89-2 10/75

207.2
2.1 (Joint Employer)

# REVIEW COMMITTEE

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ARB. 149

☐ DECISION
☐ LETTER DECISION
☐ PRE-REVIEW REFERRAL

CASE CLOSED
LOGGED AND FILED

## REVIEW COMMITTEE DECISION

North Bay Division Grievance No. 4-1234-85-9 (P-RC 1027)
San Francisco Division Grievance No. 2-1170-85-98 (P-RC 1064)
East Bay Division Grievance No. 1-2235-85-32 (P-RC 1069)
De Sabla Division Grievance No. 10-243-85-12 (P-RC 1073)
Coast Valleys Division Grievance Nos. 18-947-85-18 and
18-948-85-19 (P-RC 1099)
San Joaquin Division Grievance No. 25-846-86-8 (P-RC 1122)
San Joaquin Division Grievance No. 25-847-86-9 (P-RC 1123)
Nuclear Plant Operations Grievance No. 22-123-85-26 (P-RC 1101)
East Bay Division Grievance No. 1-2475-86-118 (P-RC 1154)
Steam Generation Grievance No. 24-204-86-77 (P-RC 1208)
East Bay Division Grievance Nos. 1-2435-86-78 (P-RC 1133)
and 1-2468-86-111 (P-RC 1153)

Review Committee File No. 1637-86-8

The above-referenced grievances were referred to arbitration as Arbitration Case No. 149 and have been returned to the Review Committee for settlement. In discussion of these cases, common legal principles relating to the proper classification of individuals as employees were examined.

There are three different potential employment relationships involved in these cases. In the first, the employer contracts directly with an individual, considering the individual to be an independent contractor. The second involves an employer contracting with an independent firm and utilizing the employees of that firm. In this situation, an argument can be made that a joint employer relationship exists. The third situation involves individuals hired by an employer through a payroll service agency. For the purpose of discussion of these cases, use of such an agency is akin to an attempt to establish independent contractor status.

In determining the existence of joint employer status, it is necessary to examine the contracting employer's involvement in each of the following areas:

- hiring/firing
- promotions/demotions
- determination of wages and benefits
- scheduling of work days and/or work hours
- determining other terms and conditions of employment
- discipline
- actual day-to-day supervision and direction of employees on the job

In determining whether an individual is an employee rather than an independent contractor, the following factors, among others, are considered:

- 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.
- Whether the employer is involved in the selection of the individual.
- Whether the employer has the right to discipline or discharge the individual.
- Whether the employer furnishes the individual tools or other implements, equipment, etc., for doing the job.
- Whether the individual is furnished a place where the individual regularly and normally works.
- Whether the employer controls the individual's work hours or work
- days.
- Whether the individual employed is engaged in a distinct occupation or business.
- Whether a specific skill is required in the occupation.
- The length of time the person is employed. It is noted that 90 workdays was established for the Clerical Agreement in Letter Agreement No. 86-85-PGE.
- The method of payment (whether by time or by the job).

- Whether the work is part of the regular business of the employer.

- Whether the parties believe they are creating an employer/employee relationship.

Primary emphasis is placed on the direction of the work, although all of the other factors must be considered in making a determination on the joint employer issue. However, it is not necessary to have an affirmative answer to all of the factors before finding an employer/employee relationship. Each case must be evaluated on its own factual situation.

With these principles in mind, the Committee reviewed each of the cases and agreed to settlements in accordance with the following:

North Bay Division Grievance No. 4-1234-85-9 (P-RC 1027)

Facts of the Case

During the period of February 4, 1985 through May 31, 1985, the Santa Rosa District contracted with two retired Electric Department employees to assist with an inspection for insulators determined to be suspect and potentially faulty. As each pole in the District was to be inspected, it was determined that insufficient manpower was available. The Company contacted the two retired employees, directed them to an employment agency and contracted for their services through that agency. Inspections in the Santa Rosa service area were handled by Patrolmen and Inspectors out of the Snta Rosa yard. The contractors were engaged to perform the necessary inspections in the Sonoma, Healdsburg and Petaluma service territory. Inspector and Patrolman classifications in the District were filled. It was also determined that none of the grievants were headquartered in Sonoma, Healdsburg or Petaluma.

Decision

The Committee agreed that the individuals used in the performance of the inspection work were employees under the above guidelines. This case is settled on the basis that in future similar circumstances, Company will not use contract or agency personnel for the performance of bargaining unit work, unless such use meets the test of true independent contractor's status.

San Francisco Division Grievance No. 2-1170-85-98 (P-RC 1064)

Facts of the Case

This grievance concerns the assignment of the inspection of work performed by outside contractors to another contractor.

Decision

The Joint Statement of Facts submitted by the Local Investigating Committee contains insufficient information to allow a determination on the joint-employer assertion. This case is returned to the Local Investigating Committee for resolution in accordance with the guidelines outlined above. If

it is determined that a joint-employer relationship exists, the Division will cease and desist. The Review Committee retains jurisdiction if the Local Investigating Committee is unable to settle the case.

East Bay Division Grievance No. 1-2235-85-32 (P-RC 1069)

Facts of the Case

Between August 1984 and April 1985, the Division contracted for the services of three retired PGandE employees who, among other duties, performed some inspection work of outside contractors. Following the filing of the grievance in April 1985, Company ceased using the three retirees for inspection work belonging to the bargaining unit. One employee began training bargaining unit employees on the performance of the inspection work. Another retiree assisted in OIT training and post-checking of work performed by outside contractors, including the inspections completed by bargaining unit "field representatives." The third retiree trained ESC Estimators and coordinated the streetlight group replacement program.

Decision

The Committee agreed that the Company properly returned the inspection work identified in Arbitration Case No. 123 to the bargaining unit in April 1985. Pursuant to Arbitration Case No. 123, this was the appropriate remedy. The Committee further agreed that the work performed by the retirees following the cessation of the inspections was not work that was historically performed by bargaining unit employees. Training is clearly within the purview of management, and the post-checking of jobs and contract administration was determined to be exempt work in Letter Agreement No. 85-95-PGE defining the scope of Arbitration Case No. 123. The Committee agreed that the individuals used in the performance of the inspection work between August 1984 and April 1985 were employees under the above guidelines. This case is settled on the basis that in future similar circumstances, Company will not use contract or agency personnel for the performance of bargaining unit work, unless such use meets the test of true independent contractor's status.

De Sabla Division Grievance No. 10-243-85-12 (P-RC 1073)

For the past six years, the Chico Building Department has used contract employees for work such as sanding furniture, changing fluorescent lights, painting, moving furniture, making campground signs, framing pictures and delivering materials. The Division has a standing request for General Construction assistance with this work. When G.C. is able to accommodate (approximately four months of the year), the contract employees are not used or are used less. When not performing work for PGandE, these individuals perform work for other companies. In 1984, 5454 hours of work were performed by the contractor; and in 1985, work was performed for 4383 hours. Since the onset of contract help, two bargaining unit positions have been added to the Building Maintenance Department. The contractor stops by the office or job site approximately three times per week to talk with and check on his employees. The Building Maintenance supervisor oversees the day-to-day work performed by the

contractor employees. The contract employees provide their own hand tools but, when necessary, use PGandE power tools.

Decision

Given the factual situation in this case with primary emphasis placed on the day-to-day direction of the work by PGandE supervision, the Committee is in agreement that Company is acting as a joint employer. Company agrees to cease its use of contract employees in this manner and have the work performed by bargaining unit employees, or structure the use of a contractor so that a joint employer relationship is not created.

On this basis, the case is considered to be closed.

Coast Valleys Division Grievance Nos. 18-947-85-18 and 18-948-85-19 (P-RC 1099)

Facts of the Case

This grievance concerns the use of contract or agency employees to perform the work of varied bargaining unit classifications in both the physical and clerical bargaining units in Los Padres Division. At the outset, the Committee agrees that the issue of the clerical work performed by agency employees has been resolved by Arbitration Case No. 128 and its subsequent implementation agreement. The Committee then turns its attention to the physical bargaining unit work being performed. According to the testimony, when a need for a temporary employee was identified, the contract agency sent a prospective employee who was interviewed by PGandE supervisors. If the individual was deemed to be satisfactory, they were "hired" by the agency. The contract employees were assigned to work with bargaining unit employees, and their day-to-day supervision was provided by PGandE supervisors. If there was a problem with any contract employee, the agency was notified by PGandE, and the individual was removed from the job.

Decision

The Committee is in agreement that this use of contract employees is inappropriate and will immediately cease.

On this basis, the case is considered to be closed.

San Joaquin Division Grievance Nos. 25-846-86-8 (P-RC 1122) and 25-847-86-9 (P-RC 1123)

These cases involve the performance of work by contract employees in the Merced and Fresno garages respectively. The Merced garage contracted for the services of two Lead Mechanics and one service person performing the work of a Garageman. The Fresno garage contracted for one Garageman. The contract employees report to work at set hours and provide their own tools. While the contractor stops in the garage to check on his employees occasionally during the week, the overall direction of the work is provided by the Garage Foreman or Subforeman. If discipline is required, the Garage Foreman notifies the contractor to take appropriate action.

Decision

It was noted by the Committee that Company has historically "farmed out" work to local garages without violating the Agreement. However, in these cases, the work performed by the contract employees was under the control and direction of the Company, and met many of the other tests attained earlier in this decision; therefore, Company was acting as a joint employer. Company will cease and desist from this type of contracting.

Nuclear Plant Operations Grievance No. 22-123-85-26 (P-RC 1101)

Facts of the Case

Beginning in 1983, Diablo Canyon Power Plant began using agency employees for clerical assistance. The agency provides the Company with several candidates that are screened by a PGandE supervisor who makes the selection of the successful candidate. On-the-job training is provided by PGandE supervisors and clerical employees. PGandE supervisors complete an annual performance review and can delay annual salary increases if performance is not satisfactory. PGandE supervisors also counsel the agency employees about minor performance problems.

Decision

The Committee agreed that Company is acting as a joint employer in this case and such use will immediately cease.

On this basis, the case is considered to be closed.

East Bay Division Grievance No. 1-2475-86-118 (P-RC 1154)

Facts of the Case

Company contracted with an electrical firm for the performance of Meterman work. The contractor hired a retired PGandE Electric Meter Shop Foreman who reported to work each morning at the PGandE facility and obtained his work orders from a Company supervisor and returned a time card to the Company each afternoon. Company ordered materials for the contract employee's use but did not steadily monitor the performance of his work, set time schedules for completion, or communicate directly with the contract employee regarding working conditions.

Decision

The Committee noted that the facts in this case were similar to those in San Joaquin Division Grievance Nos. 25-846-86-8 and 25-847-86-9 involving the contracting of garage work. While the contract employer in this case was directly responsible for the hiring and establishment of hours and working conditions for the employee, PGandE was involved in the daily assignment of work

which was performed on Company property. Therefore, Company was acting as a joint employer. This case is considered to be closed.

Steam Generation Grievance No. 24-204-86-77 (P-RC 1208)

Facts of the Case

On January 24, 1985 and May 4, 1986, Moss Landing Power Plant began utilizing an agency Casual Laborer and Clerk Typist, respectively. Both employees were under the direct supervision of PGandE supervisors. The Laborer distributed mail, washed, waxed, gassed and checked oil in Company pool cars, cleaned up in and around the plant, made labels for plant use, and shuttled pool cars for service and repairs. The Clerk Typist was used for relief purposes. Both agency employees were released on August 30, 1986, after the filing of the grievance.

Decision

It was agreed that a joint employer relationship had been established. As the remedy is cease and desist, this case is closed as moot.

East Bay Division Grievance Nos. 1-2435-86-78 (P-RC 1133) and 1-2468-86-111 (P-RC 1153)

Facts of the Cases

Both of these grievances concern contracting inspection work. The four individuals performing the inspections were retired PGandE employees. All were hired and supervised by a licensed contractor. In one case, the two employees were jointly interviewed by PGandE and the contractor. In the other case, PGandE was not involved in the selection. The work was contracted due to peak workload and primarily involved capital work. The hours of the four employees were determined by when the crews being inspected worked, and the employees generally reported to the job sites. Both of the contracts were short duration, approximately three months.

Decision

In order to make a determination on these cases, it would be necessary for the Committee to have additional information on how the inspectors operated, with primary emphasis on the supervision or direction supplied by the licensed contractor. In recognition of the fact that both contracts have ceased, the Committee agreed that these two cases were moot and they are settled in that basis.

In addition to the above referenced cases, the Committee discussed the future application of this decision. It was agreed that Company will not use contract or agency personnel for the performance of bargaining unit work in excess of 90 workdays unless such use meets the test of true independent contractor status. In the event a future determination is made that a joint employer relationship exists in violation of the above, Company shall be

required to immediately release the contract or agency personnel involved. In addition, 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 date of employment or 30 days prior to the filing of the grievance, whichever is later. Company also shall be required to pay the Union the appropriate dues retroactive to the 30th day of employment of the contract or agency personnel or 30 days prior to the filing of the grievance, whichever is later. Said dues will not be deducted from the agency or contract employees' wages. If Company determines that there is a need for additional personnel to perform the work previously performed by the agency or contract personnel, Company will fill the position in accordance with Title 205 of the Agreement.

These cases are closed without prejudice to the parties' positions in any other pending contracting cases.

FOR COMPANY:

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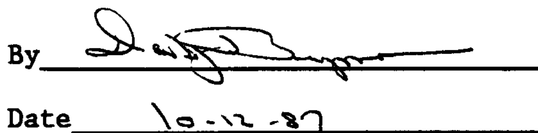
Ronald A. Morris
Robert C. Taylor
David J. Bergman

By 

Date 10-12-87

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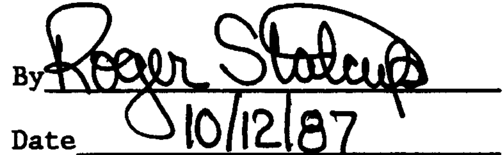
By 

Date 10/12/87