A MATTER IN ARBITRATION

In a Matter Between:

PACIFIC GAS AND ELECTRIC COMPANY

(Employer)

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1245

(Union)

Grievance: Contracting of Dump Trucks and Backhoe Services - Case No. 184

Hearing: September 9, 1991

Award: February 10, 1992

McKay Case No. 91-239

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR
FRANK SAXSENMEIER, UNION REPRESENTATIVE
LANDIS MARTTILA, UNION REPRESENTATIVE
RICK DOERING, COMPANY REPRESENTATIVE
KAREN KURT, COMPANY REPRESENTATIVE

Appearances By:

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STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above-identified Union and Employer.[1] Unable to resolve the dispute between themselves, the parties selected this arbitrator in accordance with the terms of the Contract to hear and resolve the matter. A hearing was held in San Francisco, California on September 9, 1991. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of the briefs from the parties on or before December 1, 1991. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

1 Joint Exhibit #1

ISSUE

Does the Employer's use of dump truck and backhoe contractors violate the Agreement? If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

TITLE 2. RECOGNITION

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 those employees for whom the National Labor Relations Board certified Union as such representative in Case No. 20-RC-1454, but further including clerks in the offices of electric department foremen and technical clerks in steam generation, and excluding system dispatchers, assistant system dispatchers and rodman-chainman.

. . . . . .

TITLE 7. MANAGEMENT OF COMPANY

7.1 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.

7.2 BARGAINING UNIT WORK BY SUPERVISORS

Supervisors and other employees shall not perform work usually assigned to employees in IBEW 1245 bargaining unit classifications except:

(a) Such assignments are not to be deliberately made for the purpose of reducing the number of employees performing work within bargaining unit classifications.

(b) Historical assignments recognized by the NLRB and those involving continued Company practices with respect to overlapping duties of non-bargaining unit classifications and bargaining unit classifications are to be maintained unless otherwise resolved by Company and Union.

(c) Other than the above (a) and (b), such work assignments should be limited to work performed in:

(1) Emergency situations.

(2) Training of employees and demonstrating work methods.
(3) Incidental assistance and de minimis assignments. (Added 1-1-80)

. . . . . .

TITLE 106. STATUS

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106.7 INTERMITTENT EMPLOYEES

(a) An intermittent employee is one who does not work any set schedule of hours per day or days per week, but who is on call to fill in on any schedule on an as-needed basis. During sickness or vacation relief periods, however, such employee may be assigned to work the schedule and hours of the absent employee if such an assignment cannot be made pursuant to the provisions of Subsection 205.3(a) or any Relief Agreement.

(b) Intermittent employees will attain regular status upon the completion of six months of continuous service. Continuous service is defined in Section 106.5 as being uninterrupted by (1) discharge, (2) resignation, or (3) absence for more than a cumulative total of 30 days due to (i) layoff, (ii) sickness or industrial disability, or (iii) other causes. If an employee is off for more than 30 days during a six-month period, a new six-month qualifying period will begin upon his return to work.

BACKGROUND

For a number of years, the Employer has engaged the services of outside dump truck and backhoe operators along with dump trucks and backhoes to supplement the work crews of the

Employer on various projects. According to the Employer, the companies with whom the Employer contracts for these operators and the equipment are private companies over which the Employer has no control. The work performed by the operators on the job is directed by an Employer supervisor, but the Employer asserts that it has no control over the hiring or firing of the operators in question, nor does it have any control over the equipment involved. It is the position of the Union that the arrangement which the Employer has entered with the outside contractors creates what the Union describes as "joint employers." As a secondary argument, the Union asserts the Employer has violated Section 207 of the Agreement relating to contracting of work. It is the position of the Union that the question of joint employer has been resolved in prior arbitration decisions in a manner favorable to the Union. These decisions led to an agreement between the parties in 1987, according to the Union, which sets forth the elements for determining whether a joint employer status exists. It is the position of the Union that the Employer is in violation of this agreement by its present use of back hoes and dump trucks along with the operators.

The Employer called Gloria Washington, who identified herself as a dump truck owner/operator. She stated that her company owns seven dump trucks and that, on occasion, she, herself, acts as an operator. She currently has a contract to provide dump truck service to the Employer and has had one for the past eight years.[2] The Company has been in business, Ms. Washington testified, for ten years.[3] In addition to providing dump trucks to the Employer, Ms. Washington testified, her company also provides dump trucks and operators to other companies as well. Between March, 1989 and March of 1990, Ms. Washington testified, approximately fifty percent of her business was conducted with the Employer. According to

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2 Tr. Page 12

3 Tr. Page 13

Ms. Washington, on average, she has all seven of her trucks out about three days a week. On the remaining two workdays in the week, she may have 2-4 trucks out working.

On a day-to-day basis, Ms. Washington testified, she would receive a call from the Employer requesting a particular type of truck. The Employer's representative would describe where the truck was to report, and Ms. Washington would send the truck with an operator to that job location. Once the truck and driver arrived at the job location, an Employer foreman would tell the driver what he was to do and would tell the driver when the job was done.[4] According to Ms. Washington, the Employer has the authority to send an operator back with whom the Employer is not satisfied. However, this has never occurred in her experience with the Employer. The Employer can send the operator back after any number of hours and is not required to keep the operator on the job for a full day. The rate of pay for the drivers are set by Ms. Washington, she testified. She receives a flat amount per truck set by the PUC. She is then free to take the money she receives from the Employer based on the PUC rate and use it as she determines best. She carries her own liability insurance on the trucks, including comprehensive and collision and has worker's compensation insurance, she testified.[5] The Employer does not guarantee Ms. Washington any exact amount of work, but parameters are set in the contract between she and the Employer based on the number of trucks Ms. Washington maintains.[6] The maintenance of the equipment is the responsibility of Ms. Washington, she testified. If the Employer calls and Ms. Washington has no one available or no equipment available to send, she stated, the dispatcher for the Employer calls someone else.

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4 Tr. Page 26
5 Tr. Page 15
6 Tr. Page 17

Ms. Washington indicated that in the contract she has with the Employer, there are certain specifications with which she must comply dealing with the employees that she supplies. There is a dress code, she stated, specifying the type of clothing, including boots and safety vests, that drivers are expected to wear. There is also a random drug testing program with which she is expected to comply. However, Ms. Washington testified, PG&E has never enforced the random drug testing program against any of her operators. She has never been told that she had been exempted from the drug testing program, but it has not been enforced.[7]

The Employer called Ruby Snider, the comptroller and secretary of Lisbon Backhoe Service. Her company has been contracting with the Employer since 1989. Prior to that time, the company was known as Lisbon Equipment Rental, and that company had been contracting with the Employer for approximately eight years.[8] The contracts with the Employer are for backhoes and operators. Of the 56 employees currently working for Lisbon, approximately 30 of those employees are backhoe operators. The company owns 38 backhoes. In addition to performing work for the Employer, Lisbon also does backhoe work for outside contractors. Approximately seventy-five percent of the business of renting backhoes by Lisbon is conducted with the Employer, according to Ms. Snider.[9] The company has generated approximately a million and a half dollars in revenue for the years 1988 through 1990.

When the Employer calls Lisbon in the morning for backhoes, they do not describe the nature of the job which the Employer wants to have completed. Instead, the Employer describes

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7 Tr. Page 21
8 Tr. Page 28
9 Tr. Page 36

the size of the bucket on the backhoe, and the Employer then selects the backhoe and the operator to send. Lisbon hires its own employees and pays them wages which it determines. The backhoe operators the Employer uses are not required to work exclusively for Lisbon but may go off and try to find other work if nothing is available with Lisbon or the Employer. There are no guaranteed hours given to any employee either by Lisbon or by the Employer. Normally, the Employer will call Lisbon the afternoon before it needs a backhoe, but on occasion, the Employer calls Lisbon on the same morning that it needs the backhoe. Lisbon carries general liability insurance as well as workmen's compensation insurance. Lisbon has two supervisory field personnel who check on the quality of the work being performed by its operators. If the Employer is dissatisfied with any of the operators sent, Ms. Snider testified, "Naturally, we try to find an operator that is acceptable to them."[10] On occasion, Ms. Snider, stated, Lisbon will rent simply equipment without the operator, but this is a small portion of the business. When asked whether any of its operators work "week in/week out" with the Employer, Ms. Snider stated that, "It could be for two weeks or it could be for a day." She acknowledged that some operators are with the Employer quite a bit.[11]

William Abitz, a gas general foreman in the Richmond Service Center for the Employer for the past four or five years, testified that he is responsible for new construction in the area as well as for maintenance. He has sixty-one employees and three construction supervisors who report to him. He described the nature of the work these individuals perform in the following manner,

> They perform various tasks out in the field. New business. Installing our gas and electric facility, the new tracts. Maintaining the gas facilities in the field. Replacing the old pipelines with new pipelines. Depends on their classification.

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10 Tr. Page 34
11 Tr. Page 37

> Some of them are equipment operators. Some are fitters. Some are crew foreman. Helpers. Field men. And they're each assigned different tasks according to the union contract.[12]

Mr. Abitz described the situations in which he would utilize the services of outside dump truck or backhoe operators and the equipment. He stated,

> Basically what happens is the crew foreman will turn in a tag requesting a piece of equipment, whether it be a backhoe or a dump truck, to perform the duty that he has on that given task that he's been assigned for the following day. What happens then, the construction supervisor sits down and reviews his -- his or her workload for the following day and manpower that's available to him.
>
> What they try to do is, all three construction supervisors try to move equipment between them, whether it be a backhoe or a dump truck or manpower. If that can't be done, then what they do is they'll call either for a fully operated dump truck or a fully operated backhoe.
>
> In the cases where we have a man -- manpower available to use that we can put on a bare rental, we'll also opt to use the bare rental if we can.[13]

There are eight backhoes, Mr. Abitz testified, assigned to the center in Richmond. When additional backhoe help is needed, Mr. Abitz described the process which supervisors go through in making that determination. He stated,

> . . . That's done with the construction supervisor when he sits down -- he or she reviews their workload for the following day and manpower requirements and what dates we have, the need for contractors and stuff that's requesting things be done by certain days.
> . . . . . .
> The construction supervisors sit down and review their workload for the following day. And if he or she determines that they have to go to an outside vendor, then they'll call either for the backhoe or dump truck, whatever they're requesting that they're going to need to support their crew with.
>
> And their decision is based off of customers' demands. It's based off of PUC requirements. If we have leaks, or anything like that, that we have to meet on a mandated requirement.

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12 Tr. Page 40
13 Tr. Page 41

> And it's based on the manpower, the availability of our own manpower within the service center to fully train people to put on this equipment, if we can.
> . . . . . .
> We try to use our people first at all times, if we can.[14]

When the construction supervisor calls the outside contractor for assistance, Mr. Abitz testified, on occasion, a request will be made for a particular individual to come back to the job to operate the backhoe. The drivers who come to the job to operate the backhoes wear their own clothing and are not identified by any markings or insignias as PG&E employees. He described how the drivers are used in the following manner,

> Backhoe operators are used to excavate, which is trenching, digging trenches, bell holes. They're used for loading out material on the job site into the -- into the various dump trucks, whether it be PG&E or contract rental.
>
> The dump trucks are used to offload spoils, which is the dirt, concrete, blacktop that's removed from the job site. They're used to transport material back to the job site to put back into the trench.
>
> That material, when they come back into the yard to pick it up, that's loaded by a PG&E employee on a PG&E piece of equipment. They're not allowed to operate our equipment in the service center to load the vehicles up.[15]

Mr. Abitz described how the Employer's foreman relates to the backhoe operator on a particular job in the following manner,

> What will happen is, is when he reports to the job site, the crew foreman will lay out the work for that day. He'll say that, "I want to dig from Point A to Point B. And then we're going to do this in between." There may be different things -- different stages where the backhoe has to stop, or there may be other duties that he wants him to do on that job site that's required to have done by a backhoe. And that's the -- the foreman will give those tasks to him when he arrives that morning.[16]

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14 Tr. Pages 42 and 43
15 Tr. Pages 44 and 45
16 Tr. Page 46

On occasion, Mr. Abitz testified, a backhoe operator can continue on a job site excavating or backfilling when the Employer's crew is not on the site.[17]

According to Mr. Abitz, the Employer's system of using backhoe operators has not resulted in any attrition to the bargaining unit. No direct supervision is given to the backhoe operators or the dump truck operators. The foreman lays out the work, but the supervision, according to Mr. Abitz, is provided by the agency from where the operator is hired. There are no controls over the wages, nor are there any guarantees with respect to the number of hours an operator will be on a job. If there is a problem with an outside operator, Mr. Abitz described how that is handled,

> Normally what will happen if we have a disciplinary problem or a problem out on the site with the operator, the crew foreman will call in. And then the construction supervisor or myself will contact the agency that that employee is from. They will send a supervisor out to handle that disciplinary problem with that individual.[18]

It was Mr. Abitz' opinion that the cost of using outside operators on dump trucks and backhoes is approximately the same to the Employer as it would be if their own employees were used.[19] On further questioning, however, Mr. Abitz acknowledged that the benefits paid to the Employer's employees are significantly higher than the benefits paid to the employees of outside contractors which would reduce the cost to the Employer when it used outside contractors.[20]

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17 Tr. Page 48
18 Tr. Pages 49 and 50
19 Tr. Page 51
20 Tr. Page 52

On cross-examination, Mr. Abitz conceded that it was very unusual for an outside backhoe operator to work on an Employer job site without the rest of the Employer's crew present.[21] When asked about the attrition to the bargaining unit, Mr. Abitz acknowledged that there are presently four vacancies which had not been filled, but he asserted that he is in the process of filling them. The outside supervision that he has observed consists of the supervisors going "by" once in a while to check the operators on the site. He stated that he had never seen an outside contractor supervisor on a job site, but he asserted that he did not get out in the field that much. When a problem arises with an individual, Mr. Abitz asserted, the outside contracting employee is not removed until a supervisor from his company comes and removes him. On two occasions, in Mr. Abitz' personal experience, it has been necessary to call the outside contractor to have operators removed. In both of those cases, the supervisor from a contracting company came and replaced the operator with another operator.

Mr. James Gleaves, a gas construction supervisor in Concord, testified that he supervises approximately 23 people in the maintenance and installation of underground utilities. In this group of 23 people, he has 7 crew foreman and 4 equipment operators. He is responsible for contacting outside equipment operators, which is a decision he stated, ". . . based on scheduling manpower availability . . . ." According to Mr. Gleaves, if he has the manpower available to do the work, he does not seek assistance from outside contractors. He described the process that he goes through in deciding whether to use an outside contractor in the following manner,

> . . . basically I just take my schedule, where I get the -- get the equipment, request tag. At night these equipment request tags are given to me.
>
> And if somebody asks for, say, for example, a ten-yard dump truck for eight hours, and somebody else asks for a ten-yard dump truck for eight hours, and I only have one ten-yard dump truck, obviously I have to get a ten-yard dump truck

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21 Tr. Page 54

> from somewhere. So if my counterpart on the other side's truck is not available, then I have to contract.[22]

Mr. Gleaves makes the call to the outside operator and asks for the backhoe or dump truck along with the operator. He testified,

> Usually speaking, you know, I kind of know the length of time. It will be for one day. Sometime I'll tell them, "Well, I might -- I'll need this guy for approximately three days." I don't guarantee it, but I'll say, "approximately three days."
>
> That helps them with their scheduling and whatever. Sometimes only two days. And at the end of that time he's let go.[23]

There are no guarantees with respect to the amount of time an operator from an outside contractor will remain on a job.

If there is a problem with an outside operator, Mr. Gleaves will contract the contractor from where the operator came and have the operator replaced.[24] Mr. Gleaves stated, ". . . the crew foreman is the one that the guy has to work with. And it's my job to give him what he needs to get the job done. So I try to accommodate him where possible."[25] He described how he attempts to accommodate the crew foreman in the following manner,

> If he is not satisfied, I try to get him satisfied by -- if that person is not doing what he says he wants him to do, then I go to the particular agency and I say, "This person's not satisfied." But it has to be a reasonable request.[26]

After making this request, the agency sends someone else. Mr. Gleaves indicated that over time, a relationship has developed between the Employer and the vendors that they use so that foremen

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22 Tr. Pages 59 and 60
23 Tr. Pages 60 and 61
24 Tr. Pages 61 and 62
25 Tr. Page 62
26 Tr. Page 63

know which operators are good and which are not. He stated, "And through time, these guys have realized that if this person is available, I'd like to have him."[27]

Roger Stalcup, an assistant business manager for the Union, testified that he put together information showing the amount of time the Employer used dump truck operators and backhoe operators in the East Bay region.[28] In general terms, Mr. Stalcup believed the records that he reviewed from the Employer show the Employer uses backhoe operators 33,142.75 hours per year and dump truck operators 33,064.12 hours per year. The combined total of these two figures reflects 31 or 32 full-time equivalent positions.

The Union called James McCauley, a gas crew foreman located in Oakland, California. Mr. McCauley has been with the Employer for 32 years and has served as a foreman since 1970. In the past, Mr. McCauley testified, the Employer would engage in what he described as "bare rentals" where only the equipment, such as a backhoe, would be rented. Employees working for the Employer would then operate the equipment. At one point, according to Mr. McCauley, the Employer had eight backhoes it had rented from Spires on a full-time basis located in the yard. When an additional backhoe was needed, one of the employees of the Employer ". . . would be rated up to equipment operator and take one out if it was needed."[29] These eight backhoes, according to Mr. McCauley, remained in the Employer's yard seven days a week and were operated exclusively by PG&E employees and not by employees of the vendor.

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27 Tr. Page 63
28 Union Exhibits #1, #2 and #3
29 Tr. Page 87

Under the present system, according to Mr. McCauley, he has the discretion to decide when an extra dump truck is needed and to call the vendor for the truck and operator. He controls the activities of the operator on a daily basis. If he needs the operator the next day, he tells the operator on the job to come back the next day. He also has the ability to request a specific individual from the vendor to operate the vendor's dump truck. In his opinion, Mr. McCauley testified, he has the right to terminate the operator at any time he chooses, and he has exercised that right to fire the operator on the spot.[30] He recalled specifically firing two operators who worked for Gloria Washington. When he used the term fire, Mr. McCauley indicated, he meant that he sent the drivers back to the vendor. He has terminated operators from vendors for various reasons, he stated, which include the operators' attitude on the job and things such as failing to tarp a load or taking less than a full load. In his opinion, Mr. McCauley indicated, he was responsible for supervising the rental dump truck drivers. He testified, "I'll talk to them individually in terms of what I expect out of them during the day."[31] He stated,

> . . . I tell them, you know, I expect them to shovel the edges off, all the dirt off the edges, and to work with the backhoe in terms of on a daily basis.
>
> After he's through with that, I tell him where to go to dump at, what he has to do, and, you know, when to come back.
>
> Late in the afternoon, I'll tell him that, when you're through dumping this load, to bring sand back, and stuff like that.
>
> But I direct them in terms of their overall performance during the day, when they take a lunch, when they quit, when they start the next morning.[32]

According to Mr. McCauley, a rental dump truck driver does not exercise any independent judgment on the job.

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30 Tr. Page 89
31 Tr. Page 93
32 Tr. Page 94

Mr. McCauley went on to describe the use of backhoe operators and concluded that he has approximately the same amount of control and discretion in selecting and terminating backhoe operators as he has over dump truck operators. He testified that his first experience with using a backhoe with an operator was in Walnut Creek. Prior to that, the Employer had been renting the backhoe but not the operator. The Employer gradually began to rent both the backhoe and operator. He stated, "Eventually, but not at that time, it took about a year or so. We started using slowly. And then we got into -- we probably -- we could use four or five a day now."[33] Mr. McCauley testified that he had never seen a supervisor from Lisbon, one of the backhoe vendors, on the job site. In his opinion, the vendors provide no supervision. He could not recall an instance when an outside operator of a backhoe or a dump truck had been on the job when the Employer's employees were not on that same job at the same time. Mr. McCauley contrasted the type of contracting for backhoe operators and dump truck operators with the contracting the Employer does for saw cutting to open a trench or for paving, which is done after the job is completed. In these two situations the contractors perform work assigned to them by the Employer but are not supervised by PG&E foremen.

Michael Longo, a gas department foreman who works out of Concord and has been with the Employer for twenty years, testified that he is involved in the process of securing the services of backhoe and dump truck operators. According to Mr. Longo, when he has a rental dump truck driver assigned to his crew, he includes that driver in his tailgate meetings which he conducts with other members of his crew who work for the Employer. In addition, according to Mr. Longo, he has the dump truck driver from the vendor working with the crew other than driving the truck. He cited an example where he used two rental dump truck drivers as flagmen on a job where the

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33 Tr. Page 99

Employer did not have enough manpower.[34] He stated, "I expect them to do the same as one of our own heavy dump truck drivers. . . .Anything below his classification, from helper to field man, which includes sweeping, shoveling, et cetera."[35] The dump truck driver has the discretion to determine the size of the load that he will put in the truck, Mr. Longo stated, but that is the same discretion that PG&E employees have who operate dump trucks.

With respect to backhoe operators, Mr. Longo testified, they are more critical than dump truck drivers for purposes of safety and productivity. He and a number of other foremen for the Employer have identified several individuals that operate backhoes for Lisbon who the foremen try to keep going from job site to job site for three or four months at a time in the summer. On one occasion, an operator of a backhoe sent out by Lisbon was so inexperienced, Mr. Longo stated, that he had the operator join the crew doing field work and sweeping while he operated the backhoe. The next day, Mr. Longo had Lisbon send out an operator that could operate the backhoe. He has never seen any supervisor from Lisbon on the job supervising the backhoe operators. In his opinion, Mr. Longo stated, the operators who work for the Employer full time are far more qualified than the operators who are supplied by the vendors.

The Union also called Joe Jimenez, a foreman in the general construction department in the East Bay area, who testified with respect to backhoe and dump truck operators in a manner virtually identical to that testimony provided by Mr. McCauley and Mr. Longo. Mr. Jimenez identified one backhoe operator from Lisbon who has been working regularly for the Employer for three or four years. He stated,

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34 Tr. Pages 119 and 120
35 Tr. Page 120

A. . . . we've got one in the area now. He's probably been there about three or four years. He's probably their best operator they've ever had.

Q. Day-in and day-out he's been with you that long?
A. Not with me, but he's -- well, he's on and off. Like right now they're using him for vacation relief, and stuff like that. You know, operators go on vacation, they put him in as the vacation relief.[36]

POSITION OF THE PARTIES

UNION

The Union pointed out that it viewed this case as falling within the parameters of a joint employer case and not as an outside contractor case. The Union stated that it does not believe the Employer violated the 1988 letter agreement governing contracting. It is the contention of the Union that by establishing a close joint employer relationship with the "contractor" employees, the Employer violated the recognition clause of the Agreement and Review Committee Case No. 1637. The Union asserted that over the last few years, the Employer has relied increasingly upon rental dump trucks and backhoes with operators to perform work which, without question, falls within the scope of the work normally performed by bargaining unit members. The practice has caused erosion in the bargaining unit to the extent of thirty full-time equivalent positions in the East Bay region alone. There are no material facts in dispute, making the process of applying the explicit delineation of relevant factors to be considered in joint employer cases found in Review Committee Case No. 1637 a fairly mechanical process. The Union then focused on each of the factors, beginning with hiring. The Union conceded that the Employer may not technically fire dump truck drivers and backhoe operators, but the selection process is clearly controlled in large part by the

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36 Tr. Page 146

Employer and not the rental companies. The role of the Employer in selecting operators and drivers is comparable to that established in Arbitration Case 128 and Arbitration Case 142.

With respect to firing, the Employer may not technically fire rental backhoe operators or dump truck drivers, but its crew foremen undeniably have absolute control over the rental employees. The testimony of the Union's foremen illustrates the power vested in and exercised by the Employer's crew foremen. The right to terminate backhoe operators and dump truck drivers is similar to the power which was exercised in Arbitration Cases 128 and 142. Because many of the rental companies exist largely by selling their services to the Employer, the Employer's termination effectively spells termination by the Contractor. With respect to scheduling of work, the Employer alone determines the workday and work hours of rental dump truck drivers and backhoe operators. While the rental companies may schedule the hours of work for these operators when they are not working for the Employer, when they are at PG&E, their work is scheduled solely by PG&E without restriction.

The Union noted that aside from the areas of selection, rejection, workday and work hours, the conditions of employment of rental drivers and operators are established by the rental companies. This is the same case with respect to the clerical employees provided by Kelly Services and Western Services in Arbitration Case 128 and with respect to the clerical employees provided by Waltek in Arbitration Case 142. Rental drivers and operators are supervised solely and completely by the Employer's crew foremen when on a PG&E job. They are fully integrated into the PG&E crew; PG&E crew members are assigned to support the driver or operator, and when not driving or operating, the rental employee is expected to work with the crew as if he were a PG&E employee. Application of the factors articulated by the parties in Review Committee

Case 1637 to the facts of this case leads to the conclusion that a joint employer relationship has been established. Given the high degree of control over the work of the rental drivers and operators by PG&E, the relationship is far closer to that of a direct employer than that of a customer to a contractor. The work is not contracted out; the drivers and operators are hired for the day with their equipment to work as an integral part of the PG&E crew under the firm control of the PG&E crew foremen. The harm to the bargaining unit as a result of this joint employer status is evident. The use of rental drivers and operators in a joint Employer situation harms the Union and results in the loss of potential Union membership and dues.

If the Employer attempts to establish as a defense a past practice, it must quickly fail. In Arbitration Case 183, the Employer successfully established a longstanding pervasive past practice which the Union had not challenged. For 4 decades, the Employer closed customer service offices and opened pay stations without Union dissent. Given this consistent and seasoned practice, arbitrator Kintz held that the parties' past practice was one to bar the Union's grievance. This is not the case in the present dispute. To the contrary, the practice the Employer engaged in was to use rental equipment with its own employees operating the equipment. Only recently, has the Employer begun renting fully operated rentals instead of bare rentals. As the new practice emerged, within weeks of the decision and Review Committee Case 1637, the Union filed grievances challenging the increasing practice of fully operated rentals. The Union asked that the arbitrator as a matter of remedy remand the dispute to the parties to give them an opportunity to work out the appropriate remedy in light of the decisions in Arbitration Cases 128 and 142, retaining jurisdiction over the remedy to the extent the parties cannot reach an agreement.

EMPLOYER

The Employer argued that the Union has failed to show that the outside contractor personnel are joint employees of PG&E. The Union bases its contention primarily on the alleged fact that bargaining unit foremen direct and schedule the Contract operator's work and have the right to dismiss an operator from a job and request another operator if they are dissatisfied with their performance. These facts do not prove the existence of a joint employer relationship. Citing Associated General Contractors v. NLRB, 564 F2d 271 (9th Cir. 1977), the court found that owner/operators of dump trucks and drivers, who were employed by them, were not employees of the contractor. The court made this finding, even though the outside drivers observed the same starting time as employee drivers, and in many cases were directed by the employer as to where to load, dump and what route to follow. In this case, the working foremen testified that in directing the work of contractor/operators, they merely instruct the operators as to the work that needs to be done and sometimes, in the case of dump truck drivers, where to pick up and dump materials. The PG&E foremen do not instruct the operators on how to operate their equipment.

Reprimands for poor performance from a contractor, according to the court in Associated General Contractors, are expected in order to get the job done on time and are not examples of interference with the manner or means of getting a desired result. The Union's claim that the Employer has the right to reject or return an operator with whom it is not satisfied is correct. It is also true that the crew's foremen's request for particular operators are accommodated to the extent possible although they are not guaranteed. These facts do not support a contention that the Employer or the bargaining unit has the right to hire or fire contractor employees or dictate the

terms and conditions of their employment. Citing Merchants Home Delivery Service, Inc. v. NLRB, 580 F2d 966 (9th Cir. 1978), the Employer noted that the right to approve drivers in order to ensure they are able to perform the services requested does not transform independent contractors into employees. Likewise, directing operators as to when to start, quit, take lunch and take breaks is ". . . a necessary requirement by virtue of the need for cooperation among the various workmen at a construction site." (Associated General Contractors). All the other evidence gives support to the Employer's position that the outside companies and their operators are independent contractors. The owners of the outside companies have a substantial investment in their enterprises. They purchase and maintain their own vehicles and obtain all necessary permits and insurance. They are free to provide services and equipment to companies other than PG&E. The outside operators are paid by their employers and not by PG&E.

The Employer's position is supported by the parties' agreement in pre-Review Committee Decision 37 which sets forth a number of criteria. It is undisputed that PG&E has no role in hiring, firing, promotions, demotions, discipline, determination of wages, benefits and other terms and conditions of employment of the contractor/operators. The scheduling is determined solely by the needs of a particular job in order to coordinate the work of the operators with that of PG&E crews, and work hours are not pre-arranged or guaranteed. The direction and supervision of contract operators is focused on the results and not the means of accomplishing the contract requirements. To the extent bargaining unit crew foreman direct operators to do extraneous work, such actions are not a legitimate use of the contractor's personnel and should not be used to confer joint Employer status on the Employer.

The Employer's use of contractors is supported by past practice. Citing Safeway Stores, 51 LA 1093, 1094-1095 (1969), the Employer pointed out that arbitrator Koven rejected a similar subcontracting challenge by noting that the Employer engaged in the practice for years with the knowledge of the Union. The Employer quoted from the decision where arbitrator Koven stated, "When subcontracting is done on a regular basis, arbitrators have generally found a greater justification for authorizing the continuance of the practice. It is undisputed that the Employer has utilized contractor backhoe and dump truck operators on a regular basis for years. There is no evidence that the substance or extent of this practice has changed significantly over this period. The Union has been aware of the practice and acquiesced in it.

The Employer's actions are in conformance with the parties' Agreement. In 1988 the parties executed a letter of agreement (No. 88-104) which described the circumstances under which the Employer could and could not contract work at issue in this case. This decision was reached well after the arbitration decisions upon which the Union relies. The clear meaning of this agreement is that the Employer may contract for these services if qualified PG&E employees are not available, and there is no intent or effect of reducing the regular workforce. Even the Union's testimony shows that contractors are used when employees of PG&E are unavailable. These outside employees are returned to the vendor when the Employer has employees available. There is no evidence that the contracting in question is intended to or has had the effect of reducing the Employer's regular bargaining unit workforce. The Employer asked that the grievance be denied.

DISCUSSION

It is the primary contention of the Union that the Employer's actions in this case violate the provisions of the recognition clause of the Contract because a joint employer relationship has been established by the use of operators on backhoes and dump trucks. This particular issue has a long history of dispute in the relationship between this Employer and this Union. Arbitration Decision 128 and Arbitration Decision 142 make reference to Review Committee Decisions from 1963 dealing essentially with the same type of dispute which is before this arbitrator. In his decision, arbitrator Koven stated,

> The 1963-64 Review Committee decisions, made more than 20 years before the grievance involved in the Chvany decision, referred to a contract in which, like the contract here, contained no express restriction as to contracting out work. Nevertheless, those decisions, rely on the Union recognition clause of the contract, limited the Company's right to use agency employees to occasional use where "temporary services are required for a limited period, such as emergency situations or for a specific special function, and employed help is not available to perform the required duties."[37]

The only new element in the dispute between the Union and the Employer in the present case is the nature of the work in question. Other cases have involved clerical employees and different types of construction work. The present case involves backhoe operators and dump truck operators.

There is nothing in the record presented to this arbitrator which would suggest that the parties at some point in time abandoned their respective positions on the question of joint employer status as that concept has developed out of the recognition clause of the Agreement. In each case, the Employer has consistently asserted the position that the employees involved are independent

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37 Arbitration Case No. 142, page 7

contractors and are not in a joint employer relationship with PG&E. The Union has asserted consistently that the employees are in a joint employer relationship and that the effective control of the employees and their work rests with PG&E. The most recent reflection of an agreement between the parties with respect to the question of joint employer relationships is found in the Review Committee Decisions signed off in October, 1987, (File No. 1637-86-8). There is nothing in the record which would indicate to the arbitrator that the parties have abandoned the agreements reflected in this particular Review Committee Decision. Because the disputes between the parties concerning joint employer status have stretched over a period of almost thirty years if not longer, it is this arbitrator's opinion that the most recent reflection of the parties' understanding of this concept is the most useful in helping to resolve the present dispute. In that decision, the parties stated,

> 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[38]

In a further explanation of how to determine the existence of a joint employer or independent an contractor, the Review Committee Decision goes on to state,

> 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.[39]

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38 Joint Exhibit #4

39 Joint Exhibit #4

With this admonition in mind, the Review Committee Decision goes on to describe a number of factual relationships and determines in each of the cases set forth, whether a joint employer relationship exists which would be in violation of the recognition clause of the contract.

Several of the factual situations set out in the Review Committee Decision are fairly close to the factual situations which exist in the present dispute. In the De Sabla Division grievance No. 10-243-85-12 (P-RC1073), the facts indicate that for a period of six years, the Chico building department used contract employees for work such as sanding furniture, changing fluorescent lights, painting, moving furniture, making camp ground signs, framing pictures and delivering materials. The employees provided by the contractor performed work for other companies when not performing work for PG&E. The facts point out that,

> 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 PG&E power tools.

In its decision, the Review Committee noted,

> Given the factual situation in this case with primary emphasis placed on the day-to-day direction of the work by PG&E 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.

In another factual case fairly close to the present dispute, the Committee found a joint employer relationship to exist. The case, San Joaquin division grievance No. 25-846-86-8 (P-RC1122) and grievance No. 25-847-86-9 (P-RC1123), the work involved the use of garagemen in the Merced and Fresno garages. The Merced garage contracted for the services of

two lead mechanics and one service person performing the work of a garageman. Fresno contracted for one garagemen. The contract employees reported to work at set hours and provided their own tools. The contractor would stop by the garage to check on his employees occasionally during the week, but the overall direction of the work was provided by the garage foreman or subforeman. If a disciplinary problem arose, the garage foreman would notify the contractor who would take the appropriate action. The Review Committee Decision noted that,

> 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, the Company was acting as a joint employer.

In another case, East Bay division Grievance No. 1-2475-86-118 (P-RC1154), the Employer contracted with an electrical firm for the performance of meter work. The outside contractor hired a retired PG&E electric shop foreman who reported to work each morning at the PG&E facility and obtained his work orders from a PG&E supervisor. PG&E 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. In its decision, the Review Committee noted,

> While the contractor employer in this case was directly responsible for the hiring and establishment of hours and working conditions for the employee, PG&E was involved in the daily assignment of work which was performed on Company property. Therefore, Company was acting as a joint Employer.

These three examples provide a good illustration of how the Employer and Union have approached the concept of joint employer relationships and how they have resolved those disputes.

In its brief, the Employer cited Associated General Contractors v. NLRB, a 9th Circuit case in which the court found that owner/operators of dump trucks and drivers who were employed by the owners were not employees of the contractor. The criteria enunciated by the court is interesting

but is not relevant to the present dispute since the present dispute is controlled by the terms of the collective bargaining Agreement and the meaning the parties have ascribed to the collective bargaining Agreement. Whether the employees of Gloria Washinington's operation would be considered employees in the context in which the court was making reference is not of a concern to the arbitrator. What is a concern to the arbitrator is whether the Employer and Gloria Washington are acting as joint employers as the parties have come to understand that term in the context of the present collective bargaining Agreement. If Gloria Washington and the Employer are acting as joint employers in the context in which that has become understood between the parties, it makes no difference whether in the opinion of the 9th Circuit, Gloria Washington employees would not be considered employees of PG&E.

In reviewing the facts in the present dispute, it is clear that the Employer is using dump truck drivers and backhoe operators to supplement the existing PG&E crews. When employees are absent, on disability or particular jobs need more personnel for a period of time, the Employer reaches out and hires dump truck drivers and backhoe operators to fill in the holes which are not covered by regular, full-time Union employees. The work that the Employer seeks to have the outside contractors do is not what this arbitrator would classify as typical subcontracting work. It is, instead, work which supplements the activities of an ongoing PG&E crew. In a normal subcontracting relationship, in this arbitrator's experience, a particular job is assigned to the subcontractor who then determines how the job will be done to meet whatever deadline has been placed on the subcontractor by the owner or general contractor. In other words, the general contractor may tell the subcontractor to move 40,000 yards of material; the subcontractor then determines what employees and equipment he will need to perform that task and determines how best to load the material and where to dump the material. The only parameters placed on the

subcontractor by the general usually deal with the time within which the job must be completed and the amount of money available for the completion of the work.

The relationship between the outside operators and PG&E in the present case is considerably different. These individuals are not hired to perform a particular task; they are hired, instead, to perform supplemental work along with regular PG&E employees. In fact, based on the testimony of the bargaining unit foremen, the outside operators are integrated into the PG&E crews, participating along with PG&E employees in activities such as tailgate briefings. It may be that the requests made by the working foremen for outside operators to get off of their equipment and perform other tasks, such as sweeping or flagging are in violation of the agreements that exist between the Employer and the outside contractors. The fact remains that outside operators do perform these tasks. Because of the relationship between the outside operator and PG&E's working foremen, the reality of the situation forces the outside operator to do what he is directed to do by the PG&E foremen. The operator's failure to cooperate results in the operator's loss of a work opportunity with PG&E. The best evidence in the record establishes that the outside contractors provide virtually no supervision on the job site. All of the meaningful controls over what the outside operator does are in the hands of the PG&E foremen.

The system which exists promotes that type of relationship. While the Employer and the outside contractor may have agreed that operators do not have to do all the things that are demanded of them by the foremen, the outside contractors and PG&E set up the contract and created the situation which gives rise to the present relationship. PG&E and the outside contractors cannot hide behind the legalities of their written agreement if they do not bother to enforce those agreements or police the agreements to make sure that they are enforced properly. The relationship

as it is established between PG&E and the outside contractors promotes by its very nature the relationship described by the working foremen during the arbitration hearing.

The Employer asserted that the practice of using outside operators with the equipment of outside contractors has been going on for at least eight years. To the contrary, the evidence establishes that in the past, the Employer's practice was to hire outside equipment, such as backhoes, and use PG&E operators. It is only more recently that the Employer has chosen to use both the equipment and the outside operators. The Union apparently chose to tolerate the situation initially until it became clear that the Employer was going to increase its use of outside operators and equipment on a regular basis and not use them simply for emergency situations. Given the long history of dispute between the parties concerning joint employer status, it is difficult for the arbitrator to understand how the Employer can put forth an argument concerning past practice. There has been absolutely no acquiescence by the Union in the Employer's practice of engaging the services of outside employees on a supplementary basis. The Union arbitrated this issue on at least two separate occasions and prevailed in both of those arbitrations.

For a past practice to exist, several elements must be present. First, the Contract must be silent on the subject; secondly, the practice must be open and notorious, third, and it must have existed for a relatively long period of time. In the present case, the recognition clause of the Contract has been interpreted by the parties to address the subject of joint employer relationships. In this respect, the Contract is not silent on the subject of a joint employer relationship and, therefore, on its face, a past practice cannot be asserted to exist. Furthermore, the practice has not been open and notorious but has been gradually increasing, and there has never been any Union acquiescence in the practice.

The Employer's use of outside contractors in the East Bay has had a significant impact on the manning potential in that area. Based on the evidence supplied by the Union, the Employer has used outside contractors for dump truck drivers and backhoe operators more than 63,000 hours a year. Sixty-three thousand hours a year reflects approximately 31 full-time equivalent positions. It is difficult for the arbitrator to understand how the Employer can assert that 31 full-time equivalent positions given to outside contractors does not have any impact on the size of the bargaining unit. Even if the East Bay District employs 300 employees, 31 full-time equivalent positions is approximately ten percent of the workforce. No matter how one looks at those statistics, it is a significant number and not simply an occasional use of outside supplementary employees on a short-term, emergency basis. The Union is negatively affected, as both arbitrator Chvany and Koven pointed out by the loss of dues. In other words, the Employer's practice of using outside operators to supplement its crews has a direct and negative impact on the bargaining unit and on the Union. If the Employer's practice was terminated, the Employer would be required to have more employees available to operate dump trucks and backhoes, or its projects would take longer than they presently take to complete.

Based on the Agreement between the Union and the Employer permitting subcontracting of certain work, there is no doubt if the Employer subcontracted work which would be done by dump truck drivers or backhoe operators that the Contract would permit this arrangement. However, it would be necessary to establish a true subcontracting arrangement. During the course of the testimony, subcontract arrangements to which the Union did not object were described. One of them included the sawing of trenches, and the other included the paving over of trench work. The paving is subcontracted by PG&E to independent contractors who provide their own equipment, supervision and personnel to do the paving work. They do not work as supplemental employees to PG&E crews, but they work independently of PG&E crews. The Union and the Employer both

recognized that the paving contractors, by way of example, are independent employers and are not joint employers with PG&E.

In the arbitrator's opinion, this recognition exists because the parties recognize the relationship that exists between the contractors and the contractors' employees that perform the paving in contrast to the relationship that exists between outside contractors and backhoe operators and dump truck drivers. The paving crews are not working as supplementary PG&E employees. They are working as independent contractors. If the Employer entered an arrangement of this sort with Lisbon, for example, the arbitrator would speculate that the Union would have no objection. What the Employer has created with Lisbon is most closely akin to a hiring hall arrangement that would exist in a construction setting. When the Employer needs additional personnel, it calls Lisbon, and Lisbon dispatches personnel just like a construction union would dispatch personnel off of its unemployment list. The employees of Lisbon come and go from the Employer's operation, just like construction employees come and go from various contractors back and forth between the Union hiring hall. The Employer has not contracted with Lisbon to perform particular jobs but, instead, it has contracted with Lisbon to provide personnel, which is exactly what the Union hiring hall provides, or what Kelly Services provides in the clerical field.

Based primarily on the Review Committee Decision 1637, it is the arbitrator's opinion that the Employer has established a joint employer relationship with the contractors that it uses in the East Bay for dump truck drivers and backhoe operators. Because a joint employer relationship has been created, the Employer is in violation of the recognition clause of the Contract. The appropriate remedy is for the Employer to cease and desist in its violation at a minimum, or to change the method in which it contracts for the services of outside contractors. However, rather

than deal specifically with the question of remedy, the arbitrator will remand this question to the parties for their further deliberation in a manner which is consistent with the Review Committee Decision 1637 and with the other arbitration decisions dealing with this same subject matter. The panel will retain jurisdiction over the dispute to the extent the parties are unable to fashion an appropriate remedy between themselves.

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AWARD

The Employer's use of dump truck drivers and backhoe operators violates the Agreement. The question of remedy is remanded to the parties for their further deliberation in a manner consistent with the discussion above.

It is so ordered.

February 10, 1992

Gerald R. McKay, Arbitrator

F. A. Saxsenmeier Concur

Frank Saxsenmeier, Union Representative

Landis Marttila CONCUR

Landis Marttila, Union Representative

Rick Doering Dissent

Rick Doering, Company Representative

Karen M Kurt Dissent

Karen Kurt, Company Representative

REVIEW COMMITTEE

PG&E

IBEW

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D.J. BERGMAN, CHAIRMAN

R.W. STALCUP, SECRETARY

☐ DECISION
☐ LETTER DECISION
☐ PRE-REVIEW REFERRAL

EAST BAY REGION GRIEVANCE NO. B1-2765-88-24
REVIEW COMMITTEE FILE NO. 1707-90-12
CENTRAL DIVISION GRIEVANCE NO. EB-CE-30-76-89-24-06
REVIEW COMMITTEE FILE NO. 1712-90-17
PENINSULA DIVISION GRIEVANCE NO. GG-PD-40-02-89-22-05
REVIEW COMMITTEE FILE NO. 1716-91-4

ARBITRATION CASE NO. 184

PAT SHELTON, Company Member
Bay/Central Divisions
Local Investigating Committee

FRANK SAXSENMEIER, Union Member
Bay/Central Divisions
Local Investigating Committee

VERN WHITTMAN, Company Member
Peninsula Division
Local Investigating Committee

LANDIS MARTTILA, Union Member
Peninsula Division
Local Investigating Committee

On February 10, 1992 Arbitrator Gerald R. McKay issued an Opinion and Decision on the Company's Contracting of Dump Trucks and Backhoe Services (Arbitration Case No. 184). McKay opined that the Company established a joint employer relationship with the contractors that it used in the East Bay Region and General Construction Department for dump truck drivers and backhoe operators. Since a joint employer relationship was decided to have existed, the Company was found to be in violation of Section 2.1, the Recognition clause of the Physical Agreement as well as Review Committee Decision No. 1637-86-8.

The issue of remedy was remanded back to the Company and Union. Following is the remedy agreed to by the parties:

1) Company agrees to cease and desist its use of backhoe and dump truck contractors by the divisions or General Construction in Bay, Central and Peninsula Divisions in those cases where the arbitrator determined that such contracting established a joint employer relationship.

   In addition, the Company agrees that any other "contracting" in other locations throughout the Company that is the same or substantially similar to that found to establish a joint employer relationship as outlined in Arbitration Case No. 184 and Review Committee Decision No. 1637 is to be ceased as soon as possible, but in no event later than June 19, 1992 unless agreed to by Company and Union at a local level on a case-by-case basis.

2) Consistent with Review Committee Decision No. 1637-86-8, Company agrees to pay the contractor's personnel the negotiated wage rate in effect at the time the bargaining unit work was performed by the contractors for the Company, retroactive to the first date of utilization of the contractor's personnel or 30 days prior to the filing of the grievances, whichever is later. Company agrees to make a good faith and bona fide effort to identify and contact contractor's personnel in an effort to effect this provision of this Implementation Agreement. The Union reserves the right to challenge the Company's application of this remedy.

3) Consistent with Review Committee Decision No. 1637-86-8, Company agrees to pay the Union the appropriate dues retroactive to the 30th day of employment of the contractor's personnel or 30 days prior to the filing of the grievances, whichever is later. These dues will not be deducted from the wages of the contractor's personnel. The Union reserves the right to challenge the Company's determination of the dues payment.

4) Company agrees to compensate bargaining unit employees in Bay, Central and Peninsula Divisions for temporary upgrades for any time a contractor's employee was performing Truck Driver or Equipment Operator duties or performing Miscellaneous Equipment Operator or Backhoe Operator duties in General Construction Department in the above divisions. The bargaining unit employees must have been otherwise qualified and available pursuant to Sections 205.3 or 305.4 of the Physical Agreement. Company also agrees to compensate bargaining unit employees for overtime, if it can be determined that they would have worked if not for the Company's use of the contractor's personnel on an overtime basis. The liabilities outlined will be for the period no earlier than 30 days prior to the date the grievances were filed (which differs from each division).

   The determination of the above remedies will be returned to the respective Local Investigating Committees for resolution in accordance with these guidelines.

5) Company agrees that if it determines that there is a need for additional personnel to perform the work previously performed by the contractor's personnel, Company will fill the position(s) in accordance with Section 106.12, Titles 205 or 305 of the Physical Agreement.

6) Company agrees to communicate Review Committee Decision No. 1637-86-8 and Arbitration Case Decision No. 184 throughout the Company, including the obligation to "cease and desist" the use of contractors where it has been determined that the use of said contractors constitutes a joint employer relationship. "Determined" as used in this Implementation Agreement is not limited to contracting of dump truck and backhoe services. It is defined to include 1) those situations found to be a joint employer relationship in the several grievances included in Review Committee Decision No. 1637-86-8; 2) the use of contract truck drivers and backhoe operators that were at issue in this Arbitration Case No. 184; and 3) any current or future utilization of contractors where such use is the same or substantially similar to those factual cases included in RC 1637 and Arbitration Case 184.

7. The remedy provided for above is for the cases that resulted in Arbitration Case No. 184. The remedy for other contractual violations of this same nature will be determined on the merits of each individual case.

FOR COMPANY:

By _____

Date 5-20-92

FOR UNION:

By Roger Statcup

Date 5/19/92

Memorandum

Date: April 20, 1992 **File #:** 513

To: VARIOUS

From: SENIOR VICE PRESIDENT & GENERAL MANAGER - DISTRIBUTION BUSINESS UNIT

Subject: Use of Outside Contractors

DBU OFFICERS:
DBU MANAGERS:

The decision ordered by Arbitration Case No. 184 between the Company and IBEW Local 1245 has further clarified the use of outside contractors performing work for PG&E.

The issue under arbitration in this case was the manner in which the Company was utilizing backhoe and dump truck operators in conjunction with PG&E crews. The arbitrator held that Company violated the recognition clause of the labor contract with IBEW by establishing a joint employer relationship with these outside contractors.

The arbitrator determined that the Company should, as a minimum, cease and desist those practices constituting a joint employer relationship or change the method in which it contracts for the services of outside contractors. He also left the remedy to the parties for specific resolution in accordance with RC 1637 and other arbitration decisions dealing with the same subject matter.

The Company and the Union agreed on April 2, 1992 to specific remedies in this case. Some details are still being finalized, and will be distributed as soon as the document is signed by both parties.

While this decision does not preclude contracting for outside services, it clearly stipulates that certain criteria must be met to avoid a "joint employer" relationship using RC 1637 as the primary test document to determine if a "joint employer" relationship exists (copy attached). Additionally, while Arbitration Case 184 applies only to backhoes and dump trucks in the East Bay, the principle is the same for other contracts where bargaining unit type work is being contracted.

All existing and future contracts must be evaluated with respect to the criteria listed in RC 1637. Any practices that violate those provisions must be corrected as soon as possible. Additionally, please adhere to the following guidelines for new and existing contracts and contract modifications.

1. Ensure that the contractor performs that work and only that work for which they were contracted.

2. Inform the contractor of the results required and the time frame involved and let them determine what is needed in terms of personnel and equipment to complete the job. Leave decisions as to the manner of performing work to the contract company or the operator. The results can be dictated by PG&E.

3. Utilize contractors for predetermined, specific projects, not on an "as needed" basis. Write work tags for each job, describing the parameters required.

4. Require contractors to supervise their own employees and include supervision clauses in all contracts.

Further questions on this arbitration decision may be referred to Mike Tyburski, Distribution Human Resources, on extension 223-8510.

Virgil G. Rose

VIRGIL G. ROSE

cc: Div HR mgrs
Sr Labor Reps
DBU HR Reps
Roger Stalcup

MEShipley(223-1840):clf

cc Donald A. Brand
Ronald G. Domer
Philip G. Damask
Mike L. Tyburski
Maureen L. Fries
Gas & Elec Operations Managers

Attachment