of proof. While it may be possible, as Griffis testified, that some oil from the upside down Dodge transmission leaked out of the dumpster, it is equally possible that it came from another source. It has not been shown by clear and convincing evidence that any of the minimal amount of oil at the site came from the Dodge transmission rather than another source.

Nevertheless, it cannot be ignored that S[redacted] improperly discarded his Dodge transmission in a Company dumpster, thereby using a Company asset to dispose of a large item for his personal benefit and at least theoretically creating a risk of citation by Humboldt County or the Coast Guard. It is appropriate that he receive some discipline for his conduct. However, given the evidence and circumstances outlined above, a DML is excessive. The APD guidelines provide:

> If an employee has a conduct, attendance or work performance problem, disciplinary action may be necessary to correct the situation. Positive Discipline is designed to provide the opportunity to correct deficient performance and build commitment (not merely compliance) to expected performance in a manner that is fair and equitable to all employees. Each step is a reminder of expected performance, stressing decision making and individual responsibility, not punishment. (Jt. Ex. 3, section I)

S[redacted]'s improper conduct can be corrected by affording him the opportunity to correct his behavior as it applies to using Company property for personal gain. Issuing S[redacted] a DML under the circumstances presented here would be more punitive than corrective.

Although S[redacted] admitted he discarded the transmission in the Company's dumpster, it bears repeating that the policy in question was not consistently enforced; the

amount of oil, if any, on the blacktop or in the storm drain was minimal; the evidence does not establish that any of the oil that was observed came from S[redacted]'s transmission; and S[redacted] was a 26-year employee with no other active discipline at the time he received the DML.

CONCLUSION

Based on the foregoing, it is concluded that S[redacted] is responsible for two acts of misconduct. However, given the circumstances and the parties' Agreement on Positive Discipline, the DML and termination were excessive. S[redacted]'s conduct in discarding the transmission is more appropriately corrected by a written reminder under the terms of the APD. S[redacted]'s statement to B[redacted], although not a credible threat of violence, was inappropriate and disruptive. Given the totality of the circumstances, his conduct does not warrant termination and may be corrected by a DML under the terms of the APD.[1]

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[1] The DML memo states that S[redacted]'s conduct cost the Company $2,000 for the clean up. The invoice shows that the actual cost was $1452.33. (Jt. Ex. 1, Ex. 6) PG&E could have returned the transmission to S[redacted] for disposal, but it did not. It accepted the transmission for recycling along with any salvage credit from ALCO. In any event, as discussed above, it is not clear that any of the oil came from S[redacted]'s transmission. Given these circumstances, S[redacted] will not be ordered to make restitution.

AWARD

I have carefully considered the parties' post-hearing briefs and the entire record herein. Based on the foregoing findings and conclusions, I hereby issue the following Award.

1. PG&E did not have just cause to issue S[redacted] a DML for discarding his transmission in a Company dumpster. The DML was excessive under the circumstances. It shall be withdrawn and S[redacted] shall receive a written reminder under the terms of the Agreement on Positive Discipline.

2. PG&E did not have just cause to terminate S[redacted]. Termination was excessive under the circumstances. S[redacted] shall be reinstated and made whole for his losses. The termination shall be withdrawn and S[redacted] shall receive a DML according to the Agreement on Positive Discipline.

Fred D'Orazio, Neutral Chairperson
Date: 1-6-12

Ed Dwyer, IBEW Local 1245 Representative (Concur/~~Dissent~~)
Date: 12/5/2011

Hunter Stern, IBEW Local 1245 Representative (Concur/Dissent)
Date: 12/7/2011

Doug Veader, PG&E Representative (~~Concur~~/Dissent)
Date: 12/13/11

Carol Quinney, PG&E Representative (Concur/Dissent)
Date: 12-15-11