IN A BOARD OF ARBITRATION PROCEEDINGS PURSUANT TO THE CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

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In The Matter of a Controversy

between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245,

and

PACIFIC GAS & ELECTRIC COMPANY, Hollister, California

INVOLVING: The suspension of S and V

OPINION BY THE CHAIRMAN ROBERT E. BURNS

BEFORE: ARBITRATION BOARD

DAVID H. REESE, Assistant Business Manager
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The Parties and the Issue

Pacific Gas and Electric Company ("the company"), and Local Union No. 1245 of International Brotherhood of Electrical Workers ("the union"), are parties to a collective bargaining agreement ("the agreement").

Pursuant to the agreement a hearing was held in Hollister, California on March 25, 1977, at which the parties, their attorneys and the grievants were present. At the hearing the parties stipulated that the grievance procedures of the agreement had been complied with. There was admitted into evidence a submission agreement specifying the following issue:

> Was the disciplinary layoff of a bargaining unit temporary line sub-foreman, S
> and lineman, K V , in violation of the agreement?

At the conclusion of the hearing the issue was submitted to the Arbitration Board upon the filing of briefs by the attorneys for the parties. The briefs were received by the Chairman on April 18, 1977. Thereafter, on April 20, 1977 the union, without objection by the company, submitted a letter from the California Public Utilities Commission which is hereinafter described.

Provisions of the Agreement

Section 102.13 of the agreement provides:

> "If an employee has been demoted, disciplined or dismissed from Company's services for alleged violation of a Company rule, practice or policy and Company finds upon investigation that such employee did not violate a Company rule, practice, or policy as alleged, it shall reinstate him and pay him for all time lost thereby."

Section 3.2 of the agreement provides in part:

> "The duties performed by employees of Company as part of their employment pertain to and are essential to the operation of a public utility and the welfare of the public dependent hereon. During the term of this Agreement employees shall not partially or totally abstain from the performance of their duties for company."

Statement of the Case

On September 7, 1976, grievant S as acting sub-foreman, grievant V and one other employee in the crew were directed to proceed to a pole on McCloskey Road near Hollister to perform work. The pole is a joint pole which carries the electric transmission lines of the company at the top of the pole and the communication cables of Pacific Telephone attached to a lower portion of the pole. The telephone cables were attached directly to the north side of the pole. Telephone cables are non-energized in the sense that they do not carry sufficient voltage to be hazardous for that reason. When grievants arrived at the pole they noted what they considered to be a safety violation with respect to the placement of the telephone cables on the north side of the pole. A branch of a nearby tree about four inches in diameter was located close to the south side of the pole and effectively prevented climbing that side of the pole. The safety violation concerned Section 84.7 of California Public Utilities Commission General Order 95 reading in part as follows:

> "(2) On Poles Jointly Used with Supply Conductors: The climbing space through the levels of communication conductors on line arms on poles jointly used with supply conductors, shall be not less than 30 inches in width and not less than 30 inches in depth, except that climbing spaces of the dimensions specified in Rule 84-7A1 may be used where the only supply conductors supported by the

pole are on service drop clearance attachments as permitted by Rules 54.8-C2 and 54.8C3."

"A guard arm, a longitudinal run of messenger, cable or insulated wire will not be held to obstruct the climbing space where they are placed in the climbing space because the presence of a building wall or similar obstacle will not permit the cable to be placed on the side of pole opposite the climbing space. Pole steps shall be suitably placed for the purpose of facilitating climbing past the level of terminal box, cable, drop wires and guard arm.

"Unnecessary impairment of the climbing space is not permitted by the application of this Rule 84.7-E."

Climbing space (General Order 95, Rule 20.6) means:

". . . the space reserved along the surface of a climbing pole or structure to permit ready access for linemen to equipment and conductors located on the pole or structure."

Section 2940(a) of Title 8, California Administration Code, provides:

"Safe Access. All work locations shall be safely accessible whenever work is to be performed."

The violation which grievants believed that they observed was the presence of the telephone company conductors (messengers) attached to the north side of the pole, the lack of 30 inches of clear space on the north side of the pole, and the necessity of climbing on or over those conductors in order to reach a point on the pole where they could work on the company's electrical transmission lines.

In the latter part of May, 1976 grievant S wrote to the State Division of Industrial Safety. He referred to General Order 95 and California OSHA Rule 2940 and asked if an employer was in violation if it directed an employee to climb through an obstructed climb-

ing space at the telephone company level. Under date of June 21, 1976 the principal safety engineer of the Division of Industrial Safety sent a memorandum to the Salinas office of the Division of Industrial Safety together with a copy to grievant S as follows:

> "In reply to your memo of June 4, 1976 concerning climbing space on joint use poles, we have the following comments:
>
> "1) The employer is clearly in violation of Cal/OSHA Rule 2940 as the determination of safe access would be based on Rule 84.7.
>
> "2) The only 'official' interpretation of a Safety Order is a formally issued Administrative Interpretation.'
>
> "3) These Orders appear to clearly define the situation and it does not seem to require a formal interpretation."

Shortly thereafter, a copy of this memorandum was given to company supervisors and management. The management decided that the memorandum was an erroneous interpretation in the type of situation here under consideration because the climbing area did not present a safety hazard and the type of work (such as that on McCloskey Road) was not a violation of General Order 95, or the company's rules for safe work procedures. The general foreman of the district at a special work procedures meeting, stated the company policy to line personnel, including grievants, and further stated that line personnel would climb over or through telephone company line infractions unless there was a safety hazard to the employee climbing the pole. The management position with respect to the memorandum of the principal safety engineer of the Division of Industrial Safety was known to acting general foreman , N on September 7, 1976. N was filling in for the general foreman on vacation.

On receiving notification from grievant S that there was a safety violation with respect to the pole on McCloskey Road, N proceeded to that place. He examined the pole and decided that there was no safety hazard and that the telephone lines did not constitute a violation of any safety order or rule or any company policy. N directed grievants to climb the pole and perform the work. According to him and the report of the local investigating committee composed of two representatives of the company and two representatives of the union established pursuant to the agreement, grievants stated they would not climb the pole because it did not have climbing space (30" x 30" climbing space). Grievants requested a bucket/truck and N advised them that a bucket truck was unnecessary. N also advised grievants that the company did not agree with the interpretation of the principal safety engineer of the Division of Industrial Safety and that there was no safety hazard involved in climbing over the restricted non-energized area to the place where the work was to be performed. Grievants replied that they would do the work if a bucket/truck was furnished. N advised them that unless they climbed the pole they would be suspended, but grievants refused on the grounds heretofore stated. Grievants were laid off and thereafter suspended.

Under date of October 8, 1976 the principal safety engineer of the Division of Industrial Safety wrote to the district manager of that division in Salinas concerning his memorandum of June 21, 1976 concerning safe access in the

climbing spaces on poles. In this memorandum the principal safety engineer acknowledged that he should have been more specific, that safe access also required the needed subjective judgment that a hazard was present in addition to the fact that a technical violation existed. He further stated that he would apply General Order 95 to installations not under the jurisdiction of the Public Utilities Commission as well as the following:

> "My reply memo to L. Redula made a general statement that safe access on poles was predicated on the requirement that climbing space was provided.
>
> "At that time I should have been more specific that safe access also required the needed subjective judgment that a hazard was present, in addition to the fact that a technical violation existed.
>
> "In our use of General Order No. 95, we would not interpret its use in areas applicable to utility company installations; we would apply its requirements to installations not under the jurisdiction of the Public Utilities Commission. This order appears to contain sufficient information to be objectively interpreted and applied.
>
> "The interpretation and application of Electrical Safety Order 2940(a), safe access, is very subjective, and a hazard being present is a prime requirement."

Under date of September 28, 1976, the Salinas district manager of the Division of Industrial Safety wrote to grievant V as follows:

> "Your complaint of September 10, 1976, directed to the above operation asked the Division to check on the following conditions:
>
> "1. No climbing space at the PT&T level on pole#L135 at 1575 McCloskey Rd., Hollister, Ca.
>
> "The Division started investigating this on September 14, 1976. It also consulted with the Public Utilities Commission and asked for a ruling on the climbing space."

"Confirming our verbal advice to you on September 21, 1976, please be informed that in the Public Utilities Commission's judgment, and with the concurrence of our staff, there is adequate climbing space on this pole. No violation can therefore be established."

Under date of April 18, 1977 the chief electric engineer of the Public Utilities Commission by a letter to grievant S stated that the staff had decided to change its position with respect to the McCloskey Road pole and had concluded that the pole was not in compliance with Rule 84.7 of General Order 95 because the climbing space in either quadrant on the south side of the pole was obstructed by communication conductors and the climbing space in either quadrant on the north side of the pole was obstructed by messengers and cables. The letter further stated that Paragraph E of Rule 84.7 allowing messengers and cables to intrude into the climbing space (on the north side) if they are so placed because of a building or similar obstacle will not permit the cable to be placed on the side of the pole opposite the climbing space was not applicable.

At the hearing the union offered evidence that in climbing the pole at McCloskey Road it was necessary or convenient to grasp the telephone messenger cable and also to step on it in proceeding up the pole and that the clamps holding the conductor cables to the pole some times are loose and the placing of weight on such cables can cause them to pull loose and drop the climbing linemen.

About two weeks prior to September 7th general foreman N directed grievants to perform work on a pole on Sunny-

slope Road near Hollister. The climbing space between the telephone messengers fastened to cross-arms was about 27-1/2 inches instead of 30 inches. Grievants objected to working on this pole because of inadequate climbing space in violation of General Order 95 and the advice they had received from the Division of Industrial Safety. N ordered a bucket truck and the work was performed with the use of that truck. The next day N spoke with his supervisor who advised him that the 30" by 30" rule of General Order 95 was a construction rule and that the company disagreed with the interpretation of the principal safety engineer dated June 21, 1976. N told the crew that the company disagreed with the letter obtained by grievant S : and that he would not change the district policy.

During the course of the hearing before the Arbitration Board the attorneys, grievants, witnesses and others went to the poles on both Sunnyslope Road and McCloskey Road. Foreman N climbed the pole on McCloskey Road. In doing so he grasped one of the telephone messenger cables with his hand and lifted himself with his leg by placing his foot on the telephone messenger cable.

Accident Prevention Rule No. 9 of the company provides in part as follows:

> "Governmental Safety Standards.
> In addition to its own safety rules and practices, the Company and its employees in the performance of their work are subject to the regulation of various governmental agencies including Federal, State, County and City. Supervisors shall make certain that all applicable provisions of governmental regulations are complied with on their jobs.

"A list of the major governmental regulations or orders which may be applicable to our work and presently in effect follows:

.....

"Rules for Overhead Line Construction -- G.O. 95."

In January, 1976 a foreman in charge of a crew in the district was badly burned when the line truck passed under a 21 kv. line and the derrick contacted the line. On his return to work, he was suspended for two days without pay because he failed to follow safety rules including Accident Prevention Rule No. 9.

Discussion and Opinion

The essential question posed by the issue is whether grievants were suspended without pay for just cause under the circumstances of this case.

Grievants believed in good faith that the McCloskey Road pole was a violation of General Order 95 and of Regulation 2940 (Title 8 California Administration Code, Section 2940). Grievants had been so advised by a responsible representative of the State Division of Industrial Safety and grievants knew that it was also their responsibility to comply with state safety rules. The general foreman had informed grievants that the company did not agree with the interpretation of the principal safety engineer and that the pole on McCloskey Road was a safe place to work and not in violation of General Order 95, or other state rule or safety regulation. It now appears by the letter of April 18, 1977 that the pole was in violation of General Order 95 in the opinion of the chief electrical engineer

of the Public Utilities Commission.

If we assume that the pole on McCloskey Road was not a real and apparent hazard (See Labor Code Section 6311) and further assume that grievants had complied with the order of the general foreman, the responsibility for any violation of General Order 95 and the company safety rules would have been the responsibility of the company and not grievants (Labor Code, Section 6304.5). Since grievants would have been acting under the direction of their supervisor, the company would have been estopped from taking disciplinary action against them for violation of company safety rules. This case is thus substantively different from that of foreman Thompson who was in charge of a crew. He violated or caused to be violated a company safety rule. Grievants refused to obey the order of the acting general foreman in a situation, which we shall later point out, did not present a clear and apparent hazard. It should be noted that grievants had been told some time before September 7 that the company would not follow the first administrative interpretation. Grievant V[redacted] was the shop steward. He could have filed a grievance instead of testing the matter in the field.

Section 8 (f) of the Occupational Safety and Health Act of 1970 employs the term "imminently dangerous". The Secretary of Labor has issued a regulation providing the following:

". . . The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, could conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels . . . ." (29 CFR 197.12(b)(2))

This case, therefore, resolves itself into a determination whether or not there was a real and apparent hazard on the pole on McCloskey Road and whether grievants had reasonable grounds for believing that there was such a hazard.

Section 6311 of the California Labor Code prohibits the layoff or discharge of an employee for refusing to perform work "in the performance of which this code, any occupational safety or health standard or any safety order of the division or standards board will be violated, where such violation would create a real and apparent hazard to the employee or his fellow employees." "A real and apparent hazard" is one which is or reasonably should be known or seen by the employee or his supervisor and which is an actual hazard as distinguished from a possible or theoretical hazard.

With respect to the hazard involved in climbing on or over the telephone [illegible] cable there is a direct conflict in the evidence. Grievant S [illegible] testified to his experience with telephone cables breaking loose under weight and the cable dropping toward the ground with the linemen riding on it. The foreman believed that there was no such hazard. When he climbed the pole on the date

of the hearing, he had one hand or both hands on the regular spikes inserted in the pole and did not appear to have both feet at one time on the telephone cable. N also denied that at time of the incident on September 7, either grievant made any statement with respect to the physical hazard of climbing the McCloskey Road pole. The conflict in the evidence is susceptible of resolution in that the grievance committee report does not mention hazard or the physical safety of the grievants but states that grievants refused to climb the pole because to do so would violate a state safety rule. The company took the position that there was no safety hazard involved and that there was no assertion by the union at that stage of the proceedings that any safety hazard was involved.

The act of climbing a pole without any obstruction and in full compliance with all safety rules involves some hazard, but such hazard is not the real and apparent hazard within the meaning of Section 6311 of the Labor Code or the context of this case.

The record shows that there are a number of GO 95 violations in the Hollister area with respect to telephone company cable installations on jointly used poles. The company has communicated with the telephone company but apparently all violations have not been removed. Any violation of G.O. 95 or other safety regulation by the telephone company is not here considered to be an excuse to the company.

Citing Usery v. Babcock & Wilcox (No. 4-72290 E.D. Mich.), the union urges that in situations such as this the grievants should not be given the H 's choice of violating a state safety rule and endangering their personal safety or of suffering disciplinary action because of refusal to comply with the order of supervision. There was no H 's choice with respect to compliance with the order of the foreman and of violation of the state safety code since the grievants would not have been subject to any penalty by the state or by the company for violation of state or company safety regulations because they would have acted pursuant to the order of their supervisor. There was also no H 's choice with respect to the hazard alternative because the evidence does not establish that there was a real and apparent hazard in climbing on or over the telephone cable.

Grievant S had several months to resolve any dilemma into which he was placed by the Division of Industrial Safety letter of June 21, 1976 and the advice he received shortly thereafter of the company position. He could have grieved the conflict before September 7, 1976. Moreover, as stated above, the statement by management that it did not agree with the first interpretation by the Division of Industrial Safety and the order of the foreman prevented the company from taking disciplinary action against grievants.

The union also urges that grievants did not refuse to perform the work assigned but only refused to perform it in the manner directed by N . In directing the work, management has the right to direct the manner in which the work shall

be performed. If the manner of performance involves a real and apparent hazard, then there is a basis for the employee's refusal. The finding in this case is that there was no real or apparent hazard for the reasons above expressed.

The reasonable question which arises is how is the employee to judge a situation in the field. Hindsight is notoriously easy and clear. If the order of the foreman includes a violation of a safety rule, the employee must decide whether there exists a real and apparent hazard based upon objective facts. If there is no real and apparent hazard, the employer cannot discipline the employee for violation of company safety rules because he acts pursuant to the order. If there is a real and apparent hazard the employee is excused from complying. If the employee honestly believes there is such a hazard and it is objectively determined there is no real and apparent hazard, the employee is exposed to discipline as here. There is no formula answer for every case, except that the supervisors who presumably are as experienced as the employees should be able to recognize a clear and apparent hazard as well as the employees. The Supreme Court came to similar conclusion in Gateway Coal Company, infra.

The conclusions reached in this case are based upon the evidence, the law and the regulations. The conclusions are that grievants were not excused from refusing the order of acting general foreman Nelson and that objectively determined under the evidence and the circumstances of this case there

was no real and apparent hazard to either grievant in climbing the pole. Accordingly, there was just cause for the disciplinary suspension of grievants.

Under date of March 3, 1977 the union filed a charge with the National Labor Relations Board urging that the company had restrained and coerced employees in the right to engage in protected concerted activities and had disciplined employees who have refused to engage in assigned work tasks by reason of fear that to do so will subject them to real and imminent danger to their safety. Under date of March 16, 1977 the charge was administratively deferred pursuant to the Arbitration Deferral Policy under Collyer-Revised Guidelines.

Grievant V was the shop steward of the union on September 7, 1976 and was acting for himself, grievant S and all other employees in refusing to climb the pole on McCloskey Road. The facts and findings with respect to such refusal are set forth above.

Section 502 of the Labor Management Relations Act (29 U.S.C. Sec. 143) has been interpreted in Gateway Coal Company against United Mine Workers of America (1974) 414 U.S. 368. There, the Court held that a union seeking to justify a contractually prohibited work stoppage under Section 502 must present "ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for working exists." The Court also observed that if courts require no objective evidence that abnormally dangerous work conditions actually obtain, they face a wholly speculative inquiry into

the motives of the workers. The rationale of Gateway Coal is applicable to this case. The evidence does not establish ascertainable, objective evidence that an abnormally dangerous condition for working existed with respect to the climbing of the pole on McCloskey Road. In fact, the evidence does establish that there was not on September 7, 1976 an abnormally dangerous condition for working on the McCloskey Road pole.

It is therefore concluded that the company in acting as it did through its supervisors on September 7, 1976 did not restrain or coerce its employees in their right to engage in protected activities.

Award

Pursuant to the Agreement, Submission Agreement, the stipulations of the parties and the evidence, the following award is made by the Arbitration Board:

The disciplinary layoff of bargaining unit temporary lineman sub-foreman S and lineman V was not in violation of the Agreement.

Dated: May 12, 1977.

ARBITRATION BOARD

David H. Reese - dissent
DAVID H. REESE

Lawrence N. Foss - dissent
LAWRENCE E. FOSS

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