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6
7 IN ARBITRATION PROCEEDINGS PURSUANT TO
8 AGREEMENT BETWEEN THE PARTIES

9 In the Matter of a Controversy)

10 between)

11 LOCAL UNION NO. 1245, INTERNATIONAL)
12 BROTHERHOOD OF ELECTRICAL WORKERS,)
13 AFL-CIO,)
14 and)

15 PACIFIC GAS AND ELECTRIC COMPANY.)

16 Involving Discharge of Lineman)
17 G , Grievant.)
18 Case No. 158)

OPINION AND AWARD

OF

BOARD OF ARBITRATION

19 This Arbitration arises pursuant to Agreement between
20 LOCAL UNION NO. 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL
21 WORKERS, AFL-CIO, hereinafter referred to as the "Union," and
22 PACIFIC GAS AND ELECTRIC COMPANY, hereinafter referred to as
23 the "Employer," under which MR. ROGER STALCUP and MR. ROBERT
24 W. GIBBS were selected to serve as Union Members of the Board
25 of Arbitration ("Board"), MR. RICK R. DOERING AND MR. BRETT D.
26 KNIGHT were selected to serve as Employer Members of the
27 Board, and ALEXANDER COHN was selected to serve as Neutral
28 Arbitrator, and under which a decision by a majority of the
Board shall be final and binding on the parties.

Hearing was held on April 20 and May 16, 1988, in San
Francisco, California. The parties were afforded full
opportunity for the examination and cross-examination of
witnesses, the introduction of relevant exhibits, and for

?
1 argument. Post-hearing briefs were received from the Union
2 and the Employer on July 22, 1988.

3 APPEARANCES:

4 On behalf of the Union:

5 THOMAS H. DALZELL, Esquire, Staff Attorney,
6 International Brotherhood of Electrical
7 Workers, Local 1245, 3063 Citrus Circle,
8 Walnut Creek, California 94596.

9 On behalf of the Employer:

10 KENNETH YANG, Esquire, Pacific Gas and
11 Electric Company, Law Department, 77 Beale
12 Street, 31st Floor, San Francisco, California
13 94106.

14 ISSUE

15 Was the discharge of Grievant G in violation of
16 the parties' Physical Labor Agreement? If so, what is the
17 remedy?

18 FACTS

19 Generally

20 Grievant worked for the Employer from October 11, 1966,
21 until his discharge on January 15, 1987, for alleged energy
22 diversion involving the electric meter at his home. Prior to
23 the events at issue here, he had never incurred any form of
24 discipline. Much of the case revolves around the condition of
25 Grievant's electric meter and his monthly billings over the
26 past 10 1/2 years.

27 All household electricity must first pass through a meter
28 as it enters the household circuits, and the meter's internal
mechanisms measure the flow of electricity by turning dials.
The dials are visible at some distance, and, for several
reasons, often must be read over fences or through truck
windows. For example, Grievant informed the Employer at some

1 point that the meter reader should beware of an unfriendly
2 family dog at his home. Such a warning often results in the
3 meter reader's remaining inside a vehicle while reading the
4 meter. A meter plugs into a base so that electricity flows
5 into and out of the meter through four prongs, which are made
6 of nickel-coated copper. When new, the copper is not visible.
7 The connection is made when the prongs are inserted into the
8 jaws of the base (electric panel).

9 In an attempt to reduce the likelihood of energy
10 diversion, a lead seal attaches the meter to the electrical
11 panel in such a manner as to permit detection whenever the
12 meter has been removed. Removal of a meter is necessary when
13 performing certain repairs and alterations to the electrical
14 system, but also presents the opportunity to thwart the
15 metering of electricity. The sealing tools are carried on
16 trucks and are available to employees; in addition, a pair of
17 household pliers can be used to make it appear that the meter
18 is sealed, as long as the seal is not closely inspected.
19 Extra seals are readily available to employees.

20 Several common techniques are used to divert
21 electricity. Because meters are read monthly, most of these
22 methods require that the meter be returned to the panel so
23 that it will be in place when checked by the meter reader. As
24 a result of the repeated removal and insertion of the meter,
25 the prongs gradually become worn and scratched. Some customers
26 have been found to have placed grease on the prongs to reduce
27 the wear. The Employer's witnesses have never found
28 significant corrosion on meter prongs, whether

1 greased or not, even where substantial amounts of copper were
2 exposed by admitted energy diversion.

3 The most commonly detectable method of energy diversion
4 is meter inversion, in which the meter is physically turned
5 upside down for part of the month. Some meters will run
6 backwards when so placed, whereas some new models will stop or
7 run forward. Inversion creates a distinctive pattern on the
8 prongs, one which was not evident on Grievant's meter. The
9 second most common method is to tamper with the meter's
10 internal mechanisms. Another common method is to bypass the
11 meter by removing it and installing bars or "jumpers" which
12 permit energy to flow into the household circuits; i.e.,
13 wiring around the meter itself. No evidence exists of any of
14 these methods of diversion at Grievant's home.

15 Use of a second meter for part of the month is a another
16 common method of energy diversion. Such meters are often
17 taken from billboards, freeway signs, or other poorly-secured
18 areas. In addition, because meter numbers are not logged in
19 before arrival at the warehouse, it is possible to remove
20 meters from an incoming shipment without detection./1/

21 Investigation of Grievant's Meter

22 In September, 1986, the meter reader for the area
23 reported that the seal on Grievant's electric meter was
24 missing. On November 21, Revenue Protection Representative Ed
25

26
27 1/ Although a second meter was not found in Grievant's
28 possession, as will be noted, the Employer charges that
he has used one during substantial parts of the past ten
years.

1 Mello went to Grievant's home, where he inspected the missing
2 meter seal. ~~missing~~. He pulled the meter and observed a heavy
3 coat of grease on the four meter prongs. When he removed the
4 grease from one prong, he found that the nickel coating was
5 noticeably worn away and gouged, so that the copper core was
6 clearly visible. Mello installed a new meter, and subsequent
7 inspection of the old meter revealed that all four prongs were
8 heavily worn.

9 Mello then researched Grievant's billing history and
10 prepared a written summary. Meanwhile, Grievant was twice
11 interviewed and gave written statements. An energy audit was
12 also conducted at his home to identify electrical appliances
13 in use, from which Mello and Revenue Protection Representative
14 Roy Metzler each prepared estimated energy usage figures.
15 Grievant also prepared an estimate of his energy usage and
16 presented it to the Employer. Based on the results of the
17 investigation, Grievant was discharged for diverting
18 electricity.

19 20 Wear on Meter Prongs

21 Metzler once performed a meter prong wear test, using a
22 meter of a different manufacture than Grievant's, to determine
23 the number of insertions and removals required before copper
24 was observed. In that test, using a new meter and electrical
25 panel, it took 350 insertions and removals before any copper
26 showed on the prongs. Metzler testified that wear would show
27 up faster if the electrical panel in question had been used
28 extensively, because repeated insertions and removals

1 scar the jaws and make them more abrasive. He is also aware,
2 from his field experience, that the prongs on meters made by
3 the manufacturer of Grievant's meter wear out approximately
4 twice as fast as those on the meter he tested. He further
5 testified that he once tried sanding meter prongs with emery
6 cloth issued to employees to see if he could expose copper,
7 but that his fingers and wrists got sore before he revealed
8 any copper.

9 At the hearing, the Employer introduced enlarged
10 photographs of the prongs on Grievant's meter and on a test
11 meter, and also had the meters at the hearing. Grievant's
12 meter prongs showed copper all along the leading edge of the
13 prongs. Extensive deep scratches were present on the portion
14 of the prong surface that inserts into the jaws, as well as
15 superficial marks in the area that lies outside the jaws on
16 some prongs. Revenue Protection Analyst Bill Mintun testified
17 that the marks on Grievant's prongs are inconsistent with
18 sanding, as sanding would create a finer and more evenly-
19 distributed pattern of wear. However, in the area outside the
20 jaws, he noted some evidence of scraping with something other
21 than sandpaper. Metzler, on the other hand, found that the
22 prong exhibiting arcing marks had apparently been sanded with
23 something abrasive.

24 The test meter, a newer model made by the same
25 manufacturer as Grievant's meter, had been subjected to a wear
26 test using the electrical panel from Grievant's home. In the
27 wear test, the test meter was removed and reinserted 150
28 times. After this test, the prongs showed a hint of copper on

1 the leading edge of the prongs and some abrasion on the
2 surface, but no scratches were found deep enough to reveal the
3 copper. Some evidence exists that performing the test with
4 electricity running through the panel could result in somewhat
5 faster wear than that found in the test, or in distinctive
6 pits caused by arcing from the live panel to the meter.
7 Moreover, if the electric panel itself was subjected to
8 multiple meter insertions and removals, that factor would scar
9 the jaws and result in faster wear on the prongs, particularly
10 if arcing scarred the jaws during some insertions and
11 removals.

12 Grievant's Meter

13 During most of Grievant's employment, Oakdale area
14 employees were permitted to remove their own meters, perform
15 any necessary electrical work, and replace and reseal the
16 meter. A temporary change in this policy occurred in May
17 1979, following the discharge of an employee for energy
18 diversion. In response to the allegations of misconduct, a
19 special numbered seal was placed on all employees' meters.
20 While that seal was in use, the Employer's permission was
21 required before removing the seal. The special sealing tool
22 has since disappeared, and the numbered seals are no longer
23 required on employee meters. There is currently no rule
24 prohibiting employees from removing their meters when
25 necessary.

26 Grievant's meter was newly-installed in 1972, and
27 remained in service thereafter until Mello removed it.
28 Grievant has lived in his house since 1972 with his wife and

1 family.

2 According to Grievant, approximately ten years before the
3 hearing in this case, the Employer replaced a transformer in
4 his area. Grievant assumes that his meter was removed and
5 tested at this time. The meter was next removed in
6 approximately July 1979, when Grievant installed a swimming
7 pool with an electric filter and sweep. Grievant pulled the
8 meter a few times while doing the wiring for that project.
9 One of the Employer's Trouble Men removed the numbered
10 employee seal and pulled Grievant's meter in March 1980 to
11 replace a defective main breaker, and re-sealed it the next
12 day or shortly thereafter.

13 During 1983, Grievant and then Trouble-Man D
14 replaced a defective wire (buss lead) in Grievant's electric
15 panel. To do so, it was necessary to remove the meter. D
16 had no recollection as to whether he found the meter sealed,
17 but assumes that it was. After completing their work, D
18 reinserted the meter. In doing so, he missed the jaws with
19 one prong and made partial contact with the electrical panel,
20 causing arcing to that prong. One effect of such arcing is to
21 cause pits in the prong surface, and arcing marks are clearly
22 visible on one of the prongs on Grievant's meter.

23 A dispute exists concerning what was done to remedy the
24 damage caused by D s' insertion of the meter. According to
25 Grievant, he and/or D , sanded the prongs to smooth them and
26 remove corroded areas, then applied no-oxide grease to retard
27 / / /
28 / / /

1 further corrosion./2/ Dias did not recall either man sanding
2 or greasing the prongs, and claims that he has never sanded
3 prongs. D recalled sealing the meter following completion
4 of the work.

5 Grievant's next removal of his meter occurred in mid-
6 1986, in conjunction with renovations on his house. During
7 those renovations, he re-carpeted, installed insulation,
8 replaced various structural elements, replaced his propane
9 furnace with a 3 1/2-ton electric heating/air conditioning
10 unit, and replaced the exterior siding on two ends of the
11 house. Grievant testified that in May or June, before
12 starting the work, he informed Area Manager Cynthia Crane and
13 General Foreman Gene Peyret/3/ that he would be removing his
14 meter several times as part of a remodelling job. He began the
15 work with re-carpeting, which was completed in late May. He
16 received his building permit in early August, but believes he
17 began removing the exterior siding a few weeks before he
18 received his building permit; the entire renovation was
19 completed and inspected by October 28.

20 Trouble Man W installed a new service drop
21 at Grievant's house during the remodelling, on August 23.
22 Grievant had already removed the meter when W arrived,
23 and requested that W leave the meter unsealed because
24

25 2/ Both no-oxide grease and silicone grease are available as
26 standard equipment on the Employer's trucks. Both types
27 of grease inhibit corrosion and provide lubrication,
28 although no-oxide grease has a greater corrosion-
inhibiting effect and silicone grease is a better
lubricant.

3/ Peyret has retired and was not present at the hearing.
Craine has no recollection of such notice.

1 the wiring had not been completed. Grievant removed the meter
2 while tearing the old siding off his house, in order to
3 protect the meter from breakage. He estimated that he removed
4 the meter between one and five times daily when working in the
5 meter area, but denied having removed it as many as 150 times
6 over the course of the work. It is possible that he sometimes
7 pulled the meter without throwing the main switch, so that the
8 meter was pulled under load.

9 10 Meter Work Practices

11 Some electricians prefer to pull electric meters prior to
12 doing any wiring rather than rely on the main switch to shut
13 off the current to the circuit. Although Grievant could have
14 performed some of his wiring work without pulling the meter,
15 he prefers to pull the meter so that there is no question that
16 he is working on a "cold" circuit. At the time he performed
17 his work, he owned a voltage meter, which could be used to
18 determine whether a circuit was "cold."

19 Line Subforeman W has worked in the Employer's
20 San Francisco, North Bay, and Santa Rosa offices. He
21 testified that it is standard practice to apply no-oxide
22 grease when making a connection on aluminum wire, and that he
23 has also used it on meter prongs. Generally, he would scrape
24 copper conductor to remove oxidation, then, on occasion, apply
25 no-oxide grease. Also, he would use emery cloth or a file to
26 remove oxidation or contamination from conductors. Thus, he
27 would not find it unusual to sand and grease the prongs for
28 the purpose described by Grievant. At times, however, he has

1 replaced a meter in service at a customer's home with a new
2 meter, available on the trouble truck.

3 4 Energy Use Estimates

5 Mello and Metzler prepared their energy use estimates
6 based on their experience in energy usage rather than
7 published figures for energy use by various appliances.
8 Grievant's energy use estimate was based on worksheets and
9 industry averages published by the Employer to its customers.
10 Metzler's estimates were based on the assumption that one who
11 is diverting energy will take no conservation measures. Mello
12 prepared a maximum estimate assuming energy abuse and a
13 minimum estimate assuming energy conservation.

14 Each of the estimates suffers from some known
15 inaccuracy. Mello and Metzler over-estimated the size of
16 Grievant's refrigerators; they also increased their estimate
17 for use of an electric pump system tenfold by assuming
18 erroneously that Grievant used his well water to irrigate his
19 lawn and pasture, whereas he uses well water only for
20 household consumption and occasional filling of his swimming
21 pool. Grievant, on the other hand, neglected to include any
22 estimated usage of his electric pump pressure system on his
23 estimates.

24 Separate and apart from the known inaccuracies, the
25 parties simply disagree as to the correct figures in some
26 respects. The Employer's witnesses would take into account
27 the age and location of Grievant's refrigerators, and assume
28 that he would use his swimming pool filter and sweep for at

1 least several hours per day. Grievant alleges that, except
2 during the first few weeks after installing the pool, his wife
3 used the pool sweep and filter for a few hours every few days
4 during the summer, averaging approximately an hour per day,
5 and approximately an hour per week during the winter./4/
6 Further, according to Grievant, some appliances, (e.g., the
7 electric clothes dryer that he bought in March 1985) are
8 rarely used, and his family uses very few appliances during
9 the summer because of their lifestyle.

10 Grievant estimated his monthly electric usage at 1,065
11 kilowatt hours (kwh), not including figures for the pump
12 pressure system; Metzler estimated it at 2,000 kwh, including
13 the admittedly inflated figures for the refrigerators and pump
14 pressure system; and Mello estimated it at 1,450-2,100 kwh,
15 including the admittedly inflated figures for the
16 refrigerators and pump pressure system. If the figures were
17 adjusted in recognition of the admitted errors, Grievant's
18 figure would rise to 1,095 (adding 30 kwh for the pump
19 pressure system), Metzler's figure would drop to some figure
20 lower than 1,770 (subtracting 270 kwh for the pump pressure
21 system and an unknown amount for the refrigerators); and
22 Mello's figures would drop to between 1,180 and some figure
23 lower than 1,870 (subtracting 270 kwh for the pump pressure
24 system and an unknown amount for the refrigerators).

25 However, not all of the appliances included in the
26 various estimates were in use throughout the period covered by
27 Grievant's billings. Thus, before March 1985, one would have

28 4/ Grievant prepared his energy usage estimates in the
winter.

1 to decrease the Mello and Metzler estimates to account for a
2 non-electric clothes dryer; Grievant's estimate did not
3 include use of the dryer, and therefore need not be modified.
4 Similarly, before April 1984, one would have to subtract 84
5 from Grievant's estimate and 100 from Mello's and Metzler's
6 estimates for Grievant's waterbed heater; before July 1979,
7 one would have to subtract 7 from Grievant's estimate, 300
8 from Metzler's estimate, and 150-300 from Mello's estimate for
9 Grievant's pool filter and sweep.

10 Grievant's estimates represent the low-end figure for
11 comparison with his energy usage. The minimum figure by
12 Grievant's estimate (adjusted to add in the pump) is 1,095 kwh
13 from April 1984 to the present; 1,011 from July 1979 to April
14 1984; and 1,004 before July 1979. Grievant's average monthly
15 billing was less than his estimate during calendar years 1982,
16 1983, and 1986; during other calendar years, the average
17 monthly billing ranged from 1,014 kwh in 1978 to 1,419 kwh in
18 1976. His average billing for the same month in all the years
19 between April 1975 and January 1987 ranged from 1,107 (July)
20 to 1,345 (January). Between April 1975 and January 1987,
21 Grievant was billed less than his estimate in the following
22 months:/5/

23 1977: September (966 kwh)

24 1978: January (936 kwh); May (748 kwh); June (1,000
25 kwh); July (822 kwh); August (1,000 kwh);
26 September (510 kwh); October-November (1,428
kwh for the two months combined); December
(720 kwh)

27 5/ Grievant's meter is read during the first week of the
28 month, and his billing for any particular month therefore
reflects his usage during most of the preceding month,
plus a few days in the month in which he was billed.

1 1979: January (654 kwh); February 992 kwh)
 2 1981: November (999 kwh); December (942 kwh)
 3 1982: February (949); April (950 kwh); June (946
 4 kwh); October (933 kwh); November (907 kwh)
 5 1983: January (968 kwh); February (992 kwh); April
 6 (870 kwh); May (1,000 kwh); November (1,000
 7 kwh)
 8 1984: May (1,085 kwh); August (1,072 kwh)
 9 1985: August (1,038 kwh)
 10 1986: February (899 kwh); March (968 kwh); April
 11 (1,065 kwh); May (924 kwh); June (936 kwh);
 12 August (993 kwh); November (915 kwh)

11 Grievant's highest and lowest readings for any given
 12 month over the same period are as follows:

Month	Highest Reading (kwh)	Lowest Reading (kwh)/6/
January	1987 (1,901)	1979 (654)
February	1976 (1,490)	1986 (899)
March	1978 (1,766)	1986 (968)
April	1975 (1,502)	1983 (870)
May	1976 (1,518)	1978 (748)
June	1980 (1,599)	1986 (936)
July	1981 (1,206)	1978 (822)
August	1976 (1,374)	1986 (993)
September	1979 (1,650)	1978 (510)
October	1979 (1,400)	1982 (933)*
November	1975 (1,556)	1982 (907)*
December	1976 (1,700)	1978 (720)

20 Between November 4, when Grievant's monthly meter reading
 21 was taken, and November 21, when Mello confiscated Grievant's
 22 meter, Grievant's meter registered 395 kwh; Grievant was away
 23 on vacation from November 6 through November 21, and the house
 24 was unoccupied during his absence. When Grievant's new meter
 25

26 6/ Because October and November 1978 were read together, no
 27 separate figures are available. The combined uses for
 28 those two months was 1,428, and it therefore appears that
 one or both would have had the lowest reading for that
 month in any of the years covered.

1 was read on December 1, in conjunction with the energy audit,
2 it read 595. By December 6, it read 808.

3 According to Grievant, his energy usage may have
4 decreased over the years because his children gradually moved
5 out, and because he installed energy-saving appliances,
6 windows, window coverings, and insulation. Specifically, his
7 oldest daughter moved out in December, 1977; another daughter
8 moved out in March 1980; and his son moved out in January
9 1986. Additionally, he recalled taking a week of vacation in
10 June 1981 and another in September 1981, and taking vacations
11 at some time during the months of September, October or
12 November each year from 1978 to 1986. He did not generally
13 take his entire family with him on vacation.

14 Until the fall of 1986, Grievant's family used a "swamp
15 cooler" to cool the house during the summer. However, because
16 they often remained outside until nightfall in summer, and the
17 house is shaded by large trees, they ran the cooler very
18 little. Grievant testified that he did not even bring the
19 cooler out in 1985 and 1986.

20 21 POSITION OF EMPLOYER

22 The grievance must be denied because the Employer has
23 clearly carried its burden of proof. A comparison of the wear
24 on a test meter and that on Grievant's meter prongs indicates
25 Grievant's meter has been removed between 150 and 300 times
26 from its panel. The independent test of meter prong wear thus
27 confirms the opinions given by the Employer's expert
28 witnesses. Even assuming that meter prong wear would be

1 greater if the meter were pulled under load, Grievant could
2 not state with certainty that he removed his meter under load.
3 Further, the only evidence concerning possible additional wear
4 from such a practice is that arcing could result in scars on
5 the prongs and the panel jaws. Here, the prongs in question
6 show arcing scars on only one prong, which also shows greater
7 wear than the other three prongs. No evidence exists that the
8 excessive wear on the remaining prongs resulted from removals
9 under load.

10 The sanding of Grievant's meter prongs does not explain
11 the excessive wear. It would take substantial sanding to begin
12 to reveal the copper core of the prongs, whereas Grievant's
13 meter prongs showed substantial amounts of copper. It may be
14 that Grievant sanded his prongs, but in all likelihood this
15 was done to disguise the marks made by his illicit meter
16 removals.

17 Grievant gave shifting versions of the circumstances
18 under which the sanding occurred, both during the
19 investigation and in his testimony. Dias' recollection flatly
20 contradicted Grievant's. Dias never sanded meter prongs and
21 had no recollection of Grievant doing so. Yet, if Dias'
22 incorrect insertion of the meter caused the arcing mark, one
23 would expect that he would recall the actions taken to correct
24 the damage. Moreover, Grievant has no explanation for having
25 sanded the remaining three prongs, which were not damaged. He
26 also did not explain why the arcing mark remains on the prong
27 despite the sanding. Grievant's explanation for the presence
28 of grease on the meter prongs must also be discredited. He

1 gave inconsistent versions of the process of greasing the
2 prongs, and again Dias failed to cooperate his claim that
3 grease was applied during the arcing incident. Moreover, prior
4 to Dias' visit, Grievant's meter was removed fewer than ten
5 times for various servicing. It is unlikely that they would
6 have experienced sufficient corrosion to require application
7 of a heavy layer of no-oxide grease. It is also significant
8 that the Employer's investigator found no prong corrosion on
9 any of the 180 or so greased meters showing greater prong wear
10 than on Grievant's meter. Even the Union's witnesses agreed
11 that no-oxide grease would have a lubricative effect, and it
12 is likely that the true reason for applying grease was to
13 achieve this lubrication.

14 The legitimate meter removals during Grievant's 1986
15 remodelling did not cause the excessive wear on Grievant's
16 meter prongs. If we assume that 150 removals would have caused
17 the wear shown, Grievant had testified to, at most, ten
18 removals prior to 1986. In his written statement, Grievant
19 claimed to have removed his meter between one and five times
20 daily during the period when such removal was necessary. To
21 account for the remaining 140 removals, he would have to have
22 spent between 28 and 140 days performing work requiring meter
23 removal. It is inconceivable that re-wiring and installing a
24 new electric panel would require so many removals.

25 Further, Grievant's justification for the presence of
26 grease on the prongs belies his claim that removals during
27 remodelling accounted for the prong wear. If, as claimed, the
28 only application of grease occurred during D , ' visit, then

1 there is no explanation for the heavy wear beneath the grease.

2 Grievant's billing history supports a finding of energy
3 diversion. Although he lives in an area with four distinct
4 seasons, his billing energy history shows no consistent
5 seasonal pattern of energy usage. Grievant's claim that he
6 simply did not cool his house during the hot summer months
7 must be discredited based on the weather history and on his
8 installation of a 3-1/2 ton air conditioner and heater during
9 1986. If he had no need for cooling in the summer, then no
10 explanation exists for such an expenditure.

11 A comparison of the billing for equivalent months in the
12 past ten years also suggests energy diversion. Thus, although
13 he continued to add appliances throughout the period covered,
14 his lowest billings for comparable months were more recent
15 than his highest billings, and his average monthly billings
16 for each year also decreased. The sole exception to this
17 pattern was from mid-1979 to mid-1980, at a time when a
18 specially-numbered seal was placed on meters at all Oakdale
19 employees' houses. That seal was removed in March 1980, and
20 thereafter Grievant's billings again dropped.

21 The reduction in billing cannot be explained by changes
22 in the number of inhabitants in Grievant's home. Thus, the
23 reduction bears no relationship to the dates when various
24 children left home. It also cannot be explained by his alleged
25 infrequent use of appliances. Similar to his claim that he
26 installed a 3-1/2 ton air conditioner for a home that he never
27 cooled, he claims that he obtained a filter and sweep for a
28 pool that needed little cleaning and an electric dryer for

1 clothes that are always line-dried. Moreover, Grievant gave no
2 competent evidence concerning the use of either the pool
3 devices or the clothes dryer, as his wife is responsible for
4 pool upkeep and laundry.

5 Grievant's estimates of his monthly electric use should
6 be discredited. That estimate did not include use of his
7 electric clothes dryer or his domestic water pressure system,
8 and relied on unrealistically low estimates of the use of his
9 pool filter and sweep. Further, published estimates of energy
10 consumption for some appliances, such as refrigerators, are
11 unrealistically low in these circumstances. Even taking the
12 conservative Employer estimate, Grievant has not explained
13 those months in which his billing was less than the minimum to
14 be achieved by stringent conservation measures.

15 The November 21 reading on Grievant's meter does not
16 accurately reflect his baseline use. That meter was unsealed,
17 and therefore any reading from it must be suspect. Moreover,
18 no one was home during most of the time between November 4 and
19 21, and the usual use of various household appliances did not
20 occur. Additionally, the condition of the pool on December 1
21 suggested that the pool filter and sweep also had not been
22 used. A more realistic reading is the 595 kwh that Grievant
23 used in the ten days between November 21 and December 1, at a
24 time when the weather was still mild. A more accurate
25 indicator is Grievant's billings during 1975 and 1976, and
26 during the months when Grievant's meter bore the special
27 employee seal.

28 Grievant's income and the relatively slight monthly

1 savings from energy diversion are no indicator of the
2 likelihood of theft. Over ten years, the savings amounted to
3 almost \$3,000, a sum substantially in excess of the figures
4 for which employees have risked their jobs. The fact that he
5 used the "two meter" method rather than the more popular
6 methods of energy diversion does not alter the likelihood that
7 energy diversion occurred. As an employee, Grievant had
8 greater than usual access to the meters, seals, and sealing
9 tools required to use this method.

10 Grievant's diversion went undetected for many years in
11 part because his family dog hampered inspection of the meter
12 seals by meter readers. Knowing that the meter would be viewed
13 from several feet away, Grievant need only create an
14 appearance that his meter was properly sealed by closing the
15 seal with a pair of household pliers. He was discovered only
16 because, in making his preparations to go on vacation, he
17 overlooked this detail.

18 The lack of any policy prohibiting employees from
19 removing their own meters does not excuse Grievant's conduct.
20 He was not discharged for removing his meter to perform
21 legitimate electrical work; he was discharged for doing so in
22 order to divert energy. His testimony that he informed his
23 superiors of the need to remove his meter so that the meter
24 readers would not "panic" suggests that he feared that any
25 investigation of a missing meter seal would reveal wrongdoing.
26 If he mentioned the removal of his meter to his superiors, it
27 was to forestall any investigation that would uncover his
28 energy diversion.

1 The parties have stipulated that Grievant was aware of
2 the Employer's valid rule against energy diversion and the
3 consequences thereof, and that proven energy diversion
4 warrants discharge. Having established that Grievant engaged
5 in energy diversion, the Employer did not violate the
6 Agreement by discharging him.

7
8 POSITION OF UNION

9 The grievance must be sustained and Grievant reinstated
10 with full back pay and benefits. The case against Grievant is
11 entirely circumstantial and thus requires great scrutiny. In
12 this regard, the purported expertise of the Employer's
13 witnesses is suspect. Their training was almost entirely on-
14 the-job, and they contradicted one another on a number of
15 salient items -- whether the prongs had been sanded, whether
16 the age of the electrical panel into which a meter is inserted
17 affects the amount of wear on the prongs, the electrical usage
18 of various appliances, and the estimated duration of the
19 alleged diversion. They also made glaring errors concerning
20 the pool filter system and the domestic water pressure system.

21 The sanding of the prongs and application of grease are
22 irrelevant to the alleged misconduct. It is inconsistent for
23 the Employer's witnesses to claim, on the one hand, that
24 Grievant sanded the prongs to disguise the wear, and, on the
25 other, that he greased the prongs to prevent wear. Further,
26 this testimony shows a fundamental lack of familiarity with
27 the work practices of the Employer's line crews. The record
28 establishes that prongs are often sanded to remove corrosion

1 and that no-oxide grease is commonly used to discourage
2 oxidation.

3 The meter wear tests were so flawed that they preclude
4 any reliance on their results. Moreover, Grievant's undisputed
5 proper instances of meter removal and his sanding of the
6 prongs account for the wear without any energy diversion.

7 No adverse inference can be drawn from the fact that
8 Grievant removed his meter in upgrading the electrical system
9 at his house. No Employer rule prohibited employees from doing
10 so, and the purposes for which he removed the meter were
11 necessary and proper.

12 The Employer's gross energy use estimates were inflated
13 by unrealistic assumptions about Grievant's appliances, and
14 failed to take into account Grievant's lifestyle and energy
15 conservation measures. A review of his consumption shows that,
16 in general, his family used the least electricity in summer
17 and the most electricity in the winter. This pattern is
18 consistent with his description of his lifestyle. It is unfair
19 to ask Grievant in 1988 to explain variations from this
20 pattern in 1978-79, and the Employer's delay in questioning
21 his use in those years bars any dependence on that evidence.

22 Grievant's energy use between November 4, 1987, and the
23 date of his discharge supports his description of his energy
24 use. Grievant consumed 395 kwh in the 17 days between November
25 4 and 21, which extrapolates to 690 kwh/month. Because he was
26 away from home, he had no opportunity to divert energy. Upon
27 his return, he was aware that he was suspected of energy
28 diversion, and therefore had no possibility of doing so.

1 Although he began using electric heat upon his return, he used
2 only 595 kwh between November 21 and December 1, which
3 extrapolates to 1800 kwh/month; 213 kwh between December 1 and
4 6, which extrapolates to 1290 kwh/month; and 1901 kwh from
5 December 6 to early January, when his monthly meter reading
6 was taken. The energy use was far below that predicted by
7 Employer witnesses.

8 Grievant has a lengthy and unblemished record, and
9 cooperated fully with the investigation. He knew of the
10 consequences of diverting energy, and had little to gain by
11 doing so in view of the minimal savings to be realized. Had he
12 been trying to divert energy, he certainly would have taken
13 more consistent efforts to conceal the diversion.

14 Finally, Grievant testified candidly and sincerely in
15 this proceeding. The inferences from which the Employer asks
16 the Board to draw cannot fairly be drawn from the evidence,
17 and just cause has not been established.

18 OPINION

19 Preliminary Matters

20 The Employer bears the burden of persuasion in this
21 discharge case. Although referred to as "diversion" of
22 electricity, clearly the issue is one of theft of Employer
23 product. While a fundamental requirement of just cause is
24 prior notice that certain conduct violates rules and is
25 subject to discipline, no such requirement exists in a theft
26 case. Every employee knows, or should know, that certain
27 proven conduct (e.g., theft) is a summary discharge offense.
28

1 Further, while there may be petty theft and grand theft in the
2 criminal forum, there are no degrees of theft in an employment
3 context -- the issue is never the amount stolen, but whether
4 the evidence demonstrates the charged employee stole (i.e.,
5 diverted) the product./7/ Thus, this is an all or nothing case
6 which turns solely on the weight of the proffered proof. If
7 proven, Grievant's long years of service and prior pristine
8 record do not mitigate the penalty.

9 While some arbitrators require proof "beyond a reasonable
10 doubt" in theft cases, most, including this Arbitrator,
11 recognize that the arbitral forum is not the criminal forum.
12 This is especially true when the charge is one of a known rule
13 violation as opposed to a straight allegation of theft. Thus,
14 decisions are often made in the face of some doubt, as there
15 is in this case. But, the evidence must, at least, be clear
16 and convincing enough to be conclusive.

17 Here, there is no direct evidence against Grievant; e.g.,
18 a witness who observes him diverting the electricity.
19 Nevertheless, clear and convincing circumstantial evidence may
20 sustain such a charge when the Employer's evidence establishes
21 that no other reasonable conclusion is possible because it is
22 well settled that the totality of the circumstantial evidence,
23 to a reasonable person, must result in a finding that "no
24 other conclusion than the one reached" by the Employer is
25 / / /

26
27 7/ For example, in the grocery/produce industry, arbitrators
28 almost uniformly sustain the discharges of employees,
including high seniority employees, for proven theft of
product such as one tomato or a pack of cigarettes.

1 possible./8/

2 As the Employer acknowledges, this is not one of the more
3 commonly found diversion cases. If, for example, the meter
4 reader found Grievant's meter inverted, but later inspection
5 found it right side up, the prong scratches would clearly
6 corroborate the meter reader's testimony and a strong case
7 would be made.

8 Further, the Employer is correct that it cannot be
9 penalized for finding a diversion case which does not fit the
10 common mold. Moreover, as time goes on, those persons who are
11 prone to divert energy will certainly continue to discover
12 more ways to do it. However, the Employer's burden of
13 persuasion in a "meter switch" diversion case is clearly more
14 difficult for it must have both sides of its circumstantial
15 evidence case stand up to arbitral scrutiny; i.e., the
16 physical evidence (meter prongs) and statistical evidence
17 (energy usage estimates). Lower than expected energy use with
18 little or no scratches on the meter prong or particularly
19 scratched meter prongs, given the fact there is no rule
20 against removing the meter, without lower than expected energy
21 usage will make it difficult to support a circumstantial case
22 of energy diversion.

23 Although the Board finds that common sense would indicate
24 that an employee/customer would have no more right to take out
25 his residential meter than any non-employee customer, the fact

26
27 8/ See, City of Pittsburg and other cases cited by Hill and
28 Sinicropi, Evidence in Arbitration, BNA, Second Ed.,
p. 12, footnote 8.

1 is that there was no rule against it in Grievant's area. The
2 Employer makes the point that it is not terminating Grievant
3 for removing his meter or even having an unsealed meter --
4 energy diversion is the issue. Yet, the absence of such a rule
5 clearly invites the problem found in the instant case.

6 Finally, although unusual, the Neutral Arbitrator must
7 take the responsibility for the delay in issuing the decision.
8 The delay, in great part, was based on the fact that he left
9 the hearing with an inference that this was the classical case
10 of a large employer connecting the dots in the picture to make
11 the circumstantial smoke equal the rule violation fire. The
12 inference comes, inter alia, from the fact that there is no
13 rule against an employee having either an unsealed meter or
14 removing the meter and, quite frankly, from what was obviously
15 a minuscule monthly savings compared to the risk for such a
16 long service employee with a pristine record. Thus, the
17 inference led the Neutral Arbitrator to analyze, and re-
18 analyze, the evidence and make the mathematical adjustments
19 for incorrect assumptions on the usage estimates.

20 Nevertheless, giving Grievant the benefit of the doubt that a
21 twenty year employee with a pristine record deserves, the
22 initial inference could not stand in light of the Employer's
23 evidence.

24 Merits

25 The Meter Wear

26 The Board carefully examined Grievant's meter and the
27 test meter at the hearing, as well as the close-up photographs
28 of the prongs. After 150 insertions and removals from

1 Grievant's electrical panel, the test meter showed
2 substantially less wear on the prongs. The panel in question
3 was installed during Grievant's 1986 renovation, no later than
4 August 23 when the new service drop was installed. Arguably,
5 therefore, the newer jaws could cause less friction than the
6 jaws on the prior electrical panel, and therefore less wear on
7 the test meter.

8 However, all but a handful of Grievant's admitted meter
9 removals occurred during the 1986 renovation. It, therefore,
10 is reasonable to assume that a substantial number of meter
11 insertions and removals occurred with the new panel. If
12 anything, this assumption gives Grievant the benefit of the
13 doubt. Having been subjected to meter insertion and removal by
14 Grievant when new, the panel jaws would have caused relatively
15 little wear. However, his insertion and removal of his meter
16 from the panel could cause the jaws to develop burrs which
17 would wear prongs at a faster rate thereafter, including
18 during the test. Although the test could thus over-estimate
19 the amount of wear to be expected, the actual wear on the test
20 meter still remained vastly less than on Grievant's meter. It
21 is, therefore, concluded that the evidence of meter wear
22 establishes a prima facie case of excessive insertions and
23 removals, subject to rebuttal by showing other factors that
24 could explain the wear.

25 Grievant's testimony concerning his legitimate removal
26 and sanding of the meter simply fails to explain the extent of
27 the wear shown and, in some respects, is contrary to the
28 physical evidence. Thus, for example, only one prong shows

1 evidence of arcing, and Grievant described no condition
2 affecting the other three prongs that would warrant extensive
3 sanding. Therefore, the deep scratches and extensive wear
4 along the leading edge of the other three prongs remain
5 unexplained. It is simply too difficult to believe that
6 Grievant would come up with this much damage with the usage
7 which he testified.

8 As a further example, even if one doubles Grievant's
9 estimate of the number of times he removed his meter, it still
10 does not equal the 150 insertions and removals to which the
11 test meter was subjected. If Grievant removed his meter no
12 more than the test meter was removed, no probable explanation
13 appears for the vastly greater prong wear. His admitted
14 removals, therefore, fail as an explanation of the wear.
15 Grievant's explanation for the wear is also inconsistent with
16 his claim that all but a handful of the admitted insertions
17 and removals occurred after 1983, when Grievant and D
18 allegedly greased the meter prongs. If this were so, one would
19 expect Grievant's meter to show less wear than the ungreased
20 test meter. The actual wear was, therefore, contrary to
21 expectations. Further, if Grievant greased his prongs only
22 once, in 1983, one would expect that the grease would have
23 rubbed off in later insertions and removals. That is, if the
24 subsequent insertions and removals generated sufficient
25 friction to scratch and wear the meter prongs, common
26 experience would indicate that they should have removed, to a
27 great extent, the protective layer of grease in the process.
28 However, Mello credibly testified that the layer of grease was

1 thick enough to obscure the wear on the prongs when he first
2 removed the meter from the electrical panel/9/
3

4 Energy Usage

5 Looking at the usage estimates, it must be noted that
6 estimates, by definition, are a matter of judgment and will be
7 subject to some variation. As detailed above, both Grievant's
8 and the Employer's estimates suffered from omissions and
9 incorrect assumptions. To give Grievant the benefit of the
10 doubt, the Neutral Arbitrator, therefore, has relied on
11 Grievant's own estimates, as adjusted to account for known
12 omissions/10/. However, even after factoring in the
13 corrections noted, Grievant's actual energy usage in many
14 months was still significantly lower than his own estimate of
15 his usage. It is not impossible, for example, that Grievant
16 rarely uses his pool sweep and electric clothes dryer, but
17 even using his assumptions, his low energy usage in many
18 months simply cannot be squared with the appliances in use at
19 his home.

20 Moreover, Grievant's energy usage reveals noticeable
21 discrepancies that are unexplained by any matters presented at
22 ///
23

24 9/ Given Grievant's employment history, there is absolutely
25 no reason to believe that any Employer representative
26 would purposely single out Grievant for discriminatory
treatment.

27 10/ It is unnecessary to go into great detail concerning the
28 plausibility of Grievant's estimates, since those
estimates still greatly exceeded his billings during
numerous months. However, the Employer's consumer
publications suggest that the figures for such items as
an aging refrigerator in a dusty garage probably would be
higher than the average estimate.

1 the hearing. Grievant's energy usage in 1975, 1976 and early
2 1977 show seasonal variations somewhat consistently. The same
3 seasonal variations appear from mid-1979 to at least mid-1980.
4 Further, in every month between March, 1979 and October, 1981,
5 Grievant used more energy than would be predicted by his
6 adjusted estimates. This period of relatively high and
7 noticeably seasonal energy usage occurred after the Employer
8 discharged one employee for energy diversion and placed a
9 special numbered seal on all employee meters. Grievant's
10 metered energy usage dropped after the special seal fell into
11 disuse -- and after Grievant added a swimming pool and a
12 waterbed.

13 Outside this time when Grievant clearly had no
14 opportunity to divert energy, his energy usage showed no
15 seasonal pattern, nor was the pattern of high and low billings
16 consistent from year to year. The Employer's witnesses
17 credibly testified that seasonal patterns tend to manifest
18 themselves over time, and this result is intuitively obvious.
19 Thus, while a particular family's lifestyle might cause its
20 usage pattern to vary from the "average" consumer profile, one
21 would expect that family's pattern to persist from year to
22 year, unless some major change in life style occurred.
23 Grievant described no major changes in life style that could
24 account for the random changes in energy usage. Those factors
25 on which he appeared to rely bore no apparent relation to the
26 changes in energy usage.

27 The Board recognizes that the passage of time makes it
28 difficult to recall what one might have been doing that would

1 have affected energy usage during a particular period of time.
2 Nonetheless, given the magnitude of the discrepancy,
3 particularly in the 1979-1981 period, one would expect that
4 only a relatively significant lifestyle factor could account
5 for the change.

6 Other anomalies appear from the monthly billings.
7 Grievant testified that he was disabled from January to May,
8 1984. During this period, he was not at work and was in and
9 out of the hospital. The normal expectation would be that
10 having an additional person at home would increase the energy
11 usage. However, his energy usage in January, 1984 was lower
12 than in December, 1983, and did not again exceed the December,
13 1983 reading until January 1985. In the meantime, he added a
14 waterbed heater in April, 1984.

15 Other lifestyle matters raised by Grievant bear no
16 apparent relation to his usage during the period in question.
17 For example, his claim that he achieved significant energy
18 savings insulating his house does not explain his low
19 electrical usage before late 1986, since he used a propane
20 furnace with confection feed, and only used the swamp cooler
21 in the evenings during the summer. The presence or absence of
22 insulation, therefore, would have no effect on his winter
23 electrical usage, and little effect on his summer usage.

24 Similarly, the evidence of Grievant's energy usage during
25 his two-week November, 1986 vacation does not easily
26 extrapolate to earlier years when he also took vacations.
27 Although Grievant testified that he sometimes took vacations
28 of approximately a week, apparently in months showing low

energy usage, he also testified that his family members did not necessarily accompany him on those vacations and, the house, therefore, remained unoccupied even during vacations, unlike November, 1986.

Conclusion

The combination of the physical and statistical evidence, although circumstantial, presented by the Employer supports its theory that Grievant was not billed for all of the energy he used during substantial periods of time. The factors raised by Grievant have not rebutted this clear and convincing evidence of energy diversion. Therefore, while the Board acknowledges that such matters can never be entirely free from doubt, it finds and concludes that the Employer has sustained its burden of proof.

The grievance is denied.

AWARD

The discharge of Grievant G was not in violation of the parties' Physical Labor Agreement.

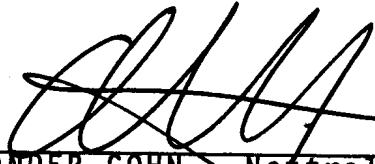
DATED: October 26, 1988


(~~concur~~/dissents)
dated 11/7/88

(~~concur~~/dissents)
dated 11-7-88

(concur/~~dissents~~)
dated 11/5/88

(concur/~~dissents~~)
dated 11/5/88


ALEXANDER COHN - Neutral Arbitrator


ROGER STALCUP - Union Board Member


ROBERT W. GIBBS - Union Board Member


RICK R. DOERING - Employer Board Member


BRETT D. KNIGHT - Employer Board Member