ARBITRATION
OPINION & AWARD

International Brotherhood of Electrical Workers, Local 1245,

Union,

and

Pacific Gas & Electric,

Employer

Re: Termination

BOARD OF ARBITRATION

Neutral Board Member:	Kenneth N. Silbert
Employer Board Members:	Margaret Short Carol L. Pound
Union Board Members:	Roger Stalcup Larry Pierce

APPEARANCES

On Behalf of the Union:

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On Behalf of the Employer:

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INTRODUCTION

This dispute arises under a collective bargaining agreement between the above-captioned Parties (JX 1). The prior steps of the grievance procedure were followed or waived and the matter is properly before the Board of Arbitration (TR 3)[1]. An arbitration hearing was conducted on December 11, 1995, 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.

A , the Grievant, was hired by PG&E in July, 1974. He was terminated effective March 16, 1994 for theft and destruction of a Company-owned vehicle (JX 2, Exhibit 10). The Union filed a timely grievance which was not resolved at the lower steps of the grievance procedure, leading to this arbitration.

ISSUE

Whether there was just cause for the termination of the Grievant, A , and if not, what is the appropriate remedy? (TR 2-3)

REMEDY REQUESTED

The Union requests that the grievance be granted, the termination overturned, and the matter be remanded to the Parties to fashion an appropriate remedy. The Employer requests that the grievance be denied, in its entirety.

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[1] The official transcript is cited as (TR __); Joint Exhibits are cited as (JX __); Employer Exhibits are cited as (EX __); and Union Exhibits are cited as (UX __).

RELEVANT PROVISIONS OF THE AGREEMENT

TITLE 3. CONTINUITY OF SERVICE

* * *

3.3 Employees who are member of Union shall perform loyal and efficient work and service, and shall use their influence and best efforts to protect the properties of Company and its service to the public, and shall cooperate in promoting and advancing the welfare of Company and in preserving the continuity of its service to the public at all times.

* * *

TITLE 7. MANAGEMENT OF COMPANY

7.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; . . . 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, memorandums of understanding clarifying or interpreting this Agreement.

* * *

TITLE 100. APPLICATION

* * *

101.2 PERIODS OF LEAVE

(a) The Company may grant a "leave of absence" without pay to a regular employee for a period not in excess of six consecutive months. It may grant an additional "leave of absence" without pay to such employee if personal circumstances and service to the Company warrant the granting thereof. Except [for reasons not relevant here] a "leave of absence" will not be granted which, together with the last "leave" or "leaves" granted, will exceed twelve consecutive months.

SUMMARY OF THE FACTS

The Grievant's Employment History:

The Grievant was hired in 1974, laid off for approximately two years in 1975, and returned to work in June, 1977. From that time, until the time of the termination at issue here, he was employed continuously as a lineman. The Employer characterizes the job of lineman as a "safety-sensitive position" in which the employee is required to work with high-voltage electricity.

The Grievant suffers from Bipolar Affective Disorder (sometimes referred to as Manic-Depressive Disorder). Since 1989, his record shows the following periods of active employment interrupted by absences related to that condition (JX 7):

11/20/89:	Lineman - Vallejo (worked 4 months)
3/19/90 - 9/10/90:	Medical Leave (6 months)
9/10/90:	Lineman - Vallejo (worked 6 months)
3/05/91 - 10/31/91:	Medical Leave (7 months)
10/22/91:	Lineman - Vallejo (worked 5 months)
3/26/92 - 2/01/93:	Medical Leave (11 months)
2/1/93:	Lineman - Vallejo

The Grievant's condition was described in a "Fitness for Duty Evaluation" by Dr. Carolyn Manson dated September 23, 1992 (EX 4):

> The preponderance of evidence leads to the strong medical opinion that Mr. I A s currently not fit for duty. His current capabilities do not enable him to safely perform the job functions of a lineman with or without reasonable accommodations. The reason is that Mr. A suffers from Bipolar Affective Disorder, Mixed, but most currently manic episode in remission ... He appears to have manic episodes beginning every spring or late winter and extending until late spring or early summer. He also appears to have had two depressions both of which occurred in the fall of

1989 and 1990. At the time of my interview on 06/02/92, he was clearly manic and believed himself to have special powers such that duties as a lineman above the ground would be clearly dangerous to him and possibly to others if he were to resume them in this manic condition even with accommodation. ...

He denied that he ever was manic or depressed and that he had Bipolar illness.

He claimed to have been on 600 mg of Lithium since his hospitalization when according to Dr. Kern's records he was prescribed and recommended to take 1200 mg of Lithium on May 29 and June 08, 1992. Mr. A also stated that he took the Lithium entirely to appease his wife and his treating doctors and denied he had any need for, nor help from taking it.

I am very concerned about Mr. A returning to work with his current medical status and level of compliance. If Mr. A cannot acknowledge that he has a Bipolar Affective Disorder, then I do not believe he can take the steps to prevent himself from being at risk to himself or others in his capacity of lineman.

. . . Dr. Kern stated that he himself believes R is not complying with their treatment plan, that R is always manic to some degree, and always in denial to a great degree regarding his psychiatric illness.

* * *

In light of R 's habit of going off medication when he begins to get manic, and in light of what seems to me to be a predictable pattern of decompensation in late winter or spring, consideration should be given to having someone else administer his medications during the critical months. . . .

When the Grievant was not suffering from the effects of his Bipolar Affective Disorder, he was considered by the Employer to be an excellent employee.

The Events Resulting in the Termination of the Grievant's Employment:

In late July, 1993,[2] while working at the Employer's Vallejo yard, the Grievant was assigned to attend a week-long seminar in Livermore. During the seminar, he stayed at a Holiday Inn at the

[2] Unless otherwise noted, all dates hereafter refer to 1993.

Employer's expense. On August 2, at the conclusion of the seminar, the Grievant requested a week of vacation. The Employer approved the request. Shortly thereafter, the Employer was notified by the Holiday Inn that the Grievant had continued to occupy his room after the conclusion of the seminar, was giving money away, and was preaching to people.

Suspecting the recurrence of symptoms of Bipolar Affective Disorder, the Employer made various unsuccessful attempts to contact the Grievant to discuss his fitness to return to work. The Grievant did not report to work as scheduled on August 10, nor did he contact the Employer to explain his absence. By letter dated August 10, the Employer instructed the Grievant to report to work immediately, and advised him that his failure to do so by August 23 might result in his termination. The Employer continued its efforts to contact him, without success. On August 17, the Grievant appeared at the Vallejo yard and submitted a lengthy, rambling, handwritten resignation. Jerry Morgan, an Employer representative at the Vallejo yard, attempted to persuade the Grievant not to resign and urged him to submit to a fitness for duty examination. The Grievant insisted on resigning.

On August 21, the Union filed a grievance protesting the Employer's acceptance of the Grievant's resignation. The Parties engaged in extensive settlement discussions to resolve the grievance. They recognized that, if reinstated, it was likely the Grievant would be placed on medical leave and, eventually, long term disability. As of January 13, 1994, the Employer agreed to invalidate the resignation and the Grievant was officially reinstated to employment retroactive to August. However, finalization of the settlement was delayed pending resolution by the Parties of issues relating to the Grievant's potential future bidding rights should he return to active employment.

In the meantime, another scenario was developing. In November, the Employer had been notified by the Fortuna Police Department that an abandoned Company service van had been located near that city, which is approximately 220 miles north of the Employer's Vallejo yard. The van had been flamboyantly painted in numerous colors with various designs, symbols and words including: "A ," "IBEW 1245," and "Retired 42 yr." A large ribbon and bow had been tied around the front of the van. An investigation, including handwriting analysis of notes found in the van, disclosed that the Grievant had stolen the truck from the Vallejo yard, between November 9 and November 13, and had abandoned it near Fortuna. The results of the investigation were documented by the Employer's Corporate Security Department on February 14, 1994. The Union does not dispute that the Grievant was responsible for the theft and vandalism of the van.

By letter dated March 15, 1994, the Employer advised the Grievant that his employment was terminated as a result of this incident.

OPINION

Positions of the Parties:

The Employer argues that the Grievant's theft and vandalism of the van constitute just cause for discharge, as measured by the widely accepted "seven tests of just cause" (Employer's Brief, pp. 9-14). The Union does not dispute that proposition. The Union acknowledges that, but for the Grievant's Bipolar Affective Disorder, "lesser misconduct than that at issue here would usually make this a 'stock run-of-the-mill' termination, one which would normally 'consign the grievant to short shrift at the arbitrator's hand'" (Union Brief, p. 11).

However, the Union sites several arbitration treatises and awards for the proposition that an employee suffering from a mental illness should not be judged by the same standards as a mentally healthy employee, and that conduct such as the Grievant's should not be viewed as just cause for discharge, given his mental condition. Most directly on point is a decision involving the same Parties, *International Brotherhood of Electrical Workers, Local Union No. 1245* and *Pacific Gas and Electric Company (Discharge of William Loud)*, (1983, John Kagel, Chairman).

At the time of the termination of his employment, the grievant in that case had been employed by the Employer for approximately eight years. Over the years, he had developed a serious drinking problem. However, he refused to acknowledge that he was an alcoholic, even when that diagnosis was expressed to him by counselors. He had also ignored various entreaties by the Employer that he seek assistance through the Employer's EAP. His disciplinary record included warnings and suspensions for various infractions ranging from absenteeism to assaulting a fellow employee. The exact conduct which triggered his termination was not clear. However, shortly before the termination, at the urging of a supervisor, he contacted an EAP counselor. When he spoke to the counselor, he was under the influence of alcohol. He told her that he was upset with his supervisor, and "if the supervisor did not get off his ass [he] was going to 'waste him'." The Grievant was suspended pending investigation shortly after making this comment, but it is not clear from the decision whether the Employer was aware of the comment when it suspended him. He then contacted EAP and commenced counseling and treatment.

Various experts testified in the arbitration before the Kagel Board. They agreed that the grievant was an alcoholic, that it was likely that his alcoholism was related to Post Traumatic Distress Syndrome (PTDS) arising out of his active combat service in Viet Nam, and that if he

refrained from drinking and continued treatment for the PTDS he should be able to return to active employment. The Kagel Board found that there was not just cause for the termination and reinstated the grievant, without back pay, on the condition that he provide the Employer and the Union with evidence of his continued treatment for PTDS and related problems, including participation in an Alcoholics' Anonymous program. The decision appears to be based, in part, upon the fact that the Employer's EAP procedures required a "formal" reference to EAP prior to discipline where it appeared that a medical/behavioral problem might be a substantial contributing factor, in part on the absence of an identifiable triggering event for the discharge, and in part on the Board's opinion that the grievant could be successfully rehabilitated through treatment.

The decision of the Kagel Board was submitted with the Union's post-hearing brief, and the Employer did not directly address the decision in its post-hearing brief. However, the Employer argues that the Grievant's Bipolar Affective Disorder does not excuse his conduct or negate the existence of just cause for the termination. The Employer notes that the Agreement contains no provisions requiring the Employer to assess an employee's mental condition before imposing discipline for misconduct. In addition, the Employer argues that there is no evidence that the theft and vandalism of the van was related to the Grievant's Bipolar Affective Disorder. Moreover, the Employer asserts, if the Grievant was suffering a manic episode when he stole the van, his failure to take his medication renders him responsible for his serious misconduct.

The Union, on the contrary, argues that the Employer was well aware of the Grievant's mental condition, and that his mental illness was the "direct, proximate, and sole cause" of the misconduct which led to his termination. In addition, the Union argues that it is not unusual for persons with Bipolar Affective Disorder to refuse to take prescribed medication such as lithium, and

their refusal to do so is a function of the disease. According to the Union, the Board should focus on the Grievant's mental condition, not his conduct, in determining whether there was just cause for the termination. The Union urges the Board of Arbitration to reject the Employer's "Gingrichian or Limbaughian claim . . . that even an employee as clearly mentally ill as the Grievant must be held accountable for his own actions . . ." (Union Brief, p. 11).

OPINION

As discussed above, the Parties agree that the Grievant's theft and vandalism of the van would normally constitute just cause for termination. They disagree, however, as to whether his known mental condition constitutes a mitigating factor which negates the existence of just cause.[3] Not surprisingly, their arguments focus on different aspects of the Grievant's conduct. The Employer stresses the seriousness of the Grievant's actions, while the Union stresses the seriousness of his mental disorder. Both factors are relevant. Clearly, in assessing the penalty, if any, which is properly assessed against an employee for misconduct, the severity of the misconduct is a normal and usual guideline. However, arbitrators typically take into account any number of possible mitigating factors, including the employee's mental condition and the existence of other external factors which might explain, justify, or excuse the misconduct. The challenge is to determine the appropriate balance between the competing considerations. In that regard, each case must be judged on its own merits, based upon the proven facts.

[3] The Employer's argument that there is no showing that the theft and vandalism of the van were related to the Grievant's Bipolar Affective Disorder is rejected. The bizarre nature of the conduct, including the flamboyant painting of the van, and the known symptoms of Bipolar Affective Disorder, permit a reasonable inference that the Grievant was in a manic state when he engaged in that conduct.

The record in this case requires the conclusion that, in spite of the Grievant's mental condition, there was just cause for the termination of his employment. Most importantly, this is not a case in which the Employer was intolerant of the Grievant's condition or acted precipitously in deciding to terminate his employment. During the four years immediately preceding the termination, the Grievant was absent due to his Bipolar Affective Disorder for a total of twenty-four months, almost one-half of his available working time. At the conclusion of each leave, the Employer returned the Grievant to work as a lineman, notwithstanding its knowledge that his Bipolar Affective Disorder was a continuing condition, and the reasonable expectation that he would continue to suffer from periodic manic or depressive episodes as clearly indicated in medical reports. The Employer's willingness to work with the Grievant is further demonstrated by its agreement to invalidate his "voluntary" termination in 1993, and return him to employment on medical leave. Thus, the Employer has reasonably accommodated the Grievant's condition over the years.

The Union is correct that, given the Grievant's mental condition, his conduct should not be judged by the same standards as the conduct of a mentally healthy individual. Clearly, his disease was a contributing factor to the conduct. For purposes of this case, the Union's argument that the Grievant's periodic failure to take the prescribed doses of lithium is a symptom of his disease may also be accepted. However, the question of the extent to which the Grievant's mental disease lessens his accountability for his conduct is not the only relevant consideration. The Employer is also entitled to consider the gravity and effects of the conduct, even if it is attributable to the Grievant's mental condition, in determining the appropriate level of discipline. In this case, the Grievant's conduct was extremely serious. Theft and vandalism of the van created financial loss for the

Employer. In addition, the Grievant subjected the Employer to the risk of substantial liability by driving the van over 200 miles while apparently in a disturbed mental state.

This case is distinguishable from the *Loud* case decided by the Kagel Board for several reasons. Most importantly, the proven conduct for which the Grievant was discharged in this case was severe, while the triggering event for the discharge in *Loud* was not clear.

Also, in *Loud*, the grievant's PTDS had not been diagnosed prior to discharge, and the Grievant had not previously recognized or dealt with his mental disorder and the associated alcoholism. Although he did so belatedly, he sought help at approximately the same time he was terminated. The Kagel Board found that credible expert testimony showed that he could be rehabilitated and returned to employment. In the present case, the Grievant has been undergoing treatment for Bipolar Affective Disorder for a number of years. Although he apparently still denies his mental illness, he has had the benefit of expert advice and treatment over the years. The Employer has given him the benefit of the doubt, and allowed him to work when able to do so. But, the medical evidence suggests that periodic relapses are to be expected.

In recent years, views regarding the extent to which employers must or should accommodate employees suffering from disabilities have greatly expanded, particularly with the passage of the Americans With Disabilities Act. However, neither the law nor the collective bargaining agreement in this case require the Employer to continue to employ a person who has engaged in serious misconduct, even if that misconduct is related to a mental disability.

For all of the above reasons, and based upon the record as a whole, the following award is rendered:

AWARD

There was just cause for the termination of the Grievant, . . A . The grievance is denied.

Kenneth N. Silbert, Neutral Member — 7/10/96 Dated

Roger Stalcup, Union Member — ~~Concur~~ / Dissent — 7/17/96 Dated

Larry Pierce, Union Member — ~~Concur~~ / Dissent — 7-24-96 Dated

Margaret Short, Employer Member — Concur / ~~Dissent~~ — 7/17/96 Dated

Carol L. Pound, Employer Member — Concur / ~~Dissent~~ — 7/31/96 Dated