In the Matter of an Arbitration	]
	]
Between	]
	]
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1245,	]
	]
Complainant,	]
	]
and	]
	]
PACIFIC GAS AND ELECTRIC COMPANY,	]
	]
Respondent.	]
	]
Re: Case No. 191 - Snow Removal	]

OPINION AND DECISION

OF

THE BOARD OF ARBITRATION

JOHN KAGEL, NEUTRAL ARBITRATOR

ROGER STALCUP, UNION ARBITRATOR

KEN BALL, UNION ARBITRATOR

DAVID BERGMAN, COMPANY ARBITRATOR

RICK DOERING, COMPANY ARBITRATOR

ISSUE:

Does the Employer's use of a contractor to perform snow removal and other work at the Helms Project violate the Agreement? If so, what is the appropriate remedy?

BACKGROUND:

Beginning with the construction of the Helms Storage Power Plant in the mountains east of Fresno in 1976 snow removal on the roads to the Plant have been performed by non-Bargaining Unit Employees. It was initially performed by the Contractor constructing the Plant. When the Plant became operational in 1984 the Company first contracted with a firm called Sierra Diversity and since 1986 with High Country for snow removal. The Company is obligated both for operational reasons at Helms as well as its permits with the County and the Forest Service to insure that both Dinkey Creek Road and McKinley Grove Road be open for two-way travel during the winter and that snow removal be done to particular specifications to accomplish this task and protect the roadway (See Jt. Ex. 5, para. 1.9).

The Company has contracted with High Country (Jt. Ex. 5) to perform the removal of snow and ice from these roads as well as the areas around the Helms headquarters and residences, to maintain the Company supplied equipment necessary for snow removal, the "maintenance of additional vehicles, emergency generators and other support equipment as requested." (Jt. Ex. 5, para. 1.4.3) and "other support services in work which may not relate to snow removal or equipment maintenance as requested. This work may include, but is not limited to light construction, trenching, road repairs, painting, etc." (Jt. Ex. 5, para. 1.4.5). According to

the Company, the maintenance work performed by High Country is maintenance work on Company provided push plows and snow blowers which are not utilized by the Company for any of its operations. High Country is also given the use of a Company back hoe and loader for clearing snow from areas that are inaccessible to the other equipment (Tr. 94-95). The maintenance schedules for High Country to maintain Company-owned equipment are approved by PGandE (Tr. 92). The Company monitors and approves High Country vehicle and equipment use policies and fuel disbursement controls as well as the safety and security policies of High Country (Tr. 93). It approves all repairs to equipment that cost more than $1,000. It periodically inspects the equipment maintained by High Country to determine whether that equipment is properly maintained. It provides heavy shop tools and radios. It provides shop areas in which the High Country maintenance work is done, sand storage, parts storage and parts (Tr. 94-95).

According to Bobby Mooneyham who has been the Hydro-Superintendent at Helms since 1984, Bargaining Unit Employees at Helms are not qualified to operate the snow removal equipment there. He testified that the work specified for High Country under paragraph 1.4.5 of the contract concerning other support services such as "light construction, trenching, road repairs, painting, etc." is work which could potentially be done by the Bargaining Unit. However, because of the remoteness of the Helms site, such work would be work that would normally be contracted out (Tr. 70); and, in any event, PGandE does not any longer assign equipment to High Country which does not involve snow removal (Tr. 71), nor does it allow High Country to perform maintenance that has nothing to do with snow removal equipment (Tr. 73).

Other aspects of the High Country contract will be discussed hereinafter.

AGREEMENT PROVISIONS:

"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.

2.2 APPLICABILITY

The provisions of this Agreement shall be limited in their application to employees of Company in the bargaining unit described in Section 2.1.

* * *

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 the 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.

* * *

TITLE 207. MISCELLANEOUS

* * *

207.2 It is recognized that Company has the right to have work done by outside contractors. In the exercise of such right Company will not make a contract with any other firm or individual for the purpose of dispensing with the services of employees who are engaged in maintenance or operating work." (Jt. Ex. 1)

DISCUSSION:

Review Committee Decision 1637:

In Review Committee Decision 1637 (RC 1637), (October 12, 1987) the Parties defined the criteria they would use to determine whether in those instances when the Company "contracted with an independent firm and utilizing the employees of that firm [so that] a joint employer relationship exists. ..." which would be a violation of the Agreement by

the Company not assigning such work to the Bargaining Unit (Jt. Ex. 4, p. 1). RC 1637 states:

> "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 wage 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.
>
> * * *
>
> 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." (Jt. Ex. 4).

POSITION OF THE PARTIES:

Position of the Union:

That snow removal is Bargaining Unit work; that there is no precedent that supports the argument that the Union's jurisdiction differs from headquarters to headquarters; that the Bargaining Unit has performed snow removal in two other geographical areas of the Company's hydro operations, the Northern area and the Central area, for the last five

years on an overtime basis (Tr. 102-103); that High Country is a joint employer as defined in Review Committee Case 1637 as the criteria there has been interpreted in Arbitration Cases 128, 142, and 184; that a past practice argument is inapplicable and in any event the close relationship between PGandE and High Country was neither open nor notorious, but was well secluded in the lengthy text of the Agreement between High Country and PGandE, so there cannot be stated that there was any Union acquiescence in the practice; that the Company's claim that PGandE's Employees cannot operate the equipment used by High Country lacks merit; that Agreement provisions provide the adaptability and flexibility which the Company seeks for snow removal work by Bargaining Unit Employees at the remote Helms location.

Position of the Company:

That the Agreement has not been violated by the Company in that the snow removal and related maintenance repair work at Helms has never been performed by Bargaining Unit Employees and is not Bargaining Unit work; that the Arbitration Cases 128, 142, and 184 do not even address the issue of Bargaining Unit work as must be examined under Title 207.2; that Title 7.2 of the Agreement permits overlapping duties between Bargaining Unit and Non-Bargaining Unit classifications; that the snow removal work at Helms is not the same and does not remotely resemble snow removal work at other hydro operations; that the Company's use of contractors is an established past practice of 20 years; that the Union was aware of that relationship and accepted it; that under the RC 1637 criteria the contractor and the Company are not joint employers; that the Company does not supervise the contracted workers and the Contractor is independent, unlike the facts that were found in past arbitration cases; that, to the contrary,

the facts fit the situation as a Contractor is defined in arbitration case 184 where the Company's monitoring procedures do not impact on the Contractor's ability to decide how to get the snow removal job done but are driven by the ongoing nature of the work, the cost plus arrangements, and the Company's ownership of snow removal equipment where the Contractor is paid in accordance with units of labor expended; that the Company is required to monitor cost and safety because of the snow removal and the related road preparation, maintenance and repair work is ongoing for months and the amount of labor needed is indeterminate and depends on the weather; that the labor rate was determined solely by the Contractor so that the Company's only way to control costs is to monitor hours expended which monitoring functions have a safety purpose as well; that none of the monitoring procedures are applied to individual contract workers and the employment relationship between the contractor and the contract worker is not disturbed; that the other six factors in R.C. 1637 are indicative of an independent contractor relationship rather than a joint employer where the Company does not hire or fire contract workers, where the Company does not promote or demote them, where the Company does not determine wages or benefits, where the Company does not schedule workers, where the Company does not determine their terms of employer nor discipline them; that the use of contractors at Helms did not harm the Union or its membership.

DISCUSSION:

Arbitration Cases Interpreting Joint Employers:

Case 128:

There have been four arbitration cases cited by the Parties' as having applicability to this case. The first, Case 128, predated RC 1637.

It involved agency employees performing clerical work in two operations of the Company. The work performed was identical to that performed by entry level Bargaining Unit Employees with cost savings to the Company being considerable comparing the agency employee wages and benefits to those that Unit Employees would have received. Agency Employees were trained, scheduled, assigned, supervised and could be terminated by PGandE. Case 128 pp. 8-9. Employees were used to work on special projects and were employed to fill temporarily vacated or unfilled bargaining positions (id. at p. 11). The period of employment varied but extended as long as two years. Another part of the case involved agency employees whose work was routine entry level clerical work of a repetitive nature (id. at p. 14) with employment extending in some instances beyond a year (id. at p. 16).

The Arbitrator found there that there was harm to the Union and the Bargaining Unit which was more likely to occur in factual circumstances "where no meaningful distinction is present between the work being contracted to outside agency's and the work performed by the Unit. ..." (id. at p. 24). In finding a violation of the Agreement she noted that the duties performed by Agency personnel were not unusual special functions for which Company Employees were not trained nor qualified but were repetitive entry level clerical duties of the type normally done by Bargaining Unit Employees.

Case 142:

In Case 142, also predating RC 1637, the Company contracted with an agency to provide clerical and technical Employees, some of whom held jobs that were the equivalent to those covered by the Contract with the Union (Case 143, p. 3). Some of those employees worked for up to two

years at the Company, "working side by side with Company Employees," the clerical personnel being trained by the Company. Wages were determined by agreement between the Company and the agency and step increases could be vetoed by Company supervisors (id. at p. 4). The Arbitrator set forth factors to be weighed based on the criteria of Case 128 as to whether the nature of the contracted work is continuous or intermittent, permanent or temporary, or of an emergency or routine nature; whether the work is of a type normally performed by Unit Employees and whether Employees who belong to the Union are qualified to do the work; whether the work is performed on the Employer's premises; the effect on Employees in terms of layoffs, termination, etc.; and whether there has been a harmful effect on the Union. The Arbitrator found, as in Case 128, that the use of agency employees to perform the same work as that performed by Union Employees for long periods of time obviously affected the Union and the Bargaining Unit (id. at pp. 11-12). Based on the facts there was also a violation found of the recognition clause of the Agreement.

Case 183:

In Case 183 the issue involved whether or not the continued use of independently owned pay stations while shutting Employer operated CSO's where Unit Employees collected customer bill payments was in violation of the applicable agreement. The arbitrator there found that the Union over an extended period of time and a series of Collective Bargaining Agreements acquiesced in the Employer's practice of using pay stations concurrently with closure and consolidation of CSO's. With the absence of a demonstrated causal relationship between the use of pay stations and displacement of Employees he found no violation of the agreement.

Case 184:

Case 184 involved the Agreement applying to Operations and Maintenance and Construction Employees, as does this present case, and involved the interpretation of Review Committee Case No. 1637. The issues there involved the Company engaging the services of outside dump truck and back hoe operators through agencies along with agency equipment to supplement work crews of the Company on various projects. The work performed was directed by an Company Supervisor (Case 184, pp. 4-5). The Company would request the dump truck agency to have a truck and an operator report to a specific location. Once present the Company Foreman would tell the driver what he was to do and when the job was done. The Company could send an operator back if PGandE was not satisfied, but that had not happened. PGandE paid a flat amount per truck set by the PUC with the rate of pay to the driver set by the agency, not PGandE. The agency owner carried her own liability insurance including comprehensive, collision and workers' compensation insurance. Maintenance of the equipment was the responsibility of the agency, not PGandE. The agency in dispatching drivers had to have its drivers comply with PGandE dress code and personal safety equipment requirements, as well as a random drug testing program, although the latter had not been enforced.

A back hoe agency representative testified that PGandE would call for a back hoe with a particular size of bucket and then selected the back hoe and operator to be sent. The agency hired its own Employees and paid them wages, as it determined. The operators were not given any guaranteed hours. The agency carried its own insurance and had two supervisory field personnel who checked the quality of work being

performed by its operators. If PGandE was dissatisfied with any of the operators sent the agency would try to find an operator acceptable to PGandE. Some of the agency's operators worked with PGandE "quite a bit" (id. at p. 8).

PGandE Employees in that case testified that no direct supervision was given to the back hoe operators or dump truck operators; that while the PGandE foreman lays out the work operates supervision is provided by the agency from where the operator is hired. That outside supervision consisted of supervisors "going by 'once in a while to check the operators.'" (id. at p. 12).

A PGandE Foreman, however, testified in Case 184 that he had the discretion to request specific operators from the agency, the right to terminate the operator at any time he chose and he had exercised that authority. He was responsible for supervising the rental dump truck drivers, specifying how they were to perform the work and when they were to perform it, including when they take lunch, and when they quit, and when they start the next morning. The rental dump truck driver does not exercise any independent judgment on the job (id. 14-15). Other Company Employees testified to the same effect.

The Arbitrator in reaching his decision in Case 184 cited factual situations which he found similar in Review Committee Decision 1637. The Arbitrator found that PGandE was using dump truck drivers and back hoe operators to supplement existing PGandE crews. He found that the work done is not what would be classified as typical sub-contracting work where the subcontractor determines how the job will be done to meet whatever deadline has been placed on the subcontractor by the owner or general contractor where the only parameters being placed on the

subcontractor deal with the time within which the job must be completed and the amount of money for completion. The Arbitrator found that the relationship between the outside agencies and PGandE is considerably different and that the individuals were not hired to perform a particular task but to perform supplemental work along with regular PGandE employees, being integrated into PGandE crews and participating in such normal PGandE activities as tailgate briefings; that those persons work under the direction of Working Foremen of PGandE and that the operator must cooperate or he/she would lose the work opportunity with PGandE. The Arbitrator noted 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 PGandE foreman." (id. 29).

The Arbitrator found no appropriate past practice argument supported the Company both factually and based upon the relationship between the Parties. The Arbitrator further noted that the use of outside contractors had a significant impact on "the manning potential in that area." (id. at p. 31). The Arbitrator distinguished subcontracting arrangements which were not objected to by the Union where independent contractors provided their own equipment, supervision and personnel but do not work as supplemental employees to PGandE crews but work independently of them. The Arbitrator concluded that based primarily on Review Committee Decision 1637 that there was a joint employer relationship. (id. p. 32).

Review Committee Decision 1637:

Joint employer status was found in specific grievances in RC 1637:

Grievance 10-243-85-12 placed "primary emphasis" on the day-to-day work direction of PGandE supervision (pp. 4-5)

Grievances 25-846-86-8 and 25-847-86-9 involved contract Employees working in PGandE garages with overall direction provided by PGandE supervision with the Employees' work under the control and direction of PGandE.

Grievance 22-123-86-26 involved agency employees used for clerical assistance hired after PGandE screening, training, annual performance reviews which could withhold annual salary increases and counseling for minor performance problems.

Grievance 1-2475-86-118 concerned a situation where the Company did not steadily monitor work performance, set time schedules nor communicate directly with the employee regarding working conditions. However, PGandE's involvement in the daily assignment of work which was performed on Company property led to a finding of joint employer status.

Grievance 24-204-86-77 dealt with an agency casual laborer and a clerk typist working directly under PGandE's in-plant supervision.

Summary of Cases

The foregoing cases establish that joint employer cases are to be determined: 1. on their own facts; 2. by careful examination of the actual, as opposed to the theoretical or potential, relationship between PGandE and the contractor; 3. with particular emphasis on whether PGandE in fact exercises control over the contractor's employees, in essence adopting and utilizing those persons as its own Employees even though they are on another entity's payroll.

In those cases relied on by the Union, particularly noteworthy is that the contractor's employees worked "side by side" with PGandE's, essentially doing the same thing as Bargaining Unit Employees, generally under the

direct control and supervision of PGandE in terms of the work being performed by them. Those individuals became integrated with and supplemented PGandE's employees.

Facts of This Case:

By contrast the principal function of High Sierra's employees has been distinct from the duties of PGandE's employees since 1984, namely the removal of snow. In terms of actual supervision PGandE, the record discloses, exercises virtually none over who the High Sierra employees are who remove snow nor how and when they actually do it.

High Country starts plowing snow at its own discretion; there is no direction given in any particular instance when High Sierra is to begin. (Tr. 63) High Country decides which areas to plow first. (Tr. 67) It is up to High Country "to decide what to do and where to do it, in order to keep Helms accessible and safe." (Tr. 64-65). No day-to-day supervision and direction is provided by PGandE to High Country employees. (Tr. 66). There has been no direction to a High Country employee by PGandE as to how to accomplish a given task in either snow removal nor maintenance. (Tr. 67, 92).

The size of High Country's crew varies from zero to 30 according to its requirements, but crew size is not directed by PGandE. (See Tr. 72). High Country's shift schedules can be set up any way High Country wants. (Tr. 90) and they have not been approved by PGandE. (Tr. 91). PGandE gave High Country an original priority for sanding but there is no approval of its procedures for sanding each area (Tr. 93). A PGandE inspector does not tell High Country how to do its work, does not tell its employees that they have not plowed properly nor follow them in their work. Rather he notes the results of High Country's overall performance,

looking for problem areas (Tr. 96-97). He then directs any problems to High Country, giving no directions to any individual High Country employee (Jt. Ex. 3, p. 2).

In terms of PGandE's overall approval and monitoring of High Country's split shift schedules, purchasing, material control procedures, routine maintenance scheduling, vehicle and equipment use policies, fuel disbursement control, safety, and security as well as equipment inspection none of such monitoring is of individual High Country employees (Tr. 91-93, 97). Any safety problem that is noted is referred by PGandE to High Country; no immediate direction is given to High Country employees (Tr. 98).

A single instance of maintenance work done by High Country mechanics on other than snow removal equipment was grieved separately and settled by the parties (Grievance HFRO 91-18, Tr. 8).

From the foregoing, unlike past cases, a joint employer relationship based on what High Country in fact is doing is not found between it and PGandE. Rather the snow removal situation is more akin to a true contractor relationship as described in Case 184 whereby High Country has been assigned a particular task to perform and accomplishes it without day-to-day Company direction.

Contract with High Country:

On paper PGandE does have apparent contractual power to supervise and direct High Country's employees on a day-to-day basis (see e.g. Jt. Ex. 5, Section 2.1), but it has not "actually" supervised or directed High Country's employees in their day-to-day work as specified in RC 1637. As noted the factual day-to-day direction of the High Country crew is what is emphasized in making a joint employer determination and at least as of

this time there is no such direct authority to amount to integration of such persons into PGandE's operations as if they were PGandE employees as required by RC 1637 and the cited arbitration cases. What the record showed was that the contractual authority of PGandE over High Country's operation has essentially been to monitor High Country's costs as is required in the cost-plus contract between PGandE and High Country.

Examination of the other factors which are taken into account under RC 1637 support a finding that a joint contractor relationship does not currently exist. The Union notes that PGandE has the right to refuse to hire and to fire High Country employees but, again, there has been no shown use of that authority as was the case, for example, in Case 184. There is no involvement in High Country's promotion or demotion of its employees by PGandE. There is no approval of schedules, as already noted, notwithstanding what the PGandE-High Country contract calls for. There has been scrutiny of split shifts from a safety standpoint as well as overtime in terms of cost but no evidence was presented of control over High Country by PGandE other than those factors. Similarly there was no showing that PGandE's ability to reduce or eliminate High Country's crew in the event no work is required has been exercised. No discipline of High Country's employees has been exercised by PGandE. Nothing in terms of other terms and conditions of employment of High Country employees exercised by PGandE at this time factually to establish a joint employer relationship.

The Union contends that High Country utilizing Company equipment, is nothing more than a labor contractor as shown by the PGandE-High Country contract. Yet the contract does show that High

Country is obligated to provide some equipment (Jt. Ex. 5, para. 4.2.1.1) and material (Jt. Ex. 5, para 3.7).

Most importantly, as the cases show, it is not what a contract says or does not say that is crucial under the applicable authority. What is crucial is the entire situation. The veil of a contract can be pierced as RC 1637 showed in Grievance 1-2475-86-118 based on the daily assignment of work by Company supervision. By the same token the current lack of such supervision in practice, however the High Country-PGandE contract might be interpreted, shows that a joint employer relationship does not exist as the Parties' have found in past situation.

This determination is based solely on the facts presented here. Under the PGandE-High Country contract if the Company's directions to High Country change, such a relationship might be found ins some future case based on its facts.

Other Contentions:

The Company contends that for a joint employer relationship o be established the work being performed must be found to be Bargaining Unit work and that the High Country work is not. The Board of Arbitration does not decide that question herein, finding it unnecessary to do so in light of the other facts presented under RC 1637 as noted above. Accordingly there is also no necessity to determine the effect, if any, of the Parties post-brief correspondence concerning Section 7.2 of the Agreement.

The Union in its brief did not pursue a claim that there was a violation of Letter Agreement 88-104 dated September 2, 1988 interpreting Section 207.2. No finding is made concerning that matter.

DECISION:

The grievance is denied.

Neutral Arbitrator — Concur/Dissent Dated: 9/20/94

Union Arbitrator — ~~Concur~~/Dissent Dated: 9/20/94

Union Arbitrator — ~~Concur~~/Dissent Dated: 9-21-94

Company Arbitrator — Concur/Dissent Dated: 9/6/94

Company Arbitrator — Concur/Dissent Dated: 9-20-94