ARBITRATION
OPINION & AWARD

IBEW Local 1245,

Union,

and

Pacific Gas & Electric Company,

Employer

Re: Termination

San Francisco, California
December 16, 1994

BOARD OF ARBITRATION

Neutral Board Member:	Kenneth N. Silbert
Employer Board Members:	Doug Veader John Moffat
Union Board Members:	Roger Stalcup Phil Carter

APPEARANCES

On Behalf of the Union:

Tom Dalzell, Esq.
IBEW Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Employer:

James Goodfellow, Esq.
P.G. & E
P.O. Box 7442
San Francisco, CA 94120-7442

INTRODUCTION

This dispute arises under a collective bargaining agreement between the above-captioned Parties (JX 2). The prior steps of the grievance procedure were followed or waived and the matter

is properly before the Board of Arbitration (TR 1). An arbitration hearing was conducted on June 16 and September 7, 1994 in San Francisco, California, at which the Parties had a full opportunity to present evidence and argument in support of their positions. The matter was submitted for decision upon the receipt of post-hearing briefs on November 7, 1994.

Grievant H was hired by the Employer on May 21, 1984. He was discharged effective October 30, 1992, based upon his involvement in a vehicle accident. At the time of the termination, he was working at the Employer's Marysville facility and was classified as a groundman (TR 2). The discharge was grieved by the Union, leading to this arbitration.

ISSUES

1. Did the Company terminate the employment of Clay Hall without just cause?
2. If so, what is the remedy? (JX 1)

RELEVANT PROVISIONS OF THE AGREEMENT

7.1 MANAGEMENT OF THE COMPANY

> The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; . . . provided, however, that all of the foregoing shall be subject to the provisions of the Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement. (JX 2)

RELEVANT PROVISIONS OF THE POSITIVE DISCIPLINE AGREEMENT

STEP THREE - DECISION MAKING LEAVE (DML)

The DML is the third and final step of the Positive Discipline System. It consists of a discussion between the supervisor and the employee about a very serious performance problem The discussion is followed by the employee being placed on DML the following work day with pay to decide whether the employee wants and is able to continue to work for PGandE, this means following all the rules and performing in a fully satisfactory manner.

The employee's decision is reported to their supervisor the workday after the DML. It is an extremely serious step since, in all probability, the employee will be discharged if the employee does not live up to the commitment to meet all Company work rules and standards during the next twelve (12) months, the active period of the DML; except as provided in Section III.B.

Because the DML is a total performance decision by the employee, there is only one active DML allowed.

* * *

III. TERMINATION

A. Termination occurs when Positive Discipline has failed to bring about a positive change in an employee's behavior, such as another disciplinary problem occurring within the twelve (12) month active duration of a DML. . . .

B. Notwithstanding the foregoing, if a performance problem which normally would result in formal discipline occurs during an active DML, the Company shall consider mitigating factors (such as Company service, employment record, nature and seriousness of violation, etc.) before making a decision to discharge, all of which is subject to the provisions of the appropriate grievance procedure for bargaining unit employees. . . .

* * *

IV. ADMINISTRATIVE GUIDELINES

A. . . .

Placement of a bargaining-unit employee at a Positive Discipline step or termination of a bargaining-unit employee may be grieved by the employee's Union on the grounds that such action was without "just

cause," the degree of discipline was too severe, or there was disparity of treatment, pursuant to the provisions of the appropriate grievance procedure.

Because the Decision Making Leave is a total performance decision on the employee's part, there is only one DML. Additionally, while the DML is active, no other formal steps of Positive Discipline may be administered; except as provided for in Section III.B. (JX 3)

RELEVANT PROVISIONS OF THE EMPLOYER'S ACCIDENT PREVENTION RULE

313. Parking

(b) Prior to leaving the controls of a vehicle or mobile equipment, the operator shall turn one wheel against the curb, set the parking brake, place the transmission in gear or parking position, and shut off the engine ignition . . ..

SUMMARY OF THE EVIDENCE

The Grievant's Employment History

The Grievant was first employed by the Employer in 1984. Throughout his employment, he worked at the Employer's Marysville yard. In December, 1990, the Grievant was promoted to the position of Lineman. In September, 1991 he opted to be demoted back to the position of Groundman. It is undisputed that this voluntary demotion occurred because the Grievant had been disciplined for various infractions and his co-workers had expressed concern about their safety when working with him (TR 74-75).

On February 11, 1992,[1] the Grievant was placed on DML as a result of a vehicle accident on February 6. The accident occurred when the Grievant drove a bucket truck under a railroad trestle

[1] All dates hereafter refer to 1992 unless otherwise noted.

near the Marysville yard. It was well known at the yard that the vertical clearance of the trestle was not sufficient to allow bucket trucks to pass beneath it. A sign was posted at the exit from the yard nearest to the railroad trestle warning employees of the problem,[2] and the vertical clearance of the trestle was posted on the trestle itself. When the Grievant drove under the trestle, the bucket struck the trestle causing approximately $3,000 of damage to the truck (TR 76-85). The Grievant testified he was not aware that the truck had struck the trestle until a co-employee stopped him and told him a piece had fallen off his truck. He did not grieve the discipline (TR 192-193).

The Incident for Which the Grievant Was Discharged

The Grievant was discharged as a result of an accident which occurred at the Marysville facility on October 26. The Grievant started work that morning at approximately 7:00 a.m; his duties included providing tools to other employees from the tool room. After distributing tools to the employees, he got a truck from the parking lot and was in the process of driving employee C to his truck. The Grievant had driven approximately 50 feet when employee O' stopped him and asked him for a traffic vest. The Grievant spoke to O' for approximately 45 seconds, then stopped in front of the tool room. He exited the truck without turning off the engine and without setting the parking brake. C remained in the truck while the Grievant went into to the tool room with O' to get a traffic vest. When the Grievant came out of the tool room approximately 1 ½ minutes later, the truck was not where he had parked it and C was not in the vicinity. He then saw the truck to his right, approximately 60 feet to the rear of where he had parked it, in contact with another truck which had been damaged by the collision. L , a bargaining unit employee assigned as an acting supervisor that day, was standing next to the trucks

[2] Employees driving bucket trucks could use another exit from the yard (TR 79).

(TR 15-16, 198-201). The Grievant testified that he is positive he placed the gear shift in park before he exited his truck, and that he did not put it in reverse immediately preceding the accident (TR 221-222). He further testified that he had not used the parking break because it was not functioning properly and because he was not in the habit of doing so (TR 208, 215).[3]

Shortly after the accident, L advised Gas and Electric Supervisor Masa Nuki that he had observed the Grievant's truck rolling backwards with the motor running, and that the transmission was in reverse after the collision (TR 15-16, JX 4, Attachment IV). Nuki met with the Grievant and shop steward T to discuss the incident. The Grievant admitted he had left the engine running and that he had not applied the parking brake, but stated that he had put the transmission in park (TR 28-30). Nuki advised the Grievant that the incident might result in the termination of his employment (TR 15-16).[4]

Nuki was responsible for deciding the level of discipline, if any, which should be imposed on the Grievant as a result of the accident. It was his opinion that the Grievant had violated the Accident Prevention Rule quoted above by leaving the engine running and not applying the parking brake (TR 46-48). He also reviewed the Grievant's past record to determine if there were mitigating factors. He concluded there were not because the Grievant's record and comments by co-workers and supervisors indicated the Grievant had been a poor performer (TR 71-72).

---

[3]This summary of how the accident occurred is taken from the Grievant's testimony. None of the other apparent percipient witnesses (C :, O and L) testified at the arbitration hearing. Accordingly, the Grievant's version of what occurred is unrebutted. Other evidence regarding the cause of the accident is discussed below.

[4]Nuki testified that he suspended the Grievant pending further investigation (TR 28-30). The Grievant testified that he was not suspended and that he continued to work until he was terminated on October 30 (TR 240-242). It is not necessary to resolve this dispute.

Nuki sought the advice of his superior Dave Cheney, Superintendent of the Marysville yard. Initially, Cheney advised Nuki that there was not sufficient evidence to warrant termination. However, after Nuki explained his view of the seriousness of the situation, Cheney agreed that termination would be appropriate (TR 64-65). Nuki also sought advice from the Employer's Human Resources department (HR). In particular, he asked whether it would be appropriate to coach and counsel the Grievant instead of terminating him.[5] He was advised by HR that because the Grievant was on DML status, the only appropriate level of discipline was termination (TR 69-70). At some point during the decision making process, Nuki told the Grievant and others that coaching and counseling might be the possible outcome (TR 65). However, after speaking to Cheney and HR, he felt that he had no choice but to terminate the Grievant (TR 66).

Condition of the Truck Driven by the Grievant

F-Units

Company vehicles with excessive mileage and/or age are removed from service and auctioned to the public. A number of such vehicles were frequently held at the Marysville yard until they were sent to auction. At the time of the accident for which the Grievant was terminated, the Employer had a practice in Marysville of permitting employees to use some of these vehicles, euphemistically known as F-Units, to supplement their driving stock. At the arbitration hearing, there was substantial testimony by bargaining unit employees to the effect that they had been instructed that they should drive F-Units "until they dropped;" that the F-Units would not be repaired; and that if they turned an F-Unit in for repair they would lose it. Some employees expressed the opinion that they were

[5]Under the Positive Discipline program, "coaching and counseling" is the earliest step in the disciplinary chain and is not considered to be formal discipline.

expected or required to drive F-Units even if they were unsafe (TR 99-106, 112-118, 122-123, 130-136, 138-147). Employer witnesses testified that F-Units would be repaired as long as the cost was not excessive, that the cost of repair would normally be borne by the department using the truck rather than by the garage, and that employees were never advised to drive trucks which were unsafe. Documentation introduced by the Employer establishes that F-Units were repaired on occasions (TR 23-28, 53-56, 70-71, 86-93, 275-281; JX 4-Attachment V).[6]

Transmission, Gear Shift and Parking Brake

The Grievant testified that the gear shift indicator on the truck in question was not functioning properly. For instance, when the transmission was in drive, the indicator would point to neutral or first (TR 196-197). He had driven the same truck before and was aware of this malfunction. He normally did not rely on the indicator when shifting, and this had not caused a problem in the past (TR 221-230). The Grievant's testimony that the gear shift indicator was not functioning properly was corroborated by J , who regularly drove the truck (TR 135-136).

The Grievant also testified that the parking brake (operated by a foot pedal) was "mushy" and would not hold the truck unless it was pushed nearly to the floor (TR 196-197). His testimony that the parking brake was not functioning properly also was corroborated by J (TR 134-135).

Nuki testified that he tested the transmission and the parking brake the day of the accident and found both to be working properly. When he placed the transmission in park, it would not slip to another gear. According to Nuki, with the parking brake applied the truck would not move forward or backward when he stepped on the gas (TR 35-27).

---

[6]It is not necessary to resolve the dispute regarding the status and use of F-Units in general. Only the condition of the Grievant's truck on the day in question is relevant to determining the cause of the accident. Evidence regarding the condition of the Grievant's truck is discussed below.

At the request of his supervisor Jerry Shipely, Garage Subforman Stan Gordon tested the truck extensively at different times and under different conditions for three days after the accident. On 50 occasions during that period he tested to see if it was possible to leave the shift lever between park and reverse and then exit the vehicle. He found this was not possible because there was no holding point between park and reverse and the gear shift would always move into reverse before he was able to exit the truck. In addition, he testified that it was not possible to exit the truck under these conditions because it would be moving too rapidly (TR 167-169).

Gordon also found that the parking break was not adjusted properly, but that if it were applied fully "it worked to a certain percentage." According to Gordon, parking brakes are designed to prevent vehicles from moving forward, but are not as effective in preventing them from moving in reverse (TR 170-171).

Gordon reported the results of his investigation to the Local Investigating Committee (LIC) as follows:

> . . . During my inspection the only thing that I found to be wrong with transmission was that the shift indicator on dash was out of adjustment. Indicator position showed truck to be between park and reverse but truck was indeed engaged in park. After many attempts to position gear shift lever in a position between park and reverse to simulate supposed failure of transmission I could not get lever to stay in any position that would allow truck to be stopped, and then be able to get out of the truck myself without possibly running myself over. Meaning that when I held shift lever in a position between park and reverse with my right hand and my right foot on the brake pedal, then opening the door with my left hand, as I would try to exit the truck which meant taking my right hand off shift lever and right foot off brake pedal I could not move fast enough to even get my left foot on the ground before truck started to move. After many attempts at this I realized that there was no way that giving consideration to all the conditions involved that anyone could get out of this truck without getting knocked down by the open door and possibly run over by the truck.
>
> One of the conditions involved in this accident was that it was a cold morning, so when truck was started the choke and fast idle cam engaged, this

> giving the engine 3 to 5 hundred more RPMs. This making it even more difficult to try to exit without hurting yourself. Even taking into consideration that having the parking brake applied which was out of adjustment, had it been applied fully you still wouldn't be able to get out of the truck without noticing the movement of the truck. (The parking brake is exactly what it is called, "parking brake," And is not really used to hold a vehicle in place in reverse with fast idle circuit engaged even when properly adjusted and engaged.) . . .[7]
>
> (JX 5)

Several days after the accident, Gordon sent the truck to an outside garage to have the transmission linkage, shift indicator and brakes inspected. The repair invoice from the garage shows that the brake pads and shift indicator were replaced (CX 2). Gordon testified that replacing the brake pads would have the effect of adjusting the parking brake (TR 171-173).

Accident Report

Nuki testified that, pursuant to standard Company practices, an accident report was prepared for the accident in question. According to Nuki, Ralph Clark of the Employer's Health, Safety and Claims Department took the accident report (including photographs) from Marysville. The Employer was unable to locate the accident report as of the date of the arbitration hearing (TR 60-62).

POSITIONS OF THE PARTIES

The Employer:

» The accident occurred as a result of the Grievant's carelessness. He violated the Accident Prevention Rule by leaving the vehicle running and failing to apply the parking brake.

---

[7] In his report to the LIC, Gordon speculated that the accident could have happened if an unknown person reached through the window of the truck and shifted it into reverse while the Grievant was in the tool room. Further, he stated that he had seen someone do that very thing the day after the accident. He did not so testify at the arbitration hearing.

Although the Grievant stated he put the truck in park, he has admitted he has difficulty concentrating and remembering events (TR 251-252).

» The Grievant has no credible explanation for his negligence. By his own admission, his failure to apply the parking brake was more a matter of habit than because it was not functioning properly.

» The Grievant's attempts to shift blame to the Company because of the condition of the F-Unit should not be accepted. The Grievant and the other employees who testified that F-Units would not be repaired and that they were required to drive them in unsafe conditions are mistaken. In any event, disputes regarding the repair policy are largely irrelevant because the Grievant admitted that he did not apply the parking brake and that he had never had a problem placing the transmission in the correct gear even though he knew the shift indicator was out of alignment.

» The Grievant's failure to apply the parking brake was an independent cause of the accident. Had he applied the brake, the accident would not have occurred even if the transmission was in reverse.

» The earlier accident for which the Grievant was placed on DML status was also a result of his carelessness.

» The Company correctly followed the Positive Discipline Guidelines when it terminated the Grievant. DML is an extremely serious level of discipline. As stated in the Positive Discipline guidelines, DML "in all probability" will lead to discharge "if the employee does not live up to the commitment to meet all Company rules and standards." As required by the guidelines, Nuki considered the Grievant's past record to determine if there were mitigating factors and

found that the Grievant had a poor past record. His previous self-demotion was motivated in part by complaints from bargaining unit employees that he jeopardized their safety.

» Inattention while operating a vehicle is sufficient cause for termination of an employee on DML status. *Arbitration Case #167*, Chvany 1990,

» The Union's arguments in favor of a lesser form of discipline are not convincing. In this case, less discipline means no discipline because, during an active DML, the only alternative to termination is "coaching and counseling" which is not formal discipline.

» The grievance should be denied.

The Union:

» The Union acknowledges that employees on DML status are judged by a harsher standard than other employees. The decision of Arbitrator Chvany in *Arbitration Case #167*, leaves no doubt that the continued employment of an employee on DML status is contingent upon satisfactory job performance in all respects.

» However, the positive discipline agreement does not require that an employee on DML status be terminated for any infraction. For example, the employee whose termination was at issue in *Arbitration Case #169*, Nevins, 1990, had been coached and counseled 14 times while on DML status. As Arbitrator Chvany held in *Arbitration Case #167*, "Whether disciplinary action is warranted for a particular accident depends upon the particular facts and circumstances involved."

» There are three possible explanations for the October 26 accident: (1) the Grievant left the vehicle in reverse; (2) the Grievant left the vehicle in between park and reverse and it slipped

into reverse; or (3) after the Grievant went into the tool room, someone else slipped it into reverse.

» Gordon's testimony establishes that neither of the first two alternatives are plausible, because he found that the Grievant could not have left the truck between park and reverse, and that if the truck was in reverse, the Grievant could not have gotten out in time to avoid impact with the truck as it moved backward.

» By process of elimination, this leaves only the third option as a viable explanation for the accident. Thus, it is established that a person who was either playing an ill advised practical joke or who was intent on harming the Grievant slipped the truck into reverse.

» The Grievant's failure to apply the parking brake did not contribute to the accident. The evidence establishes that the parking brake was not functioning properly, and Gordon's testimony shows that the parking brake would not have prevented the truck from moving in reverse.

» The Grievant left the engine running as he went to the tool room for what he thought was a quick errand. The truck was parked on level ground and Cooper was in the truck. This was at most a trivial, technical violation of the Company's safety rules. The accident which occurred was not a foreseeable consequence of his actions.

» Cheney's initial instinct was correct - there were not sufficient grounds for termination.

» Based on the evidence, and particularly Gordon's investigation, the Employer should have concluded that foul play of some sort was involved in the accident. Critical evidence was ignored, while other possibly critical evidence - the accident report and photographs - have disappeared.

» The fact that C was in the truck when the Grievant got out all but relieves the Grievant of any responsibility for the accident.

» The Grievant should be reinstated with full backpay, benefits, and seniority.

OPINION

As in any discharge case, the Employer bears the burden of proving that the Grievant engaged in conduct sufficiently serious to constitute just cause for the discipline. In the present case, the existence of just cause must be evaluated in light of the negotiated Positive Discipline agreement. That agreement indicates, and the Parties agree, that the continued employment of an employee on DML status is precarious, and dependent upon satisfactory job performance.

Arbitrator Chvany's decision in *Arbitration Case #167* establishes that negligence resulting in a vehicle accident may constitute just cause for termination of an employee on DML status. However, as Arbitrator Chvany cautioned, "Whether disciplinary action is warranted for a particular accident depends upon the particular facts and circumstances involved." In that regard, it is noted that discipline under the Positive Discipline agreement may be grieved by bargaining unit employees "on the grounds that such action was without "just cause," the degree of discipline was too severe, or there was disparity of treatment. . ." (JX 3, Section IV.A). With these standards in mind, the record must be examined to determine whether the Employer has met its burden of establishing just cause for the discharge.

The Grievant admits to conduct which violated the Accident Prevention Rules - leaving the engine running and failing to apply the parking brake when he exited the truck. However, a careful

review of the record requires the conclusion that the Employer has not shown that these infractions, alone, were the cause of the accident.

The most thorough examination of the truck after the accident was performed by Gordon. He found that it was not possible to leave the shift lever between park and reverse, and that when he tried to do so it always jumped to reverse. He also found that it was not possible to exit the truck while it was in reverse without noticing the movement and risking injury to himself. Gordon is a qualified mechanic, and his testimony is not rebutted on the record. Accordingly, his testimony raises the distinct possibility, indeed the likelihood, that someone other than the Grievant placed the vehicle in reverse while the Grievant was in the tool room.

Other troubling aspects of the record leave doubt as to whether the Grievant's conduct caused the accident. L reported to Nuki that he had observed the entire accident. Yet, L did not testify at the arbitration hearing. It is undisputed that C was in the truck when the Grievant went into the tool room. Had the Grievant left the truck in reverse, C certainly would have noticed the movement of the truck. Yet, C did not testify at the arbitration hearing. Similarly, O' was present when the Grievant exited the truck and might have noticed if the truck began to move, and he did not testify at the arbitration hearing.

Of course, the party with the burden of proof is not obligated to call all potential witnesses to support its version of the facts, and the credible testimony of one witness may be sufficient. But here, the only percipient witness to testify was the Grievant, who stated under oath that he put the truck in park. Gordon's testimony supports a conclusion that the Grievant did not leave the vehicle in reverse. In these circumstances, the absence of testimony from other percipient witnesses leaves sufficient doubt to preclude a finding that the accident was caused by the Grievant's conduct. In

particular, it is clear that the accident would not have occurred unless the truck was in reverse, and it has not been established that it was in reverse when the Grievant exited the truck.

The remaining question is whether the Grievant's failure to turn off the engine and apply the parking break are sufficiently serious to constitute just cause for discipline. Although an employee on DML status is expected to meet all Company rules and standards, the Positive Discipline agreement does not state that any infraction while an employee is on DML status must result in discharge. Rather, it states only that "in all probability" the employee will be discharged for future infractions, and it permits an employee to grieve a termination on the grounds that it "was without 'just cause,' [or] the discipline was too severe." The Positive Discipline agreement also requires the Employer to take into account potential mitigating factors "such as Company service, employment record, nature and seriousness of violation, etc.". A fair reading of these provisions is that an employee on DML status is subject to termination for offenses which might not justify the termination of other employees, but the Company must nevertheless evaluate the conduct of the employee and determine whether it is sufficiently serious to impose the ultimate penalty of termination given the employee's DML status.

As the Union argues, the Grievant's failure to turn off the engine and his failure to apply the parking break are mitigated by the fact that the vehicle was parked on level ground, another employee was in the vehicle, and the Grievant expected to be away from the truck only long enough to obtain a vest from the tool room. In these circumstances, his errors were not the cause of the accident because the accident would not have occurred unless the truck was in reverse. As noted above, the evidence is inusfficient to establish that the Grievant place the truck in reverse. Because the

Grievant's ultimate culpability for the accident is not established by the record, these infractions are not sufficiently serious to constitute just cause for the termination.

For all of the above reasons, the conclusion is required that there was not just cause for the termination of the Grievant.

Remedy

In some circumstances, discipline other than discharge might be appropriate for the Grievant's proven infractions - leaving the engine running and failing to apply the parking brake. However, under the Positive Discipline agreement, while a DML is active "no other formal steps of Positive Discipline may be administered . . ." (JX 3, Section IV.A) Because the Parties have agreed that lesser forms of discipline, such as suspension, may not be imposed on employees on DML status, the Board of Arbitration is precluded from fashioning a remedy including such discipline. Accordingly, the appropriate remedy is that the Grievant be reinstated to his former position without loss of seniority, and that he be made whole for all lost wages and benefits. The active period of the February 11, 1992 DML shall be deemed to have been suspended from the date of his termination to the date of reinstatement.

AWARD

The Company terminated the employment of , H without just cause.

As a remedy, the Company shall reinstate , H to his former position without loss of seniority, and shall make him whole for all wages and benefits lost as a result of the termination of his employment. The active period of the DML imposed on February 11, 1992 shall be deemed suspended from October 30, 1992 to the date of reinstatement. That DML shall remain in effect until

it has been active for a total of 12 months from February 11, 1992, not including the period the Grievant was absent from work due to the termination of his employment on October 30, 1992.

Pursuant to the stipulation of the Parties, the Board of Arbitration retains jurisdiction of this matter with respect to disputes arising out of implementation of the remedy.

Dated: 12/16/94 Concur / Dissent

Neutral Board Member

Dated: 12/28/94 [redacted] / Dissent

Employer Board Member

Dated: 1/10/95 ~~Concur~~ / Dissent

~~Employer~~ Board Member

Dated: 12/29/94 Concur / Dissent

Union Board Member

Dated: 1/3/95 Concur / ~~Dissent~~

Union Board Member