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In the Matter of an Arbitration]

between]

INTERNATIONAL BROTHERHOOD OF]
ELECTRICAL WORKERS, LOCAL]
UNION 1245,]

Complainant,]

and]

PACIFIC GAS AND ELECTRIC]
COMPANY,]

Respondent.]

Re: Bypass for promotion and]
demotion of [REDACTED] ck]

Arbitration Case No. 83

OPINION AND DECISION

OF

BOARD OF ARBITRATION

SAM KAGEL, Chairman

DAVID J. BERGMAN, Company Member

I. WAYLAND BONBRIGHT, Company Member

ROGER W. STALCUP, Union Member

LAWRENCE N. FOSS, Union Member

ISSUE:

Was the Grievant's (██████████) bypass for promotion and subsequent demotion in violation of the Parties' Physical Labor Agreement? If so, what is the remedy? (Tr. 3; Jt. Ex. 2)

INTRODUCTION:

The Grievant was employed August 27, 1968. On September 4, 1979, he was demoted from his position as a First Operator at Rock Creek Power House, which position he had held since 1970 when he was promoted from a Second Operator. He was demoted to the position of Helper, Hydro-maintenance, incurring a salary reduction. Prior to his demotion, the Grievant prebid a Roving Operator position at the Bucks Power House and was bypassed for that position. Also, he later prebid a First Operator vacancy at Caribou Power House and was bypassed for that position. The Grievant worked as a Helper until January 21, 1980, at which time he prebid and was awarded a System Operator, No. 2, position at the Chico substation. The demotion and bypass of the Grievant for the two prebids are at issue in this case.

The reasons for the Grievant's being bypassed for the two prebids were the same reasons which led to his demotion from First Operator at Rock Creek. While employed as a First

Operator at Rock Creek, the Grievant applied for and obtained an Award, dated June 26, 1979, from the Workers' Compensation Appeals Board for permanent hearing loss. The Appeals Board concluded that the Grievant had suffered a permanent 9% reduction of hearing in the right ear and a 21% reduction of hearing in the left ear and awarded him \$1,312.50 (Un. Ex. B, Tab i).

In the course of the Workers' Compensation proceedings, the Grievant was examined by three doctors. It was based upon these doctors' reports, and the further examinations undergone by the Grievant, that the Company decided to demote the Grievant and which caused his bypass for Roving Operator and Operator at Caribou.

The Company's position is that the demotion was a proper accommodation under the Agreement because of the potential increased liability of the Company should the Grievant continue as an Operator and incur further industrial hearing loss; and that the requirement that the Grievant wear protective hearing devices would interfere with his ability to perform these job duties properly. The Union takes the position that the Grievant was not demoted because of his medical problem but because he filed the Workers' Compensation claim.

AGREEMENT PROVISIONS:

Under Title 7, Management of Company, the Agreement provides, in part as follows:

"TITLE 7. MANAGEMENT OF COMPANY

"7.1 The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause;" (Jt. Ex. 1)

Title 112, Sick Leave, provides in part as follows:

"TITLE 112. SICK LEAVE

"...

"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." (Jt. Ex. 1)

FACTS -- DEMOTION:

The Grievant was demoted from First Operator at Rock Creek to Helper, Water Collection, effective September 4, 1979 and was not allowed to work scheduled shifts as First Operator on September 1, 2, and 3, 1979 (Jt. Ex. 4, p. 3; Un. Ex. A, Tab 2).

An intra-Company memorandum stated the reasons for this demotion as follows:

"This decision was based on audiometric examinations made by three different doctors over a period of time (10 months) all three doctors have indicated the possibility of further hearing loss if he continues as a powerhouse operator even with the use of ear plugs worn at all times. One doctor recommends two sets of ear plugs when in noisy locations.

"Consideration has been given to all aspects of a powerhouse operators responsibilities, including among others safe operation of the equipment, safety of personnel working in the powerhouse, personnel who have radio contact including helicopter control. The powerhouse foreman, Supervisor of Generation and the Hydro Superintendent feel that Tom cannot effectively operate a powerhouse while wearing ear plugs or ear muffs." (Un. Ex. A, Tab 12)

Doctor's Reports:

The following constitute excerpts from Doctors' Reports issued after examining the Grievant:

"I would suggest the patient be employed in a position where he has minimal exposure to noise. If the patient is reliable with the use of noise reduction devices, then I would think he would be able to maneuver in noisy environments as long as he has effective noise reduction devices. To answer your question relative to his present employment as a power house control operator, I suspect that with the use of two kinds of noise reduction devices, i.e., ear plugs and ear muffs, the patient would be able to effectively operate for the short periods of time in the decibels of 87 to 105 that you indicated without any significant neurosensory trauma which would lead to further degeneration of the hearing. I think consideration should be given for the patient to wear noise reductive devices while exposed to 67dB in the power house control room. This however, may not be feasible because of the need to communicate with other people. The second best alternative would be to employ the patient in a fairly noise free environment for most of his working hours. This would even allow him the opportunity to be exposed to high levels of noise if this were done with adequate noise reduction devices. If for example, the patient was employed in a roving operator job, with exposure to as much as 100dB for 75 minutes, or as much as 105dB for 5 to 10 minutes, I do not think the patient would have any significant tendency for further noise induced deterioration as long as he was simultaneously using two types of noise reduction devices. He should have an effective reduction in noise of at least 30 to 40dB depending upon the frequency of noise in the environment, and this would drop his term exposure at say 100dB to at least 60 to 70dB which would be sufficient to minimize his chance for further neurosensory hearing impairment." (from report of Larry R. Bartschi, M.D., dated August 20, 1979. Examination at referral of Company; Jt. Ex. 4)

* * *

"Considering the noise exposure summary and the patient's age, it is my impression that the hearing loss is due to excessive noise exposure while employed at PG&E. Working around these noise levels will very likely cause further deterioration in his hearing unless earplugs are worn. It is even possible to occur to a certain extent even with the earplugs. I am assuming no audiogram was available prior to the onset of this employment. Please inform me if one is available. I repeat, earplugs are a must at all times when exposed to these noise levels." (from report of Dale L. Tipton, M.D., dated March 1, 1979. Examination at Company request. Jt. Ex. 5, p. 10 et seq)

* * *

"Mr. ██████ has a bilateral sensorineural type hearing impairment, which I feel is noise-induced and consistent with that found in exposure to excessive industrial noise. I feel that by far the major portion of his noise-induced hearing loss is secondary to his occupation as a hydroelectric power house operator over the last 10 years. A minor portion is secondary to his occasional episodes of deer hunting, his occasional use of a chainsaw, and his intermittent use of a motorbike. The hearing impairment is permanent and will not be alleviated by medical or surgical therapy. He certainly should avoid further exposure to excessive industrial noise in an effort to prevent progression of his hearing loss. Serial audiometric studies are indicated." (from report of N. D. Mulcahy, M.D., dated October 18, 1978. Examination at request of Grievant's Counsel in Workers' Compensation matter. Jt. Ex. 5, p. 15 et seq).

Duties of First Operator:

The First Operator is responsible for the operation of Rock Creek Powerhouse, Bucks Creek Powerhouse, Cresta Powerhouse and Poe Powerhouse. Approximately 90% of the First Operator's eight-hour shift is spent in the control room, where one of the responsibilities is to answer the telephone and receive and transmit messages on the radio. The First Operator also conducts inspections through the powerhouse of the generator, the turbine, the switchgear and the outside transformers. He keeps a log book. The control panel sounds alarms and shows warning lights for various malfunctions of equipment (Tr. 8-10).

Primary Contentions of Employer:

The two main contentions of the Employer with respect to the Grievant's ability to perform in this job are that, first, he would not be able to communicate on and hear the telephone and radio using the ear protection he is required to wear in the control room to avoid further injury; and, second, that he would not be able to detect certain noises or sound changes when conducting inspections which may indicate possible sources of trouble with equipment.

T. E. Shaw, Hydro Production Superintendent, testified that one way in which an Operator detects malfunctions is by listening to the equipment, which, in his opinion, the

Grievant would be unable to do wearing double ear protection (Tr. 13, 15, 21-22). This testimony was corroborated by Rock Creek Powerhouse Foreman Wayne Turner (Tr. 40-41; See also Un. Ex. A, Tab 13).

DISCUSSION--DEMOTION:

Hearing protection is not normally required in the control room because it falls below the decibel level where such protection is required. Ear protection is required of all Employees in other areas of the powerhouse where the decibel level exceeds levels set forth for occupational noise exposure by the Division of Industrial Safety (See Un. Ex. A, Tab 18). The Grievant would be required to wear single hearing protection in the control room and double hearing protection in the noisier areas of the powerhouse.

Dr. Bartschi testified that he would recommend a custom-made ear mold for the Grievant's ear canal as the hearing protective device to use in the control room; that it would cause him to have difficulty communicating with people in the control room; but that continual removal of the device when necessary would not render them less effective if put on properly (Tr. 82-83).

Company and Union evaluations of the hearing protection required to be worn by the Grievant in the control room were submitted with the fact-finding materials (Un. Ex. A, Tab 15-16). The hearing protection evaluated by the Company representatives indicated that the desk phone could be heard (two bells); that the Rock Creek enunciator bells could be heard; that the radio could be heard "if at a high level" and that the Supervisor's bell could be heard "with difficulty." The two First Operators who were asked to evaluate the job using hearing protection indicated that plugs were used for several hours and there was no difficulty in using phones or communicating. It is noted that the three Operators who tested the hearing protection had some degree of audio impairment themselves (Un. Ex. A, Tab 15, p. 3).

A demonstration at the hearing at the Rock Creek control room showed that it was possible to hear the telephone and conversation in the control room while using hearing protection (Tr. 12). The CO2 siren in the basement could not be heard with or without hearing protection by the Arbitrator, the Court Reporter and others at the hearing (Tr. 17-18).

The Grievant testified that he did not try using hearing protection in the control room when he was First Operator (Tr. 53). Shaw testified the Grievant had used

hearing protection in the control room prior to his demotion (Tr. 34). Rock Creek Powerhouse Foreman Wayne C. Turner testified that there was no decrease in the quality or efficiency of the Grievant's work prior to his demotion (Tr. 45). If he in fact did use hearing protection, it apparently did not interfere with the performance of his duties in the control room, based upon Employer witness Turner's testimony.

The Grievant testified that he had no problem hearing the radio or telephone on his job (Tr. 55); that he was not the only Operator bothered by noise level in the control room at Rock Creek (Tr. 63); that he made suggestions to Supervision with respect to how some of the noise could be reduced (Tr. 63); that with respect to warning noises, problems of a serious nature that could cause damage to a unit would be detected and shut down automatically by the protective equipment on the unit faster than the Operator would be able to take action (Tr. 64); that other indications such as vibration, smell and sight will warn the Operator of malfunctions (Tr. 66-67); that it would occur rarely, if ever, that an Operator would be forewarned in time to take action before the automatic system by virtue of hearing sound (Tr. 64-65).

It is noted that the First Operator makes only periodic inspections spending 90% of the job in the control room (Tr. 8). Thus, any changes in sound would have to be detected by an Operator during their routine inspections during that limited period of time. Further, as noted above, in the higher noise level areas outside the control room at the Rock Creek Powerhouse, all Employees are required to wear single hearing protection while doing inspections (Tr. 15, 30). The doctor who testified at the hearing on behalf of the Company, Doctor Bartschi, recommended that the Grievant use double hearing protection in the noisier areas of the Rock Creek Power Plant in order to avoid further progressive hearing loss (Un. Ex. A, Tab 7). Dr. Bartschi's report stated that double hearing protection reduces noise levels by 30 to 40dB (Un. Ex. A, Tab 7). Single hearing protection provided by the Company reduces noise exposure by 30dB (Un. Ex. A, Tab 15, p. 2). Thus, that the reduction in noise level is substantially different as between single and double hearing protection, with a concomitant effect on job efficiency, has not been persuasively established.

Based upon all of the foregoing, the conclusion is required that the Company's position that the Grievant cannot adequately function in the position of First Operator because

of the requirement that he wear hearing protection has not been supported by the evidence and testimony presented.

Progressive Hearing Loss:

In addition to the contention of the Company respecting the requirement that the Grievant wear protective hearing devices, the Company's other main contention is that the Grievant may suffer increased hearing impairment as a result of remaining in that position; and that the Company would thus be subjecting itself to further liability in this regard. This contention is not supported by the record.

The Company's own witness, Dr. Bartschi, recommended in his letter of August 20, 1979, first, that the "patient [the Grievant] be employed in a position where he has minimal exposure to noise" (Jt. Ex. 4). But, Bartschi went on to state as follows:

"If the patient is reliable with the use of noise reduction devices, that I would think he would be able to maneuver in noisy environments as long as he had effective noise reduction devices. To answer your question relative to his present employment as a power house control operator, I suspect that with the use of two kinds of noise reduction devices, i.e., ear plugs and ear muffs, the patient would be able to effectively operate for the short periods of time in the decibels of 87 to 105 that you indicated without any significant neurosensory trauma which would lead to further degeneration of the hearing." (Jt. Ex. 4)

Dr. Dale L. Tipton, in his Report of March 1, 1979, informed the Company that:

"Working around these noise levels will very likely cause further deterioration in his hearing unless ear plugs are worn. It is even possible to occur to a certain extent even with the ear plugs." (Jt. Ex. 5, p. 11). (Emphasis added).

However, with respect to the last sentence, above, the record reflects that some continued progressive hearing impairment may occur due to events which occurred prior to the use of hearing protection in this position, which takes a period of time to show up. As Dr. Bartschi stated in his letter of August 8, 1979:

"The prognosis for the patient's future hearing is a difficult one to make. It is quite probable that if the patient was placed in an extremely quiet environment on a 24 hour basis, that he would show continued deterioration of his neurosensory hearing levels over the next few years. This continued deterioration would be secondary to previous noise exposure induced injury of the hair cells of the inner ear which had not sufficiently degenerated to a point that objective hearing deficits were measurable. This deterioration could also be due to his progressive age and/or a hereditary predisposition for early sensorineural hearing impairment." (Jt. Ex. 4). (Emphasis added).

It is noted that the opinions of the above doctors with respect to progressive hearing impairment are stated in terms of "possible" and "probable," not in decisive terms. The

actual audiometric studies performed on the Grievant reflect that he has not experienced significant deterioration in his condition. In a letter of March 20, 1980 Dr. N. D. Mulcahy wrote, after conducting audiometric studies with the Grievant on March 11, 1980 and comparing those to ones performed on the Grievant on October 17, 1978, that:

"You will find that there has been no progression in this gentleman's hearing impairment. It is therefore my feeling that this gentleman is not more susceptible to a hearing loss from noise exposure as a result of his prior hearing impairment, and whatever protection this gentleman is using has been working adequately as there has been no progression of his hearing impairment." (Un. Ex. B, Tab J). (Emphasis added).

It should be noted that the Grievant remained on the job as First Operator at Rock Creek until the beginning of September 1979. Thus, he was working as a First Operator for a substantial portion of this period for which the tests were compared.

Dr. Bartschi testified on direct examination that he "... would expect a further deterioration [in the Grievant's hearing] if we tested it every year" (Tr. 80-81). But, on cross-examination, after reviewing the reports and testing of Dr. Mulcahy for October 18, 1978 and March 20, 1980, respectively, he testified "... I would agree with him [Dr. Mulcahy] there is not a big difference" (Tr. 85).

The record fails to show that the Grievant is reasonably likely to suffer significant progressive hearing loss as a result of current exposure to noise level if he uses the hearing protection suggested by the doctors who examined him. Since the medical opinion provided does show the Grievant may suffer some progressive hearing loss due to prior exposure to noise levels, annual audiometric examination, and of course the use of hearing protection, are reasonable to require in this case. If the Grievant should show significant signs of additional hearing loss or damage due to his current exposure to the noise levels involved in the First Operator job, or, should it be established that any increased hearing impairment results in his being unable to perform successfully in that position, then a reevaluation of the Grievant's job status at that time would be appropriate.

CONCLUSION--DEMOTION:

In sum, the record fails to show a reasonable probability that the Grievant's hearing limitations, due to actual physical limitations or due to the required use of hearing protective devices, would significantly reduce his effectiveness in the First Operator job as compared with other Employees in such a position. Nor has the record shown a reasonable

probability, under the facts presented here, that the Grievant will incur further progressive hearing loss as a result of continuing in that position. Since these are the reasons advanced for the Grievant's demotion, his demotion under these circumstances may not be sustained.

DECISION--DEMOTION:

1. The Grievant's demotion from First Operator at Rock Creek Powerhouse was in violation of the Parties' Physical Labor Agreement. The Grievant shall forthwith be reinstated to that position provided that he notifies the Company in writing within 10 days of this Decision of his desire to be reinstated. He shall receive back pay representing the difference between what he earned from the date of his demotion from First Operator at Rock Creek and what he would have earned as First Operator at Rock Creek up to the date that he successfully bid the System Operator's job in Chico. If the Grievant determines that he desires to remain in his present position, he shall likewise receive the difference in pay between what he received after the demotion and what he would have earned for the period between his demotion and his entrance to his present position. Computation of the exact amount due the Grievant is remanded to the Parties, the Arbitrator retaining jurisdiction in the event of a dispute. The back pay shall be computed on a straight time basis.

