

1 *BEFORE THE BOARD OF ARBITRATION,*
2 *R. DOUGLAS COLLINS, IMPARTIAL CHAIRMAN, PURSUANT TO*
3 *ARTICLE VI OF THE PARTIES' 2000-2002 AGREEMENT*
4
5

6 In the Matter of a Dispute

7 - between -

8 *UTILITY WORKERS UNION OF AMERICA,*
9 *LOCAL 483, AFL-CIO,*

10 - and -

11 *SOUTHERN CALIFORNIA GAS COMPANY.*

ARBITRATOR'S

OPINION & AWARD

12 Nitrogen purging of gas line by supervisor.
13 Grievance Nos. 01-5883 & 01-0188.

14 *APPEARANCES*

15 *For the Union:*

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For the Company:

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26 *PROCEDURAL HISTORY*

27 This arbitration arises under the 2000 - 2002 Collective Bargaining Agreement
28 ("Agreement") between the *SOUTHERN CALIFORNIA GAS COMPANY* ("Company") and the
29 *UTILITY WORKERS UNION OF AMERICA, AFL-CIO, & INTERNATIONAL CHEMICAL*
30 *WORKERS UNION, AFL-CIO* ("Union"). I was selected by the parties as the impartial chairman
31 of the Board of Arbitration ("Board") in accordance with Section 6.8 of the Agreement. The Union
32 appointed *ROY BOZARTH*, Vice President of UWUA Local 483, and the Company designated
33 Employee Dispute Advisor *LEONARD PRYMUS* as their members of the Board. The Agreement
34 provides that a decision of a majority of the Board is final and binding.

1 The hearing in this matter was held on January 6, 2004, at the Company's offices in
2 Los Angeles, California. The parties stipulated that this matter was properly before the Board for
3 final and binding arbitration. Each party had a full and adequate opportunity to examine and
4 cross-examine witnesses and to introduce relevant evidence. All witnesses testified under oath. The
5 hearing was electronically recorded and a verbatim transcript was produced. The record was closed
6 upon my receipt of a post-hearing brief from each party.

7 *ISSUE*

8 The parties stipulated that the issue to be decided here is as follows:

9 What is the remedy for Supervisor Todd Tuttle doing bargaining
10 unit work, if any, involving the nitrogen purging of a gas line on or
11 about August 22, 2001?

12 *RELEVANT PROVISIONS OF THE AGREEMENT*

13 Effective April 1, 2000, through March 31, 2002.

14 ...

15 Article II

16 MANAGEMENT/UNION RIGHTS, RELATIONSHIPS, RESPONSIBILITIES

17 ...

18 2.1 - Management Rights

19 ...

20 (B) Contracting Out:

21 (1) Except as otherwise specified in this Agreement, the Company shall not contract out work performed by
22 the following classifications (hereinafter called "fenced-in classifications").

23 Cathodic Protection Spec	Instrument Spec	Planning Associate
24 Commercial Serv Tech	Ld Construction Tech	Senior Instrument Spec
25 Construction Tech	Ld Cust Serv Rep-8,	Station Maintenance Spec
26 Cust Serv Rep-4, Bilgl-4	Bilgl-8	Station Operations Spec
27 Cust Serv Rep-6, Bilgl-6	Ld Meter & Regulator Tech	Station Tech
28 Steno-6, Bilgl-Steno-6	Ld Planning Associate	System Gas Dispatcher
Energy Tech Distribution	Ld System Protect Spec	System Protection Spec
Energy Tech Residential	Measurement Spec	Trans Pipeline Spec
Field Tech	Meter & Regulator Tech #1	Welder Specialist
Gas Storage Specialist	Meter & Regulator Tech #2	
Industrial Serv Tech	Pipeline Tech	
	...	

2.2 - Union Rights

(A) Recognition:

The Company recognizes the Union for those units where the Union, through National Labor Relations Board certification, has been designated as the exclusive bargaining agency for employees of the Company

1 covered by this Agreement, i.e., employees represented by Utility Workers Union of America, AFL-CIO,
2 and International Chemical Workers Union Council of the UFCW, AFL-CIO jointly, as certified by the
3 NLRB in Case No. 21-RC-11756; and employees represented by Utility Workers Union of America,
4 AFL-CIO, as certified by the NLRB in Case Nos. 31-RC-1072 and 31-RM-164 and in Case No.
5 21-AC-41.

6
7 Article III
8 BARGAINING UNIT SENIORITY &
9 JOB CLASSIFICATIONS
10

11 3.8 — Classification Policy

12 No employee shall have more than one classification. The Company assumes no obligation to maintain any
13 specific number of employees in any given classification. The properly assigned duties of any job classification
14 include any or all tasks or duties which are within the range of skill of the classification. Two general types
15 of duties which fall within the range of skill are "parallel duties" and "downhill duties": (1) Parallel duties are
16 the duties normally associated with job classifications in related lines of work which carry the same wage rate
17 as the job under consideration; (2) Downhill duties are duties normally associated with job classifications
18 carrying lower wage rates in the same or related lines of work.

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20 Article IV
21 TOTAL COMPENSATION

22 4.2 — Overtime

23 (C) Overtime Calculation: Overtime will be paid for all time worked in excess of scheduled hours, computed
24 to the nearest quarter hour.

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26 Article VI
27 DISPUTE RESOLUTION

28 6.8 — Grievance/Arbitration Procedure

Step 5: Board of Arbitration

Should the Union and the Company failed to settle any such arbitrable dispute, the matter in controversy shall be submitted in writing to a Board of Arbitration who shall settle such matter as provided herein.

(A) The Board of Arbitration shall consist of three members, one of whom shall be selected by the Company, one of whom shall be selected by the Union, and a third by mutual agreement of the Company and the Union. . . .

The decision of a majority of the Board of Arbitration shall be binding upon the Company, the employee, and the Union, unless any party to the controversy shall, within ten working days subsequent to such award make a claim in writing that such award was invalid upon the grounds set forth in the Arbitration Statute of the California Code of Civil Procedure. . . .

(B) General Provisions

It is agreed that the Board of Arbitration or any one of them shall have no jurisdiction, power or authority to amend, modify, supplement, vary or disregard any provision of this Agreement in any respect whatsoever.

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STIPULATED FACTS

At the outset of the hearing, the parties stipulated to the following facts:

- On August 23, 2001, the Union timely filed this Grievance, charging that [certain] work [performed by supervisor Todd Tuttle] was represented work.
- On October 11, 2001, the Company issued its First-Step Grievance Response. The Company denied the complaint, stating that “[a]lthough the tasks may be included in a represented classification, the time involved was minor and the work was not being performed on a regular and sustained basis.”
- On October 16, 2001, the Union requested a Second Step Grievance Hearing.
- On December 10, 2002 the Company issued its Second-Step Response. The Company came to the same result discussed in ¶ [2] above. Specifically, the Company stated: “We do not agree with the Union’s remedy to pay overtime to employees who did not actually perform the work. The Company has counseled the supervisor involve in th[is] . . . grievance[] regarding performing bargaining unit work.”
- On December 14, 2002, the Union requested arbitration.

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ADDITIONAL RELEVANT FACTS

It is undisputed that on August 22, 2001, Supervisor¹ Todd Tuttle performed a procedure referred to as “nitrogen purging” at the Company’s La Goleta facility. The procedure entails cutting off natural gas and pumping nonflammable nitrogen into a gas pipeline. The nitrogen displaces any natural gas and oxygen that may be in the line. The purpose of the procedure is to enable workers to weld or cut the line without igniting the gas inside the pipe, which would be likely to cause an explosion. It also involves the constant monitoring of the gas outflow at the end of the pipeline with a gas scope to ensure that no flammable gas is present while the work is being done. On this occasion Tuttle also provided “fire watch,” a function that is generally performed by a second individual standing by with a fire extinguisher to protect the welder in the event of fire.

Tuttle testified that it took him about five minutes to connect the nitrogen hose and begin the flow of nitrogen. He also testified, however, that he used the gas scope to test the condition of

¹ Although the Company points out that Tuttle’s assignment to his management position was temporary and that he remained a member of the Union, it does not dispute the fact that Tuttle was a supervisor in the management position of Planning Specialist on August 22, 2001. It should also be noted that on that date, Tuttle had been in that position for approximately six months, and in March 2002 assumed a management position on a permanent basis.

1 the pipe before and during each cut to determine whether there was any combustible gas still in the
2 pipeline. Indeed, the record indicates that because of the inherent danger of explosion, nitrogen
3 purging involves constant monitoring and fire watch throughout the time the pipeline is being cut
4 or welded.

5 The Union offered the only estimate for the time required for this particular nitrogen
6 purging procedure; its estimate of two hours for accomplishment of the task in compliance with
7 established Company procedures was not contested.

8 The welding on the pipeline that day was scheduled work and did not involve an emergency.
9 Pipeline Technician James Benavidez, Welder Specialist John Williamson, and Pipeline Specialist
10 Kenneth Arimoto worked the day shift at La Goleta on August 22, 2001.² Nitrogen purging is work
11 which falls within the job profiles of these employees.³

12 Prior to cutting or welding a pipeline, a Fire Safety Permit must be issued. The employee
13 issuing the permit assumes responsibility for the nitrogen purging procedure. Although originally
14 only managers could issue such a permit, bargaining unit employees have since been trained to
15 perform the nitrogen purging and to issue Fire Safety Permits. The rule has since changed to permit
16 only bargaining unit employees to issue these permits.

17 *THE UNION'S CONTENTIONS*

18 The Union contends that Supervisor Tuttle performed bargaining unit work in
19 nonemergency circumstances even though bargaining unit employees were available to do the work.
20 It points out that the contested work can be reasonably estimated as having lasted two hours.
21 Considering the backlog of work assigned to unit employees, the Union asserts that the work would
22 have resulted in two hours of overtime if it had been assigned to a unit employee.

23 ² The "Pipeline Specialist" classification is the same as "Transmission Pipeline Specialist" and "Welding
24 Specialist" is the same as "Transmission Welder Specialist."

25 ³ All three job profiles are in the Transmission and Storage Department. The profile for Pipeline Technician
26 includes in its list of Essential Duties and Responsibilities, "Performs gas handling, fire control and fire watch operations
27 on pipeline tie-ins; sets up and operates oxy/acetylene, nitrogen and natural gas regulators, fire control stacks, and purging
28 equipment." The job profile for Transmission Pipeline Specialist contains the identical duties in its list of "Essential
Duties and Responsibilities." The job profile for Transmission Welding Specialist includes in the list of "Essential
Duties and Responsibilities" the following: "Plans and directs gas handling, purging, and fire control operations on pipeline
tie-ins and leak repairs." Although a higher classification, there is testimony that an employee in a classification that
"plans and directs" purging could also work "downhill" to perform that work.

1 as the exclusive representative of its bargaining unit employees. The Chairman must
2 conclude the Company does not have an unlimited right to use supervisors to do
3 bargaining unit work. However, with no specific language in the Agreement on the
4 subject it would be unfair to conclude supervisors could never be permitted to do
bargaining unit work under any circumstances.⁴

5 Arbitrator Rule went on to distinguish between work done on a routine basis and work done
6 in an emergency.⁵ He was convinced by the volume of work and the nature of the job that the work
7 in question was routine and not emergency work. Arbitrator Rule concluded that the supervisor's
8 well-intentioned performance of unit work indeed violated the intent of the Agreement. To remedy
9 that violation, Arbitrator Rule ordered the Company to pay overtime to the meter readers who
10 otherwise would have done the contested work.⁶

11 The parties revisited the issue in October 2003 in a case presented to Arbitrator Edna
12 Francis.⁷ That matter was decided shortly after the hearing in this case but before briefs were
13 submitted. At issue was work done by a supervisor who was working on a project with a crew of four
14 contract employees and one bargaining unit employee. The supervisor elected to continue the job
15 into the evening and offered the unit employee overtime, which he accepted. At 9:00 p.m., the
16 supervisor changed into coveralls and began assisting the unit employee. At midnight, two of the
17 contract workers left. The supervisor did not call any unit employee out to work, despite the
18 availability of two on-call unit employees. The supervisor continued to assist the unit employee
19 intermittently until 3:00 a.m.

21 ⁴ *Southern California Gas Co. & Utility Workers Union of America, Local 132* (Rule, 1991). Arbitrator Rule is one
22 of many who have discussed the significance of reserving bargaining unit work for bargaining unit members. As
23 Arbitrator Saul Wallen wrote long ago, "Job security is an inherent element of the labor contract, a part of its very being.
24 If wages is the heart of the labor agreement, job security may be considered its soul. Those eligible to share in the degree
of job security the contract affords are those to whom the contract applies. . . . The transfer of work customarily
performed by employees in the bargaining unit must therefore be regarded as an attack on the job security of the
employees whom the agreement covers and therefore on one of the contract's basic purposes." *New Britain Mach. Co.*,
8 LA 720, 722 (Wallen, 1947).

25 ⁵ This is in accord with arbitral precedent. See for example *NCR-Worldwide Service Parts Center & General*
26 *Teamsters Local 528* 74 LA 224 (Mathews, 1980). See also Committee on ADR in Labor and Employment Law, Section
27 of Labor and Employment Law, American Bar Association, Alan Miles Ruben, editor-in-chief, *How Arbitration Works*,
Elkouri and Elkouri, Sixth Edition (Washington, D.C.: BNA Books, 2003) 757 - 764 and cases cited therein.

28 ⁶ *Id.* at 10.

⁷ *Southern California Gas Company & Utility Workers Union of America, Local 483* (Francis, 2004).

1 Arbitrator Francis credited the Union's estimate that the supervisor spent six hours doing
2 bargaining unit work, but stated that even if she were to use the supervisor's estimate that he spent
3 only one hour doing the tasks in question, his assistance was not *de minimis* "either in terms of the
4 nature of the work done or the amount of time involved." She continued: "The record establishes
5 that at least two bargaining unit members would have responded to a call-out if contacted. Thus,
6 there is evidence of a monetary loss to a member of the bargaining unit." The Board of Arbitration
7 in that matter therefore ordered an award of six hours of overtime pay to a member of the bargaining
8 unit to be determined by the parties.

9 The persuasive force of these awards is strong. Here, the case before Arbitrator Francis
10 involved the same issue, the same Agreement, the same local, and work at the same plant. Similarly,
11 Arbitrator Rule's award involved the same issue between the Company and another local under the
12 parties' predecessor Agreement. In both cases, the arbitrators held that the Company's use of a
13 supervisor to perform bargaining unit work in the absence of an emergency or other justifying
14 special circumstance violated the Agreement. In both cases the arbitrators ordered the Company
15 to pay monetary damages to make the affected bargaining unit employees whole. This is a sound
16 result where, as here, the contract not only contains recognition, seniority, and subcontracting
17 language, but also protects or "fences in" the work of specified classifications.

18 It is clear in the present case that the work of nitrogen purging was bargaining unit work.
19 The job profiles of the Union-represented positions of Benavidez, Williamson, and Arimoto include
20 the work of nitrogen purging, and their job classifications are included in Section 2.2 (B) of the
21 Agreement as "fenced-in classifications" which may not be contracted out. Moreover, Tuttle testified
22 that his job profile does not address the duties of fire safety and nitrogen purging, and there is no
23 evidence to the contrary in this record. The evidence also establishes that only bargaining unit
24 employees are being training in nitrogen purging.⁸ In addition, even though Tuttle was supervising
25 contract employees on August 22, 2001, the Company did not counter the Union's evidence that
26 bargaining unit work remains bargaining unit work even when contract employees are assigned to
27 the same project.

28 ⁸ Tuttle received such "pipeline tech training" while a bargaining unit employee.

1 The fact that Tuttle was authorized to issue a Fire Safety Permit at the time did not alter the
2 nature of the work he was performing. The Company's policy entitled "Fire Prevention and
3 Protection — Transmission" refers to the responsibility of the person issuing the permit⁹ to make
4 the area safe, inspect the area, designate fire control measures, and to test the work area periodically.
5 It does not specifically authorize the person issuing the permit to perform the hands-on tasks
6 required to fulfill the responsibility conferred by the issuance of the permit. Indeed, given the
7 contrast between the job profile of planning specialist with those of pipeline technicians and other
8 classifications with specific responsibility for fire safety, I cannot agree that the mere issuance of a
9 Fire Safety Permit authorized Tuttle to perform what would otherwise be bargaining unit work. I
10 therefore find that Tuttle's performance of the work in question violated the Agreement.

11 The parties disagree as to the appropriate remedy for the proven violation of the Agreement.
12 The Company rejects the idea of paying unit employees for work that was not done. Instead, it
13 maintains that its counseling of Tuttle not to do bargaining work was the appropriate remedy for
14 the violation. The Union, on the other hand, argues that a monetary remedy is appropriate for a unit
15 employee's the loss of overtime to a supervisor.

16 A monetary remedy is both appropriate and customary in these circumstances. Such remedies
17 are within the inherent power of arbitrators to place the parties in the position they would have been
18 in had there been no violation of their contract.¹⁰ Despite the Company's arguments against the
19 payment of wages for work not performed, such "make whole" remedies are at the core of the
20 arbitral system of righting contractual violations. This is especially true where, as here, the wrong
21 is the denial of overtime to an employee who is contractually entitled to do that work.¹¹

22 The general rule regarding the appropriateness of a monetary remedy in case of lost overtime
23 is that if the overtime assignment was made within a group that shares opportunities for overtime,
24 the employee can be given a makeup opportunity. However, arbitrators often hold that "if the
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26 ⁹ In August 2001 such permits could be issued either by a supervisor or by a bargaining unit employee.

27 ¹⁰ See *Elkouri, supra*, note 5, at 1201 – 1205.

28 ¹¹ The Union has cited a number of cases in support of this proposition. See, for example, *Louisville Cement Co.*, 79 LA 584 (Archer 1982).

1 improper assignment of overtime was made to employees outside the unit or group, it is impossible
2 to make it up because it can never be recovered and the only logical remedy is a monetary award.”¹²

3 Since the work which would have created overtime for bargaining unit employees was done
4 by a supervisor, that overtime opportunity cannot be recovered. A monetary remedy is therefore
5 reasonable and appropriate. This same conclusion was reached in 1988 by Arbitrator Thomas
6 Christopher,¹³ in 1991 by Arbitrator Rule,¹⁴ and in 2004 by Arbitrator Francis.¹⁵

7 The Company has cited *Western Resources, Inc.*,¹⁶ in support of the proposition that monetary
8 damages are not appropriate in this case. In *Western Resources*, the arbitrator held that the employer,
9 an electrical power provider, violated the collective bargaining agreement when it moved the duties
10 of the represented foreman classification to non-bargaining unit supervisors. The arbitrator did not,
11 however, impose a monetary award because all the foremen remained employed at the proper rate
12 of pay or better and the Union had not claimed an overtime violation. *Western Resources* is thus
13 distinguishable from the present facts, as here the Union has established that but for the supervisor’s
14 performance of bargaining unit work, a bargaining unit employee would have been assigned to
15 those duties and would have been required to work overtime to complete his other assigned duties
16 that day. Thus awarding a monetary remedy in this case is consistent with the principle articulated
17 in *American Red Cross*,¹⁷ cited by the Company in support of the proposition that absent evidence
18 that an individual employee suffered monetary loss, there is no basis for any monetary remedy.

19 The Company argues that the work Tuttle performed was so trivial as not to merit a
20 monetary remedy. It maintains that the only bargaining unit work Tuttle performed, specifically
21 connecting the nitrogen to the pipeline, took about five minutes. Citing *Consolidation Coal Co.*,¹⁸ the
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23 ¹² *Supra*, note 5, at 1246. See also cases cited at footnote 324 therein.

24 ¹³ *Southern California Gas Company & Utility Workers Union of America, Local 132, in the matter of the grievance*
25 *of Thomas Warren* (Christopher, 1988).

26 ¹⁴ *Supra*, note 4.

27 ¹⁵ *Supra*, note 7.

28 ¹⁶ 115 LA 234 (Thornell, 2000).

¹⁷ 116 LA 167 (Daniel, 2001).

¹⁸ 65 LA 892 (Stokes, 1975).

1 Company maintains that the disputed work was *de minimis* and thus insufficient to justify an award
2 of overtime. In *Consolidated Coal*, the arbitrator found that 25 minutes of loading roof bolting
3 supplies was *de minimis*. Although apparently frequently cited for that proposition, that award does
4 not pretend to set or apply a standard for what amount of time is to be considered *de minimis*.¹⁹

5 Moreover, the record demonstrates that Tuttle necessarily spent significantly more than five
6 minutes performing the duties of a bargaining unit employee. The work in question not only
7 involved connecting the nitrogen hose to the pipeline, it required Tuttle to constantly monitor for
8 the presence of flammable gas during the cutting and welding of an abandoned pipeline. The
9 Union's witness estimated the time it would take to perform a nitrogen purge in accordance with
10 Company safety procedures to be two hours. The Company did not contest this estimate, and Tuttle
11 himself acknowledged that he monitored the gas scope and was on fire watch duty during the entire
12 cutting and welding process. The Union's estimate of two hours is thus reasonable.

13 The Company also argues that the defining point for what is to be considered *de minimis*
14 is four hours, presumably based on prior decisions involving these parties. Yet both the parties'
15 contract and the cited arbitral opinions support a different conclusion. The parties have agreed in
16 Section 4.2 of the Agreement that overtime is to be computed to the nearest quarter hour. Absent
17 evidence to the contrary, that provision necessarily establishes the *de minimis* standard for overtime.
18 Further, the general arbitral consensus is that although fifteen minutes may be considered *de minimis*
19 in some circumstances, one hour or more may not. The Union has cited several cases which
20 persuasively support this definitional range.²⁰ Therefore, based on the language of Section 4.2 and
21 on the cited authority, I find that the bargaining unit work performed by Tuttle on August 22, 2001,
22 was not *de minimis*.

23 ¹⁹ The arbitrator explains in his decision that the grievance was based on suspicion and supposition rather than
24 evidence. He agreed with the employer that there was no evidence that a supervisor had done the disputed work, which
25 involved the loading and transportation of supplies into a mine. The supplies apparently had been placed in the
26 bucket of the Unitrack system used by the supervisor to enter the mine without the supervisor's knowledge. The arbitrator
stated that even if he were to consider that to have been unit work, the 20 to 25 minutes spent by the supervisor
transporting the supplies was *de minimis*.


27 ²⁰ In addition to the opinions of Arbitrators Christopher, Rule, and Francis discussed above, the Union has
28 cited *Safeway Stores*, 93 LA 457 (Cohen, 1989), and *Chromalloy-Am. Corp.*, 78 LA 324, 327 (Stix, 1982). See also,
Anderson v. Mt Clemens Pottery Co., 328 U.S. 690 (1946) (under FLSA, 20 USC Section 201 *et seq.*, "a few seconds or
minutes of work" may be considered *de minimis*, while "one hour, or even two half hour incidents" may not.)

1 To summarize, the nitrogen purging and fire watch performed by Supervisor Tuttle on
2 August 22, 2001, was bargaining unit work. In view of the Agreement's recognition, seniority,
3 contracting-out, and classification provisions, that work should have been assigned to a bargaining
4 unit member whose duties included those tasks. Tuttle's performance of that bargaining unit work
5 lasted approximately two hours and therefore was not *de minimis*. The record establishes that there
6 were three bargaining unit members on duty when Tuttle performed these duties. Had the
7 Agreement been observed, the work would have been assigned to one of the three available unit
8 employees. The unit employee assigned to do the work would have needed two hours of overtime
9 to complete his other assigned duties for that day. The appropriate remedy in this case is therefore
10 payment of two hours of overtime to the employee to whom the work should have been assigned
11 in accordance with the Agreement.

12 *AWARD*

13 The Company violated the Agreement when Supervisor Todd Tuttle performed bargaining
14 unit work involving the nitrogen purging of a gas line on or about August 22, 2001. To remedy that
15 violation, the Company shall pay two hours of overtime to a member of the bargaining unit who was
16 qualified and available to do that work, and who had the first right to the next available overtime
17 assignment as of August 22, 2001. The Board of Arbitration shall retain jurisdiction over this matter
18 for the sole and limited purpose of resolving any dispute between the parties concerning the
19 interpretation or application of this Award.

20 It is so ordered.

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24 R. DOUGLAS COLLINS
25 Impartial Chairman
26 Board of Arbitration

27 Dated: May 1, 2004
28 Los Angeles, California

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I concur.
 I dissent.
 Opinion attached.

I concur.
 I dissent.
 Opinion attached.

LEONARD PRYMUS
Company Member
Board of Arbitration

ROY BOZARTH
Union Member
Board of Arbitration

Dated: _____

Dated: _____