IN ARBITRATION PROCEEDINGS BEFORE

A BOARD OF ARBITRATION

In the Matter of a Controversy Between LOCAL UNION 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Union, and PACIFIC GAS AND ELECTRIC COMPANY, Employer.	OPINION AND AWARD
Arbitration Case 183 (Pay Station Grievances)	

MEMBERS OF BOARD OF ARBITRATION:

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This arbitration arises out of a dispute between Local Union 1245, International Brotherhood of Electrical Workers, AFL-CIO ("Union") and Pacific Gas and Electric Company ("Employer") involving the closure--consolidation of various Customer Service Offices. Employer and Union are parties to a collective bargaining agreement ("Contract"), pursuant to the provisions of which Walter L. Kintz was named as Chairperson of a Board of Arbitration. The parties stipulated that all procedural requirements of the Contract have been met, and the matter is properly before the Board with jurisdiction to render a final and binding award.

Hearing was held on January 7, 1991 in San Francisco, California. The parties were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to file post-hearing briefs and reply briefs. The matter having been submitted on the briefs, the following opinion and award is issued:

ISSUES[1]

Whether the Employer violated Section 24.5 of the Contract in each of the following five grievances by the described conduct and, if so, what is the remedy:[2]

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[1]The parties were unable to agree on a statement of the issues presented. The following statement of issues was formulated after consideration of the respective positions of the parties.

[2]Six grievances were presented at the hearing in this matter; however the Union, by its brief, withdrew Grievance #1702/Yosemite Division.

1. Fresno Division, #1699:
Closure of the Clovis Customer Service Office ("CSO") while continuing to use pay stations in Clovis.

2. Vaca Valley Division, #1700:
Closure of the CSOs in Rio Vista and Winters and consolidation of these offices with the Dixon CSO; relocation of the West Sacramento utility clerk to Dixon while continuing to use pay stations in Rio Vista, Winters and West Sacramento.

3. Ukiah Division, #1701:
Notifying employees Redman and Davison of their layoff while continuing to use pay stations in Ukiah.

4. Drum Division, #1703:
Consolidation of the Cameron Park and Colfax CSOs with the Auburn CSO while continuing to use pay stations in Cameron Park and Colfax.

5. Coast Valleys Division, #1708:
Consolidation of the Monterey CSO with the Salinas CSO while continuing to use pay stations in Monterey.

RELEVANT CONTRACT PROVISIONS

2.1 RECOGNITION

For the purpose of collective bargaining with respect to rates of pay, wages, hours of employment and other conditions of employment, Company recognizes Union as the exclusive representative of all office and clerical employees, including Meter Readers and Credit Representatives, in Company's geographical Divisions and Regions and Departments, . . .

24.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees; to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; to introduce new or improved methods or facilities, 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.

24.5 CONTRACTING

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 workloads prevent 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.

CONTENTIONS OF THE PARTIES

The Union argues that in each of the five grievances the Employer breached the Contract, specifically Section 24.5 as previously interpreted, by removing unit work while concurrently using independent contractors (pay stations) to perform such work and failing to notify the Union of such actions.

The Employer responds that its actions at issue are consistent with a practice of 40 years' duration which the Union has known of and acquiesced in. The Employer also argues that in any event the actions complained of have no legally significant impact on unit work.

FACTS COMMON TO ALL GRIEVANCES

For at least 40 years the Employer has used independent businesses as pay stations. The Employer pays these businesses a fee averaging $.25 per bill to accept payment from customers who

wish to pay their PG&E bills directly rather than by mail. This is primarily a service aimed at senior citizens and others who prefer to pay by cash or do not have checking accounts. There are approximately 400 such stations currently in use which is generally consistent with the number extant over the past 20 years. The direct payment of bills has also been available at Employer operated CSOs where unit employees provided the same convenience of accepting direct customer bill payments.[3]

Prior to the events which gave rise to the instant grievances, the Employer closed--consolidated more than 30 CSOs over the past 20 years. In at least 24 of these situations the Employer currently uses pay stations; however, the record does not establish when these pay stations were initiated. It is stipulated that the Union was generally aware of the use of pay stations, as described above, although the Employer has not notified the Union of the opening and closing of pay stations.

Pay station locations are selected primarily in areas of high foot traffic, a consideration which formerly controlled the choice of locations for CSOs. The Employer no longer seeks high foot traffic sites for CSOs because it has determined that payment by mail is more efficient and therefore wishes to discourage direct payment. This implicit contradiction is not explained and is made more enigmatic by evidence that the Employer initiated a pay station immediately adjacent to the former Clovis CSO; also by evidence that the West Sacramento CSO stopped accepting cash payments in July 1988 while a pay station accepting direct payments was opened

[3]In most cases the CSO facilities also house other operations of the Employer.

concurrently in that community.[4]

When a customer pays a bill at a pay station the transaction is limited to receiving payment, making change, correcting the bill for partial payment, and issuing a receipt; customers with questions, complaints or requests for service are referred to the Employer's unit facilities. At the end of each business day the pay stations transmit the money received, the bills and a summary of the day's transactions to a nearby Employer facility by mail or direct delivery. Also, in some situations unit employees pick up these materials. Unit employees then review and balance the receipts against the bills and enter the transactions into the Employer's teleprocessing system. If a customer makes a direct bill payment at a CSO the unit employee enters the payment at the time of the transaction into the teleprocessing system which, at the end of the day, is used to obtain a balance of payments received against bill stubs.

The Employer's Director of Credit and Collection Operations, Gary Wood, testified that "approximately the same" amount of bargaining unit time is involved in the processing of direct payments made at pay stations and CSOs. He also suggested that the pay station payments could require more unit time as a result of the difficulty of reviewing and balancing pay station receipts which are often inaccurate. Wood further testified that pay stations do not result in a savings of expense to the Employer because of the combination of the expense of the fee paid the pay station and the necessity for unit employees to review pay station

[4]Further evidence concerning this apparent contradiction is discussed infra under grievance #1708.

collections and enter them into the teleprocessing system. He suggested that use of pay stations may also increase the unit workload at the nearest Employer office.

FACTS SPECIFIC TO EACH GRIEVANCE

Fresno Division, #1699:

The issue here is the Employer's consolidation--partial closure of the Clovis CSO in August 1988. Two pay stations were opened in Clovis in July 1988, one in August 1988 and one each in September and October 1988. It appears that two of these pay stations, including a pay station immediately adjacent to the former CSO location, were subsequently closed. The action involved in this grievance was motivated by a corporate strategy to reduce the overall employee complement by 1.8%. The Union does not challenge the Employer's right to make this reduction in employee complement and further concedes that no employee layoff resulted from the closure, although one unit employee was displaced to Fresno.

The decision to close or consolidate the Clovis CSO function was also influenced by the fact that it was a less efficient facility which provided no opportunities for employees to perform work in the absence of customers seeking to pay their bills. It is undisputed that the Employer took the position that the Clovis pay stations ". . . were established for the purposes of conveniently serving our customers and maintaining a presence in the communities. . ."

Vaca Valley Division, #1700:

At issue here are the closures of the Winters CSO in September 1988 and the Rio Vista CSO in January 1988, and the July 1988 change of operations at West Sacramento. Concerning the

latter, the West Sacramento CSO ceased accepting cash payments and relocated one of its two unit customer service employees to the Dixon office. Although West Sacramento had a pre-existing pay station, when the West Sacramento CSO ceased accepting cash payments a new pay station was established "to maintain customer convenience." Similarly, the Employer initiated pay stations in Rio Vista and Winters to avoid the customer inconvenience which would have resulted from the absence of a direct pay location in those communities. None of these actions resulted in layoffs although employees were displaced to other locations. There is evidence that the customer service workload at West Sacramento prior to the change in operations was equivalent to less than 84 hours per month of unit time.

Ukiah Division, #1701:

This grievance does not involve the closure or consolidation of a CSO. At issue here is the December 1, 1988 notice of layoff to two customer service clerks at the Ukiah office while continuing use of three pre-existing pay stations in that community. Inexplicably the record indicates that these two employees are currently employed in the Ukiah CSO, and it does not affirmatively appear that either was actually laid off.

Drum Division, #1703:

In October 1988 the Cameron Park and Colfax CSOs were consolidated into the Auburn office. As a result, five employees were displaced although none were laid off. The total authorized clerical staffing was reduced by two positions as part of this consolidation. This action was apparently part of the overall 1.8% reduction in employees mentioned above. Concurrently with the

consolidations the Employer opened a total of six pay stations in both of the communities as a convenience to its customers.

Coast Valleys Division, #1708:

In October 1989 the Employer consolidated its Monterey CSO into its Salinas facility pursuant to a decision made and announced on March 30, 1989. This decision was motivated by considerations relating to the expense of the lease of the Monterey facility. Two new Monterey pay stations were established in March 1989 and eight are currently in use in that community. Prior to its closure the Monterey office had a low volume (approximately 15 hours per month) of customer direct payment work. The two new March 1989 pay stations have a slightly lower volume of such work. For reasons which are unexplained, the Employer currently has assigned a customer service employee to an existing Monterey facility (which is not a CSO). This employee is prepared to receive direct payments from customers. The Employer ". . . intends to measure this traffic to see if a customer service counter is justified" but does not advertise the availability of this service as it "does not want to encourage the establishment" of the service.

ANALYSIS AND CONCLUSIONS

The Union argues that the Employer violated the recognition (2.1) and subcontracting (24.5) provisions of the Contract in four particulars; i.e., (1) reducing the scope of the unit, (2) use of subcontracting for more than "a limited period of time" (24.5(a)), (3) use of subcontracting without giving appropriate consideration to the availability of unit employees, and (4) failure to notify the Union in advance of contracting work (24.5(c)).

Turning to the latter contention, the Union finds support in the stipulated facts. The Employer does not point to any factual contradiction, but appears to view the requirement of 24.5(c) as irrelevant because its conduct is otherwise privileged. However, the express language requires notice ". . . if possible" of contracting, without requiring or assuming that the contracting in question is impermissible. On the contrary, the context of the Contract language suggests that such notice is required even for permissible contracting. There is clear precedent for the strict application of 24.5(c) in the award of Arbitrator Chvany in Arbitration Case No. 128 (slip opinion pages 32, 33).[5] The evidence that the Employer used pay stations to "provide customer convenience and a presence in the community" suggests a potential for impact on unit job opportunities. The requirement of notice in the contract provides the Union a significant opportunity to police this and other types of subcontracting activity and should not be undermined. The Employer's ambivalence concerning direct payment services for its customers strongly suggests the possibility that future CSO closures could impact unit job opportunities and/or extend beyond past practice. Further, the strict requirement of notice is a minimal burden on the Employer compared to the potential harm to the Union and the unit employees. For these reasons and based on the record as a whole, it is concluded the Employer violated the Contract by failure to comply with 24.5(c) with respect to each of these grievances.

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[5]The well-reasoned award of Arbitrator Chvany interpreting the same contract language at issue here is treated as precedent insofar as it applies to these facts.

The briefs of the parties focus primarily on the Union's first three contentions and the question of whether the Employer's past practice can be used to interpret the pertinent Contract provisions so as to privilege the use of pay stations while concurrently closing CSOs or otherwise displacing customer service employees.

As a secondary argument the Employer urges that the evidence fails to support the necessary element of harm to unit employees or unit employment opportunities resulting from its conduct. The Union attacks the Employer's evidence on the latter point by pointing to the weakness of the empirical basis for the conclusion that pay stations increase rather than decrease unit work. Whatever the merits of the Union's contention in this regard it must be noted that the Employer's evidence, albeit conclusionary, is the only evidence on this record concerning the impact of the Employer's action on the unit. As the Union has the burden of proof it is concluded that the Union has not established a negative impact from the Employer's action.

The Union argues, alternatively, that no effect on the unit need be shown and cites two previous grievance resolutions in support of this contention. First the Union notes Arbitrator Chvany's "expansive interpretation" of Section 24.5 in Arbitration Case No. 128. The Employer defended that grievance by arguing that no violation of Section 24.5 could be found where the subcontracting at issue did not result in the layoff of unit employees. In response to this contention Arbitrator Chvany opted for a "more expansive interpretation" stating:

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> Reduction of the scope of the bargaining unit can occur in situations that do not involve layoff of current unit Employees. Even where no current Employee in the unit has been displaced by agency Employees, erosion of the bargaining unit occurs when available jobs that would otherwise go to bargaining unit members under the recognition clause of the Contract are filled by persons outside the unit. The bargaining unit is not a static concept, nor is it defined in terms of the Employees currently working. The unit is defined in terms of jurisdiction over certain jobs and types of work. When those jobs or that type of work is given to outside agencies rather than to bargaining unit persons, the services of bargaining unit Employees are dispensed with and the scope of the unit is reduced. [emphasis added]

The cited award, therefore, finds a clear impact on the unit rather than a holding that no such effect is required. Arbitrator Chvany relied on the fact that the Employer subcontracted work of the type covered by the Contract, and traditionally done by unit employees, to temporary employment agencies. Reliance on that award in the instant grievances is misplaced because here there is no demonstrated loss of current or prospective employment opportunity flowing from the conduct. The Union's reliance on the March 1988 Review Committee Decision on the Mission Trail Region grievance is similarly flawed. That dispute involved a grievance in response to the Employer's subcontracting to a credit agency the mailing of delinquency notices to customers, a change in the Employer's method of operation which resulted in the loss of potential increase in employment opportunities for the unit. In both of these previous grievances the Employer responded to the development of a new work opportunity of the type covered by the parties' Contract by denying the Union the representational opportunity inherent in notification of the subcontract and then initiated the use of nonunit employees to perform those unit functions. In summary, there is insufficient basis on this record to apply the cited prior grievance resolutions

as precedent for the conclusion that no impact on the unit need be shown.

Finally it is necessary to resolve the significance of past practice in these grievances. The role of past practice in contract interpretation is discussed extensively in the authoritative books and published opinions of prominent arbitrators (many of which are cited in the briefs of the parties). Both sides find ample support for their respective positions; however, the conflicting results are not entirely persuasive for a variety of reasons including disparity of facts and contract language. Of the awards cited it appears that Safeway Stores, 51 LA 1093, 1094, is the most pertinent. There Arbitrator Koven declined to find a breach of the subcontracting clause in partial reliance on a past practice of 30 years in which the union tolerated the use of nonunit employees to perform the work in question.[6] Also of interest is the award in Grocers Dairy Co., 69 LA 7, 10, where the arbitrator declined to find a breach of the subcontracting clause,[7] noting:

> The record shows that, by well-rooted practice extending through several Agreements, the Parties have allowed customer pickups to transpire under circumstances which do not adversely affect or threaten work preservation and job opportunities of the active work force.

The evidence in this record establishes that the Union has, 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

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[6] It is also significant that the contract clause at issue there was apparently a more severe restriction on subcontracting than Sec. 24.5.

[7] Again, that contract severely restricted subcontracting.

CSOs.[8] That acquiescence together with the absence of a demonstrated causal relationship between the use of pay stations and the "displacement" of employees precludes Items 1 and 2 of the remedy sought by the Union here; i.e., (1) cease and desist from contracting to pay stations in Clovis, Winters, West Sacramento, Rio Vista, Ukiah, Monterey, Cameron Park and Colfax, and (2) return to the bargaining unit work performed by pay stations in these communities. In these circumstances it is inappropriate to require those remedial actions for conduct the Employer had every reason to believe the Union would not grieve. Also in connection with (2) above, this record does not disclose that bargaining unit work has been lost to pay stations which is an obvious assumption of this remedial request.

Whatever may be said concerning the appropriate role of practice in contract interpretation, a collective bargaining relationship is not enhanced by imposing extensive remedies for conduct which has long been indulged. For these reasons the question of Contract violation is largely academic as the usual remedies would not be appropriate in any event.

Notwithstanding that conclusion, on the facts presented, including the absence of evidence of impact on the unit, I decline to find the use of pay stations under the circumstances of these grievances violated the Contract. However, for the reasons noted

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[8]The Union's argument that the evidence of past practice ". . . does not address the specific factual situation challenged. . ." is rejected for the following reason: The uncontradicted testimony of Employer witness Wood and the documents in evidence as part of various joint exhibits establish the Employer's practice of closing--consolidating CSOs while using pay stations.

above, failure to give the notice required by 24.5(c) does violate the Contract, but does not require a remedy other than to cease and desist from such conduct in the future.

AWARD

The Employer violated the Contract in grievance Nos. 1699, 1700, 1701, 1703, and 1708 by failing to give notice as required by Section 24.5(c) of the Contract to the Union before using pay stations while displacing unit employees. As a remedy the Employer is required to cease and desist from such conduct in the future. Jurisdiction is retained by this Board for the limited purpose of resolving any disputes as to compliance with this remedial award.

DATED: May 7, 1991

WALTER L. KINTZ
Chairperson

Union Board Member — Date: 5/10/91 — ~~Concur~~/Dissent

Union Board Member — Date: 5-10-91 — ~~Concur~~/Dissent

Company Board Member — Date: 5/10/91 — Concur/~~Dissent~~

Company Board Member — Date: 5-10-91 — Concur/~~Dissent~~