7.1 P
105.1 P
102.13 P

IN ARBITRATION PROCEEDINGS PURSUANT TO THE

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between PACIFIC GAS AND ELECTRIC COMPANY and LOCAL UNION NO. 1245 INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO Involving the Discharge of SC	Arbitration Case No. 81 OPINION BY ROBERT E. BURNS, CHAIRMAN

BEFORE THE ARBITRATION BOARD

Appointed by the Union:

LAWRENCE N. FOSS. Business Representative, and
MANUEL A. MEDEROS, Business Representative
Local Union 1245 International Brotherhood of
Electrical Workers
Post Office Box 4790
Walnut Creek, California 94596

Appointed by the Company:

PAUL E. PETTIGREW, Industrial Relations Representative, and
DAVID J. BERGMAN, Senior Industrial Relations
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Appointed by the Parties:

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APPEARANCES:

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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 applying to operation, maintenance and construction employees (the "agreement").

Pursuant to the agreement and a submission agreement, a hearing was held in San Francisco on January 29, 1980, and February 22, 1980, at which the parties, their attorneys and grievant Sc were present. Pursuant to the submission agreement, the following issue was submitted to the arbitration board constituted by the parties:

> Was the discharge of Sc in violation of the physical labor agreement? If so, what is the remedy?

At the conclusion of the hearing, the issue was submitted to the arbitration board upon the filing of briefs by the parties. The briefs were received by the chairman of the board on May 2, 1980. Thereafter, on May 22, 1980, the arbitration board met and considered the matter submitted to it.

Provisions of the Agreement

Section 102.13 of the agreement provides:

> "If an employee has been demoted, disciplined or dismissed from Company's service 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

Grievant Sc was discharged by the company effective August 10, 1979. A letter of discharge dated August 14, 1979 from Hollister general foreman, B set forth the following:

> "The purpose of this letter is to confirm our discussion on August 14, 1979 relative to your latest act of insubordination on August 10, 1979.

> Inasmuch as your explanation failed to excuse your insubordination particularly in the light of the numerous past warnings, and disciplinary actions for the same type of job misconduct and the clear notice contained in Mr. Mitchell's letter to you of July 31, 1979 and Mr. Bouchard's letter to you of July 26, 1979. These letters stated that further job misconduct would have serious consequences on your employment. Therefore, it is our decision to terminate your services effective 3:30 p.m. August 10, 1979."

Grievant had been employed by the company as an apprentice lineman and a lineman in excess of 19 years. Grievant was considered by B his immediate supervisor, and the general foreman at the Hollister yard of the company, to be a good lineman. His working foreman, S , testified that he was a good lineman and was very safety-conscious. At the time of the events which led to grievant's discharge, he was the shop steward at Hollister, California.

On August 10, 1979, the company arranged for an electric service shut-down on a joint pole owned by the company and Pacific Telephone and Telegraph Company. Pacific Telephone utilizes the lower part of the pole, suspending lead communication cables from cross arms affixed to the pole. The pole is located at East and Seventh Streets in Hollister. The telephone cables are low voltage. The cross arms supporting the cables are drilled to industry standards and are bolted to the pole. The holes supporting the bolts to which the cables are attached are spaced 15-1/2 inches from

the center line of the pole. These measurements are required under General Order 95 of the Public Utilities Commission. The communication cables are supported by a steel cable. G. O. 95 prescribes that the distance be measured from the steel cable (the messenger) to messenger. The measurement from messenger to messenger on the pole in question would be 31 inches but the space between the inside surfaces of the cables was less than 30 inches. There are steel climbing steps inserted on each side of the pole to a point below the telephone cable level. These steps extend out from the pole. Steps such as these are properly in place on poles according to Public Utility Commission regulation. Cables are slung on poles which are approximately 175 feet on each side of the pole here in question. According to some of the testimony, the suspended weight of the cable between poles is approximately 400 pounds.*

B , the Hollister general foreman, reviewed the work procedures with subforeman S before the arrival of the crew. The crew truck had a flexible arm-type hoist (the "bucket"). B told S that the use of the bucket would not be necessary as there was sufficient safe access for the linemen to climb between the cables to reach the higher level of an idle company cross arm on the pole which was to be re-

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* Grievant estimated the weight at 200 pounds.

moved. The access space between the telephone cables was not measured. S did not request the use of the bucket.

The pole at East and Seventh Streets is located across the street from a cannery which at the time in question was operating and emitting steam and machinery noises. The area is industrial and there is a substantial amount of traffic noise on the street.

At about 3 p.m., on Augest 10, grievant was assigned to remove the idle cross arm on the pole. S told grievant that the pole was a little short on climbing space and grievant replied that he would use a sling on one of the cables. This statement was understood by S to mean that grievant intended to move the cable so that there would be greater climbing space.

Prior to this time, the employees had held a Union unit meeting at S 's house. Business Representative Corbett Wheeler was present. Under discussion was the problem that employees were being ordered to climb poles with less than 30 inches of climbing space. The employees stated that they understood that G. O. 95 forbade them to climb such poles. The employees decided that in order to keep from receiving disciplinary action and to comply with G. O. 95, they would move the telephone cables to increase the climbing space so that they would be climbing through a space not less than 30 inches. There are several methods available. Those methods include tying the cables together and disconnecting the cable from

the cross arm and moving it out.

Grievant climbed the pole as directed by S. B. returned to the jobsite at the time that grievant had "strapped off" at the telephone cable level some 23 feet above the ground level. Grievant was positioned in the "bite", that is, with the cable between his body and the pole. His climbing spikes were implanted in the pole below the cable and his head and trunk were outward from the inside cable which was over his safety belt, which was looped to the pole. B. observed grievant loosening the nut that attached the cable to the bolt on the cross arm. S. said to B that he thought grievant was choking the two cables in order to gain additional climbing space, S yelled at grievant to stop what he was doing. There was no response. B who was approximately 14 feet from the base of the pole also shouted at grievant , ordering him to stop what he was doing and to come down. Receiving no response, B shouted a second time at grievant that he was suspended for failure to respond to an order. Grievant did not look down or give any outward indication that he had heard.

Grievant had rigged a sling on the telephone cable. He continued to loosen the net holding the cable to the cross arm. The cable dropped across grievant's safety belt and pushed the belt below his hips and below his knees. The telephone cable fell about four feet because the sling was too long. B shouted the same instructions to grievant, but

grievant gave no indication that he had heard the order to come down. Grievant pulled the cable from his safety belt, pulled up the safety belt, and climbed the pole to the company's cross arm where he belted off. The company's cross arm was about 32 feet above the ground. B shouted at grievant to come down and that he was suspended. Grievant gave no sign that he had heard B He removed the cross arm, rigged a line on the cross arm looking down at S at the base of the pole and passed the arm down to him. Grievant started to come down the pole. When he was a few feet above the telephone company level, he gave his first indication of his awareness of B by cupping his hand to his ear and verbally responding. Grievant then came down the pole. B told him he was suspended for disobeying an order of a supervisor.

Grievant testified that S and B were on opposite sides of the pole and that he did not hear S or B until he cupped his ear; and that when he saw and heard B he came down the pole as ordered. Grievant requested the presence of the shop steward. Grievant and B moved to the general foreman's office. J a trouble man and shop steward, was brought in from the field. Also present was Robert E. Bouchard, the Hollister manager. At the conclusion of the meeting, grievant was suspended. That suspension was converted to a discharge as set forth above.

At 2:30 p.m., on August 11, 1979, James L. Frazier, of

the company's Safety Department, conducted a sound level test at East and Seventh Streets. Also present were B S , and R , a subforeman from Salinas. S and R climbed the pole and belted off at the telephone cable level. B stood where he had stood the day before. The noise level was about the same as that of the previous day. R and S testified that each of them had no difficulty hearing B talk in a conversational tone.

Grievant testified that he believed he would be breaking a law if he climbed a pole which had less than 30 inches of climbing space. That had been the decision of the meeting which had been held the night before. Grievant, therefore, attempted to move the cable out to make legal space. Subforeman S approved because there are several ways to gain more space and the choice was in the discretion of grievant. S testified that grievant had left too much slack in the line when he tied it to the cable and as a result the cable dropped the distance and in the manner which it did. S also testified, somewhat reluctantly, that grievant's leaving too much slack in the line created a hazard. R , called by the company, testified that grievant should have secured the line better and used a hoist if it was too heavy for him to handle.

Dr. Donald A. Belt, an audiologist and a specialist in communicative disorders and communications, industrial noise and medical audiology, testified that grievant had a very

slight high frequency hearing loss, but in general for speech as well as tone testing he had normal hearing. In response to a hypothetical question which included the position of B from the pole, grievant's distance of 23 feet from the ground, B yelling to him, and grievant having financial problems in his mind, a windy day, the cannery across the street letting off steam and making a clattering noise, the traffic noise on the street, and the fact that grievant was not looking at B , Belt testified that grievant's position was an extremely difficult listening situation because of the ambient noise levels and the attention factors of grievant who was engrossed in his work on the pole; that as a result of these factors where the person's attention is not toward the communication, but toward one's own tasks and safety, grievant would not even be aware of a sound; that the sound may be heard by the individual, but it doesn't register on the brain and is irrelevant to the person; that the combination of noises of the traffic and the cannery increases the likelihood that the person would not hear the voice of the person on the ground, particularly since the person was not looking in that direction; that industrial noise is a very good masker of other sounds, and a sound level meter would not measure this effect; that grievant gave the first sign that he was aware of B when he looked at him, cupped his ear, and B gave him the thumbs down signal.

S testified that on other occasions when he had been working on a pole with grievant, he had to

tell grievant that someone on the ground was signaling to him because he had heard the communication and grievant had not heard it.

Belt further testified that at about the time B was calling to grievant, the telephone cable had fallen on his safety belt and his attention was directed to his own preservation.

On September 7, 1976 grievant and another employee refused to climb a power pole on McCloskey Road near Hollister. That pole was also a joint pole carrying electric transmission lines of the company at the top of the pole and the communication cables of Pacific Telephone in the lower portion of the pole. A violation of General Order 95 was observed by grievant and the other employee and they both refused to climb the pole and were suspended. The suspension was upheld by the arbitration board on May 12, 1977, the Chairman of that board being the same as the Chairman of this board. The grounds of the decision were that there was no safety violation unless there was a real and apparent hazard to the employees within the meaning of Section 6311 of the Labor Code, and that under the facts and circumstances of that case there was no clear and apparent hazard to the employees. Prior to the decision in that case, a Deputy Labor Commissioner of California decided that the suspensions of grievant and the other employee were in violation of Section 6311 of the Labor Code

and ordered the company to pay the employees for time lost during the suspension. The decision was unsuccessfully appealed to the Superior Court. Grievant received his pay lost during the suspension period.

The company took the position that the decision of the arbitration board was the correct interpretation of the labor agreement and that the company did not have to provide bucket trucks for linemen when there was less than 30 inches of climbing space but the pole was otherwise safe. The company's letter was not shown to the employees although B did discuss the company's position with grievant in January, 1977. This was before grievant received his pay and before grievant was informed in writing by the company that the incident would not be used against him. Grievant and the employees believed that they had the right to refuse to climb a pole with less than 30 inches of climbing space.

Prior to July, 1979, B allowed employees to use buckets on poles with less than 30 inches of climbing space if he had not examined the location. Subforeman S testified that he believed if he allowed the men in his crew to climb a pole with safety infractions that he would be violating the law. At a meeting in February of 1979, District Electric Superintendent Pembroke stated that employees would not be forced to climb poles with less than 30 inches of climbing space.

M is a field line foreman assigned to Salinas. On or about July 10, he was assigned to Hollister

while B was on vacation. He was told by S . that the employees in Hollister did not climb poles with less than 30 inches of climbing space.

There was a pole to be climbed at Fourth and Washington Streets in San Juan Bautista. M had the pole measured. He called in the employees and told them that there were less than 30 inches of climbing space and asked them if they would climb the pole. On July 10, 1979, grievant attempted to reach P . Being unable to do so, he contacted Hollister Manager Bouchard and the union representative. Bouchard told him that the employees could not be ordered to climb the pole.

Grievant, as well as the other employee, asked for union representation. It was refused on the ground that this was a work order.

Grievant was given permission to examine the pole. There was less than 30 inches of climbing space and there were pole steps below the telephone level extending out from the pole on each side of the pole. He informed M that he did not believe the pole was safe and that he wanted union representation before he answered. M refused him union representation because it was a work-related matter. Grievant and the other employees were suspended. M told grievant that he was going to be terminated and that he should leave the property. B reinstated grievant to return to work the next day. Grievant's suspension was for six

hours.

Because of a statement by an OSHA inspector, grievant believed that he had the right to call on OSHA in the event he observed health or safety violations. Grievant observed what he believed were misdated rubber goods and he anticipated there might be a discipline by the supervisors if the crew used rubber goods stamped with the wrong date. District Manager Bouchard, under date of July 26, 1979, wrote to grievant and in substance stated that about 8 a.m. on July 13, grievant in front of crew personnel asked if the rubber goods were going to be removed from the trucks; that M stated that the rubber goods would not be removed and that it was time to go to work. The letter is attached to this opinion as Appendix A. Thereafter the matter was considered by the fact-finding committee constituted pursuant to the labor agreement. The fact-finding committee determined that the statement in the letter concerning grievant's request that the rubber goods be removed from the truck, and reference to a work stoppage were not supported by independent evidence and that the suspension of grievant was mitigated by reason of the district manager and general foreman's actions and comments. The committee decided that the July 26 letter should be rewritten to eliminate any reference to grievant's comment concerning removal of the rubber goods, but that the letter was proper disciplinary action for insubordinate action. The fact-finding committee was composed of two members

appointed by the union and two members appointed by the company.

B returned from vacation before the end of July and issued an order that no employees could use bucket trucks on poles with less than 30 inches of climbing space unless he specifically approved it.

Grievant testified that after the decision of the Labor Commissioner setting aside his suspension in 1976, in connection with his refusal to climb the pole on McCloskey Road, he believed that he had won the grievance; that B had told him that he had won; that prior to July, 1979, the policy in the Hollister yard was not to climb poles with less than 30 inches of climbing space at the telephone level; that P , in February, 1979, at a safety meeting said that the employees did not have to climb a pole with less than 30 inches of climbing space; that beginning in 1960, he had personal difficulties with M ; that early in July, he heard that M was going to require the crew to climb a pole in San Juan Bautista with less than 30 inches of climbing space; that he spoke to Bouchard, who said that he would speak to M and that nobody is told to break safety rules; that on the morning of July 11, he was called to M 's office and was told there was a pole to be climbed which measured 28-1/2 inches from inside surface to inside surface of the telephone cables and asked grievant if he would climb the pole; that he replied that it would be

necessary for him to look at the pole; that he, M , B and two other employees went to San Juan Bautista and looked at the pole; that he said that he did not consider it a safe pole, but before he answered he wanted union representation; that he did not believe it was a safe pole because it had less than the minimum required, and the pole steps jutted out into the climbing space; that M said no, he could not have union representation at that time; that M asked him again if he would climb the pole and grievant stated he wanted union representation before he answered; that M told him he was going to be dismissed; that M told him again to climb the pole, and when grievant refused, M told him that he was dismissed; that he then went to Bouchard's office and Bouchard told him he was reinstated and to report to work the next morning; that on August 10, at East and Seventh Streets, he had a discussion with B concerning service over the top of a building; that B said "One of us is going to have to go"; that S said that they were short of climbing space on the pole and he said I will just hang it out on a sling, and S said O.K.; that after he climbed the pole and stopped at the telephone level, he tied the sling to the end of the telephone cross arm and around the cable and took the nut off the clamp; that the cable fell and knocked his belt down below his hips; that he then stepped down and under the cable and pulled his belt back up, took off his strap and went up to the secondary

level and removed the cross arm and sent it down to the ground; that he then got the hand line and went back down to the telephone level and got set to give a lift on the telephone cable, and there was B yelling at him; that this was the first that he saw him and he swung to the other side of the pole and put his hand to his ear and said "What?"; that B then pointed down and he descended the pole, and B told him he was suspended; that grievant said he wanted union representation; B said O.K., let's go to my office; that there was quite a bit of noise from the cannery and the traffic on the street; that at the time he was having serious troubles with his house; that his well went dry and his tractor broke down; that after it had been repaired for $700, it was dropped off the delivery truck and he got a bill from the tractor company for $2500, and was sued; that he had a property line dispute; that he had to get to a realtor's office at 4:30; that he had to sell part of the 13-1/2 acres he and his wife had bought, and couldn't sell the property because a lien had been filed against it; there were also problems with the bank; that at the meeting with B Bouchard, S and J , the shop steward, B asked him why he took the cable loose, and grievant replied to make more climbing space; that he told B he did not hear him when he called; that B told Bouchard he did not know for sure whether grievant had heard him; that B said the only issue for discussion was his failure to respond

to a direct order; that climbing space had nothing to do with it.

Grievant recalled that some time prior to July, 1979, B. had a meeting with yard personnel and told them that in the future he would decide whether they could climb through an impaired climbing space of less than 30 inches, and that the Hollister practice theretofore in effect would no longer apply.

Under date of August 13, 1979, in response to a complaint by grievant concerning the climbing space at Fourth and Washington Streets, San Juan Bautista, the Public Utilities Commission through its Chief Electrical Engineer, ordered that the Commission's interpretation that G. O. 95 Rules support the intent of the authors to allow half of the cables bordering the climbing space at the communication level to impinge such climbing space; and further, that the minimum clear climbing space is 28 inches.

Under date of April 18, 1977, the Chief Electric Engineer of the Public Utilities Commission in a letter to grievant stated that the only judgment to be offered by the Public Utilities Commission was whether a pole was or was not in compliance with the climbing space requirements of G. O. 95, and that an opinion of climbability or the degree of hazard present is outside the purview of G. O. 95.

Grievant and other employees filed a complaint with the U. S. Department of Labor, Occupational Safety and Health

Administration. The complaint charged a violation of Subsection 11(c) of Federal OSHA Regulations providing that no employer shall discharge or in any manner discriminate against an employee because the employee has filed any complaint or cause to be instituted any proceeding under the Act. Under date of January 14, 1980, an Operations Review Officer of the Department of Labor notified the company that the complaints had been dismissed.

Grievant filed charges with the National Labor Relations Board alleging violations of the National Labor Relations Act. The charges were that on July 11, or thereabouts, the company denied union representation to grievant where there was a question of safety about climbing a pole in San Juan Bautista, and that subsequently grievant was suspended and no union representation was allowed by the employer. The second ground of the charge was that on or about August 15, the company discharged grievant because of his union activities and because he filed charges with the Board. The Board has administratively deferred to the arbitration board the matters set forth in the charges.

Discussion and Opinion

The principal ground for grievant's discharge was his alleged refusal to comply with the order of Bengard to climb down the pole on East and Seventh Streets in Hollister on August 10, 1979. There is no question that B , as well as S yelled at grievant several times and there was no

response and that grievant did not climb down the pole until he looked at B and saw his hand motion. The serious factual question is whether grievant heard B .

The expert testimony of Dr. Belt has been outlined above. Dr. Belt was of the opinion that under the circumstances and in consideration of the noise and grievant's attention to his work while he was on the pole, grievant did not hear B or S , and that it was only when he glanced down at the ground and saw B 's hand motion that he realized or knew that he was being ordered off the pole. Grievant testified that he did not hear B . and did not know he was being ordered off the pole until he looked at B , and it was then that he heard B 's order.

If motivation played any part in grievant's conduct, it would be most unlikely that he would have refused B 's order. Grievant's objections to the orders of supervision were centered around climbing space through telephone cables and other safety matters. It is an understatement to say that grievant was preoccupied with safety matters. His preoccupation may have been induced in part because he was shop steward and was genuinely concerned with his own safety and the safety of his fellow employees. His preoccupation with safety matters and his adamant refusals to perform any work which he believed to be in violation of law or safety regulations would not seem to extend to a defiance of an order to come

down off the pole. The foregoing matters do not resolve the clear conflict in the evidence produced by the company and the union with respect to whether grievant heard B 's order. These matters do indicate that grievant would have had no motive to disobey the order because he had already corrected what he thought was a violation of G. O. 95 when he unfastened the cable from the cross arm and in the process almost propelled himself from the pole.

We have the direct testimony of grievant that he did not hear B 's order. There is the supporting opinion evidence by Dr. Belt. The demonstration by the company which took place the following day was performed under circumstances when the linemen on the pole knew that they would be asked whether they heard the voices of the men on the ground. Under such circumstances, any person is more likely to hear and mentally recognize a sound than one who is not expecting that sound. He is waiting for the call.

In discharge cases there should be at least a preponderance of the evidence with respect to each ground for the discharge. It cannot be held that the evidence by a preponderance establishes that grievant on August 10, 1979 heard B yell at him while grievant was occupied on the pole. B stated at the meeting on August 10 in the office that he could not be sure that grievant had heard him. Such a statement was reasonable and proper because grievant gave no indication by bodily movement or otherwise that he had heard

B

At the hearing and in its brief, the company asserts that grievant violated company safety rules and engaged in a very hazardous venture when he rigged his sling and removed the supporting nut which allowed the telephone cable to fall on his belt and force it down below his knees. There is no doubt that a lineman of 20 years' experience should know that the telephone cable between the two supporting poles on each side of the pole on which grievant was working, was extremely heavy, weighing as it did somewhere between 200 and 400 pounds. In order to avoid what grievant considered a G. O. 95 violation, grievant engaged in an operation which was hazardous to himself. He did not perform the operation properly. The hazard was real and should have been apparent to him. Grievant had been told by subforeman S that he could handle the matter of the less than 30 inches of climbing space as he saw fit. He was, of course, not authorized to perform it negligently in violation of company safety rules and in danger to himself. But the charge against grievant was not for his improper handling of the telephone cable, but for insubordination. It was not insubordinate to attempt to tie off the telephone cable and to remove the bolt fastening it to the cross arm. It was negligence and a safety violation by a person who seems to be constantly concerned with safety matters. The letter of August 14, 1979 signed by B refers to "your latest act of insubordination on August 10,

1979", and "your explanation failed to excuse your insubordination, particularly in the light of numerous past warnings and disciplinary actions for the same type of misconduct." There was basis for disciplinary action for grievant's improper job performance on August 10, but that act was not the ground or apparently a ground for his discharge.

The union contends that the company committed an unfair labor practice in refusing to allow grievant and the other employees union representation on July 11, 1979 with respect to the order to climb the pole at Washington and Fourth Streets in San Juan Bautista. Grievant did request union representation because he believed that it was a work-related problem and not a union problem. The penalty against grievant and the other employees had been discussed the previous day in a conversation between District Superintendent Banta and M. should grievant and the other employees refuse to perform the work assignment. Grievant and the other employees knew or suspected that they would be ordered to climb the pole in San Juan Bautista. Union representation as requested by grievant and the others would have been useless because the only question was whether the employees, including grievant, would climb the pole. They had decided beforehand that they would not climb the pole. Legal arguments at the work place are out of place. Few, if any, businesses can be run if employees constantly contest work orders and demand union

representation for a discussion. The work place is not a forum for debates. The employees have the option of refusing a work order if a real and apparent hazard reasonably and objectively is present. There was only one question on July 11, and that was whether grievant and the other employees would climb the pole at San Juan Bautista. Grievant and the other employees had decided that the pole violated G. O. 95 because there was less than 30 inches between the telephone cables. The question which M wished to put to them was whether or not they would comply with the order. The purpose of M was not to obtain facts to support disciplinary action as stated in Alfred M. Lewis v. N.L.R.B., 587 F. 2d 403 (9 Cir. 1978), but to learn whether grievant and the other employees would perform the work.

Grievant was thus faced with the dilema which is unavoidable when alleged safety hazards are encountered in the work place. If there is a real and apparent hazard which can be objectively determined, the employee may refuse the order. If there is no real and apparent hazard, then the employee acts at his peril in refusing because he has refused a proper work order. The Supreme Court in Whirlpool v. Marshall, 63, L. Ed. 2d 154, 159 upheld an OSHA regulation providing in part:

> "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 con-

clude 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 regulatory statutory enforcement channels."

The confrontation on July 11 did not concern the right of grievant and the other employees to engage in concerted activity for the purpose of collective bargaining or other material aid or protection as provided in Section 7 of the National Labor Relations Act (29 U.S. Code Section 157) or Section 8 (a) 1 of the Act (29 U. S. Code 158(a)(1) forbidding an employer from interfering or restraining or coercing employees in the exercise of those Section 7 rights. The confrontation simply concerned the question whether grievant and the other employees would climb the pole at San Juan Bautista. Grievant and his fellow employees had decided that the pole violated G. O. 95 and that they were not required to climb it. The company through its supervisors had determined and decided that there was no real and apparent hazard and that climbing space of less than 30 inches as provided by G. O. 95, did not create a real and apparent hazard. As stated above, an argument or debate with the union representative would have been useless, time-consuming and inappropriate. The union representative would not have any better perception of a real and apparent hazard than grievant and would probably have had less perception of such a hazard if he had never been a lineman.

It should be noted that B had praised grievant

for calling attention to possible safety violations. At safety meetings, which are held bimonthly, B has complimented grievant for his participation in the company's safety program.

B sincerely believed that grievant had heard his order to come down the pole on August 10, and accordingly determined in the light of that refusal and grievant's record with the company of insubordinate acts, including the insubordinate act with respect to the rubber goods, that grievant should be discharged. His decision had nothing to do with grievant's union activities. The evidence does not support the contention of the union that grievant was discharged because of his activity as union steward or because of other union activities or because he filed a charge with respect to the July 11 incident. If the finding here was that grievant had heard B ' order on August 10, the discharge would be upheld. Accordingly, there were no violations of Sections 7 or 8 (a)(1) of the National Labor Relations Act.

The union contends that the climbing step below the telephone cables was a safety hazard at San Juan Bautista and at Hollister. The P.U.C. on September 12, 1979, decided that such steps are proper and normal on a joint pole and are not infractions of G. O. 95, and that the only infraction at San Juan Bautista was an idle "J" hook which was not in the climbing space and did not prevent safe access to the work space. The U. S. Department of Labor has dismissed

the complaint by grievant and the other employees with respect to alleged safety violations at San Juan Bautista. The Deputy Labor Commissioner of California found that no violation of Section 6310 of the Labor Code occurred on August 10, 1979. These findings are not conclusive here but they are persuasive. An unimpeded climbing space of 28 inches is not a real or apparent danger or hazard. It is no danger or hazard at all. Less than 30 inches between telephone cables may be a violation of G. O. 95 by the telephone company, but it is not a real and apparent hazard to the lineman per se.

The step below the cables is something else. The P.U.C. through its Chief Electrical Engineer says that "this is a common, normal method of stepping joint poles and is not an infraction of G. O. 95." The step could be a hazard if the lineman slipped and fell on the step, but the climbing of any pole from the ground up involves some hazard. The only answers would be to remove the steps or use buckets on all poles with steps. There are hazards in most parts of life - in the home, travelling to and from the work place, and at the work place. Examples come easily to mind. All hazards cannot be eliminated. There must a real danger of death or serious injury keeping in mind the training and experience of the persons climbing the poles and doing the work. The step below the telephone level is not a real and apparent

hazard or danger to a journeyman lineman climbing the pole because he is trained and experienced to do it properly.

As stated above, grievant was not discharged because of his negligent performance on the pole on August 10 or his violation of the company safety rules which include the following:

> "Each employee shall use reasonable care in the performance of his duties and act in such a manner as to assure at all times maximum safety to himself, his fellow employees and the public.
>
> . . . .
>
> "No employee shall attempt work for which he is not mentally and physically fitted."

Grievant's personal problems are not an excuse for endangering himself because he should not have worked on August 10 if he was mentally and emotionally upset. His preoccupation with his personal problems probably contributed to his failure to hear Bengard. His failure to hear was not wilful. Refusal to obey an order is a wilful and intentional act and the evidence does not establish that grievant heard or intended to disobey B 's orders.

By reason of the foregoing, the suspension on July 10 should be upheld and the discharge should be set aside because it was without just cause.

Award

Pursuant to the physical labor agreement, the situplations, and the evidence, the following award is issued:

1. The suspension of grievant on July 10, 1979 was for just cause.

2. The discharge of grievant Sc was in violation of the physical labor agreement and he should be reinstated with seniority and benefits restored and back pay at the straight time rate from the date of his discharge to the date of his reinstatement less any wages or earnings of grievant during the period of his discharge.

3. Jurisdiction is reserved in the event the parties do not agree on the amount of back pay.

Dated: May 23, 1980.

Concur/~~Dissent~~ — Lawrence N. Foss

Concur/~~Dissent~~ — Manuel A. Mederos

~~Concur~~/Dissent — Paul E. Pettigrew

Concur/Dissent — David J. Bergman

Concur — Robert E. Burns, Chairman