

In the matter of an Arbitration

between

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 1245,

Complainant,

and

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

Re: Temporary Rain Shelters.
Arbitration Case No. 118.

OPINION & DECISION

of

BOARD OF ARBITRATION
San Francisco, California

BOARD MEMBERS:

UNION MEMBERS:

Messrs. Roger Stalcup and Wayne Greer
INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL UNION 1245
P. O. Box 4790
Walnut Creek, California 94596 .

COMPANY MEMBERS:

Messrs. Parley Merrill and
I. Wayland Bonbright
PACIFIC GAS AND ELECTRIC COMPANY
245 Market Street
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CHAIRPERSON:

Barbara Chvany
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APPEARANCES:

On Behalf of the Union:

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On Behalf of the Employer:

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INTRODUCTION:

This dispute arises under the Collective Bargaining Agreement between the Parties (Jt. Ex. 1, 1A). Pursuant to that Agreement and the Submission Agreement pertaining to this arbitration case, the above Arbitration Board was appointed and a hearing was conducted on October 23, 1984, in San Francisco, California (Jt. Ex. 2).

At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses and to present relevant exhibits. The Parties stipulated that the grievance has been pursued through the grievance procedure and is properly before the Board for hearing and decision (Jt. Ex. 2, Tr. 4).

A verbatim transcript of the proceedings was taken. Post-hearing briefs were received by the Chairperson on January 26, 1985.

ISSUE:

Is the requirement that certain gas department Employees work under temporary rain shelters violative of the Parties' Agreement? (Tr. 4; Jt. Ex. 2).

BACKGROUND:

The dispute in this case involves the assignment of non-emergency field work to be performed under temporary rain shelters by gas transmission and distribution crews during inclement weather. The shelter in question (referred to as either a canopy or a tent) is approximately 7' by 15' and is carried on the truck (Tr. 24; Co. Ex. 1). It is installed temporarily at the work site and then torn down by the crew when the work has been completed.

The canopies were first used in November, 1982, when they were provided on a trial basis to six crews within the Sacramento Division (Tr. 17, 54; Co. Ex. 2). The trial period was initially intended to last a period of one year and was to determine whether the use of these temporary shelters would be feasible and cost-effective (Tr. 17, 36). The program was begun on a voluntary basis (Tr. 17, 37, 38, 62, 72).

Certain types of work were pre-selected to be performed during inclement weather under the canopies (Co. Ex. 2; Tr. 24). The work in question was routine work as distinguished from emergency work (Tr. 20).¹ Through the performance of this work

¹ The Union does not dispute that Employees are expected to perform work in emergency situations notwithstanding inclement weather (Tr. 12, 13, 35, 72).

under the canopies, the Company's goal was to increase productivity and reduce backlog (Tr. 25). Under prior practice, the routine work performed under the canopies would not have been performed in inclement weather but would have been postponed to clear-weather days (Tr. 9, 20, 37, 63, 69).

In implementing the canopies, the Company recognized they could not be employed in all conditions. In the event of high winds, heavy downfall of rain or other hazardous conditions, the tents were not to be utilized (Tr. 18-19, 31). The trial period statistics reveal an approximately 40% utilization, based upon the actual hours the six crews performed productive work under the canopies out of the total man hours during inclement weather for which canopies were available (Tr. 57; Co. Ex. 2).²

The setting up of the tent usually requires a three-man crew, although it is possible in some instances to set up a tent with a two-person crew (Tr. 45-46). The time involved varies depending upon the size of the crew, the weather conditions and other factors (Tr. 46-47, 74). Under less than perfect conditions it would normally take a minimum of 15 to 20 minutes to set up a canopy (Tr. 75). If it was already raining when the crew was sent out, the set-up process would have to be performed while the crew was exposed to the elements. Similarly, when tearing down the tent, placing safety equipment outside the tent area, and obtain-

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The Union raises a number of contentions regarding the statistics compiled by the Company during the trial period. These are discussed, below.

ing tools from the truck, the Employee would be outside the shelter of the tent.

The Company furnished ponchos to the crews utilizing the canopies. The poncho provided some light rain protection; however, it was recognized that better rain gear would be required to afford full protection from the elements (Tr. 26, 27).

Records were maintained during the trial period regarding production and any problems identified in the utilization of the tents (Tr. 27). The data was then compiled by the Company based upon the daily reports made out by the crew foremen (Tr. 28, 29; Co. Ex. 4, 5; Tr. 32-33; Co. Ex. 2; Tr. 55-57). The statistics developed by the Company contained projections of the potential labor savings that could be realized by expanded utilization of canopies throughout the system (Co. Ex. 2; Tr. 58, 59).

A number of problems were identified during the trial process. These included inadequate rain gear, spoil getting wet, water running into excavation, water dropping between the canopies and the truck, the instability of the tents in wind or on slopes, truck exhaust being trapped in the tents, leaky seams, the need for a three-man crew to set up the tent, problems with the height of the tent poles, slippery truck decks, wet and slippery tools, traffic and visibility (Co. Ex. 2; Tr. 21, 22, 38, 48, 50, 51, 53, 76-83, 94, 96, 97, 102; Co. Ex. 2, 3). Solutions were achieved for some of the problems, for example, sealant was applied to leaking seams, non-skid surface was added to truck decks, and

additional rags were issued to wipe off tools. It was suggested that spoil be stored inside the tent or used as a dam to prevent water from running into the excavation (Co. 2, 3; Tr. 21, 22, 23, 39, 48, 50, 53). Solutions were proposed as to certain other problems (for example the inadequate rain gear, the exhaust and the length of the tent poles) but the record fails to show all of these proposed solutions were, in fact, implemented.

While the Company presented testimony to establish the tents would not be used in situations in which they were unsafe, the Union presented testimony to show crew foremen were assigned to use the tents in some circumstances they did not consider safe (Tr. 73, 79, 80, 97-99, 100).

The Company continued to assign routine work under the tents following the one-year trial period. This practice continued during the second winter period of 1983-1984 (Tr. 60). During this time, the Company was still gathering information, although the daily statistics were not being recorded (id.). Union witnesses testified that the program ceased to be voluntary after the initial trial period (Tr. 73).

AGREEMENT PROVISIONS:

7.1 MANAGEMENT OF COMPANY

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.

* * *

105.1 PREVENTION OF ACCIDENTS

(a) Company shall make reasonable provisions for the safety of employees in the performance of their work...

* * *

107.1 ANTI-ABROGATION CLAUSE

Company shall not by reason of execution of this Agreement (a) abrogate or reduce the scope of any present plan or rule beneficial to employees, such as its vacation and sick leave policies or its retirement plan, or (b) reduce the wage rate of any employee covered hereby, or change the conditions of employment of any such employee to his disadvantage. The foregoing limitation shall not limit Company in making a change in a condition of employment if such change has been negotiated and agreed to by Company and Union.

* * *

203.1 [from TITLE 203. INCLEMENT WEATHER PRACTICE]
Regular employees who report for work on a work-day, but are not required to work in the field because of inclement weather or other similar cause, shall receive pay for the full day. During such day they may be held pending emergency calls, and may be given first aid, safety or other instruction, or may be required to perform miscellaneous work in the yard, warehouse, or in any other sheltered location.

* * *

(Jt. Ex. 1)

POSITIONS OF THE PARTIES:

Position of the Union:

According to the Union, the record establishes that Employees are exposed to the elements when assigned to work under the tents. The tents do not constitute a sheltered location within the meaning of Section 203.1, in the Union's view. The suggested solutions for the problems identified under the canopies have either not been implemented or have not been successful in keeping Employees dry and protected from the elements, the Union asserts.

The Union identifies what it regards as substantial safety concerns involved with use of the tents: traffic, impaired vision, dark working conditions, and tent collapses or blow-downs. Some of these problems are not capable of correction and are inherent in the use of tents, according to the Union. The assignment of work under these conditions violates Section 105.1, which provision obligates the Company to "make reasonable provisions for the safety of employees in the performance of their work" (Jt. Ex. 1).

The Union also charges a violation of Section 107.1, the Anti-Abrogation Clause. Prior to the introduction of these tents in November, 1982, gas department Employees were not required to perform routine work during inclement weather. This long-standing practice establishes that emergency work may be performed in the rain but routine work may not, the Union claims. Since this is the historical interpretation of Section 203.1, the requirement of Employees to perform work under the tents while exposed to the

elements constitutes a change in the conditions of employment to the Employees' disadvantage, in violation of Section 107.1.

The Union regards the Company's assertions of increased productivity as irrelevant to this proceeding on the basis that increased productivity is not a defense to a contractual violation. Further, the Union asserts that various assumptions relied upon by the Company in compiling the trial period statistics are flawed.

On the basis that the assignment at issue in this case violates the three above-cited provisions of the Agreement, the Union requests a cease and desist order (Tr. 4; Un. Bf., p. 18).

Position of the Company:

The Company first notes that many of its Employees are routinely required to work in the rain. However, the Employer acknowledges that gas transmission and distribution crews have generally not been required to perform routine work during inclement weather. This, the Company asserts, has been based upon the obvious impracticability of opening an exposed bell-hole or trench during rainy weather. However, the Employer contends that the assignments made in this case are permissible when, in the judgment of the appropriate exempt supervisor (or the bargaining unit light crew foremen) the work can be performed safely under a canopy. A determination of this nature is in compliance with Section 105.1 of the Agreement, the Employer submits, and is consistent with Management's rights under Section 7.1 of the Agreement.

The Company retains the right "to introduce new or improved methods" under Section 7.1 of the Agreement, the Employer notes; and the Union may not rely upon Section 107.1 to bar Management from changing methods of operation. To allow such a result would render the rights bargained for in Section 7.1 meaningless, according to the Employer.

The Company regards the implementation of canopies in this case as a change in operations rather than a change in the conditions of employment. This distinction is significant, the Company asserts, since changes in operations are not barred by Section 107 of the Agreement and may be unilaterally implemented.

The Company states the Union has failed to establish the canopy is unsafe. The Company points to its demonstrated concern for safety throughout the trial period and the response of the Company to problems identified by Employees.

The Employer regards its assessment of cost savings and increased productivity as a non-issue in this case, citing arbitral authority to support the proposition that it has the primary responsibility to direct the work and to make judgments regarding economics and efficiency. The Union has failed to demonstrate that the change in this case was brought about for reasons other than increased productivity.

For all these reasons, the Company requests that the Board deny the grievance.

DISCUSSION:

Limited Scope of Dispute:

The conflict in this case pertains only to the assignment of routine field work to be performed under temporary shelters. The dispute is thus limited to the assignment of work which, prior to the introduction of the tents, would not have been performed in the rain (Tr. 14). The Union does not dispute the performance of emergency work by Employees in inclement weather and does not contend that the use of a canopy in such a situation would constitute a violation of the Agreement (Tr. 12, 13).

Increase in Productivity:

The evidence and testimony presented supports a conclusion that an increase in productivity and efficiency was achieved by the introduction of the tents. Although the Union contends that the particular statistics developed by the Company are unreliable on a variety of grounds, the record is sufficient to establish an increase in productive work when canopies are made available for use in certain situations.

However, a demonstrated improvement in efficiency or productivity is not dispositive of the issue in this case. The issue before the Board is whether the unilateral implementation of the canopies constitutes a violation of the Agreement, in particular Sections 105.1(a), 107.1 and 203.1. If this change constitutes a violation of these provisions, or any of them, the Union has the right to protest their unilateral implementation by the Company notwithstanding any demonstrated improvement in efficiency.

The Company's position is accepted that it is within the Employer's prerogative to assess efficiency and economy in its methods of operation. The Board does not purport to judge the merit of the tent program in terms of cost-savings or increased productivity; that is the province of the Company to determine. The sole issue to be determined by the Board is whether the program complies with the Agreement.

Section 7.1 - Management Rights:

The Management's Rights Clause of the Agreement, Section 7.1, vests in the Company the right to manage its business, direct its work forces and "introduce new or improved methods" (Jt. Ex. 1). However, the foregoing prerogatives are "subject to the provisions of this Agreement" (id.). The question presented is whether the Agreement provisions cited by the Union restrict or limit the Company's right to unilaterally implement the tent assignments at issue. In this regard, it is noted that the Union does not challenge the right of the Company to introduce new technology or methods per se, but challenges the application of certain provisions of the Agreement to the Company's actions in this case.

Safety - Section 105.1(a):

The Union contends implementation of the tents is barred by Section 105.1(a), which requires the Company to make reasonable provision for the safety of Employees (Jt. Ex. 1).

The Company recognizes that utilization of the tents in certain circumstances can be unsafe. The record supports a conclusion that numerous safety concerns must be taken into

consideration in determining whether a tent may safely be used to perform a given job in light of weather conditions. Many variables are involved in making such an assessment, requiring that the circumstances be appropriately evaluated on an individual, case-by-case basis. However, the evidence and testimony presented fails to support an across-the-board conclusion that the utilization of tents to perform routine field work in inclement weather is unsafe and therefore violative of Section 105.1(a). Even according to Union witnesses, there are circumstances where such work may safely be performed under the canopies. Use of the tents is, therefore, not barred in all circumstances under this provision.

Inclement Weather - Section 203.1:

The Union contends that the longstanding application of Section 203.1 supports its position in this case. The Company does not dispute that the assignments at issue here constitute a departure from longstanding and consistent past practice (Tr. 9, 10). The record is clear that routine work was not performed in inclement weather by gas transmission and distribution crews prior to the introduction of the tents (Tr. 69).

Section 203.1 of the Agreement must be interpreted in light of this established practice. The provision contemplates that, "because of inclement weather or other similar cause," Employees may not be required to work in the field. The provision goes on to set forth the other types of activities to which Employees may be assigned under such circumstances: "they may be held pending emergency calls and may be given first aid, safety or other

instruction, or may be required to perform miscellaneous work in the yard, warehouse, or in any other sheltered location"

(Jt. Ex. 1). These are the types of activities that were assigned to the crews in question during inclement weather prior to the introduction of the tent. The assignment of these Employees to perform routine jobs under the canopies in the rain, thus, constitutes a significant departure from the historical application of Section 203.1 to gas transmission and distribution crews.

While the tents provide some protection from the elements, they do not qualify as a "sheltered location" within the meaning of Section 203.1. It is clear that, in setting up and tearing down the tents, setting up safety equipment, obtaining equipment from the truck, as well as other activities, Employees performing work in inclement weather with the canopies are exposed to the elements. Requiring Employees to perform the work at issue under the tents is not consistent with the intent expressed in Section 203.1, as that provision has been consistently applied to these Employees by the Parties in the past.

Section 107.1 - Anti-Abrogation Clause:

The remaining issue is whether this unilateral change in work requirements constitutes a violation of the Anti-Abrogation Clause contained in Section 107.1 of the Agreement. The Union relies upon the language which provides that the Company shall not "change the conditions of employment of any...Employee to his disadvantage," providing that the "foregoing limitation shall not limit Company in making a change in a condition in employment if

such change has been negotiated and agreed to by Company and Union" (Jt. Ex. 1). Here, the record is clear the Union did not agree to the assignments at issue.

According to the Union, the Company has clearly changed the conditions of employment to the detriment of Employees affected by this program in that it has required them to perform long hours of routine work in unpleasant and uncomfortable conditions, which was not required in the past. This, the Union asserts, has upset the historical balance the Parties have achieved regarding performance of work in inclement weather.

The Company asserts that the change involved in this case is one in operations rather than in conditions of employment and, hence, is not prohibited by Section 107.1 of the Agreement. This distinction is significant, according to the Company, because a change in the method of operation is subject to exclusive control of Management.

In determining whether the change in this case is in a method of operation or in an individual Employee benefit, it must be ascertained whether the benefit is of peculiar personal value to the Employee and whether it has been the subject of negotiation between the Parties prior to its institution.

In this case, the benefit to the Employee in not being assigned to perform routine work in inclement weather is not merely incidental to the Company's main purpose but is a condition of employment that inures to the direct, personal benefit of an Employee. The Employee's working environment, safety and physical

comfort are directly affected by the change in conditions at issue in this case. Under the circumstances, it may not be found that a change in the method of operations, alone, is involved here.

The "change in operation" implemented by the Company does not solely involve the introduction of a new piece of equipment. Use of the tents led to a significant change in the longstanding practice under Section 203.1 regarding assignment of work in inclement weather. Further, this change in working conditions for gas transmission and distribution crews was disadvantageous. It was not shown that the fieldwork locations were the equivalent of "sheltered locations" within the meaning of Section 203.1 of the Agreement.

Additionally, the record supports a conclusion that the performance of work during inclement weather has been the subject of negotiations between the Parties. This is evidenced by the inclusion of an inclement weather provision in the Contract (Jt. Ex. 1).

In light of the foregoing facts, the conclusion is required that the Company has violated Section 107.1 of the Agreement by unilaterally requiring the crews in question to perform routine work under the canopies in inclement weather, as this constitutes a disadvantageous change in the conditions of employment. This conclusion is not to say that the tent program may not be implemented under any circumstances. It does mean that the Company is first obligated to negotiate and agree with the Union as provided under Section 107.1 before it may implement such a change in employment conditions.

Distinguishable Facts:

This case is distinguishable from Arbitration Case No. 90 on a number of grounds. First, this case involves a working condition of direct personal benefit to Employees, not an incidental benefit such as that at issue in Case No. 90. This matter involves an Agreement provision regarding inclement weather in addition to a longstanding practice. Further, the practice at issue in that case was not one of general applicability: only one sub-Foreman each week, who volunteered for particular work, was affected. In this case, a practice of general applicability to all light crew Employees is potentially involved. Further, while the tent program was initially voluntary, the assignments ceased to be voluntary after the first year trial period.

Another distinguishing factor in Arbitration Case 90 was the significance placed by the Board on the failure of the Union to grieve prior changes on the same issue in other locations. No such acquiescence on the part of the Union at other locations has been established in this matter. In fact, this grievance was brought to protest the pilot implementation of this program, based upon the record presented.

Accordingly, the following decision is made:

DECISION:

The requirement that certain gas department Employees perform non-emergency field work under temporary rain shelters constitutes a violation of Section 107.1 and 203.1 of the Agreement.

The Company shall forthwith cease and desist from unilaterally requiring the Employees in question to perform routine field work under temporary rain shelters in inclement weather.

Concur/Dissent 4/8/85 W. Paulbright
Date Company Board Member

Concur/Dissent 4/4/85 Pauley Merrill
Date Company Board Member

Concur/Dissent 4/1/85 Roger Stalcup
Date Union Board Member

Concur/Dissent 4-1-85 Wayne K. Greer
Date Union Board Member

Concur/Dissent 4-10-85 Barbara Conway
Date Chairperson