In the Matter of a Controversy between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL NO. 1245, Complainant and PACIFIC GAS AND ELECTRIC COMPANY, Respondent RE: Requirement to fly to work site by helicopter	ARBITRATION CASE NO. 51

OPINION AND DECISION

OF

BOARD OF ARBITRATION

JOHN KAGEL, Chairman

L. N. FOSS, Union Member

TONY MORGADO, Union Member

I. W. BONBRIGHT, Company Member

D. J. BERGMAN, Company Member

San Francisco, California
April 17, 1974

ISSUE:

Was the order to fly by helicopter to a work site giventhe Grievants on November 22, 1971, a violation of the Parties' Labor Agreement?

The Union is seeking by way of relief a declaration that flying in helicopters to work sites can only be voluntary on the part of Employees, and that Employees cannot be ordered to use that mode of transportation to the work site.

BACKGROUND:

The Grievants are Communication Technicians at Rodgers Flat in the Company's De Sabla Division. Since approximately 1968 the Company has been flying Communication Technicians to work sites by helicopter in the Division (Tr. 10-11). On November 22, 1971, the Grievants refused to fly to their work site by helicopter on what would have been a routine trip, but later flew it under protest.

The issue in this case is whether or not helicopter flights to work sites by Communication Technicians are strictly voluntary, or whether or not the Communication Technicians can be ordered by the Company to go to their site of work by helicopter.

AGREEMENT PROVISIONS:

"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 105. SAFETY

"105.1 Company shall make reasonable provisions for the safety of employees in the performance of their work. Union shall cooperate in promoting the realization of the responsibility of the individual employee with regard to the prevention of accidents.

. . .

"TITLE 107. MISCELLANEOUS

"107.1 Company shall not by reason of the execution of this Agreement (1) abrogate or reduce the scope of any present plan or rule beneficial to employees such as its vacation and sick leave policies or its retirement plan, or (2) reduce the wage rate of any employee covered hereby, or change the conditions of employment of any such employee to his disadvantage. The foregoing limitation shall not limit Company in making a

change in a condition of employment if such change has been negotiated and agreed to by Company and Union." (Jt. Ex. 1)

POSITION OF THE PARTIES:

Position of the Union:

That the only issue is whether or not the decision as to the mode of transportation to the job site was subject to the exclusive discretion of the Employer; that safety practices and conditions which impinge upon the safety of Employees are mandatory subjects of bargaining under the National Labor Relations Act and are not reserved Management rights; that the Company's alleged practice of nonvoluntary helicopter rides was not so well known that its existence can be considered as an estoppel or waiver by the Union; that there was no practice of requiring flights by helicopter as a factual matter; that the Union has never agreed with any claimed Company policy; that the Company's alleged policy of nonvoluntariness is selective rather than uniform, for Employees doing the same work in the same classifications with the same pay and duties are not required to fly; that the Company was required to bargain with the Union prior to making any change in employment conditions; that the principles of Section 8(d) of the NLRA are applicable to contractual disputes involving unilateral

changes and conditions through the recognition clause of the Agreement.

Position of the Company:

That the issue at stake is who decides how the work is to get done; that, under Section 7.1 of the Agreement, it is for the Company to determine this; that the Company's policy to use volunteers first, if they were available and if it is practical to do so, has been uniformly applied since 1958; that the issue of voluntariness as a topic of discussion between the Parties and the Company's position was well known; that contrary Union evidence was hearsay, amounting to only generalities; that a business necessity for the use of the helicopters has been established; that through bargaining the Company has reserved the right to initiate safe but expeditious work methods; that, notwithstanding this right, it has put the issue on the bargaining table; that the Union never opposed the policy; that the policy is a reasonable accomodation of the interests and welfare of the Employees involved and the Company's obligations to its customers; that Section 107.1 is inapplicable in that the policy does not predate the 1952 execution of the Agreement; that the policy does not impose a change of condition disadvantageous to the Grievants and the policy has been negotiated and acquiesced to by the Union as required by Section 107.1.

DISCUSSION:

Evidence of Company Policy:

The Parties stipulated that the use of the helicopter in the Company's operation is reasonable and saves time (Tr. 64-65). According to one of the Grievants, at the time the helicopter was introduced he was informed by his immediate supervisors that flying in it would be voluntary and that those who did not want to fly would so indicate and would not have to fly. Several Employees, including a Communications Technician at Rodgers Flat who stated he had a general fear of flying, have not been required to fly. However, sometime after the introduction of the helicopter, that Communication Technician said that if he was required to fly, he guessed he would have to do so, at which point his supervisor stated he did not believe the situation was ever going to come to that point (Tr. 14-15).

Until the current grievance, there had never been a situation in which the Company personnel did not agree to fly in helicopters to their work sites (Tr. 52).

Company witnesses testified that, since 1958 on, when fixed wing aircraft was first introduced into the Company's work, the Company's position had been consistent and announced to Union officials in meetings having to do with job definitions in the Transmission and Distribution Department and the Water Department

and at safety meetings; that that position was that the Company preferred to use volunteers for flying but if the situation developed where the Company was required to use personnel who did not volunteer, the Company would require them to fly (Tr. 49); that the Union did not claim not to understand the announced Company policy, but did not state that it fully agreed with it (Tr. 51).

In the De Sabla Division the Division Superintendent stated that in many Joint Grievance Committee meetings whenever the question of helicopters came up, he announced the policy that the Company did not anticipate any difficulties insofar as being able to get Employees who would be willing to fly; that should there be anyone with any problems concerning flying that these should be discussed with the Employees' Supervisors; that where there was a general fear of flying, or a medical problem concerning flying, the Company should be notified; that the Superintendent felt that such Employees would not be required to fly; that insofar as voluntariness was concerned, individuals should be required to fly unless they met such particular requirements; that in the event the Company found it did not have personnel available in order to do the work that was necessary which involved flying, the Company would work with the Union in getting personnel transferred so the Company could have available personnel to fly (Tr. 57, 58, 61).

According to the Union Business Representative, he discussed the question of voluntariness in flying assignments with Shop Stewards in the De Sabla Division and was informed that the topic had not been discussed during Joint Grievance Committee meetings (Tr. 73, 82). One summary of what occurred at a Joint Grievance Committee meeting prepared by the Company indicates that a Union representative stated concerning a helicopter patrol:

> "Strictly voluntary."

with the Company responding,

> "Not strictly voluntary. You are not forced into it. No one I know of has been forced into it...
>
> "Union: Feels have right to refuse."
> (Tr. 90, Un. Brief p. 6 and attachment)

SUMMARY:

General:

Under Section 7.1 of the Agreement the Company can introduce new and improved methods subject to the provisions of the Agreement. In this case, this was done in 1968 insofar as the transportation of the Communication Technicians to their work site by helicopter. For ten years prior to that time, other Company personnel had flown on Company aircraft, both fixed wing and rotary wing. According to the Agreement, it was amended four times since 1968 and prior to the current grievance (Jt. Ex. 1, p. 4).

The essential question posed by the Union is whether or not the Company violated Section 107.1 by changing the conditions of employment of Employees without the flying requirement being negotiated and agreed to mutually.

Section 107.1:

The record establishes there has been a consistent Company policy concerning flying to work sites. The Company witnesses, both specifically as to the De Salba Division as well as on a Company-wide basis, have announced that while the Company sought to have Employees fly who had no general aversion to flying, and in that sense the basic flying crew would be a voluntary one, that it would require its Employees to fly whether or not they volunteered to do so.

The Company's policy is one of not attempting to force individuals to fly and it has not had to do so at least prior to this grievance. But, taken as a whole, the evidence establishes that the Company would so require Employees to do so; that this policy was enunciated over a long period of time and was in fact a policy which was known to the Union. Although the record is not specific as to the specific dates of meetings in which this policy was discussed between the Parties, it is clear there was enough identification of the kinds of meetings and the Union officials who were

in attendance at them to establish that the Union either knew or should have known how the Company viewed the requirement of flying.

The Grievants believed that their flying was only voluntary and that Shop Stewards told the Business Agent that the Company policy had never been discussed at the Joint Grievance Committee meetings at De Sabla. Yet, the evidence indicates that only limited weight should be given such evidence.

Insofar as the Grievants are concerned, one of them testified that an Employee who initially stated he would not fly later stated he would fly if it was necessary for him to keep his job, indicating that this Employee must have been informed at some point he may be required to fly. As to what the Shop Stewards told the Business Agent, not only was this testimony not presented first hand, but the summary of the Joint Grievance Committee minutes which was presented indicates that the Company's policy was not "strictly voluntary", contrary to what the Shop Stewards had generally indicated.

Accordingly, contrary to the Union's contention, the Company's unilaterally established policy has been in effect for a long period of time. Its existence has transcended several amendments to the Agreement between the Parties when the Union was charged with

knowledge of it. Thus, insofar as the application of Section 107.1 is concerned, the Union is now estopped from asserting that that provision is now a limitation on the requirement that Employees fly.

The Union maintains that it never agreed to the Company's policy. This was established by Company witnesses who so stated, as well as by the minutes of the Joint Grievance Committee in the De Sabla Division. While this may be so, it is further clear there was no evidence that the Union sought to assert its rights to bargain concerning the conditions for flying under Section 107.1, or otherwise. Its failure to do so through the successive amendments of the Labor Agreement cannot establish that there was a violation of that provision insofar as these Grievants were concerned in November, 1971.

Mandatory Subject for Bargaining:

This is further true as to the Union's contention that the principles of Section 8(d) of the National Labor Relations Act have been violated. The Union's own conduct in not raising the question prior to the 1971 situation, including intervening Agreement negotiations, clearly is an estoppel toward finding that there is an Agreement violation on this asserted ground.

Safety:

There is no question that the helicopter saves the

Company time, and accordingly, improves productivity. There is also no question but that any kind of aircraft can present safety problems. However, there is a specific provision for safety in the Agreement, Title 105, and no allegation has been made that that provision was violated on the date this case arose.

The Employees' initial refusal to fly was based upon a prior incident where they believed a pilot was required to fly by his employer, a Company contractor, notwithstanding the pilot's individual judgment that flying on that day would be unsafe.

The record establishes that, whether or not the incident occurred, both the law and Company policy and its contracts with its subcontractors require that no aircraft takes off unless the individual pilot decides that it is safe to do so. As stated by a Company witness, the decision is made by "[t]he pilot and the pilot only." (Tr. 62, emphasis added.)

Clearly such rule is not only sound, but must be actively enforced by the Company as to its subcontractors and publicized to their pilots. Such active enforcement and publicity would have a major effect to reassure Company Employees of the safety of the helicopter operation.

Discrimination:

Finally, the Union contends that the Company's

policy is discriminatory in that it allows certain Employees to opt completely out of flying. This is not what the Company's policy does, but what it does do is to allow Employees who have an aversion to flying to avoid flying duty as well as to avoid personnel being transferred to some other position or location.

DECISION:

The grievance is denied.

Chairman	Concur/~~Dissent~~	5/6/74 Date
Tony Morgado Union Member	~~Concur~~/Dissent	April 29 1974 Date
Lawrence N. Ross Union Member	~~Concur~~/Dissent	April 30, 1974 Date
J W Boatright Company Member	Concur/~~Dissent~~	29April 1974 Date
Company Member	Concur/~~Dissent~~	April 22, 1974 Date