In the Matter of Arbitration

between

Arbitration Case No. 72

PACIFIC GAS AND ELECTRIC COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245

APPEARANCES: L. V. Brown, Esq., for the Company; Neyhart and Anderson, by John Anderson, Esq., for the Union

CHAIRMAN'S DECISION

This case arose under and is governed by the Physical Labor Agreement between the above-named parties effective 1 January 1977. (JX-1) The parties having appointed an Arbitration Board (Board) consisting of Messrs. David. J. Bergman and Joe Cates, representing the Company, Messrs. Roger Stalcup and Manuel A. Mederos, representing the Union, and Benjamin Aaron, neutral member and Chairman, a hearing was held on 7 September 1978, in San Francisco, California. Both sides appeared and presented evidence and argument on the following issue, as defined in their Submission Agreement dated 31 May 1978 (JX-2):

> Was the discharge of General Construction Truck Driver . B , on July 14, 1977, in violation of the parties' Physical Labor Agreement, as last amended?

At the outset of the hearing the parties jointly stipulated "that the Grievance Procedures have been exhausted and the matter is properly before the Board." . . .(Tr. 6)

A verbatim transcript was made of the proceedings before the Board.

The Company filed a prehearing brief; the Union waived its right to do so. (Tr. 5) Both sides filed posthearing briefs. The record was closed on 25 December 1978.

The partisan members of the Board jointly waived their rights to an executive session of the Board prior to receiving draft copies of the Chairman's proposed decision and opinion, which were sent to the Board members on 22 January 1979.

Paragraph 5 of the Submission Agreement reads in part:

> The Chairman shall have the right and obligation to render a separate written award in Arbitration Case No. 72, which will be final and binding on the Company and the Union, and neither party will seek an appeal therefrom except, however, that if the Chairman's award goes beyond the scope of the issue submitted to arbitration, or is not responsive to such issue, or if it in any way changes, or adds to, or reforms the Agreement of September 1, 1952, as amended, it shall have no force or effect and shall not be binding on either party. . . . The Chairman shall have the further right and obligation to submit a separately written opinion relative to the award made in Arbitration Case No. 72.

On the basis of the entire record, the Chairman makes the following

AWARD

The discharge of General Construction Truck Driver . B , on July 14, 1977, was not in violation of the parties' Physical Labor Agreement, as last amended.

Arbitration Board

Benjamin Aaron, Chairman

Concurring: David J. Bergman

Joe Cates

Dissenting: Roger Stalcup

Manuel A. Nederos

Ann Arbor, Michigan
22 January 1979

In the Matter of Arbitration

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PACIFIC GAS AND ELECTRIC COMPANY

and

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245

Arbitration Case No. 72
(Emmett D. Butler)

CHAIRMAN'S OPINION

I

B , the grievant, was initially hired by the Company on 1 October 1976 as a Helper in the General Construction Department. On 4 April 1977, he was promoted to Truck Driver - Light in the same department. The General Construction Department, which is analogous to an outside contracting firm, supplies construction and maintenance crews to the Division to accommodate workloads in excess of the Division's manpower or, as in the instant case, a construction force to build or modify plant facilities that are beyond the capacity of the Division's work forces.

The Station subdepartment of General Construction "contracted" for the reconstruction of Unit 3, the nuclear generating unit at the Company's Humboldt Bay Power Plant, and for other work outside of the radiation-monitored areas of Unit 3. The work in the Unit included seismic modifications ordered by the Nuclear Regulatory Commission (NRC). Station employees

were assigned to work in certain controlled access areas in Unit 3. About one-third of the work assigned was outside of Unit 3.

B was transferred to the Humboldt Bay Power Plant and reported there on 5 July 1977. According to the uncontradicted testimony of William K. Glenn, Resident Engineer in the Station Construction Department, General Construction employees are usually assigned to a job and stay there until the job is completed. They are normally transferred frequently because the jobs are usually of short duration. Department employees are not permitted to reject transfers to a different location; any who refuse are terminated. This policy has been uniformly applied.

At the time of his transfer on 5 July 1977, B 's status was that of a "regular" employee in General Construction. Section 106.5(b)(1) of the Physical Labor Agreement provides in part: "A regular employee who has completed less than one year of Service. . .may be terminated for inadequate work performance without recourse to the grievance procedure."

B 's initial assignments at Humboldt Bay were outside Unit 3, pending the completion of his physical examination and required orientation session. He passed both his physical and radiation training examinations. In filling out his Occupational External Radiation Exposure History (CX-5), B wrote "NONE" under Item 5: "Previous Employments Involving Radiation Exposure. . . ."

Following the successful completion of his examinations, B was scheduled for a "walk through" conducted by bargaining-unit radiation monitors of the proper safety procedures to be observed after "stepping over the pad" into the contaminated area in Unit 3. B refused to put on his safety equipment or to step over the pad, on the ground that he was afraid that to do so would cause him immediate or future physical damage. He was sent to his supervisor, Foreman W , who took B to F , Foreman, Line Tower, General Construction. According to W , F told B "to think it over and come back the next day ready to go to work or resign." (Tr. 111) B returned the next day, but refused either to work in Unit 3 or to resign. He was then terminated as of 14 July 1977 for inadequate work performance.

B testified without contradiction that neither at the time of his initial hiring nor at the time he was promoted to Truck Driver - Light was he told that as part of his duties he would be assigned to an area of high radiation. He testified further that prior to his employment with the Company he had served in the U.S. Navy as a rigger aboard an ammunition ship which carried nuclear warheads; that he had, since high school, been aware of the possibility that exposure of humans to nuclear radiation could lead to birth defects in their offspring; that subsequent to his service in the Navy, his wife had given birth to a still-born baby; and that a friend

who had been exposed to radiation at the Yucca Flats, Nevada, nuclear test site had eventually died as a direct result of that exposure. Finally, B testified that during his orientation lectures he had asked whether, "if you went in that reactor and. . .picked up cancer or some other thing related to it, the radiation could have caused, who would be liable? Would PG&E? And [the lecturer's] answer. . .[was] 'No.'" (Tr. 116-17)

II

The normal and appropriate function of an arbitrator or arbitration board is to determine whether the action complained of by the grievant violated any of the terms of the collective bargaining agreement. The parties to this case have so agreed, as witnessed not only by the language of paragraph 5 of the Submission Agreement dated 30 May 1978 (JX-2), but also by Section 102.12 of the Physical Labor Agreement (JX-1), which provides in part:

> The decision of a majority of the members of the [Arbitration] Board shall be final and binding on Company and Union and the aggrieved employee, if any, provided that such decision does not in any way add to, disregard or modify any of the provisions of this Agreement.

The Agreement includes another provision, however, which expands the normal function of an arbitrator or arbitration board. Section 500.5 provides:

> Any provision of this Agreement which may be in conflict with any Federal or State law, regulation or executive order shall be suspended and inoperative to the extent of and for the duration of such conflict.

It is upon this last-quoted provision that the Union's case is ultimately based. The evidence it adduced at the

arbitration hearing purported to establish the following facts: (1) that the assignment to high radiation areas is not a part of the "regular" job duties of a general construction employee; (2) that there is no such thing as a "safe" amount of exposure to radiation, and that any amount of such exposure is potentially harmful; (3) that B 's fear of such exposure was entirely reasonable; and that, therefore, (4) his dismissal for refusing to undergo such exposure was without just cause.

The safety provisions (Title 105) of the Physical Labor Agreement do not deal squarely with this issue, and the Union seems to base its argument on the application of Section 502 of the Labor Management Relations (Taft-Hartley) Act, 1947 (LMRA), which provides in part:

> . . .the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees [shall not] be deemed a strike under this Act.

Although not specifically cited by the Union, the California Labor Code is also relevant. Section 6311 thereof provides in part:

> No employee shall be laid off or discharged 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.

The same may be said of Sections 654(a) and 660(c) of the Occupational Safety and Health Act (OSHA). The first of these provisions requires each employer covered by the Act to "fur-

nish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees," and to "comply with occupational safety and health standards promulgated under this chapter."

Section 660(c) is not directly applicable; it merely forbids the discharge of or discrimination against any employee because such employee has filed a complaint, instituted a proceeding, or exercised in any way rights guaranteed to employees by the Act. The section is relevant, however, because of the regulations issued thereunder by the Secretary of Labor. Thus, 29 C.F.R. §1977.12 (1977) provides in part:

> (b)(1). . .[R]eview of the Act and examination of the legislative history discloses that, as a general matter, there is no right afforded by the Act which would entitle employees to walk off the job because of potential unsafe conditions at the workplace. Hazardous conditions which may be violative of the Act will ordinarily be corrected by the employer, once brought to his attention. If corrections are not accomplished, or if there is dispute about the existence of a hazard, the employee will normally have opportunity to request inspection of the workplace pursuant to section. . .[658 of this chapter], or to seek the assistance of other public agencies which have responsibility in the field of safety and health. Under such circumstances, therefore, an employer would not ordinarily be in violation of section. . .[660(c)] by taking action to discipline an employee for refusing to perform normal job activities because of alleged safety or health hazards.
>
> (2) However, occasions might arise when an employee is confronted with a choice between not performing assigned tasks or subjecting himself to a serious injury or death arising from a hazardous condition at the workplace. If the employee, with no reasonable alternative, refuses in good faith to expose himself to the hazardous condition, he would be protected against subsequent discrimination. 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, would 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. In addition, in such circumstances, the employee, where possible, must have sought from his employer, and been unable to obtain, a correction of the dangerous condition.

The validity of 29 C.F.R. §1977.12(b)(2) was attacked in two cases cited by the Company: Marshall v. Daniel Construction Co., 563 F.2d 707 (5th Cir. 1977), cert. denied (1978), and Usery v. Babcock & Wilcox, 424 F. Supp. 753 (E.D. Mich. 1976). In the latter case, the federal district court rejected the challenge and sustained the Secretary; but in the more recent case the Fifth Circuit, by a divided vote, held that the regulation was invalid because beyond the Secretary's grant of authority under the enabling provision of the statute.

The Company's position is based on alternative and independent grounds. It argues, on the one hand, that Section 106.5 (b)(1) of the Physical Labor Agreement, quoted above, deprives Butler of standing to protest his dismissal. The Company also argues, on the other hand, that even if B has standing to challenge his dismissal, his claim of dismissal without just cause is groundless because (1) the work involved was ordered by the responsible federal agency, namely, the NRC; (2) the work involved no violation of federal or state law; (3) the Union has not presented "ascertainable, objective evidence supporting a conclusion that an abnormally dangerous condition for work exists" (the test applied by the U.S. Supreme Court

in Gateway Coal Co. v. United Mineworkers, 414 U.S. 368, 387 (1973), a case relied upon by the Union; (4) there is no documented evidence in the record relating the work at the Humboldt Bay nuclear facility to health problems of employees who have worked there for as long as 15 years; and, finally, because (5) the Union has failed to raise the issue of the alleged hazard of the disputed work through the proper channels, namely, the Health and Safety Committee established in Section 105.3 of the Physical Labor Agreement.

III

The first question to be decided is whether either B or the Union has standing to challenge B 's discharge under the grievance and arbitration procedure of the Physical Labor Agreement. As previously noted, B was, at the time of his discharge, a "regular" General Construction employee who had "completed less than one year of Service"; and under the specific language of Section 106.5(b)(1) of the Agreement, he was subject to termination "for inadequate work performance without recourse to the grievance procedure."

Was B 's work performance "inadequate" within the meaning of Section 106.5(b)(1)? After the successful completion of his first six months of service and the consequent attainment of the status of "regular [General Construction] employee," B was entitled, pursuant to Section 106.5(b)(4), to pay "established at a weekly wage rate." Unlike a Division employee occupying a corresponding status (Section 106.5(a)(3)),

he was not entitled by that status to a "definite job classification."

It is true, as the Union points out, that nothing in the Agreement indicates that part of the regular duties of a regular General Construction employee involves exposure to nuclear radiation. It is also true, as the Company points out, and as confirmed by Union representative Roger Stalcup (Tr. 103), that there are no negotiated job descriptions in General Construction. Stalcup also testified, however, that in the 12 years he had worked for the Company, he did not know of any truck drivers who were assigned to work in radiation areas. (Tr. 102) Against his testimony must be balanced that of G , who said that the principal work performed by General Construction employees in Unit 3 at Humboldt Bay--drilling holes in concrete--had been assigned indiscriminately to "Electricians, Mechanics, Helpers, Carpenters, Truck Drivers, Tractor Operators." (Tr. 30) In order to reduce the total radiation exposure of any given employee, G testified, all General Construction employees at Humboldt Bay were rotated in and out of Unit 3, the work performed in that unit constituting about two-thirds of all work then being done at that facility.

The foregoing evidence is sufficient, in my judgment, to establish that B 's refusal to accept any assignment involving exposure to radiation, rendered his work performance "inadequate" within the meaning of Section 106.5(b)(1) of the

Agreement.

IV

We come, then, to the ultimate question whether B 's refusal to enter the radiation area was protected by statute, specifically, Section 502 of the LMRA, previously quoted. The Union's reliance on Gateway Coal Co. v. United Mineworkers seems to me misplaced. The issue in that case was whether employees could engage in a work stoppage over an alleged safety hazard instead of referring the issue to arbitration under the terms of the applicable collective agreement. Contrary to the implication on page 6 of the Union's posthearing brief, the holding was against the United Mineworkers, and the statement in reference to Section 502 quoted by the Union in its brief was only dictum. The actual holding was that the dispute should have been arbitrated and that the work stoppage was properly enjoinable. Only Justice Douglas thought that disputes over safety conditions were exempt from the federal labor policy favoring arbitration of labor-management disputes over rights.

It is arguable that Section 502 of the LMRA was drafted to deal with concerted refusals to work because of allegedly hazardous conditions, and did not contemplate the type of issue involved in the instant case. Of greater relevance are the provisions of the California Labor Code and of OSHA, and the regulations issued under the latter, to which reference has already been made. So far as it appears, however, the Union has made no effort either to invoke the procedures

available to it under each of those statutes, nor has it referred the instant dispute to the Health and Safety Committee established in Section 105.3 of the Agreement. Instead, the Union seeks in this arbitration proceeding to establish a rule that would, in effect, preclude the Company from assigning any unwilling employee to work in radiation areas.

The question thus arises whether the hazard of radiation at Humboldt Bay is so great that any employee has a statutory right (in the absence of a right provided in the Agreement) to refuse an assignment to Unit 3 without adversely affecting his employment status. On this point I find myself in complete accord with the views of Arbitrator Matthew A. Kelly in Consolidated Edison Company of New York and Utility Workers Union of America, Local 1-2, 71 L.A. 238, 240, as quoted on p. 13 of the Company's posthearing brief. The Consolidated Edison case seems to have involved the same issue as that in the instant case, and the union there involved made the same argument as that advanced by the Union in this case. Kelly commented on the issue as follows:

> The broad question as to whether or not it is unsafe and hazardous to health for employees to be exposed to low-level radiation within the permissible limits set forth by the Federal Nuclear Regulatory Commission is not a matter to be decided by this Board of Arbitration or for that matter by any other such arbitration board established under the provisions of the collective bargaining agreement between the parties. This Board of Arbitration is not a tribunal for the regulation of such questions and indeed the Board is not equipped to address itself to, or let alone adjudicate, such issue. The Board must and does assume that so long as the NRC rules and regulations are complied with and conditions of operation

conform to the essential safety and health protecting provisions of the standards set forth by the NRC and such other regulatory bodies, management's right to require work in containment at its Indian Point facility is lawful, not detrimental to the health and safety of its employees and hence, refusals of such work assignments are subject to discipline.

The assumption that I think must be made as a matter of law may in fact be erroneous. The testimony of the Union's expert witness, Dr. John W. Gofman, whose credentials entitle his views to be treated with the greatest respect, was very persuasive. The decision in this case obviously does not imply a rejection of those views, and it should not be so construed. Rather, the decision reflects the conviction that neither the Chairman nor the Board is qualified to make a judgment as to whether Dr. Gofman or the NRC is correct. I also wish to emphasize that procedures are available to the Union under both state and federal law to challenge the Company's present policy of requiring employees to expose themselves to a certain amount of radiation. Meanwhile, however, the Company must be allowed to operate within the limits authorized by the NRC.

For all of the foregoing reasons I conclude that B 's discharge was not in violation of the Agreement and that the grievance should be denied.

Benjamin Aaron
Chairman