

In the Matter of an Arbitration]
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 between]
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 IBEW Local 1245,]
]
 Complainant,]
]
 and]
]
 PACIFIC GAS & ELECTRIC COMPANY,]
]
 Respondent.]
]
 Re: F]
]
 _____]

ARBITRATION CASE NO. 164

OPINION & DECISION
OF
BOARD OF ARBITRATION

KATHY KELLY, Neutral Board Member

ROGER STALCUP, Union Member

BOB GIBBS, Union Member

DAVID BERGMAN, Company Member

RICK R. DOERING, Company Member

San Francisco, California

Hearing Date: September 28, 1989

ISSUE:

The Issue submitted for final and binding determination in this case was stated at the Hearing as follows:

"Did the Company violate the Collective Bargaining Agreement when it terminated the Grievant, and if so, what is the appropriate remedy?"

BASIS FOR TERMINATION:

The payroll change form effectuating the termination was dated February 11, 1988. It stated the following as the basis for termination:

"Employee being discharged due to being physically/permanently precluded from performing work of a Gas Helper." (Jt. Ex. 2, Attachment 22).

BACKGROUND:

The Employment History of the Grievant

The Grievant, F , was first employed by the Company in 1983 as a Meter Reader. In 1985, an excessive error rate while performing the functions of Meter Reader led to F 's termination. The termination was not contested. The Union contended however, that F was improperly denied the opportunity to transfer into the position of Gas Helper before the termination occurred. this position was sustained in Arbitration, and as a result, F was reinstated to the position of Gas Helper. F 's employment as Gas Helper commenced on March 25, 1987.

The Company introduced a 12-page job description for the position of Gas Helper (Co. Ex. 1). The Union made clear that this is not a negotiated job description, and its accuracy was challenged in many particulars. The disputes raised about the accuracy of the job description really do not, however, have direct bearing on this case. For purposes of this case, it is clearly agreed that the work of Gas Helpers is heavy, physical work. There is no dispute concerning the fact that Gas Helpers are required to handle tools like pavement breakers and jackhammers, weighing up to 90 lbs. There is also no dispute concerning the fact that Gas Helpers must lift sacks of asphalt weighing up to 90 lbs. These aspects of the job are referred to on pages 4 and 5 of the job description and F 's testimony confirmed that work of this nature is regularly required of Gas Helpers. The job description also refers to heavier weights. For example, on page 7 there is a reference to boxes, vault lids and tools weighing up to 300 lbs. There is nothing in the record, however, suggesting that Gas Helpers are expected to individually lift items having such weight. Indeed, such a notion hardly seems likely.

The aspects of the job critical for purposes of this case are, therefore, undisputed. Gas Helpers must handle tools weighing up to 90 lbs., and they must lift

materials such as asphalt bags weighing up to 90 lbs. Nearly all of their activities throughout the day require exertion of considerable physical effort, including digging holes or trenches and applying pressure to the use of hand tools.

F performed these duties for more than a month. The record discloses no difficulty whatsoever concerning her performance on the job (Tr. 8). F testified that she worked hard and achieved good results despite the fact that she was unfamiliar with many of the tools involved and received no instruction concerning proper methods for using them.

F did begin to experience some soreness which she believed was the product of her work duties. On Sunday, May 3, 1987, she visited St. Joseph's Immediate Care Center and complained of pain to the right side of her back as well as numbness in her third and fourth fingers on the right side. F was advised by the medical personnel at St. Joseph's to take the next two days off work. She did so.

F returned to work on May 6, 1987. On that day, she was seen by both her personal physician, John Morozumi, and a physician selected by the Company, Dr. C. A. Luckey. F's Supervisor accompanied her to the offices of both physicians. Dr. Morozumi recommended that F

should remain off work until the following Monday. He also referred F for further examination to an orthopedist, Dr. Robert Hermann (Co. Ex. 2). At the time F was seen by Dr. Luckey, she complained only of "slight discomfort." Dr. Luckey's conclusion was emphatic:

"I feel that the patient is capable of working, considering the entirely negative examination." (Jt. Ex. 2, Attachment 3).

F was returned to work. The Company concluded, however, that it would be advisable to receive an evaluation from Dr. Hermann because the Company regularly utilized Dr. Hermann and F's personal physician had suggested the advisability of receiving his evaluation. F was placed on light duty pending further medical evaluation.

F was evaluated by Dr. Hermann on May 11, 1987. Dr. Hermann's conclusions were summarized in the following two paragraphs:

"This patient at this time has no subjective complaints or objective findings. Other than the minimal scoliosis noted on the x-ray, she has no abnormalities of her lumbar spine. Scoliosis of this type does not constitute any significant disability nor is it known to produce any kind of pain in the back or mechanical problems.

"Therefore from the orthopaedic standpoint, this patient has no restrictions from carrying out activities that are mechanically suitable for some person of her body size,

stature and muscular development. It is my opinion that the job description attached far exceeds her physical capabilities. It is my opinion that if she persists in attempting to perform this kind of work, she will eventually develop a significant injury." (Jt. Ex. 2, Attachment 4).

This report was dated May 13, 1987. Between the time of this report and September of the same year, an exchange of correspondence occurred between the Company and Dr. Hermann in which the Company sought clarification of Dr. Hermann's opinion. Everything he stated in responsive correspondence confirmed the opinion quoted above. Throughout the time that this correspondence was being exchanged, a variety of clerical functions were assigned to F and she was kept on light duty.

In August of 1987, Company representatives met with F. They discussed with her Dr. Hermann's perception that F is physically incapable of performing a Gas Helper's work. F disagreed. The Company representatives with whom F spoke encouraged her to consider permanently transferring into a clerical position. F stated that she did not want to voluntarily transfer into clerical work. At the hearing, F explained that the Gas Helper's job pays better and gave her a possibility for advancement to higher skilled positions paying even more.

The Company decided that it should have F examined by a further physician before taking final action.

The Examination of Dr. Sims

F was examined by Dr. George Sims on December 28, 1987. At the time of this examination, F had gained approximately 20 lbs. over the weight she maintained when she was working as a Gas Helper. F testified that she had not done anything to maintain or improve her physical condition while she was performing clerical functions, and that anxiety over her job status contributed to the weight gain. F also testified that she joined a gym sometime in December of 1987 in order to make efforts toward correcting this situation (Tr. 73).

Dr. Sims was the first physician to attempt any form of scientific testing which might provide hard data concerning F 's physical capabilities. He tested her physical strength in a number of different respects, affording a chance for both a first and a second attempt at each test. This appears to be standard procedure, since performance is generally enhanced on the second attempt. The results of the tests performed by Dr. Sims were as follows:

	<u>First Attempt</u>	<u>Second Attempt</u>
Squat Lift		
Avg. Sample	79.3	85.7
Peak Sample	88.2	93.8
Standing Lift		
Avg. Sample	95.4	107.7
Peak Sample	101.2	111.6

Press Down		
Avg. Sample	113.5	118.1
Peak Sample	122.1	128.6
Pushing		
Avg. Sample	79.5	76.9
Peak Sample	82.5	82.2
Pulling		
Avg. Sample	88.2	86.4
Peak Sample	91.8	98.7

(Jt. Ex. 2, Attachment 12).

All of the results summarized above reflect pounds.

Dr. Sims' report, prepared on January 7, 1988, reflects that his testing included a second major segment. That segment was described as follows in the report:

"ERGOMETRIC TESTING:

* * *

"Using the same program, when lifting from a height of 2-1/2", considering the fact that she was a female and weighed 204 pounds and was 5'4", it was found that she exceeded the allowable limit as noted on page 5. She reached a 95 percentile as far as her back was concerned. The 95 percentile makes it almost a certainty that she will develop low back pain to her lumbosacral junction. Back compression, at that point, was 807 pounds.

"On page 6 of the packet, she was asked to lift 90 pounds, which is an equivalent to a sack of cement or a sack of sand, again from the ground up and she exceeded the allowable limit again and compressed the back to 1085 pounds, placing her into a 95 percentile, making a back injury almost a certainty.

"On page 7 of the packet, she was asked to lift the same cement bag weighing 90 pounds on the simulator, standing erect as pointed out by the wire figure and it was perfectly safe for her to do. Her back compression dropped to only 390 pounds when she was standing." (Jt. Ex. 2, Attachment 12).

Dr. Sims was not called as a witness and no further explanation from him concerning the nature of this ergometric testing was received. The portion of the report set forth above gives the impression that Dr. Sims performed tests which ascertained the precise stress to F 's back when performing various functions and further reflected her particular risk of injury when performing these functions.

The Union called an expert witness in these proceedings, Dr. Janet Weiss. Dr. Weiss has significant training in ergonometics, that is, studying how physical stresses will affect particular parts of the body. Dr. Weiss' testimony made clear that the "ergometric testing" performed by Dr. Sims did not ascertain in any way, shape or form the extent to which F might be more likely to incur injury from performing certain functions than anyone else.

Dr. Weiss made clear that what Dr. Sims did can only be understood if certain terms of art developed by NIOSH are first defined. Some time ago, NIOSH sought to develop standard terms for use in establishing the advisability of making various tasks routine parts of any job. NIOSH developed two relevant concepts, namely, the "action limit" and the "maximum permissible limit." The action

limit is reached when performance of a task creates 770 lbs. of compression force at the L5/S1 disk. According to studies performed by NIOSH, 75% of women and over 99% of men are capable of performing work at this level. NIOSH also concluded, however, that where this action limit is exceeded, the risk of muscular or skeletal injuries warrants task modification in order to reduce back stress. Hence, NIOSH recommends that where the action limit is exceeded for performance of a task, lifting devices or some other aids should be utilized in order to reduce the risk of injury.

NIOSH has defined the "maximum permissible limit" as work creating 1,430 lbs. of compression force at the L5/S1 disk. At the maximum permissible limit, only 25% of men and less than 1% of women workers may be expected to be capable of the task, and the risk of injury is unacceptable.

The second segment of testing described by Dr. Sims in his report did not include any opportunity whatsoever for F to display her individual capabilities. The attachments to the report reflect that Dr. Sims used a computer program which incorporates NIOSH terminology. He input a height and weight equivalent to that of F, namely, 64" tall and 204 lbs. He then utilized the computer to simulate what would happen if a person with these dimensions performed various tasks. The computer generated what the average back compression would be. It also generated predictions as to what portion of the population could

capably perform these task, predicting on the basis of NIOSH's statistical experience.

Dr. Sims predicted on the basis of this that squat lifting 90 lbs. would create an unacceptable risk of injury to F because the resulting back compression for her would be 1,085 lbs. This conclusion may be drawn from the chart created through the computer simulation just described. That chart, however, also conveys additional essential information.

The chart essentially predicts that anyone performing this task who is 5'4" tall and 204 pounds will experience back compression between the action limit and the maximum permissible limit. The predicted back compression for all females in the population having these dimensions is 1,085 lbs. The predicted back compression for all males in the population having these dimensions is 1,138 lbs. The computer simulation does not in any way take account of individual muscle tone. According to Dr. Weiss, this is a significant variable since good muscle tone can reduce back compression (Tr. 108-109). By contrast, Dr. Weiss testified that weight is not a significant factor impacting on back compression during performance of tasks such as those covered in the computer simulations (Tr. 103).

In sum, the computer simulation relied upon by Dr. Sims essentially establishes that squat lifting 90 lbs. poses significant risk of injury to anyone, male or female, who is 5'4" tall and does not have good muscle tone. The computer simulation did not, however, take into account any information about F's individual strength as reflected in the lifting tests she performed so as to predict the specific likelihood of injury to her, as opposed to everyone else 5'4" tall, when squat lifting 90 lbs.

The bottom left hand portion of the chart reflecting the results of Dr. Sims' computer simulation predicts on the basis of NIOSH statistics that 95% of men and 68% of women will be capable of the task at issue, namely, squat lifting 90 lbs.. There is nothing in Dr. Sims' report indicating an effort on his part to ascertain whether Flynn is within the 68% of women who are capable of performing this task or the 32% of women which are incapable of performing this task. Dr. Weiss, however, who has considerable experience with testing, testified that F's performance on this strength test placed her in good stead. Dr. Weiss testified that women on average squat lift between 50 and 70 lbs. During her individualized strength tests, F reached a peak of 93.8 lbs. while squat lifting. This provides some indication that she could place herself within the 68% of women statistically predicted to be capable of squat lifting 90 lbs.

The other "ergometric testing" performed by Dr. Sims consisted of similar computer simulations predicting back compression for all persons 5'4" tall when performing various tasks. The methodology was the same throughout, and nothing incorporated any information particular to F with reference to muscle tone or capability.

Subsequent Developments

The Company determined on the basis of Dr. Hermann's and Dr. Sims' reports that F is physically incapable of performing as a Gas Helper (Tr. 46-47). The Company further determined that clerical work was not a possibility for the Grievant on a permanent basis since she had expressed a disinterest in that during conversations which took place in August of 1987. Hence, no clerical position was offered to her on a permanent basis (Tr. 43). F had submitted standing requests for transfer to several positions in December of 1987, but the Company concluded that these positions were either inappropriate or unavailable (Tr. 30-31). Hence, the Company terminated F's employment effective February 11, 1988.

DISCUSSION:

Was F physically incapable of performing as a Gas Helper?

Dr. Hermann's report does not establish F to have been physically incapable of performing as a Gas Help-

er. Dr. Hermann observed that "from the orthopaedic standpoint" no restrictions were apparent limiting F 's activities. Dr. Hermann concluded on the basis of his visual inspection that F 's stature and "muscular development" rendered her unsuitable for Gas Helper work. He did not, however, perform any qualitative or quantitative testing in an effort to substantiate this visual conclusion, nor did he address whether F 's "muscular development" could be enhanced so as to overcome any shortcomings. These omissions prevent his report from constituting an adequate basis to support termination.

For the reasons already discussed, the "ergometric testing" relied upon by Dr. Sims is of no help. It showed that some tasks required of Gas Helpers can be expected to produce acceptable back compression in the case of persons 5'4" tall. It also showed that other tasks required of Gas Helpers (such as squat lifting 90 lbs.) can be expected to cause back compression for persons 5'4" tall that exceeds NIOSH's recommended action limit. These computer simulations, however, did not show anything about F 's individual capabilities. The Company has not sought to enforce a blanket rule prohibiting anyone 5'4" tall from working as a Gas Helper. Moreover, this record leaves open the distinct possibility that predicted back compression would be just as problematic for persons of other heights when squat lifting 90 lbs. It is rudimentary that an Employee may not be

singled out for adverse treatment when uniform policies have not been adopted assuring that similarly situated persons will be treated similarly. This record does not disclose any consistent effort to use height or other factors as uniform predictors for physical capacity, and F may not be singled out in reliance upon a computer simulation that did not take account of anything about her apart from her height and weight.

The only useful information in this record is the individual strength tests performed by F during the course of her examination by Dr. Sims. These tests show significant capability on the part of F. Her standing lift performance consistently showed enough strength to lift a 90 lb. jackhammer and her press down performance consistently showed enough strength to handle such tools.

The one area which arguably shows deficiency is the squat lift. This probably best reflects what is required of an Employee when lifting 90 lb. bags of asphalt. Flynn achieved a peak sample of 93.8 lbs., but she was only able to maintain an average sample of 85.7 lbs. This leaves her a little shy of what is needed. It is noteworthy, that even the expert called by the Union, Dr. Weiss, did not represent F to have met or exceeded all job requirements during her strength test. Dr. Weiss solely testified that F met or exceeded "most" job requirements (Tr. 99, line 21).

Did These Test Results Afford "Just Cause" for Termination?

The answer to this question is unquestionably, "no" for two reasons. First, the tests at issue were given to F _ after she had been in a sedentary job for several months. It is quite apparent, therefore, that those test results do not reflect what F _ is capable of with conditioning. It was not appropriate to resolve F _ 's right to keep a physically demanding job on the basis of tests given without notice or opportunity for preparation after several months of clerical work.

At the hearing, it was established by stipulation that between 1985 and 1988, twelve Gas Helpers filed Workers' Compensation Claims for back injuries. Of the twelve Employees involved, three were placed on an exercise program at Company expense (Un. Ex. 14). One of the twelve was also placed in a weight loss program at Company expense (Un. Ex. 14). While agreeing that these matters are facts of record, the Company asserted that such information has no relevance to the present dispute because its actions in these cases were required by the Workers' Compensation system, a fact not shown in F _ 's case.

These cases have relevance. They show that exercise can enhance a person's fitness to perform Gas Helper work. The payroll change effectuating F _ 's termination alleged that she was "permanently" precluded from performing

work of a Gas Helper" [Emphasis added] (Jt. Ex. 2, Attachment 22). Dr. Sims, upon whom the Company most strongly relies, concluded that "... the cause of [F's] difficulty was her obesity and her poor muscle tone" (Jt. Ex. 2, Attachment 12). The experiences of the persons referenced serve to confirm what most people would conclude from life experience: obesity and poor muscle tone are not necessarily "permanent" conditions, as alleged by the Company. Because they are not, just cause required clear notice to F and a fair opportunity to correct any deficiencies before her employment rights were severed.

Moreover, even if the record conclusively demonstrated that F cannot achieve the muscle tone required for working as a Gas Helper, it would not follow that termination was supported by "just cause." F was performing needed clerical functions. While she did not desire to do so permanently, it is quite likely that she would have preferred continuing clerical work to termination. It was not appropriate to act on the basis of informal conversation in August, without presenting clear choices to the Grievant.

Furthermore, in a circumstance such as this, where no fault of the Employee is involved, it is appropriate to investigate conversion to some form of unpaid status such as leave of absence or lay-off, with retention of seniority for a contractually appropriate period, so that prospects for finding a suitable vacancy to which the Employee might

transfer may be exhausted. The record submitted in this case does not allow a conclusive determination as to whether leave or lay-off may have been appropriate for F. It may be conclusively stated, however, that "just cause" required meeting with the Grievant, discussing the conclusions the Company drew from Dr. Sims' report, and reviewing alternatives in the face of those conclusions. Such a meeting could easily have led F to change the views she expressed during the informal August meeting when she was unwilling to consider anything other than immediate return to Gas Helper work and believed she would convince the Company of her fitness to do so. In a case such as this, immediate termination simply because a suitable vacancy is not instantaneously available is not consistent with the protection for seniority rights afforded within the Collective Bargaining Agreement.

For all of the foregoing reasons, the termination of F violated the Collective Bargaining Agreement and her reinstatement is essential.

Back Pay and Other Relief

Two hearing dates for the Arbitration in this case were continued. The Company contends that these continuances were necessitated because the Union made last minute requests for documents which could not be provided and reviewed in sufficient time for the scheduled hearings. On this basis, the Company contends that back pay liability

should be tolled and that the Union should be required to reimburse it for its portion of cancellation fees incurred.

The record does not conclusively establish that one party bears more blame than the other for the continuances which occurred in this case. The Union submitted a request for documents dated May 2, 1989 for a hearing scheduled to take place on May 18, 1989. This request was not so untimely as to leave the Union solely responsible for the consequences of continuance.

There is a different factor in this case, however, impacting upon responsibility for back pay. As discussed above, Company representatives met with F during August of 1987 to discuss their concern that based upon the report of Dr. Hermann, she was not physically capable of performing as a Gas Helper. Nonetheless, during the several months between that conversation and the examination of Dr. Sims, F did nothing to improve her physical condition. Indeed, it seems to have deteriorated. While the Company had an obligation to treat F fairly, F also had certain responsibilities. Since she was seeking return to a physically demanding job, she had the responsibility to strive for and maintain the best physical conditioning possible. If she had done that, Dr. Sims' findings might well have left less to fight about. Since there is a significant prospect that F's lack of attention to physical condi-

tioning may have prolonged this dispute, full back pay is not appropriate. The award below reflects this.

DECISION:

1) The termination of F. . . violated the Collective Bargaining Agreement. The Company shall forthwith reinstate her to her prior employment with no loss of seniority.

2) Pursuant to the Executive Session, F. . . is placed on leave effective June 11, 1990 and the Company will provide her with back pay and benefits for the period between April 18, 1990 and commencement of the leave. The terms controlling the leave and F. . . 's return to work thereafter are remanded to the parties for negotiation.

3) The Company shall also provide to the Grievant all pay and benefits which she would have received had she been in her employment as Gas Helper throughout the second half of the period between her termination and April 18, 1990, less interim earnings received.

4) The Grievant shall not receive any back pay or fringe benefits for her prior months' of unemployment.

5) This Decision is based on the unique facts and circumstances of this case. It should not be relied upon as a precedent in a different setting.

6) Jurisdiction is retained for the purpose of resolving any dispute which arises concerning interpretation or implementation of this decision.

7/12/90
Date

Rady Kelly
Neutral Member

Roger Statcup
Union Member

¶ #1 Concur/~~Dissent~~
¶ #2 Concur/~~Dissent~~
¶ #3 Concur/~~Dissent~~
¶ #4 ~~Concur~~/Dissent
¶ #5 Concur/~~Dissent~~
#6 Concur

7/30/90
Date

Robert York
Union Member

¶ #1 Concur/~~Dissent~~
¶ #2 Concur/~~Dissent~~
¶ #3 Concur/~~Dissent~~
¶ #4 ~~Concur~~/Dissent
¶ #5 Concur/~~Dissent~~
#6 CONCUR

7-30-90
Date

Richard R. Doney
Company Member

¶ #1 ~~Concur~~/Dissent
¶ #2 Concur/~~Dissent~~
¶ #3 ~~Concur~~/Dissent
¶ #4 Concur/~~Dissent~~
¶ #5 Concur/~~Dissent~~
¶ #6 Concur

7/24/90
Date

Duff Doney
Company Member

¶ #1 Concur/~~Dissent~~
¶ #2 Concur/~~Dissent~~
¶ #3 ~~Concur~~/Dissent
¶ #4 Concur/~~Dissent~~
¶ #5 Concur/~~Dissent~~
#6 concur

7.24.90
Date



REVIEW COMMITTEE

IBEW



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D.J. BERGMAN, CHAIRMAN

- DECISION
- LETTER DECISION
- PRE-REVIEW REFERRAL

July 30, 1990

ARBITRATION CASE NO. 164 - IMPLEMENTATION AGREEMENT

Following are the details of the parties' agreement concerning Items 2 and 3 in the decision of Arbitration Case No. 164:

1. The grievant, F , will receive back pay and benefits retroactively from March 16, 1989 through June 11, 1990, at the Gas Helper rate of pay, less outside earnings, if any.
2. Effective June 12, 1990, the grievant will be allowed to use any current and accumulated sick leave. She will then be placed on a medical leave of absence due to her pregnancy.
3. Company will arrange and pay for a supervised fitness program under the direction of a health care professional, including an evaluation and counseling on physical fitness and weight loss, during the period the grievant is off work. The fitness program will be designed to address those areas of physical conditioning the health care professional determines are necessary to prepare grievant to return to work in a Gas Helper classification. Grievant will be required to notify Company a minimum of 30 days in advance of the time she desires to begin such fitness program.
4. If the grievant applies for a child care leave of absence, a doctor's release stating that she is released to return to work will not be considered as evidence that she is physically capable of meeting the physical requirements of the Gas Helper classification.
5. When the grievant requests to return to work, either following the termination of her medical or child care leave, she will be required to undergo testing by a medical professional to determine whether she is physically qualified to perform Gas Helper duties. The selection of the medical professional and the testing to be administered shall be agreed to by the Company and Union. If the grievant is determined to be physically qualified, she will immediately be returned to a Gas Helper position in Stockton. If it is determined that the grievant is not physically qualified, her employment will be terminated.

6. It is the grievant's obligation to meet the physical requirements of the Gas Helper position once the counseling and fitness program referred to in Item 3 above is completed.
7. It is understood and agreed that the above is applicable only to F. in the settlement of Arbitration Case No. 164. As it applies to the requirement for non-standard testing to demonstrate physical abilities, this settlement is non-precedential and will have no application except to this case.



DAVID J. BERGMAN, Chairman
Review Committee



ROGER W. STALCUP, Secretary
Review Committee

RRDoering(223-1124):nj