Workforce Management

The Status of Contracting out Work after:

- **Arbitration 128 and 142**
- **RC 1637, and**
- **Letter of Agreement 88-104**

DBU and Corporate Industrial Relations
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* To be included as Title 207 of the Industrial Relations Manual

Title 207: Contracting

Arbitration 128 and 142 , 183
Letter of Agreement 88-104, etc.

Background

The Company's right to subcontract has recently been contested on numerous occasions by the IBEW. The two interests which collide when subcontracting issues are contested are the Company's legitimate interest in efficient operation and the union's legitimate interest in protecting the job security of its members and the stability of the bargaining unit. Two major restrictions on the Company's ability to subcontract work developed during the mid- to late 1980s. The first was **Arbitration 128** and **Arbitration 142** and **RC 1637,** the first Review Committee decision which applied these arbitration cases to several other challenged contracting situations. The second is **Letter of Agreement 88-104** (LA 88-104). We will discuss each in turn.

The following discussion will incorporate decisions from both the clerical bargaining unit and the physical bargaining unit. It will also incorporate decisions from the 300 series of the Agreement which normally would only apply to general construction employees. This crossover is necessary because the principles from these decisions apply across bargaining units and across business units. We need to take a comprehensive view of the development of the law on contracting out to fully appreciate and understand the nature of the restrictions on the Company in this area. However, before reading the following generalized discussion, the reader should be forewarned that:

1. The express language restricting the Company's rights to contract out work is different in the clerical agreement than in the physical agreement.

2. The express restriction against contracting for physical employees is only found in Title 207. There is no similar restriction in the 300 section governing general construction employees.

3. The Recognition Clause Title 2 of the physical and clerical agreements is increasingly being used by Arbitrators as an implicit restriction on the Company's right to contract out work notwithstanding the presence or absence of express restrictions on contracting, and

4. **Letter of Agreement 88-104** (discussed at the end) applies only to physical bargaining unit employees covered by the 200 series of the agreement.

The only express restriction on the Company's ability to use contract employees is found in Section 207.2 of the Physical Agreement and Section 24.5 of the Clerical Agreement. Title 207 states:

Express Restriction: Physical Agreement

It is recognized that the Company has the right to have work done by outside contractors. In the exercise of this Company will not make a contract with any other firm or individual for the purpose of dispensing with the services of employees who are engaged in maintenance or operating work.

Section 24.5 of the Clerical Agreement states:

Express Restriction: Clerical Agreement

It is recognized that the Company has the right to have work done by outside agencies. In the exercise of such right Company will not make a contract with any company or individual for the purpose of dispensing with the services of employees who are covered by the clerical bargaining agreement. The following guidelines will be observed:

a.) Where temporary services are required for a limited period of time, such as an emergency situation or for a specific special function,

b.) Where the regular employees at the headquarters are either not available or normal workload prevents them from doing the work during the time of the emergency or special function situation,

c.) The Union Business Representative in the area should, if possible, be informed of Company's intentions before the agency employees commence work.

For several years this language was interpreted to mean that as long as the use of contract or agency employees did not result in the layoff of bargaining unit employees performing maintenance or operating work, the Company was not in violation of the agreement. Today, the Company is no longer able to demonstrate compliance with this language simply by demonstrating no layoffs of bargaining unit employees when contracting out work. Now the Company has the burden of actually filling positions with bargaining unit employees if their use of agency employees or other non bargaining unit staff exceed certain limits.

"Dispensing with Services or Bargaining Unit Employees"

In the 1980's the Company began to get more aggressive in their use of contractors to perform work which had normally been performed by the bargaining unit. In return, the Union became more aggressive in challenging the Company's decisions in contracting work and urged for a more expansive definition of "dispensing with the services of bargaining unit employees" to include more than just a commitment not to lay off or demote employees while contracting. The Union argued that dispensing with the services of employees in the bargaining unit should be defined in terms of work jurisdiction of the bargaining unit classifications. Therefore such services could be dispensed with even in the absence of layoff or demotion. For example, the Union has argued that the continuing use of agency employees in lieu of hiring additional bargaining unit employees has the effect of "dispensing with" bargaining unit employees because of the fact that "but for" the continuous use of the agency employees, more bargaining unit employees would be hired. According to the Union position, the mere assignment of such work to employees outside the unit is sufficient to establish that services of bargaining unit employees have been dispensed with.

Arbitration 128 and 142

Implied Restrictions on Right to Contract

The Union's position was substantially upheld in a series of Arbitration and Review Committee decisions in the mid to late 1980's. Now, in addition to the express restriction of Title 207 of the Physical Agreement and Title 24 of the Clerical Agreement the Company needs to be concerned with the implicit restriction of the Recognition Clause of Title 2. This implicit restriction applies to employees in both bargaining units and in all business units.

The first implicit restrictions on contracting employees were developed in **Arbitration 128 and Arbitration 142.** Those cases introduced the concept of *"co-employer"* relationships. When the Company and another contractor (e.g. temporary employment agency) are found to be co-employers, the individual performing the work is deemed to be an employee of PG&E and thus eligible for all wage rates, benefits and protections of the Labor Agreement. In addition, in the case of an improperly claimed independent contractor situation, the Company may be liable for paying union dues and the appropriate state and federal withholding taxes for the employee.

Arbitration 128: Factual Background

Arbitration 128 tested the limits on the Company's ability to use agency employees for work normally performed by clerical bargaining unit employees. In Arbitration 128, the Union challenged the Company's use of agency employees in three separate grievances. Two of the grievances involved agency employees performing clerical work in support of energy conservation programs in San Jose and Stockton. The third grievance involved using agency employees to process documents in the Design Drafting department.

In the San Jose and Stockton division grievances the agency employees were found to be performing work which was identical to the work performed by members of the clerical bargaining unit. The staffing levels of the agency clerks fluctuated depending upon the demand of energy conservation services from the public. The record showed several agency employees worked for periods in excess of three months and some worked for periods

in excess of six months. The Company failed to notify the Union in advance of its intent to use the agency employees in this manner.

The Company's rationale for using agency employees for this work was:

1. The conservation program was a special program for a limited time which required additional staffing

2. The work was volatile and uncertain, and

3. The funding of the program was separate and limited and the Company needed to be cost effective.

The design drafting grievance involved assigning the processing of engineering documents to agency employees. In this case, several of the agency employees had performed work in excess of one year and more than half of the agency employees were employed for greater than three months. The Union claimed that these assignments were in violation of the Agreement.

The Company defended its use of agency employees by arguing that their use was justified by the language of Section 24.5 and **RC 358, 374, 375** (1963), and **RC 473** (1964) which recognizes the legitimacy of contracting in two situations:

1. Short term replacement or augmentation of the workforce to accommodate temporary increased workload of usual and customary business, and

2. Work of a limited nature outside the usual and customary business of the Company,

The Company argued that its use of contractors in these cases fell within the scope of the second situation.

The Union argued the Company's use of agency employees was contractually impermissible under Section 24.5. Specifically the length of time the employees were used was such that the work was not temporary, for a limited period, or for a special function. The Union asserted the Company's primary motivation for using the agency employees was to achieve an economic advantage as it realized considerable labor savings. (Agency employees cost to the Company was 29% of the cost of employing a bargaining unit employee to perform the same work).

The Union argued that any efficiency concerns the Company may have had about cost effectiveness could have been addressed under the existing provisions of the Agreement which provide for the use of part time, intermittent, or temporary additional employees. In addition, the Company could have brought their concerns to the bargaining table if it still felt overly restricted by these options.

Alleged Joint Employer Relationship

Finally, the Union argued the evidence clearly demonstrated that the Company was a Joint Employer of the agency employees within the meaning of the NLRA since it shared or determined matters governing essential terms and conditions of their employment.

Arbitrator Chvany held that, although no regular employee was laid off, the Company's utilization of agency employees over a period of years violated:

1. Section 24.5 regarding contracting out work;

2. The Company's own policy set forth in the Standard Practice, and

3. **RC 358, 374, 375, and 473** (1963 and 1964) based on the Union recognition clause of the contract.

Those RC cases held that "where certain work is expressly recognized as falling within the jurisdiction of the bargaining unit, an implied limitation on the right of Management to subcontract may be recognized, depending on the specific facts of the case and direct expressions of the parties on the

subject of contracting out." Chvany sets out factual considerations in weighing the right of management to contract out work. These factors will be discussed below.

Recognition Clause as an Implied Limitation

The arbitrator relied on the above language from **RC 358** et. al. which state that the Union recognition clause implies a limitation on the right to use agency personnel for temporary services for limited periods of time, such as emergency situations, or for specific special functions where employed help is not available to perform the required duties. This conclusion is consistent with general arbitral authority which holds that even in the absence of a provision prohibiting subcontracting, the Union recognition clause prohibits such conduct by an employer unless done in good faith.

As to whether the Company acted properly under these standards in its employment of agency personnel, Arbitrator Chvany set out in her opinion the relevant factual considerations to be weighed in deciding whether the Company's actions were proper and consistent with the recognition clauses. These factors are:

Factors to use when Assessing Potential Violations

1. Whether the nature of the contracted work is continuous or intermittent; permanent or temporary; or of an emergency or routine nature.

2. Whether the work is of a type normally performed by Union employees and whether employees who belong to the Union are qualified to do the work in question.

3. Whether the work is performed on the employer's premises.

4. What effect, if any, has the contracted work had on employees in terms of layoff, termination, etc.

5. Whether there has been a harmful effect on the Union.

Similar factors have been applied in numerous arbitral decisions to assess whether the employer acted in good faith in contracting out work where the contract contains no provisions on the issue of subcontracting.

In applying these factors to this case Chvany concluded the facts of these cases established that much of the agency employment involved continuous employment for several months, an emergency situation was not involved, and that the use of agency employees had a harmful impact on the Union.

This case forced Chvany to confront and decide upon the appropriate interpretation of the clause

"For the purpose of dispensing with the services of employees covered by the collective bargaining unit"

Expansive Interpretation of "Dispensing" Clause

In a very expansive decision, Chvany found this phrase to include situations which do not necessarily involve layoffs of current bargaining unit employees. Erosion of the bargaining unit could also be found if available jobs, which would otherwise go to bargaining unit members under the recognition clause are filled by persons outside the unit. Chvany noted that the "bargaining unit" is defined in terms of jurisdiction over certain jobs and certain types of work rather than in terms of a static concept of number of employees working at a given time. When such work normally performed by bargaining unit employees is dispensed with, this erodes the Union's status as the exclusive representative and results in the specific harm of lost union dues.

Chvany further found the Company violated its obligation to provide notice to the Union Business Representative of its plan to subcontract as required by Section 24.5.

As a remedy, the arbitrator directed:

1. The immediate reclassification to the clerical bargaining unit of all agency employees who had worked for greater than 90 days and who were still employed as of the date of the award.

2. That such employees receive the negotiated wage of the appropriate classification and all benefit coverage from the date of the arbitration award forward, and

3. Regular status be granted to any agency employee who had worked six months and was still working as of the date of the award, and

4. The Company to pay Union all foregone dues and fees which resulted from the inappropriate use of agency employees.

Arbitration 128 concerned only the employees in the clerical bargaining unit. It had binding impact only on the Company's ability to contract out clerical bargaining unit work. Immediately after the Arbitration decision, the Company reassessed its use of agency employees performing clerical work throughout the system and either ceased the usage of such employees or converted the agency employees to PG&E employees to comply with the Arbitration decision. The parties eventually agreed that the Company will not use contract or agency personnel for the performance of bargaining unit work in excess of 90 work days.

Arbitration 142: Contracting in the Physical Bargaining Unit

The Company's right to contract physical bargaining unit work was tested in **Arbitration 142.** Here the question was whether assigning work to agency personnel violated the provisions of the contract applicable to General Construction. This case applied exclusively to General Construction employees so the language of Title 207 was not applicable. There is no equivalent section to Title 207 in the 300 series of the Agreement. Although this case applies only to General Construction, the doctrine of co employment and its restrictions on the Company's ability to contract apply equally across all business units.

Arbitration 142: Factual Background

In **Arbitration 142,** the Company contracted with agency employees from Wall- Tech Inc. to work on a full time basis alongside Company employees. They were interviewed and hired or rejected by Company supervisors. They performed the same work as Company employees. The clerical personnel were provided with training by the Company. All agency employees were supervised and disciplined by Company supervisors. Their wages were determined by agreement between the Company and the agency, and progressive step increases were usually granted, although such increases could be vetoed by Company supervisors.

Vacations for agency employees were arranged through the agency.

The size of the agency workforce on the Diablo Canyon construction site had grown steadily over the years just prior to the Arbitration hearing. At the time of the hearing in April 1986, there were 184 Company employees and 136 agency employees on the payroll. The Company testified that agency employees were required to provide support during the construction of the Diablo plant. The Company had planned that over time the use of agency employees would be reduced to zero and over time a full complement of Company employees would be working at the plant.

The Union relied on the recent Arbitration 128 decision to argue that the Company was a joint employer of these agency personnel. The Company, in opposition, relied on a 1983 RC decision which found no violation under similar facts. In addition, the Company asserted that since the Union had withdrawn their proposals at the most recent general bargaining relative to additional restrictions on the Company's ability to contract out work was an indicator that the Company had the right to engage in this type of contracting.

In assessing whether or not the Company acted properly in contracting out the grieved work, Arbitrator Koven relied upon the same factors identified as relevant by Chvany in Arbitration 128. Koven found that in applying these factors, the work was in violation of the agreement. Koven also rejected the Company's argument that the Union had implicitly agreed to allow the Company to exceed its implied restriction on subcontracting by withdrawing its bargaining proposals on contracting restrictions at the most recent negotiations. Koven directed the parties to determine an appropriate remedy in light of his findings. The remedy worked out eventually resulted in the Company hiring some of the agency employees.

After Arbitration 142, the Company reassessed its use of contract employees who performed physical bargaining unit work and evaluated the legitimacy of each individual contracting situation based on the factors laid out in Arbitration 128.

Aftermath of Arbitration 128 and 142

Arbitration 128 and 142 impose significant new restrictions on the Company's ability to contract out work. They introduce the concept of the Recognition clause of Title 2 as an implicit limit on our ability to contract. They also introduce us to the concept of joint employer and improper designation as an independent contractor. These concepts are related in that both allege the reality of the worker's relationship with the Company is one the law recognizes as employer-employee. In the Joint employer scenario, the Company is using an intermediary organization (employment agency) as the source of the labor; but is still considered to be the legal employer of that employee, regardless of who issues the employee's paycheck. In a challenged independent contract situation, the Company has directly secured the worker's services without going through such an intermediary organization. The distinction between these two concepts is not too critical because we apply essentially the same factors to assess whether the relationship is one of a valid contract vs. an employment situation as we do to determine if a given situation is a valid independent contract vs an employment relationship.

RC 1637: Developing the New Law on Contracting

Upon the strength of these new decisions (Arbitration 128 and 142), the Union could make better arguments that several contracting situations occuring around the Company were in violation of the Agreement. In light of these decisions, the Company and Union agreed to recall thirteen cases from Arbitration (referred as **Arbitration 149**) involving alleged inappropriate contracting. After recalling these cases, the Review Committee in its decision **RC 1637** (October 29, 1987) applied the factor tests from Arbitration 128 and 142 as well as the applicable legal doctrine to determine whether appropriate contracting relationships existed between the Company and the contractor. In applying these factors the Review Committee found an invalid contract due to the joint employer concept in eight cases, valid contracts in two cases, and insufficient information to determine the validity of the contract in three cases. In

addition these decisions set the stage for the Company and Union agreeing to a more specific restriction against contracting (letter of Agreement 88 - 104).

Joint Employer / Co-Employer

The concept of Joint employer was raised as one of the arguments in support of the Union's position in Arbitration 128. The federal case of Boire v. Greyhound Corp., 376 US 473 (1964) defines a co employer relationship as one in which decisions on matters governing essential terms and conditions of employment are shared.

In determining whether or not a contracting situation is a valid subcontracting relationship or instead a joint employer relationship , we as the contracting employer must examine our involvement in each of the following areas.

Employer or Contractor?

The Relevant Factors

1. Actual day to day supervision
2. Hiring / Firing
3. Promotions / Demotion
4. Determination of wages / benefits
5. Scheduling of work days and or work hours
6. Determining other terms and conditions of employment
7. Right to discipline

The following discussion looks at specific cases where each of these factors have been applied.

1. Actual Day to Day Supervision

This has proven to be the most important factor in determining if there is a joint employer relationship. The following cases illustrate how this factor is applied:

PRC 1099: Here, the Company needed temporary employees. A contract agency sent prospective employees, who were interviewed by PG&E supervisors. If the individual was deemed satisfactory, he/she was hired by the agency. The contract employees were assigned to work with bargaining unit employees, and their day-to-day supervision was per-

Employer or Contractor?

Factors to Assess (cont.)

formed by PG&E supervisors. If there was any problem with any contract employee, the agency was notified by PG&E and the individual was removed from the job. The Committee found a joint employer relationship existed based largely upon the day to day supervision supplied by a PG&E supervisor. The Committee ordered the Company to cease and desist this inappropriate use of contract employees.

PRC 1122 Here, the Merced Garage contracted for the services of two Lead Mechanics and one service person performing the work of a Garageman. The contract employees reported to work at set hours and provided their own tools. The contractor stopped in the garage to check on his employees occasionally, but the overall direction of the work is provided by the Garage Foreman or Subforeman. If discipline was required, the Garage Foreman notified the contractor to take appropriate action. The Committee found the Company was acting as a joint employer based largely upon the fact that the PG&E foreman provided the actual day-to-day supervision and direction of employees on the job

Day to Day Supervision:

Applications

PRC 1073: In this case, the Chico Building Department used contract employees for maintaining and repairing furniture. The contractor normally stopped by three times a week to check on his employees. The Building Maintenance supervisor oversaw the day-to-day work performed by the contract employees. Here again, the Committee found the day to day supervision was sufficient to establish that the Company was acting as a joint employer and ordered the Company to cease and desist.

PRC 1154: Here, a retired meter shop foreman was referred by a contractor to PG&E to perform Electric Meterman work. While the contract employer was directly responsible for the hiring and establishment of hours and working conditions for this employee, a PG&E supervisor was directly involved in the daily assignment of work which was performed on the Company property. This daily supervision was sufficient to find the Company was a joint employer and the contract was therefore inappropriate.

PRC 1208: The Company's use of an agency casual laborer and clerk

typist were found to be joint employer situations because the employees were directly supervised by a PG&E supervisor.

Employer or Contractor?

Factors to Assess (Cont.)

2. Hiring/Firing

PRC 1027: The Company contacted two retired employees and directed them to an employment agency so they could work as inspectors. The Committee ruled that under these circumstances, the two inspectors were not hired under an appropriate contract but rather that the Company was a joint employer.

3. Promotions / Demotions

See Arbitration 142 discussion on Wall- Tech Inc. employees.

4. Determination of Wages and Benefits

See Arbitration 142 discussion above on the determination of Wall-Tech agency employee wages.

5 Scheduling of work days and/or work hours

PRC 1122: Here, the Merced Garage contracted for the services of two Lead Mechanics and one service person performing the work of a Garageman. The contract employees reported to work at set hours and provided their own tools. The contractor stopped in the garage to check on his employees occasionally, but the overall direction of the work was provided by the Garage Foreman or Subforeman. If discipline was required, the Garage Foreman notified the contractor to take appropriate action. The fact that the Company determined the hours of work was one factor which influenced the Committee to determine that the Company was acting as a joint employer.

6. Determining other terms and conditions of employment

PRC 1122: The fact that the Garage Foreman could instruct the contractor as to what discipline was appropriate for the individual was a factor which helped the Review Committee conclude a joint employer relationship existed.

7. Right to Discipline

Independent Contractor vs Employee

In assessing whether an individual is performing under the terms of a valid independent contract or is in reality performing as an employee, **RC 1637** instructs us that we are to evaluate each situation on its own merits taking into account the following factors:

Independent Contractor or Employee?

The Factors to Assess

1. Right to direct and control as to results or as to means and methods
2. Involvement in selection decision,
3. Right to discipline or discharge,
4. Who Furnishes tools and equipment?
5. Is the employee furnished a place to work?
6. Does the employer control work hours and or days?
7. Is the individual engaged in a distinct occupation or business?
8. Is a specific skill required?
9. How long is the person employed?
10. How is the person paid?

Let's discuss each of these items separately and illustrate with actual cases where applicable. Many of these illustrations for the cases actually involve joint employer situations rather than challenged independent contractor situations. They are included in this discussion only because

they illustrate how that factor is applied.

1. Whether the employer has the right to direct and control the individual's performance both as to the results and as to the means and details of accomplishing the result.

The employer need not actually exercise such control; it is enough if the employer merely has the right to do so. This is the most important consideration in making the distinction between employees and independent contractors. See cases under this heading under Joint Employer discussion for applications which illustrate this point.

2. Whether the employer is involved in the selection of the individual

PRC 1027 The Company contacted two retired employees and directed them to an employment agency so that they could work as inspectors of insulators. Under these circumstances, the two inspectors were employees.

3. Whether the employer has the right to discipline or discharge the individual.

See discussion of PRC 1122 under this section in the Joint Employer Section.

4. Whether the employer furnishes the individual tools or other implements, equipment, etc., for doing the job.

Remember, however, that the fact of an individual furnishing his or her own tools may not be enough to establish that the employee is a contract employee.

PRC 1073 This was the Chico Building Department case where contract employees were supervised by PG&E supervisors. Even though the contract employees provided their own tools, they were still considered PG&E employees because the day-to-day direction of work by PG&E supervisors outweighs the tool factor in importance.

Independent Contractor or Employee?

The Factors Applied (cont.)

5. Whether the individual is furnished a place where he/she normally works

PRC 1154 The Company contracted with an electrical firm for the performance of Meterman Work. The contractor hired a retired PG&E Electric Meter Shop Foreman who reported to work each morning at the PG&E facility. The fact that he reported regularly to the PG&E facility to perform his work was a factor in determining that this was an inappropriate use of a contractor. Note that although this situation actually involves a joint employer situation rather than an invalid independent contract, it serves to illustrate the application of this factor.

6. Whether the employer controls the individual's work hours or work days.

PRC 1122 (See discussion of facts in section on joint employer). In this case, the fact that the Company set the hours and days of work was a factor in determining that this was a joint employer situation .

7. Whether the individual employed is engaged in a distinct occupation or business.

The more the employee is truly engaged in a distinct occupation or business, for example -elevator repair, the greater the likelihood will be that the relationship will be recognized as a valid independent contract. One case currently pending at arbitration involves whether or not the Company's use of a contract backhoe is in violation of the agreement on the grounds of that constituting a Joint Employer. The Company will argue this factor in support of the fact that it is an appropriate contract.

8. Whether a specific skill is required in the occupation

The greater the skill requirement of the contracted individual, the more likely the relationship will be recognized as a valid independent contract Similar to #7.

Independent Contractor or Employee?

The Factors Applied

9. The length of time the person is employed.

As a general rule, the longer the duration of the assignment, the greater the likelihood of there being found an employment relationship. The Company and Union agreed upon an upper limit of 90 workdays as the maximum allowable time period in **RC 1637.**

10. The method of payment

If the contractor is paid a flat amount which was quoted as being based upon the completion of the job, the contract is more likely to be found a valid independent contract. Payment by the hour is a more suspect situation and is frequently used to invalidate an alleged independent contract situation.

Work Normally Performed by Bargaining Unit?

To demonstrate a situation of inappropriate contracting, the Union must demonstrate that the work itself is the type that is normally performed by the bargaining unit In **PRC 1069** the Committee upheld the contracting out of work **not** typically performed by the bargaining unit. Here, the Company contracted for the services of three retired PG&E employees as inspectors. After a grievance was filed alleging inappropriate contracting, the company re-assigned the three to training assignments. The Union again grieved to challenge the contracted training assignment. The Committee found the Company did not violate the contract by placing the three employees in training assignments because training work was not work historically performed by the bargaining unit.

Remedy for Future Violations of Joint Employer Doctrine

In addition to the above cases, the Committee discussed the future application of this decision and agreed on the following course of action when finding a joint employer relationship in violation of the agreement:

- Company will be required to immediately release the contract or agency personnel involved.

- Company shall be required to pay the contract or agency personnel the negotiated wage rate in effect at the time the bargaining unit work

was performed, retroactive to the first day of employment or 30 days prior to the filing of the grievance, whichever is later. These dues will not be deducted from the employee's wages but rather paid directly form the Company.

- Company will use Title 205 if it decided there was a need for additional personnel to perform work previously performed by the agency or contract personnel.

Arbitration 183

Union Burden to Show "Harm" Resulting from Contracting

Arbitration 183 (May 20, 1991) upheld the Company's usage of remote bill paying stations against a challenge that this was an inappropriate contract in violation of the Recognition clause. Five Review Committee cases were consolidated into this Arbitration referral. The grievances involved closing and consolidating customer services offices within a Division and re-locating customer services clerks while at the same time using remote pay stations within that division. The Company's use of remote pay stations had been a practice with a 40 year history whereby the Company pays independent business a flat rate per customer bill collection. The Union stipulated that they were aware of the use of these pay stations over this time period. The Company stated that the use of these pay stations did not result in a savings of expense to the Company due to the necessity for employee review of the pay station collections and entry into the teleprocessing system. The primary purpose of the pay station was for customer convenience and "presence in the community".

Given these facts, the Arbitrator found the Union failed to meet its burden of proving that the Union was "harmed" by the Company's use of pay stations. The Arbitrator found that the "expansive" definition of Section 24.5 from Arbitration 128 which held that erosion of the bargaining unit occurs whenever available jobs that would otherwise go to the bargaining unit are filled by persons outside of the bargaining unit, cannot be used when there is "no demonstrated loss of current or prospective employment opportunities flowing from the conduct". The arbitrator also found that due to the extensive past practice of using these pay stations, the Union "over an extended period of time and a series of collective bargaining agreements, acquiesced in the Employer's

practice of using pay stations concurrently with the closure—consolidation of the Customer services Offices".

This decision clips back somewhat the expansive Arbitration 128 definition of "dispensing with services" and limits such a definition to cases where the Union can demonstrate it was "harmed" by the Company's actions. Because of the particular facts of this case, the Union was not able to conclusively demonstrate it was harmed by this practice. In other words, the Union did not satisfy the Arbitrator that the contracting out of this collection assignment to the pay stations has resulted in harm to the Union of loss of dues from creation of other bargaining unit positions which would be required to do this work in the absence of the pay stations. In most other contracting situations, harm can more easily be demonstrated by the Union.

Letter of Agreement 88-104

Armed with the recent victories of Arbitration Cases 128 and 142, the Union sought further protection of its bargaining unit from any erosion which might be caused by the Company's increasingly aggressive contracting policies by challenging a number of the Company's contracting policies. In lieu of proceeding to arbitration on several challenged contracting situations, the Company and Union agreed upon **Letter of Agreement 88-104 (88-104)** (September 7, 1988,) as an additional specific restriction on the Company's right to subcontract.

88-104 allows the Company to continue subcontracting where it has been customary as well as to subcontract during peak periods or as long as employees are not subject to attrition. 88-104 went a step further to allow the Union to police whether or not there had been "attrition" by establishing minimum "floor levels" of employment for physical employ-

Floor Employment Numbers

ees in each department and location. In addition, 88-104 restricts employees who return to the bargaining unit from exempt positions from exercising any demotion, displacement, or bumping rights.

New Restrictions on Management Demotion Rights Back to Bargaining Unit

Under Letter of Agreement 88-104, the Company must look at the use of optimum overtime or use of ENCON employees before using outside contractors. Once this obligation is satisfied, the Company may contract bargaining unit work as long as it does not reduce the work force by attrition, demotion, displacement, or layoff.

Violations of the agreement fall into two general categories:

1. Illegitimate contracting situations, and

2. Failure to maintain floor employment levels established by the agreement.

We will discuss each of these situations in greater detail in the following sections.

Letter of Agreement 88-104 also provided restricted demotion and bumping rights for employees in supervisory positions who were formerly in the bargaining unit. This restriction has since been supplemented by Section 206.19 as amended in the 1991 general negotiations.

The first series of case law decisions applying and interpreting 88-104 came out from a specially created 88-104 Committee (June 13, 1990). These 19 cases assessed the legitimacy of contracting and headcount situations in various operating situations around the system. In reviewing these cases, there appears to be three primary factors which influence the determination of whether or not a given contracting situation is in compliance with letter of agreement 88-104. Note that these factors were not mutually agreed upon as controlling by the Company and the Union, rather they have been identified as consistent themes which have emerged in applying 88-104 to a variety of situations. These factors are:

A Legitimate Contract?

Some Factors to Look At

1. Is the contract a "hard money" or a "soft money" contract

2. Has the department made optimum use of overtime prior to assigning the work to an outside contractor?, and

3. Does the contract involved require the use of a specialized skill or specialized equipment not available in/to our current workforce.

Contracting Terminology

Before discussing each of these factors, we need to agree to some definitions of these terms so we are all talking, hearing, or reading the same message. Let us define these terms here . Later we will illustrate application of the term in an actual decision where the application of that term was found controlling.

1. **Contracting out** - assigning work that would normally be done by bargaining unit employees to non-PG&E personnel: also referred to as "farming out", "shopping out", "jobbing", and "out-sourcing."

2. **Optimum use of overtime** this is a nebulous concept which is more thoroughly and illustrated in the following case discussions. But for now, suffice it to say that prior to contracting out an assignment normally performed by the bargaining unit, the Company must demonstrate it has made a good faith attempt to use its own bargaining unit employees through the optimum allocation of voluntary overtime.

3. **Hard money contract** - a specifically defined assignment whereby the contractor is given a discrete task to complete within a pre-determined period of time and for a pre-determined dollar amount. Examples include a major repair job for a specialized piece of equipment for which PG&E has no qualified employees. Such contracts are more easily justified by the Company than are soft money contracts.

4. **Soft money contract** - a less defined relationship whereby the Company supplements its current work force for more routine assignments which are normally performed by PG&E employees. Such

contracts are frequently open-ended and have no definite starting and end dates, but rather, are used periodically to supplement PG&E's work force and tackle any potential backlog of work.

4. **Floor number** - the headcount of all physical bargaining unit employees as of September 1, 1988, or as adjusted over time.

Before discussing the first three factors, lets get clear on the significance and calculation of a "floor number". Remember the basic rule that the Company cannot reduce the workforce by attrition, demotion, displacement, or layoff when it is contracting out work. You may then ask the question "reduce the workforce from what?" To provide such an objective level, floor employment numbers were established in the 1988 agreement for each department at each headquarters. These floor numbers are designed to serve as a reference point for determining compliance with this portion of the agreement. The floor numbers may change over time as a department's operating conditions change. Each department and headquarters, therefore, must continually monitor their employment activity and reassess their floor numbers in order to ensure they remain in compliance.

Calculating the Floor Number

Two important principles govern the movement of 88-104 floor numbers:

1. Floor numbers move up as actual headcount increases, during both contracting and non-contracting periods; and

2. Floor numbers decrease when actual headcount decreases and contracting is not occuring, given that a reasonable amount of time has elapsed.

As a general rule, the Company must maintain a reduced sized work group for twelve months with no contracting occuring prior to adjusting floor numbers downward. For more detailed instructions on this issue, review the letter from Rick Doering dated September 12, 1991.

Full time, part time, and probationary employees, as well as employees on sick leave, and temporary upgrades are included in headcount for L.A. 88-104 purposes. Not counted are summer hires, intermittent employ-

Calculating the Floor Number (Cont.)

ees, employees on Long Term Disability or Workers Compensation, or employees identified as temporary relief by the Company and Union. Floor numbers pertain to the department as a whole; employment within each classification is not subject to any restrictions.

Based on these floor number calculations, the agreement limits the Company's right to contract by mandating the following:

1. The floor employment level for a department at a headquarters must be maintained when contracting is occurring in that department at that location, and

2. The systemwide floor employment level for a department must be maintained when contracting is occurring in that department anywhere in the solar system.

Refer to the attachment to the previously noted September 12th letter from Rick Doering for a helpful flowchart that can be used to assess compliance.

Specific cases which have provided us these guidelines on floor number calculations are:

PRC 1325 and **PRC 1338** tell us to include temporary additional employees (T/As) in the floor number, but not summer hires.

PRC 1410, which instructs us that floor numbers protect the number of employees, not individual employees. Therefore, individual employees may be demoted or displaced among headquarters as long as that headquarters maintains its minimum floor level in each of its classifications.

PRC 1410 illustrates that correctly identifying the appropriate floor employment level may require you first determine which functional department is responsible for what work. In this case, layoffs and demotions occurred in the Redwood Region Gas Service Departments. The Union contended that contractors were doing work on gas meter sets in the Golden Gate Region and that the number of positions company-wide in the Gas Service Departments should not have been reduced. Here, the

Committee made the initial determination that gas meter set construction is Gas T&D work, not Gas Service work. Therefore Gas Service contracting was permissible even though the gas service department on the system was below the floor number because this assignment was Gas T&D work, not Gas Service Work. The company was not in violation because the work in question was Gas T&D work, not Gas Service work.

Now that we have discussed the concept of "floor numbers", let's review again the three factors which appear to be influential in determining the validity of a challenged contracting situation and review how these factors were applied in actual decisions. Again these factors are:

A Legitimate Contract?

Some Factors to Look At (cont.)

1. Is the contract a "hard money" or a "soft money" contract
2. Has the department made optimal use of overtime prior to assigning the work to an outside contractor?, and
3. Does the contract involved require the use of a specialized skill or specialized equipment not available in our current workforce.

"Hard Money" vs. "Soft Money" Contract

First let's analyze the significance of whether a contract is one for hard money or soft money.

In general, "hard money" contracts are easier to justify under letter of agreement 88-104 than "soft money" contracts. The following cases illustrate how this factor has been applied:

PRC 1116 illustrates that once a hard money contract is let out (i.e. contracted), the Company may allow the contractor to finish the job notwithstanding subsequent availability of Company employees to do the work. In this case, the Company had contracted a feedwater heater repair job at a power plant during an outage. All PG&E employees at the plant were already working overtime when this contracting decision was made. The repair assignment required the contractor to work ten-hour days six days a week.

A Legitimate Contract?

Some Factors to Look At (cont.)

The overtime work for the PG&E employees ended prior to the conclusion of the contractors assignment. Rather than reassign the Contractor's assignment to the available PG&E employees, the Company allowed the Contractor to complete the job for which it had contracted. The Union grieved that PG&E employees, not contractors, should have been used to finish the work on the feedwater heater. The Committee rejected this argument and found the situation to be an appropriate use of contractors. A key fact the Committee focused upon was that this was a "hard money" contract. The Committee found that once a hard money contract is legitimately made, the Company has already considered optimum use of overtime and the Company is entitled to have the contractor finish the job notwithstanding a subsequent decline in or cessation of overtime worked by PG&E employees. This case also instructs us that in cases of hard money contracts, the Company need not ensure that PG&E employees work more overtime than contractors. The lesson here is that once the decision has been legitimately made to contract work out, that work is out.

PRC 1349 (June 13, 1990) In 1988, a Livermore Gas T&D Crew Foreman was unavailable to work overtime one evening, therefore overtime was cancelled for the crew the entire week. During that same week, a number of previously established contract jobs were in progress. These jobs were found to be "hard money" contracts by the Committee. The Company was deemed to be in compliance with the contract because once a contractor is on the property fulfilling a "hard money" contract, optimum use of voluntary overtime has already been considered.

Optimum Use of Overtime

The second major factor to look at when assessing whether or not a contract was legitimately let out is whether the Company met its obligation of providing the "optimum use of overtime".

Under letter of agreement 88-104, the Company has an obligation to

A Legitimate Contract?

Some Factors to Look At (cont.)

Optimum Use of Overtime

make "optimum use of overtime" including consideration of General Constriction crews, prior to assigning work to an outside contractor. "Optimal use of overtime" is a nebulous concept, generally interpreted as meaning the Company has made a good faith effort to allot optimal levels of voluntary overtime to its own employees prior to resorting to other means of getting the work accomplished. There are several ways to approach this issue. Some that have been employed by the Review Committee have included:

a. Duty to exhaust list.

b. Duty to upgrade (Note: there is no duty to upgrade to fill overtime needs)

c. Time worked by PG&E employees vs. contractors time worked

c. Past practice

d. Employee willingness to work overtime

Let us analyze each if these approaches separately and discuss cases which illustrate their application.

a. Duty to Exhaust Overtime List

PRC 1264 Here, a supervisor assigned a boiler feed pump repair to an outside contractor during a power plant outage. Prior to assigning this work out, the supervisor considered using the employees who had volunteered for emergency overtime. In reviewing the list, the supervisor saw that of the three employees on the emergency overtime list, two had already been called to work on another job. The supervisor then contracted the job to General Electric. The employee who was on the emergency list but not called filed a grievance.

The Review Committee found no violation of the agreement. The Committee ruled that a four-person crew was needed for the job and an

A Legitimate Contract?

Some Factors to Look At (cont.)

Optimum Use of Overtime (cont.)

insufficient number of persons was available, so the Company met its optimum use of overtime obligation. This case illustrates the Company can assign overtime work by crews, and if the full crew compliment is not available it may legitimately assign the work to an outside contractor.

b. No Duty to Upgrade:

PRC 1264 During the same power plant outage, the specific contract here involved contract crane operators for work with boiler feed pump turbines. The Union grieved that PG&E operators should have been upgraded to perform the crane operation part of the contract job. No crane operators had signed the overtime call-out list. However, a helper, the next lower classification, had volunteered for emergency duty. The Union argued that the Company should have upgraded the helper into the crane operator position prior to contracting the job. The Committee ruled that LA 88-104 does not require the Company to upgrade employees prior to contracting work and the contract was found to be legitimate.

c. time worked by PG&E employees vs. time worked by contractors

PRC 1116 For review of facts, See discussion under #1 Hard money contract vs soft money contract. The Committee ruled that in order to satisfy the requirement for optimum use of overtime, PG&E employees need not work more overtime than contractors. Once work is legitimately contracted out, in the situation of a hard money contract, the Company has already considered optimum use of overtime and the Company is entitled to have the contractor finish the job notwithstanding a subsequent decline in overtime worked by PG&E employees. Here the contractor employees worked more hours than PG&E employees, but the contract was nonetheless found to be legitimate.

d. Past practice

PRC 1388 Here, a manager wanted to work a crew of PG&E Communications Technicians a certain amount of overtime that the technicians felt was

A Legitimate Contract?

Some Factors to Look At (Cont.)

unreasonable. The technicians suggested working an alternate schedule which they felt was more reasonable and which had been routinely used in the past. The manager rejected the suggestion of the technicians and instead assigned the work to contractors. The Committee found the supervisor failed to satisfy the "optimum use of overtime" requirement and thus found a violation of 88-104. This case shows that local past practice may be considered in determining optimum use of overtime.

e. Employee willingness to work overtime

Optimum Use of Overtime (cont.)

PRC 1282 Here, the Company contracted for a specialized wash rig with Southern California Edison to wash insulators. Southern California Edison employees then assisted PG&E crews in washing insulators, since they had a new type of wash rig that was more productive than any that PG&E had at the time. Other PG&E crews used to wash insulators did not want to work overtime. The Committee found no violation of the contract. The fact that there were no other employees willing to work overtime was a consideration in reaching this finding.

PRC 1349 (June 13, 1990.) In this case, the employee on the emergency overtime list made themselves unavailable to work overtime. No other Company employees were available or willing to perform the assignment. On these facts, the Company had the right to contract out this assignment.

Specialized Equipment / Specialized Skills

The third important factor to assess in determining the legitimacy of a contracting situation is whether or not the contract involved the use of specialized equipment or specialized skills not available within our own workforce.

As a general rule, if the reason the Company decides to contract out work is due to the lack of in house requisite skills required specialized equipment required to perform the job, the contract will be valid.

PRC 1282 (June 13, 1990) Here, PG&E contracted with Southern California Edison for the services of a special wash rig which PG&E did not

A Legitimate Contract?

Some Factors to Look at (cont.)

have. The fact that the assignment involved use of specialized equipment which PG&E did not have was a major factor in finding this to be a legitimate contracting situation. However, the Company may need to demonstrate the superior efficiency of a contract crew if the assignment involves work which PG&E employees have performed in the past and are qualified to do. However, supervisors should be expected to substantiate any claims that a contractor crew has superior abilities and can achieve greater efficiencies than could be realized by completing the job with Company employees.

Specialized Equipment/ Specialized Skills (cont.)

PRC 1284 (June 13, 1990) In this case, a supervisor's claim that a contractor crew could perform a job more efficiently than a PG&E crew was found insufficient to justify the decision to contract the work out. A malfunction occurred on an air pre-heater. A PG&E crew that had been working on the problem and that was ready and available to continue the repair work on overtime. The crew, however, was sent home at the end of its shift. The work was immediately contracted, based on the supervisor's belief that the contract crew could work faster than the PG&E employees.

The Committee found the supervisor could not adequately substantiate his claim that the contract crews could perform the work more efficiently and therefore ruled the supervisor did not meet his burden of ensuring optimum use of overtime prior to contracting out this work. This case illustrates that in cases where the assignment involves work which PG&E employees could do or have done, the supervisor may have the burden of demonstrating that a particular contractor can perform the assignment with greater skill and or efficiency.

The Company's ability to contract out work will continue to be a significant concern to both the Company and the Union. Over the past few years we have seen an increasing willingness on the part of Arbitrators to recognize implicit restrictions on the Company's ability to contract out work. These implicit restrictions limit the Company's ability to subcontract more than you would expect by simply reading Titles 207 of the Physical Agreement and 24 of the Clerical Agreement. More recently the agreement to maintain minimum floor levels imposed by letter of agree-

ment 88-104 (applicable only to the IBEW Physical employees , excludes ENCON) is another specific restriction on our ability to contract out work and provides the Union protection against erosion of its bargaining unit.

Apply Guidelines Case by Case

The status of the Company's right to contract is still not crystal clear, even after LA 88-104. However, the above cases and discussion may provide a set of standards by which we can determine whether, under all circumstances of the case, the specific subcontracting in question is in accord with the agreement. Although these standards do not produce automatic results they can provide supervisors some guidance in determining whether or not they have a valid contract situation

The final word on our ability to contract work has not yet been written. Stay tuned for further developments in this increasingly active area of Company-Union relations.