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IN ARBITRATION PROCEEDINGS PURSUANT TO

AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between: INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245 Union, and PACIFIC GAS & ELECTRIC COMPANY, Employer. Re: Use of Telogis GPS (Grievance No. 25048)	OPINION AND AWARD OF THE ARBITRATION BOARD Arbitration No. 366

This arbitration arises pursuant to a Collective Bargaining Agreement between **INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245** (referred to below as "Union"), and **PACIFIC GAS & ELECTRIC COMPANY** (referred to below as "Company" or "Employer"). Under its terms, **MATTHEW GOLDBERG** was selected to serve as neutral Member of the Arbitration Board; **ROBERTO BALISTRERI** and **JOE OSTERLUND** were appointed Union Board Members, and **ROBIN WIX** and **JODI BAXTER**, Employer Board Members, to render a final and binding decision.

A hearing on this matter was conducted on February 6, 2020, in San Ramon, California. All parties had full opportunity to examine and cross-examine witnesses, and to submit evidence and argument. Posthearing briefs were received on or about April14, 2020.

+ APPEARANCES:

On behalf of the Union:

ALEXANDER PACHECO, Esq., of **IBEW LOCAL 1245**, 30 Orange Tree Circle, Vacaville, California, 95687

On behalf of the Employer:

JOSHUA D. KIENITZ, and **PHILIP B. BALDWIN,** Esqs., of **LITTLER MENDELSON,** 333 Bush Street, 34th Floor, San Francisco, California, 94104

THE ISSUE

Whether the Company violated Letter Agreement 15-16, and, if so, to cease and desist acting in a manner inconsistent with the letter agreement.

RELEVANT CONTRACT SECTIONS

Title 7. MANAGEMENT OF COMPANY

7.1 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

Title 102. GRIEVANCE PROCEDURE

102.3 TIME LIMITS

(a) Filing

It is the intent of the Company, and the employees that timely filed grievances shall be settled promptly. (I) A local grievance is timely filed when submitted by the Business Representative or his/her alternate (hereinafter either is referred to as "Business Representative") in writing on the form adopted for such purpose to the designated electronic mailbox in the Labor Relations Department or alternatively, to a "Sr. Labor Specialist;" or (ii) a Business Manager grievance is timely filed when submitted by a Union's Business Manager to Company's Labor Relations Director (iii) within the following time periods:

(1) * * *

(2) A grievance which does not involve the grievant's discharge must be filed not later than 30 calendar days after the date of the action complained of, or the date

the employee became aware of the incident which is the basis for the grievance, whichever is later. * * *

(3) Business Manager grievances which may be filed pursuant to (a)(ii) above shall concern contractual interpretation matters which have system-wide or classification wide implications. Business Manager grievances shall not involve an employee's discharge, demotion, discipline, promotion, demotion or transfer.

LETTER OF AGREEMENT NO. 13-05 (January 28, 2013)

In support of making safety the most fundamental and critical element of how we conduct our business, the Company has developed new safety principles. These principles emphasize building a trust based culture, encouraging open and honest communication, understanding underlying causes in order to prevent recurrence, treating safety incidents as learning opportunities, increasing recognition and rewarding of safe behavior, and adopting a behavior-based approach to discipline which decreases the emphasis on discipline.

Under these new principles, discipline for safety-related incidents will only be considered when an employee acts in a reckless manner, demonstrates a pattern of carelessness or non-compliance, puts themselves, their co-workers or the public at risk by intentionally violating a Key to Life, or violates the Code of Conduct.

The parties met recently to discuss the new safety principles, and in particular, the limited role of discipline and the use of a behavior based approach. In the implementation of this new approach, the parties agree to the following as it relates to safety-related incidents.

1. Non-disciplinary safety discussions are the preferred approach to learn from an incident and develop positive approaches for eliminating similar incidents. These one-on-one discussions are opportunities for open and honest discussion of safety incidents with a focus on understanding and learning. Safety discussions are not considered as discipline or coaching and counselings under the Positive Discipline Agreement.

2. The parties agree that discipline for safety-related incidents will only be considered when an employee acts in a reckless manner, demonstrates a pattern of carelessness or non-compliance, puts themselves, their co-workers or the public at risk by intentionally violating a Key to Life, or violates the Code of Conduct.

3. Although there will be significantly less disciplinary action issued with this approach, the recognizes the Company's right to issue discipline and discharge for safety related incidents on the basis set forth above. The reserves the right to grieve any discipline or demotion.

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LETTER OF AGREEMENT NO. 15-16 (May 20, 2015)

In 2012 and 2013, the Company conducted a pilot vehicle technology program as part of its Motor Vehicle Safety Initiative. The parties have met several times since the pilot program to review the progress and the positive results of this initiative. The Company is moving forward with a phased implementation of the Motor Vehicle Safety Initiative and will focus on driver behavior and

awareness improvement, specifically a reduction of speeding, hard cornering, hard braking and hard acceleration. To best achieve the implementation of this, the parties have agreed to establish an oversight committee comprised of members from Company Operations, Safety, Labor Relations departments, and IBEW Local 1245 Senior Assistant Business Managers Bob Dean and Joe Osterlund.

This Agreement will provide for the following:

1. Scope

The focus of this driver behavior and awareness improvement program will be on approximately 1,500 vehicles and initially of employee groups with higher risk (i.e. dense urban areas, remote areas, and frequent starts/stops) and will be installed on vehicles that will come with the technology installed at the factory. The Company will make a final determination on the specific areas, classifications, and timing as the program is expanded.

The parties recognize the focus of this phased implementation is to improve safe behaviors as demonstrated by the pilot program noted above. As with the pilot program, the intent is not to utilize this information for disciplinary purposes. The provisions and concepts of Letter Agreement 13-05 shall be utilized as part of this agreement. The Company would consider discipline only if an employee acts in a reckless manner, demonstrates a pattern of carelessness or non-compliance, or puts themselves or others at risk by intentionally violating PG&E's Keys to Life or Code of Conduct.

2. Oversight Committee:

The Oversight Committee will meet as needed to monitor and address potential issues with the implementation of this program and ensure uniform application of the driver behavior improvement program. This committee will also review and approve joint communications to employees. The Oversight Committee will also establish Subcommittees as necessary. This Committee may add additional committee members as needed and will be charged with resolving any issues that may also arise as a result of this agreement.

3. Subcommittees:

Subcommittees will be comprised of equal representation from Union and Company members and will be appointed by the Oversight Committee. Subcommittees will provide input and support for the implementation and roll out of the program, including but not limited to the classifications, locations, communications plan, and expansion of the program. Given the importance of the safety initiative and the broad impact to all employees, the Company will provide the sub committees and/or delegates all resources and time necessary to ensure proper and thorough communication and presentations to affected employees during Company paid time. The Company will cover wages and expenses for those bargaining unit employees participating on subcommittees.

The Company and Union recognize that the Company may elect to make changes to the Vehicle Technology program in the future based on business and operational needs. With that in mind, the parties agree to meet confer, [sic] and where required, negotiate those changes.

This agreement has been discussed with Senior Assistant Business Managers Bob Dean and Joe

Osterlund.

[signed by Robert Joga, Senior Director and Chief Negotiator, PG&E, and by Joe Osterlund and Tom Dalzell, IBEW Local 1245 Business Manager]

FACTS

In 2015, the parties negotiated Letter of Agreement LA 15-16 to facilitate the implementation of what was ostensibly a Company driver safety initiative. The central feature of the initiative involved the use of video safety technology or "VST" devices which would be installed on hundreds and eventually thousands of Company vehicles. The devices, manufactured by a vendor known as Telogis, were capable of providing real time "beep" alerts to drivers engaging in unsafe driving behavior such as speeding, sudden acceleration or hard braking. They also had the capacity to supply evidence of a vehicle's whereabouts at any given time using GPS location data. In 2018, three years after the Letter was signed, the Company began to use that data as evidence to support discipline based on time fraud and/or record falsification. The Union responded with this grievance alleging that the Company was utilizing the Telogis system for improper purposes in violation of the Letter Agreement.

Prior to the negotiation of LA 15-16, a discrete group of employees which included troublemen,[1] gas service representatives and electric meter technicians utilized the field automation system or FAS installed on their laptops to plan work, record their time on breaks and work assignments, and to make notes about jobs. GPS data from the FAS could also be accessed by the Company and was relied upon as proof of misconduct. The Union neither objected to or requested bargaining over such use.

Nonetheless, as the FAS was on a portable device, it could be and was removed from a vehicle for legitimate reasons. When it was, the FAS supplied information on the location of the

[1]Troublemen take their trucks home and act as first responders to power outages, downed lines, and other urgent matters. They are also designated as service employees.

computer rather than the vehicle and arguably lead to erroneous assumptions about employee behavior. In contrast, the Telogis system would be installed on the vehicles themselves. As of 2015, these VST devices had yet to be installed in the 800-1000 vehicles used by troublemen and others, although the Company had conducted certain safety pilot programs in 2013 using "accelerometers" which were programmed into the FAS laptops.[2] Approximately 1300 to 1500 troublemen and GSRs were using the FAS system at that time. Following the issuance of LA 15-16, VST has been installed on practically the entire Company fleet of vehicles in use by the approximately 12,000 members of the bargaining unit.

Board Member and Senior Assistant Business Manager Joe Osterlund testified at length about the informational and bargaining meetings he attended prior to the execution of the Letter Agreement 15-16 and the installation of the Telogis devices. Osterlund is a Union Senior Assistant Business Manager and served as the Union's principal negotiator for that agreement.[3] He stated without contradiction that Company Labor Relations Director Stephen Rayburn sought the Union's "buy-in" on the "change management" associated with the process leading up to the introduction and implementation of the new technology. It was clear to both sides that any device capable of real-time monitoring would face pushback from workers concerned about "Big Brother" type activities.

The Company held a meeting with Union officials July 23, 2014 to discuss the transition. As noted, the Company had a limited way of gathering GPS information at that point for a small group of employees. The Company expressed an interest in expanding GPS location capability

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[2]Combined with the GPS, the accelerometers supplied data which recorded instances of rapid acceleration, hard stops, vehicle speed, and other information. The pilot studies had specific terms regarding access to information and did not use terminology similar to that at issue in LA 15-16.

[3]Osterlund is widely experienced in labor-management matters, having been on Union staff since 2003, first on an intermittent basis, then full time in 2015 following a career with the Company beginning in 1979. Osterlund was also a shop steward for about 15 years beginning shortly after he was hired. He has participated extensively in grievance matters and in negotiations both for the Contract and for interim Letters of Agreement. Osterlund has negotiated approximately 50 such Letters.

for dispatching purposes, replacing the FAS devices with cheaper models and placing GPS systems in all of its vehicles at every location. It was in the process of talking with vendors who would supply the platform. Rayburn put together a talking points email following the meeting highlighting the matters discussed. The following bullet points, among others, noted:

- GPS technology is rapidly advancing.
- The Company is continuing to consider different available GPS technology for our field employees.
- GPS is currently implemented on service vehicles, not yet installed on crew vehicles.
- Real time GPS information/tracking is expected to be available and used by Dispatchers in the very near future.
- The IBEW recommends that the Company and the Union partner together on communications, education and change management.
- The Company reserves the right to take disciplinary action in any egregious situations or for repeat offenses

Osterlund stated that the Company identified safe driving behavior as the reason it needed to track employees with the VST technology, and that there was no discussion about tracking employees for any other reason. As he later came to understand, individual employees would not be identifiable through the data produced, and only safety employees and the worker involved him/herself would have access to it. The reference in the email to "disciplinary action" was not in regard to time fraud.

Telogis reps prior to the negotiations for 15-16 provided Union and Company leaders with information on the technology, as well as sample reports generated from the data captured by the system. Management presented a communication, change and installation plan to the Union for their review which included presentations to Union leaders and effected employees. The Union recommended that the Company partner with it on communications and education, using Osterlund and Bob Dean[4] to get the information out informally.

According to Osterlund, Rayburn made it clear that the Telogis system would not be used

[4]Bob Dean was also a Senior Assistant Business Manager.

for real time monitoring or general surveillance purposes. Osterlund further recalled being told "many times" by numerous Company personnel that the technology would not be used for discipline or for "anything other than safe driving behavior." There had been discussions regarding Telogis' capacity to monitor employees' whereabouts, with the Company explaining that it was needed only to determine the posted speed limit and whether the driver was exceeding it.

A Company "Vehicle Safety Technology Communications Tactics" document dated April 21, 2015[5] detailed a series of meetings and emails designed to introduce employees to the system and discuss plans for the "what, why and when" of the implementation. Union leadership was involved in the roll-out, and feed-beck from employees was sought. The document listed "key messages" to be imparted to employees which were included along with the schedule for the meetings and each aspect of the project. Among these messages were the following:

- The Vehicle Safety Technology initiative is all about public and employee safety. . .
- . . . we want to proactively address our driving behaviors – in real time – so we make adjustment and avoid accidents.
- . . . we are installing and plan to utilize technology to increase your personal awareness of any risky driving behaviors that may show up so that you can take appropriate corrective action.
- Initially, we plan to have 1,007 company vehicle fitted with the coaching devices as part of a phased rollout that starts with work groups and locations with the highest motor vehicle incident risk.
- Installations are scheduled to begin on May 2 and will not become operational until all of our impacted stakeholders are aligned, including users and the union leadership.
- Like most of today's technology, this system can do a variety of thing other than help us with our safe driving habits. As an example, it can also tell us if the airbags have been deployed, where the vehicle is located in the event of an accident or if the vehicle is operating correctly. This project will only include the safe driver behaviors component of he technology.
- It's important to understand that this initiative is all about public and employee safety, helping prevent motor vehicle incidents and keeping our drivers safe.

A "Vehicle Technology: Change Canvas"[6] document dated April 27 specified certain aspects

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[5]Osterlund reviewed this document with Company safety specialist Diane Thurman.

[6]Osterlund obtained this document during the negotiations for 15-16. It was provided by Thurman and the safety specialist team. Osterlund would examine this as well as the previous document to determine whether they were consistent with Company intent as related by senior leads, and provide input as to items that may have been omitted.

of the initiative. Pertinent for present purposes were statements by the Company that "public and employee safety" was "driving this change"; that the Company was trying to "raise drivers' awareness of their unsafe driving behaviors," "decrease the rate of unsafe driving behaviors" and the vehicle incidents associated with them, "increase(s) visibility into driving behaviors at the utility level," and "configure a technology platform that supports additional functionality to be added later." In a section delineating the areas and technologies which would be affected, the Company lists "adds a hardware component to vehicles," "adds capability of a mobile application and website to view driver behavior information," and, most significantly, "adds the capability to track other information that is not in scope of this project." Additional comments on the Canvas included "Employees need to understand their driving behavior is being tracked for their own safety" and

> This system will give leaders information about their employees that may require coaching or disciplinary action (for egregious actions). . . .

Finally, the document lists "Boundary Conditions" of the project." Under "In Scope" are items such as "in-cab alerts" and email and web reporting of "driver behaviors and scores." Under "Out of Scope" is listed "dispatching," "route planning/optimization," "cameras," and "time and location reporting (real-time or after-the-fact). As stated by Osterlund, "out of scope means not part of this agreement. Shall not be used."

In a publication regarding a "5 minute meeting"[7] dated April 29 whose subject was "Vehicle Safety Technology – Phase 1 Installation, the Company detailed key discussion points for the meeting as well as a set of questions and answers. It wrote "we are now planning to leverage industry leading coaching technology . . . to help us become safer drivers," and that the technology "is intended to create personal awareness of risky driving behaviors that may put you at risk so you can take actions to self-correct them." Another key discussion point states that the technology is

[7]A 5 minute meeting is a tailboard led by management addressing a group of affected employees. Osterlund as well as rank-and-file members provided feedback to the outline prepared by the Company

"in use at many utilities and companies worldwide to support safe driving behavior" and "is not intended to be used for disciplinary purposes."

The meeting memo also lists a series of questions and answers to be presented. These note that the Company has previously used the technology in pilot programs which resulted in a "significant improvement in driving behaviors" which was "accomplished thorough driver awareness and self-correction, not through reporting or discipline." In response to the question "Does the technology use GPS tracking, the Company states:

> The equipment we are installing does have the capability to track other vehicle information, such as location (GPS) and engine diagnostics. However, we are not turning on this function at this time. GPS information WIX only be used to correlate vehicle location with map data to report on vehicle speed over posted speed limit. The vehicle's location itself will not be reported to PG&E. In the future, if the company (in partnership with union leadership) decides to activate any other type of data reporting, employees will be notified in advance.

In response to the question, "Once turned on, how will the information be used and who will see it?", the memo recites:

> In addition to real-time audible alerts, reports will be available to drivers and their leaders. The Vehicle Safety Technology Working Team, comprised of union and management representatives, is working to together on these guidelines and procedures. This information is intended to be used as a coaching and self-correction tool and not for disciplinary action.

In another set of FAQ's issued in May, under the bullet point "Is there discipline involved," it stated:

> This program is not intended to be disciplinary. The intention is for the Supervisor/Manager to have an enlightened discussion with the employee on the observed behavior and safe driving behaviors, and engage with leadership and Field Safety as needed. Discipline would only be considered if an employee acts in a reckless manner, demonstrates a patter of carelessness or non-compliance, or puts themselves or others at risk by intentionally violating PG&E's Keys to Life or Code of Conduct.

Osterlund testified that the Company was clear at negotiations that the data was for driver self-coaching only. No one from the Company team said they intended to use the GPS data to surveil the whereabouts of employees. If there were any disputes regarding the implementation

of the program, the agreement provided that they would be submitted the oversight committee, which had the authority to approve any changes to its scope. If the Company wanted to start using the system for look for instances of time fraud, Osterlund would expect that possibility to be run through the committee. It has not done so.

In 2017, the Company opened discussions with the Union directed at expanding the scope of LA 15-16 by deploying Telogis GPS to monitor driver behavior for discipline purposes where appropriate. Specifically, management wanted to conduct random checks to determine whether drivers were where they were supposed to be. The Company provided a study which showed that 95-97% of drivers were in the correct location. The situation was described in a memo to Business Manager Tom Dalzell which outlined Osterlund's conversations with the Company on this issue as well as a number of others. Osterlund wrote:

> Company wanted to use GPS to monitor GSR [gas service representative] behavior and use discipline when appropriate. Union declined and noted the most recent gas service study indicated 99% compliance rate. Recommended the Company declare victory.

The Company dropped this proposal and no changes were made to the Letter of Agreement.

In late 2018, Osterlund learned that the Company had begun using Telogis data in a manner which he believed was outside the scope of the agreement. In seven separate termination cases, Telogis GPS location data was accessed by corporate security to provide evidence of misstating Company activities, falsifying records, misusing Company time, and/or submission of fraudulent timecards. In the course of processing at least one of the associated grievances, Osterlund found out that the Company started to utilize the Telogis data in January 2018.

Presumably in response to a request for information regarding these grievances, the Union was supplied with a series of Company documents dating from 2013 entitled "Access to Vehicle Event Data Recorder Standard" which delineated who was authorized to access information from these recorders or "black boxes" which were expected to be installed on all new cars and light

trucks after September 1, 2014.[8] Pursuant to the standard which remained in effect until the beginning of 2014, the download of the data "must be conducted by [an] authorized third party" and only the Senior Director of Transportation Services was authorized to submit such requests after they had been submitted to him/her by "directors or higher."

On January 17, 2018, the Company unilaterally adopted an amended "Vehicle Event Data Recorder and Telematics[9] Standard." Under the heading "Telematics Policy," the Standard states:

> The purpose of the implementation of the technology is to help employees driving on company business become more aware of specific at-risk driving behaviors and allows self-correction in real time. This is focused on a coaching approach to reduce risk and exposure while driving. Additionally, the technology allows for asset locating to aid in timely vehicle maintenance and repairs.

The amendment permitted the Director of Transportation Services Planning & Perf etc. as well as the Senior Director to submit the download retrieval requests to the authorized third party. It also added the ability of corporate security to retrieve this information, at least insofar as "location/history." Osterlund noted that this was contrary to the Union's understanding as to who would be permitted to access the data. The Union had no input in producing these protocols, and was unaware of them until it obtained these documents in the beginning of May of 2019 pursuant to its processing of the grievances cited.

Several months prior, Osterlund requested to meet with "senior leadership" from the Company "to address the use of GPS (Telogis) with respect to surveillance of IBEW members." The Oversight Committee had not met on these matters beforehand. After receiving the Standard, Osterlund requested another Oversight Committee meeting in early May. The meeting was

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[8]The California Vehicle Code prohibits the download of such data except with the owner's consent, a court order, for vehicle safety research and for diagnosing, servicing or repairing a vehicle.

[9]"Telematics" was defined as "a device that can internally record vehicle information (e.g., location and speed) and send the information from a vehicle to a remote computer."

attended by Dean, Anthony Brown, Matt Levy and Andrew Williams.[10] Osterlund testified that Williams acknowledged he was "shocked" that this information was outside the scope of the original agreement. Williams and Levy stated that would talk to some senior leaders to determine whether what was going on was appropriate. Williams agreed the use of the Telogis information for discipline was inappropriate, and that the Company had other tools which made that unnecessary.

Following these discussions, the Company declined to change what it was doing. Both sides acknowledged that the Company had accessed GPS information from FAS for some time, but employees had been made aware of such. To Osterlund, Telogis data was "carved out" in the agreement and should not have been used by the Company to investigate and terminate the five employees referred to above. Although he originally thought it was a "one-off" issue, he later learned that there were a number of employees currently under investigation. He was particularly concerned that GPS location data was reviewed for purposes of questioning employees during investigations, rather than to support termination decisions that were already made based on other information.

Jodi Baxter, former Labor Relations Manager, testified that she was involved in the grievance process referred to by Osterlund for the employees who were terminated based upon a review of their GPS data. She confirmed that the Company started accessing Telogis GPS data in 2018, the earliest being in May of that year. She identified several cases from 2018 in which the Union was informed that Telogis data was part of the Company's justification for discipline. She explained that in each situation, there was a trigger to access GPS information from Telogis. It was not reviewed in real time but examined as a past record. She also explained that Osterlund requested Telogis GPS data and timecards for use by the Union in a pending grievance on January 18, 2019, demonstrating that the Union was aware that the Company was using this data in early

[10]Brown is another senior assistant Business Manager. Williams was a Vice President for Labor and Employment who was overseeing the corporate safety unit at the time. Levy was the Senior Director of Labor Relations.

2019.

Baxter provided historical data to establish that GPS data had been accessed and relied upon in numerous past disciplinary cases, with the Union's knowledge and acquiescence, both before and after Telogis was installed. However, in ten of the matters cited, GPS data was derived from a source other than Telogis. As noted, it was not until 2018 that a case arose in which corporate security accessed Telogis data to support grounds for a termination. In that instance as well as two of three subsequent other discharges in which grievances were filed, Telogis data was relied upon as proof of misconduct. There is no indication from these matters that the Union alleged a violation of LOA 15-16 as a defense to the allegations. Of the three cases involving Telogis data, one was settled while the other two apparently remain unresolved.

Jeremy Courval is the principal negotiator for the Company's labor relations group and was the negotiator for LA 15-16. He and Osterlund had many conversations as they worked through the agreement. Courval denied that he ever told Osterlund that the agreement would have any effect the Company's existing ability to investigate and discipline employees for timecard falsification or that it would have any effect on the Company's ability to use GPS information in such investigations. In response to the question, "Did you ever state in your negotiation of Letter Agreement 15-16 that the letter agreement would have any bearing on discipline other than safety related discipline?", Courval testified "No, it was related or pertained to the Telogis and driver safety."

When asked if the Union stated its position that the agreement prohibited the Company "from using GPS data to investigate time card falsification," Courval answered "No." Asked by Union Counsel whether it was the Company's intent to install Telogis so that it could surveil employees to determine where they were supposed to be, Courval responded "No, I do not recall that being the intent. Again, this was a driver safety improvement project and using a platform like Telogis was the way to do that."

This past May, Levy and Dalzell discussed the instant grievance informally to attempt to reach agreement. The grievance was filed on behalf of all employees in all departments and HQs, system wide. It was advanced under both the Physical and Clerical Agreements[11] as a continuing grievance under LA 15-16.

The LIC conducted prior to the arbitration was composed of Dean, Osterlund and Baxter. The Committed found that the issue presented was "whether the use of the Global Positioning Systems (GPS) data derived from Vehicle Safety Technology (VST) devices is a violation of the Letter Agreement 15-16 and the IBEW Physical Agreement." As summarized in the report, the Company's position on the grievance was that GPS data from various devices such as cell phones and field computers has been used to investigate conduct as well as other purposes over the past 15 years. The Union has always been aware of that use and has not requested bargaining over the subject. The Company further contended that when VST devices were installed, the parties did not bargain about GPS data usage but rather entered into LOA 15-16 "to define and support the Safe Driving Program." This was consistent with all other GPS device deployments, while the current VST usage is consistent with the usage of all other devices. Citing a 2015 NLRB Advice Memo[12] which stated that no bargaining is required when there has been no "material, substantial and significant" change to terms and conditions of employment, the Employer urged that there has been no violation of the Letter Agreement or the Collective Bargaining Agreement. As indicated,

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[11] The clerical agreement was not entered into of the record. However, Osterlund testified that this CBA also incorporates letter agreements in section 24.1. 41. The parties agreed that "there is in addition another agreement that applies to clerical employees with the same operative language."

[12]The memo in *Share Point Distribution Co., Inc*, 22-CA-151053 concerned an alleged Company failure to bargain before installing a GPS device on an employee's truck. The installation allowed an investigator, who was asked to confirm whether the employee was stealing time, to follow the truck even after losing visual contact with it. The Board concluded that the installation and use of the device "was a mandatory subject of bargaining but that it did not constitute a 'material, substantial and significant' change in employees' terms and conditions of employment. In reaching that determination, the Board cited *Colgate Palmolive Co.*, 323 NLRB 515 (1997), which held that the unilateral installation and use of hidden surveillance cameras was a mandatory subject because it "has the potential to affect the continued employment of employees whose actions are being monitored" and "serious implications for . . . employees' job security." The memo also cited another advice memorandum in Case 19-CA-29566 which concluded that the unilateral installation of vehicle data recorders or VDR's constituted "a significant change" because "the VDRs collected far more information and therefore increased employees' chances of being disciplined."

the Company did not contend at any point that the grievance was untimely.

In contrast, the Union asserted that after numerous meetings with the Company and a review of information provided by the vendor and by the Company to affected workgroups via communication plans, 5-Minute Meeting tailboards, and FAQ's, the Union agreed to LA 15-16. Nonetheless, the Company has violated its commitment and LA 15-16.

POSITION OF THE UNION

This is not a difficult case. In 2014, the Company approached the Union seeking its buy-in on a VST initiative using Telogis equipment on its fleet of vehicles. The Company's motivation was two-fold. Because the equipment included a GPS component that would significantly expand the Company's surveillance capabilities, the initiative was a mandatory subject of bargaining. Secondly, the Company wanted the Union's assistance in convincing its wary membership that despite the GPS functionality, the technology would not be used for "Big Brother" surveillance nor as a disciplinary tool, but only for the purposes of improving driving behavior.

Based upon repeated and unequivocal assurances from the highest levels that the Telogis equipment would not be used for discipline other than for egregiously unsafe driving, and that only a handful of safety personnel (and not corporate security) would have access to the data, the Union agreed to LA 15-16. The agreement is significant in that it forbade the use of the Telogis VST for discipline except under the very limited circumstances of continuous or egregious driver safety issues, and that in the event that parties wished to change the scope of the technology's use, the changes had to be negotiated through a joint oversight committee.

The Company implemented the initiative as bargained. However, after installing the VST on thousands of vehicles, the Company experienced a significant change of heart. It now wanted to use its GPS data in a manner that was antithetical to the parties' original agreement, that is, to surveil, investigate, and discipline employees for misconduct unrelated to driving behavior. While the Company initially abided by the agreement by again seeking the Union's buy-in, when it did not,

the Company then decided to move ahead with its plan without Local 1245's knowledge or consent.

In 2018, the Company terminated a number of employees for time fraud-related reasons. In the course of processing these grievances, the Union learned that the terminations were premised in part on the GPS data from the Telogis system and that the Company had decided to modify the protocol to give security investigators access to the data. Upon discovering that the Company had been using the data in a manner expressly forbidden under LA 15-16, the Union confronted the individual in charge of the safety team, who acknowledged he was unaware that non-safety personnel were attempting to access Telogis GPS data. He admitted that he did not know of the new protocol and that this use of the data violated LA 15-16. Despite these admissions, the Company maintained that its use of GPS data in this fashion was perfectly acceptable.

The Union came into the hearing assuming it would have to rebut the Company's position as asserted at the LIC. In its opening statement, the Company pivoted to claiming that the crux of the dispute centered on what the parties meant by "this information" in reference to use for discipline. The Union always understood the term to mean any/all information, including GPS data, that was produced by the Telogis system. The Company advanced a different interpretation. Not only did "this information" not refer to GPS data, but also that during the negotiations for 15-16, the parties never discussed the permissible use of the GPS data produced by VST. The evidence suggests that this interpretation was never genuinely held by anyone at the Company. Whether analyzed under the plain meaning rule or considering external evidence, the Union's interpretation prevails.

The Company made another novel claim toward the end of the hearing regarding timeliness, which it intended to support with the introduction of several exhibits. This is despite the fact that timeliness had not been raised at any prior grievance step or present when the parties were required to frame the issue. Once confronted, it modified its claim. While it waived any argument

regarding the timeliness of the grievance in this case, it requested that the Arbitrator limit the preclusive effect of the Award, if any, on any currently pending grievances. This modified claim of untimeliness is not really about timeliness so much as it is about *res judicata* or issue preclusion. Such an Award is neither expected nor within the Arbitrator's authority, and should be denied.

The parties spent considerable time during the negotiations for LA 15-16 discussing the permissible use of GPS. It is was known to the parties at the outset that the Telogis devices could be used to surveil employees similar to the FAS/ The surveillance capacity put the initiative squarely within the jurisdiction of the NLRB. Under several of its advice memoranda, an employer must bargain over GPS devices that would cause anything more than a *de minimis* expansion of existing surveillance practices. Because the Telogis devices would be installed on the Company's entire fleet of vehicles and eventually affect 10,000 employees represented by the Union, the Company was required to bargain this initiative with the Union.

The issue is not whether the Company has previously used GPS tracking technology in some other form. Whether an employer has a duty to bargain over the implementation of new technology is the extent to which employees that will be subject to it have already been tracked using the same or similar technology. As the record shows, the vast majority of employees were never subject to any type of GPS surveillance.

Recognizing this duty to bargain, the Company sought the Union's "buy-in." In order to get it, the Company needed to dispel the notion that its intent was never to use the technology for surveilling employee whereabouts. As acknowledged by Courval, Telogis was "not a tool for discipline or performance management," but rather something "to help our drivers become safer drivers." Contrary to the Company position, the evidence establishes that whether Telogis data could be used for investigating and disciplining employees, was an integral part of the parties' bargaining over the initiative, and was by far the most important and heavily discussed subject. As to why GPS was a necessary component of the Telogis platform, the Company made it clear

that it was needed solely for the purpose of establishing whether a driver was speeding by identifying his/her location to determine the posted speed limit. Additionally, the Company assured the Union that personally-identifiable information would be accessible only to a limited group of safety personnel.

The Company's *res judicata* argument, framed in terms of timeliness, fails as a matter of law. However, the issue is now moot based upon representations of Counsel for the Employer when confronted about the failure to raise he the issue at any point in the grievance process, that if the relief requested was prospective cease and desist only, the Company would not have a timeliness objection. If the issue were whether the Company violated the Contract in 2018 in using Telogis GPS to discipline employees, the Company would retain its objection. The Company is asking the Arbitrator to prospectively circumscribe how his award may be applied in other cases involving similar issues and claims. This request is problematic for a number of reasons.

First, as the Arbitrator noted, he could not anticipate whether what arguments were raised or going to be raised in those other cases. Arbitrators should not try to anticipate, let alone dictate, how their decisions are applied in future cases. Those are evidentiary considerations that should be left to the arbitrator in that matter to decide, based upon a full evidentiary record and the respective arguments advanced by the parties and the application of *res judicata* by that arbitrator.

It would be not only be presumptuous for this Arbitrator to speculate regarding separate proceedings, it would require exceeding his authority by considering facts and law not presented. The only issue to be decided here is whether LA 15-16 permits the Company to consider Telogis GPS data to investigate and discipline employees for time fraud. Although the cases outlined in the Union's summary are relevant to the issue, the Arbitrator may only adjudicate issues presented to him. *How Arbitration Works*, at 7.3.B. (Statement of the Issue), citing John Kagel, *Practice and Procedure,* in *The Common Law of the Workplace: the Views of Arbitrators*, 17-18 (St. Antoine ed., BNA Books 2d ed. 2005). Even if this Arbitrator were to attempt to circumscribe this Award in the

manner suggested by the Company, there is nothing to ensure it would be binding on future decisions and just simply ignored.

Second, the Company suggests that because Osterlund first realized the Company had used Telogis GPS data for at least one conduct investigation sometime around Fall 2018, any claims filed beyond 30 days after that point would be untimely. This argument misunderstands the difference between contract interpretation and discharge/discipline cases. Osterlund's knowledge regarding the Company's use of Telogis GPS data to investigate employees would be relevant only to the timeliness of a Contract violation, which is the very issue in dispute here. That argument was expressly waived. In other words, the Company is trying to get around its waiver through a request that the Arbitrator apply *res adjudicata* prospectively. This is not a proper request.

On the merits, the dispute has everything to do with whether LA 15-16 permits the Company to use Telogis GPS data for timecard falsification discipline and other types of misconduct unrelated to driving behavior. The Union assumed coming into the hearing that it would only have to rebut claims and defenses set forth in the Company's LIC position statement at Step 2: that it had no obligation to bargain over permissible use of Telogis GPS data in negotiating LA 15-16 and it was not incorporated as a term of the agreement; that even if it did have an obligation to bargain, the parties did not discuss permissible use of Telogis GPS data. The Company has always used GPS data produced by other technology systems, including FAS, for investigatory and disciplinary purposes, and therefore should be allowed to use Telogis GPS data for the same purposes.

The Company's opening statement demonstrated that it no longer believes that whether it had a duty to bargain with the Union over Telogis GPS data is a relevant issue. Counsel for the Company went so far as to offer the stipulation that no NLRB advice memoranda would be used in a post-hearing brief. It was established later in the hearing that the Company's practice regarding other technology platforms is likewise irrelevant. By method of deduction, the last remaining agreement is whether the parties bargained over the permissible use of Telogis GPS

data when they negotiated LA 15-16.

This argument suffers from a fatal flaw. The Company expressly agreed in LA 15-16 that "the intent is not to utilize this information for disciplinary purposes." If the Union's contention that "this information" refers to any and all data produced by the Telogis system, there is no way to argue that the parties failed to bargain and reach agreement on the permissible use of GPS data. If true, it would be one of the defining features of the agreement. Therefore, the Company argues, by positing for the first time that the phrase "this information" was meant only to refer to information produced regarding bad driving behavior (speeding, hard cornering, hard breaking, and hard acceleration.) In other words, in signing LA 15-16, the Company agreed to refrain from using Telogis GPS to investigate and prove driving related misconduct—using it for other types of misconduct would be fair game.

Accordingly, how the Arbitrator interprets "this information" is the dispositive consideration. This argument strains credulity to the breaking point and is contradicted by the Company's own actions and omissions. The documents created by the Company one month prior to signing LA 15-16 used the term "this information" as a general catch-all to describe any/all types of data produced by the Telogis system which would be used "as a coaching and self-correction tool and *not for disciplinary action.*" As the language states in the agreement, "the intent is not to utilize this information for disciplinary purposes [.]" The Company's interpretation would mean that the Union agreed to pitch the technology based upon the assurance it would not be used for surveillance or discipline and actively deceived its own membership to benefit the Company. This argument is illogical and offensive.

There is no evidence that the Company intended the term "this information " in the fashion it now argues at the time it signed LA 15-16. That argument does not appear within the Company's LIC position statement. There is a strong presumption that this interpretation was offered at hearing was a manufactured claim to prepare for arbitration. If so, the Arbitrator's inquiry should end here,

and the grievance should be sustained.

Regardless, the Union's interpretation should prevail regardless of the interpretative framework applied. In contract disputes, the majority view is to construe language according to its plain meaning and to consider extrinsic evidence only if the language is ambiguous. The term "this information" is clear—it was intended to apply to any/all information produced by the Telogis system. That was how the parties understood the terms at the time and the only logical way to construe the terms. By saying "this information" would not be used for disciplinary purposes without naming Telogis, the parties ensured that LA 15-16 would apply to any VST and the entire universe of information produced by that VST.

In addition, the Company's interpretation, that "this information" applies only to the four types of driving misconduct, does not make sense under the plain meaning rule. The categories of driving misconduct do not appear in the same paragraph as the phrase "this information" or even within the same section of LA 15-16. The Company's interpretation would require applying the term "this information" to the introductory paragraph, six sentences earlier. This interpretation fails the smell test.

Moreover, if the term is ambiguous, the Union has offered no fewer than nine documents to explain the parties' intent and the Company has offered none. The parties had extensive discussions about whether and how the Company would be allowed to use Telogis GPS data, and they agreed that such data could not be outside the scope of anticipated use, outside of the goal of ensuring driver safety. The parties discussed that the data could be used to determine if an employee was speeding and that the data would not be available to anyone but a handful of safety personnel (not management and corporate security.) The only document offered by the Company was an agreement used for a pilot program which uses different language than LA 15-16.

The parties' intent to prevent the Company from using Telogis as a tool for discipline is corroborated by the actions of the Company after LA 15-16 was executed. If the Company truly

negotiated carte blanche authority to use the new technology for disciplinary purposes, one would expect the use to occur immediately after the language was bargained. This didn't happen here. In fact, the Company only took this action after consulting with the Union and soliciting the Union's agreement on new language, which the Union declined to give. The Company's decision to secretly modify an internal protocol to allow management and corporate security access all but proves that the Company knew what it was doing was in violation of LA 15-16. This interpretation is bolstered by the statement of Andrew Williams, who agreed with Local 1245 that the Company had violated LA 15-16 when it used Telogis GPS data to discipline employees.

The fundamental purpose of the Telogis GPS system was never to surveil employees for where they were supposed to be. It was a driver safety initiative. The Company has failed to enter any evidence in support of its contention that the phrase "this information" was limited to the four categories of driving misconduct. Jeremy Courval was never asked his interpretation of the term despite being called to testify by the Company. The bulk of his testimony was to refute that GPS was a subject negotiated by the parties, which is overwhelmingly refuted by the Union's massive documentary evidence introduced by the Union. The omission is revealing. Whether applying the plain meaning rule or looks to external evidence, the Union's interpretation is the only reasonable and logical one.

Finally, the Company has no legal right to request the Arbitrator to authorize it to use Telogis information to investigate and discipline employees either prospectively or retroactively. Pursuant to the NLRB's Advice Memoranda, this would be a mandatory subject of bargaining. If the parties did not reach agreement on that issue, the only thing the Arbitrator can do is deny the grievance and refer the matter back to the parties for negotiations. Even if the Arbitrator aggress with the Employer that the parties did not bargain over the use of Telogis GPS data for investigatory and disciplinary purposes, this would only mean that Local 1245 would have the right to demand to bargain and to litigate a potential unilateral change with the NLRB.

Accordingly, the grievance should be sustained in full and the Company ordered to cease and desist acting in a manner inconsistent with the Letter Agreement, without any accompanying order regarding the preclusive effect of such decision.

POSITION OF THE COMPANY

There is no dispute that the purpose, scope and intent of LA 15-16 was to improve safe driving behavior—nothing more, nothing less. The grievance should be dismissed because it is clear and undisputed that LA 15-16 pertains only to driving safety and safety-related discipline. It says nothing about the Company's longstanding, agreed-upon and arbitrator-approved practice of the Company using location data to investigate non-safety related instances of timecard fraud and falsification of Company records. There is nothing in the operative agreement nor in the parol evidence discussions to upset by unstated implication more than a decade of settled past practice. Because the grievance does not challenge any actions taken by the Company regarding driving safety or safety-related discipline, the grievance should be dismissed. Further, in light of contractual time limits in Title 102.3, the grievance is untimely to the extent that the grievance challenges any actions by the Company prior to April 15, 2019 or any discharges prior to May 1, 2019. If the Arbitrator sustains any part of the grievance, any relief must be prospective and injunctive in nature.

The Company presented numerous examples to demonstrate the long-standing practice of using GPS location records, including the following:

EX 3	Arb. 304 (Goldberg, 2010)	Arbitrator concluded grievant could be disciplined where "the GPS data from his truck" showed that grievant lied about his whereabouts.
EX 4	Arb. 320 (Goldberg, 2016)	Arbitrator upheld termination of grievant, where grievant's GPS location records from computer in his truck reflected that he was committing time fraud.
EX 5	Arb 344 (Hoh 2019)	Arbitrator concluded grievant could be disciplined where grievant's "GPS records, which provided the exact geographic location of her Company truck," suggested

		that she had committed time fraud.
EX 6	Pre-Review Committee No. 201971 (2012)	Union and Company agreed there was just cause to terminate grievant where GPS from Grievant's phone showed multiple instances in which Grievant was not where he reported he was.
EX 7	Pre-Review Committee No. 22109 (2013)	Union and Company agreed there was just cause to issue decision-making leave where GPS showed grievant misrepresented his location in company records.
EX 8	Review Committee No. 22238 (2015)	Union and Company agreed there was just cause to terminate grievant where GPS showed multiple instances in which grievant was not where he reported he was.
EX 9	Review Committee No. 22307 (2015)	Union and Company agreed there was just cause to terminate grievant where GPS showed multiple instances in which grievant was not where he reported he was.
EX 10	Review Committee No. 22642 (2015)	Union and Company agreed there was just cause to terminate grievant where "GPS records from the grievant's assigned Stockton vehicle" demonstrated that grievant misrepresented the usage of his company vehicle.

Given that the sole focus of LA 15-16 was safety and safety-related discipline, the parties never discussed in negotiations leading up to LA 15-16, whether past GPS location data obtained through the Telogis technology could or could not continue to be used by the Company. As Osterlund testified, consistent with the complete silence of the text of LA 15-16 regarding use of historical GPS location data, the Company's negotiators were "[n]ever specific with respect to that" in negotiations regarding LA 15-16 and the parties "did not specifically ever broach that issue." There is nothing in the black letter of LA 15-16, and no parol evidence from the negotiations that led up to LA 15-16 (the discussions between Mr. Courval and Mr. Osterlund), that LA 15-16 has any effect on the Company's use of historical GPS location information for investigations regarding suspected timecard fraud and falsification of Company records. Mr. Osterlund conceded this point

on direct examination:

> Q: From the union's perspective, Joe, based on your experience or your participation in negotiating Letter of Agreement 15-16, was it understood by the union that this agreement would apply to all information produced by the Telogis system?
>
> A: It was not. It was only with respect to safe driving behavior.

Mr. Courval explained that if the parties were going to enter into an agreement that restricted the Company's ability to continue its long-standing use of GPS location data for (non-safety related) timecard fraud and record falsification discipline, such a limitation would have been included in the agreement. The plain language of the agreement confirms that the parties intended to constrain LA 15-16's application to safe driving behavior and safety-related discipline.

The Union bears the burden of proof in establishing a contract violation. Here, the Union is unable to prove that the Company violated the plain language of LA 15-16, which only related to safety-related discipline, by continuing to use historical GPS location data to investigate suspected timecard fraud and record falsification. The parties agree that LA 15-16 is clear and unambiguous on its face. Parol evidence is not relevant or admissible to interpret the express terms of LA 15-16. See *City of Sunnyside*, 123 BNA LA 1217 (Boedecker, 2007) (where contract language is clear, "the arbitrator is constrained to give effect to the thought expressed by the words used"). Because LA 15-16 applies exclusively to driving safety and safety-related discipline, and because the Union does not challenge any safety-related discipline administered by the Company, the grievance should be dismissed.

The Union presented a number of ancillary documents that the Union claims supports its position if the agreement in ambiguous. If the Arbitrator does consider the Union's evidence, such consideration should be limited to parol evidence related to the negotiations of LA 15-16, the correspondence between Mr. Osterlund and Mr. Courval. Only Courval was authorized to negotiate LA 15-16 on behalf of the Company. Statements attributed to others, who had nothing to do with the actual negotiations of LA 15-16, such as Andy Williams, are irrelevant.

The Union also introduced a range of documents both pre-dating and post-dating LA 15-16. The Union made little or no showing regarding to whom the documents were distributed, who drafted them and for what purpose, or whether the documents were in final or just drafts. There was no evidence that the documents were discussed, exchanged, or incorporated into the negotiations for LA 15-16 between Osterlund and Courval. As such, they do not even amount to parol evidence regarding the agreement at issue. Other problems with Mr. Osterlund's testimony and reliability include his assertion that GPS "tracking" and "surveillance" were not to be conducted using Telogis. However, Osterlund did not tie these statements to anyone in particular. He admitted that the parties never discussed whether or not the Company could continue to look back at historical GPS location data to investigate non-safety related discipline. References to real-time tracking and surveillance are misplaced where the Union's real goal is to attack the Company's use of after-the-fact location data.

The fatal flaw in all of the Union's testimony and evidence is that none of it constituted parol evidence to the negotiation of LA 15-16. Even if it were appropriate for the Arbitrator to consider it, the only bona fide parol evidence in the record is the undisputed testimony that the discussion in the negotiation of LA 15-16, like the black letter of LA 15-16 itself, pertained exclusively to driving safety issues and safety-related discipline. The real thrust of the Union's argument, that the Company is somehow precluded, by the unstated implications of LA 15-16, from using past GPS location data to investigate non-safety related timecard fraud and record falsification, founders under the settled presumption that parties do not "hide elephants in mouseholes." If LA 15-16 was intended to upend PG&E's settled, longstanding, agreed-upon and arbitrator approved past practice regarding the use of historical GPS location data for non-safety related discipline, LA 15-16 would have expressly so stated.

Because only prospective relief is sought in the grievance, only prospective relief may be granted. The Union sought a cease and desist order. The grievance neither challenges nor refers

to any disciplinary actions taken by the Company, whether safety-related or otherwise. The same is true for the LIC report. The remedial authority of the Arbitrator is limited to the remedy requested in the grievance.

Finally, the grievance is untimely to the extent that it is read to challenge any actions by the Company prior to April 15, 2019 (30 days before the grievance was filed) or any discharges prior to May 1, 2019 (14 days prior). The clear contractual time lines set out in Section 102.3 should be enforced as written. This defense need not be reached because the grievance seeks only prospective injunctive relief. There is no dispute that the grievance is timely in that regard. If the grievance is sustained and any relief ordered, it should also be prospective and injunctive in nature.

The Company did not waive its timeliness argument. It was advanced in its opening statement. Once raised, the Arbitrator is compelled to decide that issue prior to addressing the merits. Secondly, the Company had no occasion to raise the argument until the Union made it clear at the hearing that it intended to seek relief that was beyond that sought in the grievance itself.

The Union was well aware long before April 15, 2019 that the Company was using historical GPS location data obtained through Telogis in connection with time card fraud and falsification investigation. Grievances were filed regarding terminations in mid-2018 that relied on Telogis GPS data. They did not mention Telogis, GPS or 15-16.

Alternatively, the Union has waived the argument that LA 15-16 is violated when Telogis GPS location data is used to investigate fraud. The agreement has no relevance to any continued and longstanding use of historical GPS date from Telogis or any other source. Rather, it pertains exclusively to driving safety and safety-related discipline. Even assuming for the sake of argument that the agreement does pertain to non-safety related misconduct, it provides that the Company "may elect to make changes" to the program and the parties agree to negotiate these changes. The program's stated focus was to improve safe behaviors. Thus, the Company is only required to negotiate changes to the safety program.

Assuming that the Company violated the agreement by using GPS data obtained through Telogis, the Union admits it knew about such alleged violations in the summer of 2018, but did not raise this dispute with the Company until March 2019. It therefore waived its right to challenge this conduct as a result of its tacit consent over these months. While not material to the decision here, the Union has also waived any argument that it violated the NLRA. The Company took the position during the grievance process that under settled precedent it was not required to bargain either a continuation of or a minor modification to an established past practice. The Union did not file a charge with the NLRB on this issue. The Union conceded that the duty to bargain is "not that important" given the issue before the Arbitrator which concerns a violation of LA 15-16.

The Union's bargaining history evidence is not parol evidence from the 15-16 negotiations and is thus irrelevant. Since the parties agree that the agreement is clear and unambiguous, and both negotiators agree that it pertains exclusively to driving safety and safety related discipline, there is no reason to refer to the to refer to it. Should such evidence be considered, it should be limited to the correspondence between Osterlund and Courval or Robert Jorga. Osterlund's testimony named a variety of individuals to support the Union's argument, but was unable to tie a single alleged statement to Courval.

Even if it were appropriate to consider parol evidence, the only bona fide such evidence was the testimony of Osterlund and Courval that LA 15-16 pertained exclusively to driving safety issues and safety-related discipline.

The grievance should be denied on the merits because there is no dispute that the Letter of Agreement pertains exclusively to safe driving behavior, and there is no evidence that the Company inappropriately used the Telogis system to monitor safe driving behavior or impose safety-related discipline. The real thrust of the Union's argument is that the agreement somehow precluded the Company from using GPS data to investigate non-safety related offense founders under the settled presumption that parties do not "hide elephants in mouseholes. If the agreement

was intended to up-end a long-standing arbitrator approved past practice, it would have so stated.

The grievance is untimely to the extent that it is read to challenge any actions prior to April 15, 2019. If any part of the grievance is sustained and relief is awarded, such relief must be prospective and injunctive in nature.

DISCUSSION

For the first time during the processing of this grievance, the Company raised an issue at the hearing as to the grievance's timeliness. The issue was not advanced, as is typical, to foreclose consideration of the question arising from the wording of the grievance, namely whether the Company's conduct constituted a violation of LOA 15-16. Rather, the Company is seeking to limit the application of any remedial order to events thirty days prior to the filing of the grievance on May 17, 2019 and prospectively.

As the Company did not argue that the grievance was untimely at any point prior, that contention has been waived. Consideration of the merits of the grievance can therefore proceed. Insofar as the Company's timeliness argument is directed more to the remedial aspect of the Award, the Arbitrator's authority is already limited to what the parties have agreed to grant in that regard. Here the stipulated statement of the issue does not include a proviso that the Arbitrator may determine an "appropriate remedy" should the grievance be sustained. Rather, the parties have agreed that in that event, the Arbitrator may only order the Company to "cease and desist" from violating LOA 15-16. How the parties view and apply that restriction is left up to them to determine in the future. Any express limitations on such a remedial order in the manner suggested by the Company would not only be speculative and premature, they would also exceed the grant of authority that the parties have extended. The grievance is therefore timely in all respects.[13]

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[13]Although not presented in the context of its timeliness argument, the Company asserted that the Union waived its argument focusing on the use of Telogis GPS data to investigate fraud by "acquiescence," as it was aware of such use in the summer preceding the filing of the May, 2019 grievance here. Notwithstanding the Union's knowledge of the Employer's conduct in this regard, as the conduct was and is continuing, each occurrence gives rise to a renewed right to file a grievance which challenges it.

have utilized cell phones and the FAS in the past to track the whereabouts of a specific group of service workers encompassing approximately 15% of the bargaining unit, LOA 15-16 involved a completely different type of technology which would affect thousands more if not most of the remaining 12,000 unit members. Simply put, by deploying the GPS component of Telogis, the Company wished to increase its employee location monitoring ability nearly ten-fold. Contrary to the Company's claim, this was not simply a "continuation or minor modification to an established past practice."

For a past practice to be as binding on the parties as it might be if included as a term of an agreement, the practice has to be clear, readily ascertainable over a reasonable period of time as fixed and established, and mutually acceptable. There is no dispute that the Union agreed to or at least acquiesced in the utilization of GPS data obtained from the FAS or cell phones to locate employees and even to use "historical" location information from those devices to prove time fraud or false record-keeping. This "practice" also remained in effect for at least five years prior to the execution of LOA 15-16. The use of FAS and cell phone data for location purposes was thus well established and mutually acceptable. What was neither well-established nor mutually acceptable was the expansion of that function using newer technology with more wide-ranging capability and an impact on a far greater number of employees. The Company plainly recognized that if it wanted implement that newer technology even without its location capacity, it would require the Union to "buy in." LOA 15-16 was the result.

Moreover, whatever practice may have existed with regard to location data prior the existence of LOA 15-16, the Company continued to observe its limitations for three years beyond its execution and the phased installation of the VST devices. Thus, past practice reinforces rather than detracts from the Union's interpretation of the agreement that the use of Telogis devices was restricted to safety-related purposes.

To the extent that the Company maintains that LOA 15-16 had nothing to do with its ability

to mine the Telogis data for "historical" GPS information, or that the parties never discussed or specifically broached the use of its GPS capability for that purpose, the Company's conduct during the months leading up the execution of the agreement, as well as the information it distributed during that period, demonstrates otherwise. The Company advances a rather narrow view of "parol evidence" when it defines it in terms of words exchanged by the principals in the course of the negotiations themselves. Parol evidence in the context of labor arbitration may include documentary as well as spoken evidence, and conduct by the parties both before and during the negotiations. Evidence of this type is necessarily included within the category denoted as bargaining history, a universally recognized guide to contract interpretation. Furthermore, while parol evidence may not be used to contradict or nullify the language of an agreement, it may be used to explain its terms or resolve ambiguity.

In some instances, the Company disputes the provenance of the exhibits submitted by the Union and its use as evidence of the Company's contractual intent. Nonetheless, most of those documents were Company-generated. Statements they contained establish that the Company contemplated that the utilization of VST devices was initially supposed to have limited purpose and scope. This conclusion is reinforced by the parties' shared concern that workers were wary about the "Big Brother" aspects of the project. The fact that employees were potentially resistive to the initiative's implementation required the Union's "buy-in" to allay those concerns as well as motivate the Union to attempt to set limitations on the project.

Rayburn's July, 23, 2014 email to the Union and others summarizing their meeting of that date refers to GPS in its lead bullet point, thus underscoring its significance and the emphasis that was placed on it during the meeting. GPS is mentioned in about one-third of the points listed, thus conclusively demonstrating that it was in fact discussed. One such mention establishes that the Union was made aware that "real time GPS information/tracking is expected to be available and used by Dispatchers in the very near future." The point that it is "not yet installed on crew vehicles"

plainly signals the Company's plan to do so and have its possible impact felt on the great bulk of the work force. Clearly, GPS tracking was uppermost in people's minds during that July meeting.

In the month prior to the execution of 15-16, a list of "Key Messages" was issued by the Company as part of a "VST Communication Tactics" document and presumably conveyed in emails and conference calls to all "impacted employees" designated and scheduled to receive them. The Messages included the Company's representation that the VST initiative was "all about public and private safety" and that the Company's plan was to "utilize technology to increase your personal awareness of any risky driving behaviors." Most importantly, it contained the Company statement that the technology "can do a variety of things other than help . . . with . . . safe driving habits," including an ability to tell the Company "where the vehicle is located." This statement was accompanied by the exclusionary assurance that "the project will only include the safe driver behaviors component of the technology."

The "Change Canvas" described in the Facts section of this Award was provided to the Union during the negotiations themselves. In addition to the statement that the technology "adds the capability to track other information that is not in scope of this project," the Company provided a set of "Boundary Conditions" which listed facets which were "In Scope" and "Out-of Scope." In the latter group was listed "Time and location reporting (real-time or after-the fact)." The Company's clearly expressed intent was to exclude GPS tracking from the initiative. As stated previously, its more recent inclusion was and is currently a change which the Company elected to make to the Vehicle Technology program. In addition, it was a change which necessitated that the Company modify its "Standard" with regard to access to the vehicle data recorder to include access by Corporate Security.

In an April 29, 2015 5-Minute Meeting directive, the Company reiterated in a "Questions and Answers" section that the technology was to be used for "improvement in unsafe driving behaviors" "through driver awareness and self-correction, not through reporting or discipline," a point which

is repeated further on in the document. The directive states that while the technology "does have the capability to track other vehicle information, such as location (GPS)," "GPS information will only be used to correlate vehicle location with map data to report on vehicle speed over posted speed limit" and that the "location itself will not be reported to the Company." Again, the Company expresses the intent not to utilize GPS location data for anything other than this narrow circumstance. The Employer adds to this response that "[i]n the future, if the company (in partnership with union leadership) decides to activate any other type of data reporting, employees will be notified in advance." The "partnership" statement implies that the decision to activate "any other type of data recording" will be a joint decision by the Company and the Union after meeting and conferring.

Lastly, two years after the agreement was signed, an intra-Union communication of June 22, 2017 stated that the Company wanted to use GPS to monitor GSR behavior "and use discipline when appropriate." The Union "declined," demonstrating that the Company consulted with the Union before going forward with the plan. Osterlund testified that the reference in the memo was to a cost-saving measure which the Company discussed with the Union that involved using Telogis to discover where employees were on a random basis. The document thus arguably establishes that the Company was aware or at least believed at that time that it was obliged to confer with the Union about the plan because of the Letter Agreement.

The testimony of neither Osterlund or Courval supports the Company's position in this matter. The Company asserts that the parties "never discussed" whether GPS data gathered from Telogis devices could or could not continue to be used by the Company. However, the question posed to Osterlund was not framed in that way. Rather, he was asked whether Courval said that 15-16 would "limit PG&E's ability to use GPS information for discipline for timecard falsification or other non-safety reasons." Certainly, the Company was using and had used GPS data from sources other than the Telogis system with the Union's knowledge and acquiescence. It just was

Turning to the merits, the Union is essentially asserting that the use of GPS data obtained from Telogis devices for non-safety related discipline violated LOA 15-16. Stated differently, the Union argues that the agreement should be interpreted in such a way as to limit the use of Telogis GPS data to safety purposes. As in any contract interpretation case, the Arbitrator is being requested to enforce the parties' contractual intent as expressed in the language of their agreement. When intent is expressed in clear terms, there is no need to "interpret" it: the language is simply enforced as written. When, however, wording is unclear or ambiguous, technical rules of contract construction or extrinsic evidence, such as bargaining history or past practice, are commonly referred to in order to discover the true intent and thus the meaning of the words that the parties chose.

The wording and hence the meaning of LOA 15-16 is clear. Under its terms, the "implementation of the Motor Vehicle Safety Initiative" "will focus on driver behavior and awareness improvement" "to improve safe behaviors." The "phased implementation" of the "Initiative" consisted of the gradual installation of advanced technology devices on a discrete number of Company vehicles with the "potential for additional units to be turned on" in the future. The parties expressly agreed that "the intent is not to utilize this information," *i.e.*, the information generated from the technology installed, for disciplinary purposes. However, discipline could be considered "only if an employee engages in a reckless manner, demonstrates a pattern of carelessness or non-compliance or puts themselves or others at risk by intentionally violating PG&E's Keys to Life or Code of Conduct or dangerous driving behavior."

In sum, the parties agreed that the information gathered from the newly installed technology would not be used for discipline except for safety-related reasons that involved serious or egregious conduct. The focus of the initiative, *i.e.* the initiative whose central aspect was the installation of computer-aided vehicle monitoring equipment, was on driving behavior, and not surveillance of employee activities for purposes of discipline, in real time or otherwise. Should the technology be

used for that or any other non-safety purpose, this would constitute, in the language of 15-16, a "potential issue with the implementation of the program." As such, it would be something which the agreement provides will be addressed by the Oversight Committee.

Furthermore, the parties recognized and agreed that the Company "may elect to make changes in the Vehicle Technology program in the future." The utilization of the Telogis device to provide location data for non-safety related discipline was just such a change, one that the Company elected to make three years after the agreement had been in effect. The change expanded the technology's capabilities beyond the limitations imposed on it by the agreement itself. Notwithstanding and in addition to any obligations which might arise under the National Labor Relations Act with regard to mandatory subjects of bargaining, 15-16 required the Company to meet, confer and negotiate any such changes with the Union. As the Company did not submit the issue of expanded VST use to the Oversight Committee, nor meet and confer with the Union and negotiate the change which broadened the purposes behind the Telogis installation, it violated the express terms of LOA 15-16.

The Company nonetheless argues that the grievance should be dismissed because the agreement pertains only to driving safety and safety-related discipline, and not to discipline for other reasons. Contracts can mean as much for what they don't say as for what they do. As discussed more fully below, the parties' omission of any reference in 15-16 to what the Company characterizes as a "longstanding practice" to use "location data" to investigate non-safety related offenses is consistent with an intent to restrict the use of the new technology to safety purposes, rather than an indication that the Company had carte blanche to deploy the technology for present purposes as well as whatever use it might deem appropriate in the future.

The Company's attempt to justify the use of Telogis equipment to provide information about non-safety misconduct by including it within the broad category of "location data" devices as a mere adjunct to a recognized past practice plainly understates the case. Although the Company may

not using GPS data from the Telogis system.

Similarly, while Courval denied ever stating at the negotiations that the Letter Agreement would have any effect on the Company's ability "to investigate and discipline employees for timecard falsification, or "use GPS information" for that purpose, the questions as phrased were not narrowed to circumstances implicating Telogis. They were thus sufficiently ambiguous as to encompass present and accepted practice regarding timecard falsification and the use of GPS information. While Union negotiators may never have stated that the Letter Agreement prohibited the Company "from using GPS to investigate timecard falsification," the question was likewise ambiguous in the sense that GPS and not Telogis was then being used for that reason. Moreover, Courval simply did not "recall" the statement being made. Nor did he "recall" the Union stating that the Letter applied to discipline other than that which was safety related. Nonetheless, as noted, the parties recognized in LOA 15-16 that the Company might make future changes to the Vehicle Technology program, as it did in this case. Those changes gave rise to the obligations stated in the agreement, obligations that the Company failed to comply with and, as a consequence, violated LOA 15-16.

AWARD

The grievance is sustained. The Company violated Letter Agreement 15-16. It is therefore ordered to cease and desist from acting in a manner inconsistent with the letter agreement as identified in this Award, namely using Telogis GPS technology for non-safety related discipline without meeting, conferring and negotiating that use with the Union.

The Arbitrator retains jurisdiction over any questions arising from the interpretation or implementation of this Award.

Dated: June 9, 2020

MATTHEW GOLDBERG
Arbitrator

AWARD

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Dated: June 9, 2020

MATTHEW GOLDBERG
Arbitrator

ROBERTO BALISTRERI
Union Board Member
Concur __ Dissent__

Dated:

JOE OSTERLUND
Union Board Member
Concur __ Dissent__

Dated:

Robin Wix

ROBIN WIX
Company Board Member
Concur __ Dissent✓

Dated: 08/19/2020

Jodi Baxter

JODI BAXTER
Company Board Member
Concur __ Dissent✓

Dated: 08/19/2020

AWARD

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Dated: June 9, 2020

MATTHEW GOLDBERG
Arbitrator

ROBERTO BALISTRERI
Union Board Member
Concur ~~Dissent~~

Dated: 6/28/20

JOE OSTERLUND
Union Board Member
Concur ~~Dissent~~

Dated: 6/26/20

ROBIN WIX
Company Board Member
Concur __ Dissent__

Dated:

JODI BAXTER
Company Board Member
Concur __ Dissent__

Dated: