IN ARBITRATION PROCEEDINGS PURSUANT TO THE COLLECTIVE BARGAINING AGREEMENT AND THE SUBMISSION AGREEMENT BETWEEN THE PARTIES

In the Matter of the Controversy)
Between)
PACIFIC GAS AND ELECTRIC COMPANY)
And)
LOCAL UNION NO. 1245 OF INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO)
Involving the Demotion of Lineman . B.)

ARBITRATION CASE NO. 71

ARBITRATION BOARD:

ROBERT E. BURNS, Esq., Attorney at Law, 155 Montgomery Street, San Francisco, CA 94104; Chairman

I. WAYLAND BONBRIGHT, Manager of Industrial Relations, Pacific Gas and Electric Company, 245 Market Street, San Francisco, CA 94106; Company Member

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DARREL MITCHELL, Business Representative, International Brotherhood of Electrical Workers, Local Union 1245, 3063 Citrus Circle, P. O. Box 4790, Walnut Creek, CA 94596

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APPEARANCES:

ON BEHALF OF THE COMPANY:

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The Parties and the Issue

Pacific Gas and Electric Company (the "company") and Local Union No. 1245, International Brotherhood of Electrical Workers, (the "union") are parties to a collective bargaining agreement applying to operation, maintenance and construction employees, amended and effective on January 1, 1977 (the "agreement" or "Physical Labor Agreement"). The original agreement between the parties was dated September 1, 1953. It has been amended periodically.

Pursuant to the agreement and a submission agreement, a hearing was held in San Francisco on July 28, 1978 at which the parties, their attorneys, and grievant Gary L. Bissmeyer were present. At the hearing the parties stipulated that the following issue was properly submitted to the Arbitration Board:

> Was the demotion of lineman . B
> : in violation of the parties' Physical Labor Agreement?

At the conclusion of the hearing, the issue was submitted to the Arbitration Board upon the filing of briefs by the parties, which were received on October 2, 1978. The Board met in executive session on October 30, 1978.

Provisions of the Agreement

Section 7.1 of the agreement provides:

"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."

Section 108.2 in Title 108 entitled, "Supplemental Benefits for Industrial Injury" provides:

"108.2 An employee who is absent by reason of industrial disability may be returned to work and given temporary light duties within his ability to perform. The duration of any such period of temporary work shall be determined by Company. Employees shall be compensated at the rate of pay of their regular classifications while engaged in such temporary duties."

Section 112.10 of the agreement provides:

"112.10(a) Except as provided in Section 108.2, if an employee's health or physical ability becomes impaired to such an extent that he cannot perform the work of his classification, Company shall, if practical to do so, give such employee light work within his ability to perform for which he shall be compensated at the rate of pay established for such work.

"(b) It is Company's policy in the administration of Subsection 112.10(a) above to assign employees who are permanently partially disabled to such light work as may be available within the employee's current classification. When making such assignments within the employee's classification, Company shall give consideration to whether or not the disability is industrially related, the employee's service, the operating requirements of the District or Department, and the temporary assignments as provided in Section 108.2. For example, in the Electric Transmission and Distribution Department of the Divisions, Company will attempt to assign employees who can no longer meet the climbing requirement but who are otherwise qualified as journeymen to duties which require journeyman skills but do not require employees to climb on a regular basis. The foregoing shall not be interpreted to apply to more than one journeyman, including classifications higher thereto in the normal line of progression, in ten in any headquarters and shall be administered on the basis of service and qualifications."

Section 112.10(b) was added to the agreement in 1974.

Section 206.15 provides:

"An employee who is demoted for any reason other than for lack of work may be placed in a vacancy created in his headquarters by the promotion of one or more employees to fill the job which the demoted employee vacated. If no such vacancy occurs he may be demoted to a vacancy in a lower classification in the Division in which he is employed. In the application of this Section an employee shall be demoted to a vacancy in the first successively lower classification which he is qualified to fill."

Statement of the Case

On December 13, 1976 grievant . B was demoted from his job as journeyman lineman in the Humboldt division to T&D driver. The company's answer to the grievance filed on December 13, 1976 was as follows:

> "Grievant was demoted from a Lineman to a T&D Driver pursuant to Title 206.15 of the Physical Agreement. Company did so because Grievant has been permanently restricted from climbing power poles by his case physician. Therefore, reinstatement to the Lineman classification is impossible. The correction sought is denied."

Grievant has been employed by the company for over 17 years. In 1971, while working in the San Joaquin division as a lineman, he received a knee injury. In 1974 he transferred to the Humboldt division as a lineman. M , a general foreman in Electric T&D, Eureka district, testified on behalf of the company with respect to grievant's employment and the difficulties which grievant experienced. M was employed by the company in 1952 and after a period of time in the Gas Department, transferred to the Electric Department as a groundman, worked as an apprentice lineman and journeyman lineman, sub-foreman, field foreman, and was promoted to his present position of general foreman. He has performed all phases of electrical work. There are 44 employees in the

Electric Department in Eureka of which 12 are linemen.

Grievant reported to Mc in August, 1974 as a journeyman lineman. He performed all of the duties of a lineman including the climbing of poles as well as underground work. In August, 1975 he complained that he was having trouble with the knee which had been injured in 1971 and requested that he be relieved from climbing poles. Grievant was sent to the doctor for examination. In October, 1975 he was placed on the worker's compensation payroll during which time he received worker's compensation and additional compensation by the company up to 85% of his gross lineman's wages. Grievant's knee was operated on in February, 1976.

Grievant returned to work in April, 1976 on limited duty. He received his lineman's rate of pay pursuant to section 108.2. "Limited duty" in his case consisted of doing any work other than climbing. A lineman is expected to do overhead and all kinds of construction work on poles. A lineman is also qualified to do most phases of underground work. Underground work consists of work in manholes or vaults, some of which are 6 feet deep and 4 feet wide. A ladder is either built in or lowered into such manholes.

After grievant's return to work in April, 1976, he was not assigned to work climbing poles or to work in an

underground vault requiring him to climb a ladder. Grievant was first assigned to the warehouse performing clerical work. He was then assigned for 5 days as a warehouseman. Grievant complained that the work of a warehouseman on the concrete floor was giving him trouble with his leg. Grievant was then assigned by M to the wash rig used to wash live line insulators. The equipment consists of an aerial lift with double baskets. The baskets are about 44 inches deep. The person washing the insulator uses a high pressure hose and must brace himself against the basket. There are methods of bracing oneself to relieve pressure on one leg or the other. He complained that when he locked his knees while washing insulators he experienced pain. M removed him from the wash rig and assigned him to the pre-fab shop. Pre-fab shop makes cross-arm units for mounting on poles. After working in the pre-fab shop constructing cross-arm units, grievant complained that the lifting and turning of the units hurt his leg while he was standing on the concrete floor. Some units weigh from 60 to 80 lbs. or more. During the pre-fab assembly work, grievant hurt his back and was taken out of that work by M . Grievant was also assigned to a crew digging holes for electric poles. Grievant complained of pain and called the doctor. M received a note from the doctor stating

that grievant was not to push or pull more than 20 lbs. and not lift more than 20 lbs. and that he was not to use a shovel. Grievant was then assigned to groundman's duties. The groundman assists other workmen on the poles by sending up material on a hand line. He also performs other associated ground work, but no climbing is involved. Grievant was also assigned to underground work which involved pulling cable into the splice boxes. Pulling cable involves work in the vault at times. M heard through the sub-foreman that grievant was complaining of pain in his leg. M removed him from that assignment. The foregoing assignments were given to grievant between April and October, 1976.

On or about October or November, 1976, M was informed that the company doctor had decided that grievant's knee condition was permanent, stationary, and rateable. In his report dated October 1, 1976, received by the personnel department of the Humboldt division on October 20, 1976, the doctor stated:

> "I feel that the above captioned's left knee injury is now stable and rateable with subjective complaint of aching in the left knee aggravated by increased work, relieved by taking mild analgesic. I believe the subjective complaint in most instances is mild and at times may graduate towards moderate but has not as yet resulted in work impairment capacity other than pole climbing.
>
> . . . .

"I do not feel there is any treatment necessary to further relieve the patient's condition and that he is ready for a permanent disability rating with the above factors of disability plus impairment of work capacity in that he should not be a pole climber. He is able, however, to do the rest of the work required of his job."

M recommended to his supervisor that grievant be placed in the T&D driver classification rather than in the lineman classification. The T&D driver drives and handles equipment on the line trucks, digs holes with a pole digger mounted on the truck, operates the controls, assists the linemen by sending material to him on the poles, and does associated ground work and paper work.

A discussion of the management decision was had with grievant and he was asked if he would take advantage of an opportunity to transfer to another division for a lineman position he could handle. Grievant declined to transfer. There are also positions involving the inspecting of overhead lines, such as patrolman, which carries a lower rate of pay than lineman. There is also a part-time lineman position as underground instructor. The underground instructor spends about 25 days a year doing this work, and the balance of the year he works as a lineman. M did not consider grievant for this work because he did not have

the background or experience in the opinion of M . In addition there is inspection work which involves about 35 days a year on the average. In the Eureka district about 15% of a lineman's work is underground and about 85% overhead work.

Grievant's demotion to T&D driver was effective on December 13, 1976.

The union, through Lawrence N. Foss, assistant business manager of the union, offered evidence that during the fact finding and review level of the grievance procedure the company did not take the position that there were duties other than climbing duties which could not be performed by grievant. The company's position at those levels of the grievance procedure was that there was insufficient non-climbing work to keep grievant occupied on a full-time basis. At the review committee hearing the company produced a document showing that in 1977 there were 179 out of 244 workdays (73%) on which there were 8 hours of underground work and underground inspection work in the Eureka district. This exhibit did not include the hours spent in cross-arm pre-fabbing work, work in the meter shop or in hot washing. The union also produced two linemen witnesses who testified that two linemen in the district were assigned almost exclusively to underground work and that there is in addition sufficient non-climbing work to

fully employ grievant. The union produced a further exhibit, prepared by grievant from his observations and from statements by other employees in the T&D department, covering the period from April 11, 1978 through July 20, 1978 showing that three or more crews performed underground work for at least 8 hours during many of the days in this period. Crews usually consist of a sub-foreman, a lineman, and a third person. None of the work shown in grievant's survey included work on risers requiring pole climbing.

Grievant testified that he had been employed by the company in 1961 as a groundman, worked as apprentice lineman and became a journeyman lineman in 1966; that while employed in the San Joaquin division he had done underground work as a lineman and as a sub-foreman; that he experienced a knee injury on the job in 1971 and had an operation on his knee; that about a year after he transferred to Eureka he began having trouble with his leg; that he requested help for a couple of days a week in order to rest his leg in between climbing; that he did not receive the help, and his leg became so bad that he had to see the company doctor; that he subsequently had another operation on his knee in February, 1976 and returned to work on April 26, 1976; that under date of October 1, 1976 the orthopedist to whom he had been referred

certified him as having a permanent disability rating, and that he was able to do his work except as a pole climber; that there are two linemen assigned to underground inspection work and other underground work; that at the time of the hearing he believed he was physically qualified to do all the work of a lineman, except the climbing of poles; that this included the work of hot washing insulators and underground work.

Discussion and Opinion

Section 112.10(b) was added to the Physical Labor Agreement in 1974. The union proposed during negotiations that all industrially injured employees returning to work be placed in the classification which they occupied prior to the industrial injury and that they be paid at the rate for that classification regardless of their physical ability to perform the work of that classification. The company replied that it was company policy to return employees to their pre-injury classifications on light duty if it was practical to do so. The union replied that the policy of the company was not uniformly applied. As a result of the negotiations, the statement of company policy was included in section 112.10(b).

Section 112.10(a), which has been contained in the Physical Labor Agreement for a number of years, provides that when an employee's health or physical ability becomes impaired

to such an extent that he cannot perform the work of his classification, the

> "company shall, if practical to do so, give such employee light work within his ability to perform for which he shall be compensated at the rate of pay established for such work."

The 1974 amendment to the agreement in section 112.10(b) grafted on the provisions of section 112.10(a) the statement of the company policy in the administration of section 112.10(a)

> "to assign employees who are permanently partially disabled to such light work as may be available within the employee's current classification"

and to "give consideration" to industrial disabilities, the employee's service, operative requirements, and temporary assignments under section 108.2.

The example cited in section 112.10(b) applicable to the electric T&D department provides that the

> "company will attempt to assign employees who can no longer meet the climbing requirements but who are otherwise qualified as journeymen to duties which require journeymen skills, but do not require employees to climb on a regular basis."

The "one in ten" limitation is met because there are more than ten journeymen in the Eureka district.

Section 108.2 provides that an employee absent by reason of industrial disability "may be returned to work and given temporary light duty within his ability to perform." Title 108 is entitled, "Supplemental Benefits for Industrial Injury." The work which grievant was given upon his return in April, 1976 has been outlined above. In each case he complained of pain by reason of the cement floor in the warehouse, and the pain resulting from the necessity of locking his knees and bracing his back while operating the hose to wash the insulators. The assignment in the pre-fab shop also caused grievant to complain concerning his leg.

The company's position is that section 112.10 does not require the company to retain a lineman where there is only a projected 60% to 73% non-climbing workload; that the company's management rights are only restricted by section 112.10 to those situations where the company has acted arbitrarily or capriciously; that irrespective of the interpretation of section 112.10, the company went through the process of eliminating light work assignments which grievant could not perform; and that grievant has demonstrated he could not perform those non-climbing light duties. Further, the company argues the company has no obligation to keep an employee in a classification when he cannot perform eight hours a day, five

days a week.

The union urges that section 112.10(a) is mandatory in nature if it is "practical" to give the lineman work within his classification and within his ability to perform the work; that the company must show that there is insufficient light work or that the employee's physical impairment is such that he cannot perform the light work available; that some of the work assigned to grievant, such as washing insulators with a high pressure hose, on his return after his operation in February, 1976 was not light duty and the pre-fab work of lifting 60 to 80 pounds was not light duty; that six months after his return and after the certification by the company doctor the company still concluded that grievant could not perform non-climbing work; and that the evidence is "overwhelming" that there is sufficient non-climbing work in the district as shown by the company's survey, the grievant's survey and the work of two linemen assigned to underground work.

An arbitration board in a case such as this should not substitute its judgment for the judgment of the management which has the right and obligation to direct the working forces, to direct and control operations, and to employ the work forces in the most efficient manner. Section 112.10 does place some limitations on management rights and requires consideration

to be given to industrial disabilities, service, and operating requirements, and in the case of a lineman requires the company to attempt to assign linemen to journeymen duties which do not require climbing on a regular basis.

The company not only attempted to assign, but did assign grievant to non-climbing duties prior to October 1, 1976. Grievant in those months was unable to perform the assigned duties (as outlined above) because of pain in his leg. The critical aspect of this case concerns the period after October 1, 1976 (or after October 20, 1976 when the Humboldt division received the doctor's report). The record is not clear and does not establish that, contrary to the doctor's report, grievant could not perform non-climbing duties including underground work after October 1 (or October 20), 1976. The doctor's report recognized that grievant's "subjective complaint" of pain is mild (to be relieved by mild analgesic) and that grievant should not be a "pole climber" but "is able, however, to do the rest of the work required in his job." Presumably, the orthopedist knew or was told the nature and extent of grievant's work as a lineman. Although grievant is not an authority on his own condition, his testimony that after October 1, 1976 he could perform all lineman duties except climbing is entitled to consideration.

There are more than ten linemen in the district. There is substantial evidence that in 1977 and in 1978 there was sufficient non-climbing lineman work to fully occupy a non-climbing lineman for full work weeks. The company attempted to assign grievant to non-climbing work before October 1, 1976 and grievant could not perform those assignments, but the evidence does not show that in November and December, 1976, after the doctor's certification, grievant was unable to perform them or that the company attempted to assign grievant to non-climbing work such as underground work after the receipt of the doctor's report.

This case involves a type of continuing grievance. The hearing was not held until more than 18 months after grievant's demotion in December, 1976. Without direct evidence that grievant could not perform non-pole climbing duties after October 1, 1976, and that the company attempted after that date to assign grievant to non-pole climbing duties in the face of the evidence that there was sufficient non-pole climbing work (including underground work) in 1977 and thereafter, it must be concluded that the company did not comply with section 112.10.

The foregoing conclusion is open to some doubt because it is true that the company is entitled to a day's

work for a day's pay, and to reasonable flexibility in directing the working forces and is not obligated under section 112.10 to tailor its work for a disabled employee whereby efficient deployment of the work forces is prevented. We do not know whether the opinion of the orthopedist concerning grievant's condition would be verified in the field. It must be noted that grievant reported "pain" to the doctor which was relieved by mild analgesics. Grievant may suffer some pain in his leg operating a truck. He may experience some pain or discomfort using a ladder in a vault. He may have to bear the pain in almost any assignment.

Because of uncertainties inherent in this case, the solution of the grievance is to return grievant to the lineman classification and assign him to lineman duties except pole climbing. The assignment shall be for a trial period to determine if grievant can perform all lineman duties except pole climbing, including underground work, and to further determine whether there will be sufficient non-pole climbing work for him to perform within the customary and practical allocation of work and work crews in the Eureka district.

It will be necessary to reserve jurisdiction in this case to determine (a) whether grievant can perform all non-pole climbing duties as the orthopedist and grievant say; (b) whether the work crews can be properly and efficiently assigned so that grievant has a full day's work every working day, and it is practical to assign grievant to non-pole climbing work; and (c) whether there should be back pay. Jurisdiction shall also be reserved for all other matters relevant to this case, including whether the company was in violation of the agreement.

Award

Pursuant to the agreement, the stipulations, and the evidence the following award is made:

1. The demotion of . B was in violation of the Physical Labor Agreement.

2. Grievant shall be temporarily restored to his classification of lineman in the Eureka district and assigned to linemen's duties, except for pole climbing.

3. Jurisdiction is reserved for all purposes, including the determination of

a. Whether grievant can now perform all non-pole climbing duties as the orthopedist and grievant say;

b. Whether the work crews can be assigned so that grievant has a full day's work every working day, and it is practical to assign grievant to non-pole climbing work;

c. Whether there should be back pay.

Dated: October 30, 1978.

ARBITRATION BOARD

I. Wayland Bonbright - dissent
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Appointed by the Company

David J. Bergman - dissent
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Robert E. Burns
ROBERT E. BURNS
Chairman