

In the Matter of a Controversy]
]
 between]
]
 INTERNATIONAL BROTHERHOOD OF]
 ELECTRICAL WORKERS, LOCAL UNION]
 NO. 1245,]
]
 Complainant]
]
 and]
]
 PACIFIC GAS AND ELECTRIC COMPANY,]
]
 Respondent]
]
 RE: Suspensions of [REDACTED]]
 and [REDACTED] and discharge]
 of [REDACTED]]

Arbitration Case No. 57

OPINION AND DECISION
OF
BOARD OF ARBITRATION

SAM KAGEL, Chairman

LAWRENCE N. FOSS, Union Member

PETER R. DUTTON, Union Member

I. WAYLAND BONBRIGHT, Company Member

DAVID J. BERGMAN, Company Member

Between 3:00 and 3:30 p.m. on November 27, 1972, [REDACTED] y Sa [REDACTED] z, a water systems repairman, walked down the flume past the two sections which were subsequently burned, arriving at Douds Landing about 3:30 or 3:45 p.m. He testified that he did not see any of the burned areas indicated on Company Exhibit 1 as he was leaving.

Between 3:45 and 4:00 p.m. P [REDACTED] and S [REDACTED] n walked through the burned area arriving at Douds Landing about 4:00 p.m. P [REDACTED] e, S [REDACTED] n, Sa [REDACTED] z and [REDACTED] s S [REDACTED] n, the sub-Foreman of the Hunter's Dam crew, drove off together.

A police report dated December 1, 1972 indicates that Deputy McWherter of the Calaveras County Sheriff's Department was advised by Oliver Garcia, a Supervisor for the Employer, that the flume had been checked at approximately 4:00 p.m. on November 27 by [REDACTED] t O [REDACTED] the ditch tender, "and that everything was OK at that time." (Co. Ex. 2, p. 3)

About 11:30 p.m. on Novmeber 27 an alarm was sounded indicating that water had diverged from the flume. An investigation revealed fire damage to two portions of the flume - a small burn on the upper portion of the flume and a large burned area on the flume below it (Co. Ex. 1). Seven burn areas on the ground above the flume were also discovered and matches were found near several of these burn areas.

The initial investigation of the fires by the Calaveras County Sheriff's Department commenced on November 28th. On December 12, 1972 Robert Bunning, who was at that time a Detective with the Calaveras County Sheriff's Department, continued the arson investigation.

On December 13, 1972 Bunning interviewed Michael Skenfield of the United States Forest Service. Skenfield told him that he was looking for one [REDACTED] B [REDACTED] as he had information that Barker had been boasting about setting old cabins on fire and that B [REDACTED] was known to frequent the area near Douds Landing.

On December 27, 1972 Bunning interviewed O [REDACTED], who was a friend of B [REDACTED]'s, a second time and O [REDACTED] stated that he had not seen B [REDACTED] during the entire week in which the fire had occurred.

On December 28, 1972 Bunning interviewed S [REDACTED] a second time. The police report noted:

"... SA [REDACTED] further stated, however, that P [REDACTED] has the habit of striking a wooden match with his thumb nail and flipping matches off of the flume and he has observed him do this numerous times and also S [REDACTED] N has observed him doing it." (Co. Ex. 3, p. 6)

On December 29, 1972 Bunning interviewed S [REDACTED] a second time and advised him of his Miranda rights. S [REDACTED] stated that he had never seen P [REDACTED] strike or flip any matches from the flume and that he did not do that either,

although he knew how to do so.

On the same day, December 29, 1972, Bunning also interviewed P[REDACTED] a second time and advised him of his Miranda rights. The police report indicates:

" . . . He further stated that he did not remember throwing any matches, at this time, however, he stated that from time to time he has thrown matches by the use of the thumb nail, striking the head and flipping the match out and has done this from the flume." (Co. Ex. 3, p. 9)

Bunning also noted that both P[REDACTED] and S[REDACTED] stated they would be willing to take a polygraph test with regard to their involvement in the fires.

P[REDACTED] and S[REDACTED] were suspended on January 8, 1973 as the Employer suspected that they had started the fires.

P[REDACTED] and S[REDACTED] were arrested about January 13, 1973 for arson (Tr. 114).

On June 26, 1973 the charges against S[REDACTED] were dismissed.

S[REDACTED] died on May 6, 1974 while on suspension.

On April 3, 1975 P[REDACTED] was discharged by the Employer.

On January 29, 1975 the Calaveras County District Attorney moved to dismiss the case against P[REDACTED] on account of the death of a key witness for the prosecution, i.e., S[REDACTED]. The motion was granted.

POSITION OF THE PARTIES:

Position of the Union:

That while P [REDACTED] and S [REDACTED] were initially suspended because of the arson investigation, P [REDACTED] was discharged on April 3 not for arson, but for negligence; that the Employer has the burden of coming forward with enough credible evidence to do more than raise a mere suspicion that it may be justified in its belief that P [REDACTED] and S [REDACTED] were responsible for the fires; that there are a number of possibilities as to how the fires which damaged the flume were caused; that the notion upon which the Employer most heavily lies is that P [REDACTED] must have caused the fire because he had a "habit" of flicking matches; that there is not the slightest evidence in the record which justifies the conclusion that P [REDACTED] had a habit of flicking matches off the flume; that both P [REDACTED] and S [REDACTED] offered to take lie detector tests to refute any notion that either was involved in any conduct that could link them to the fires; that after S [REDACTED]'s remarks about P [REDACTED]'s so-called habit, the police report became filled with negative implications against P [REDACTED] and [REDACTED]; that even if P [REDACTED] and S [REDACTED] were negligent, and there is no evidence which supports that allegation, then the Employer was wanton and wilful in failing to train, equip and guide P [REDACTED] and S [REDACTED] for their jobs; and that the appropriate remedy is that P [REDACTED] be reinstated

with full back pay and restitution made to S [REDACTED]'s estate.

Position of the Employer:

That inasmuch as the Board's decision will impose only industrial sanctions and not criminal sanctions, the action of the District Attorney in dismissing criminal charges is largely irrelevant and immaterial; that the evidence needed to support the disciplinary action taken against P [REDACTED] and S [REDACTED] need not fore-close every possibility of innocence, but must only reasonably convince the Board of Arbitration of the Grievants' part in the shown acts of industrial misconduct; that once the Employer has established a prima facie case of guilt, then it becomes incumbent on the Employee to offer evidence negating or excusing the alleged conduct; that the evidence unequivocally establishes that the fires were incendiary, i.e., man set; that the fires followed the path P [REDACTED] and S [REDACTED] took walking from their work area back to the assembly point; that it took several hours for the grass and bush fires to reach and burn through the heavy-timbered flumes; that P [REDACTED] and S [REDACTED] were the last known persons to walk down the flume before the fires; that the Grievants have admitted to engaging in the childish adventure of flicking lit matches on the job; that the record is clear that the fires were the result of P [REDACTED]'s and S [REDACTED]'s misconduct; that even if

the evidence does not, as it does here, clearly implicate P█████ and S█████, the mere knowledge of their admitted irresponsible, negligent acts would suffice to support their terminations; that not only is P█████'s testimony with regard to how he went about his work inconsequential to the act of misconduct, but it is highly suspect as to truthfulness.

DISCUSSION:

Cause of Fires:

William Van Dusen, a California State Forest Ranger with considerable expertise in the investigation of wild land fires, testified that as a result of his investigation in April, 1973 he determined that the fires which burned the flume on November 27 were incendiary in origin, i.e., deliberately set. He based this finding on the number of fires, seven, and the matches which were found on three of the seven burned areas (Tr. 40). He testified that the fires were set from north to south by someone walking down the flume toward Douds Landing (Tr. 39), and that the damage to the flume was the result of burning material from a wild land fire becoming dislodged and, while burning, rolling down the hill under the flume and causing the flume to be ignited. Van Dusen also stated that it would take a number of hours before the flume would be burned through (Tr. 41). Van Dusen

also stated that it was not possible that the burns were made for the purpose of clearing debris as there was no evidence of the remains of debris (Tr. 45).

Perpetration:

The Employer admits that the only evidence of F's and S's complicity in the November 27 fire is circumstantial. While it is true that the rules of evidence applicable to criminal proceedings do not apply to arbitration proceedings, the quality of evidence must be considered in determining the weight to be given it.

F and S were the last known persons to leave the burn area on November 27 and S's statement to Bunning regarding F's alleged habit of flicking matches off the flume is the only "evidence" offered as to F's causing the fires.

At the hearing F testified that he could light a stick match with his thumb nail and would do so to light a smoke or fire (Tr. 101). He stated that he lit matches with his thumb nail while on the flume to light a smoke, but that he would toss it in the flume which had water in it unless the head was broken off (Tr. 101). This testimony is clearly in conflict with Bunning's police report wherein he stated that F told him that he, F, had from time to time lit matches with his thumb nail and flipped the lit match off the flume (Co. Ex. 3, p. 9).

At the hearing S [REDACTED] stated that, although he had seen P [REDACTED] flip three matches previously, he did not remember where he had seen P [REDACTED] do this (Tr. 58).

Bunning testified that his investigation of the suspect, [REDACTED] B [REDACTED], was curtailed due in part to S [REDACTED]'s statements regarding P [REDACTED]'s habit of flicking matches (Tr. 29). Bunning did not even question B [REDACTED].

E [REDACTED], the sub-Foreman of the Hunter's Dam crew, testified that he had worked in the same area as P [REDACTED] and S [REDACTED] off and on for two or three years and that he felt they were good workers. He also stated that he had never seen them flicking matches off the flume (Tr. 66).

W [REDACTED], the General Foreman for General Construction, discussed the fire with P [REDACTED] and S [REDACTED] individually after it was learned that they were suspected of involvement in the fires. He spoke first with S [REDACTED] who denied any involvement with the fire (Tr. 69). S [REDACTED] testified that:

"He [REDACTED] mentioned that P [REDACTED] had struck heads on matches and -- to see how many times he could strike a match without missing and throwing them in the flume." (Tr. 69-70, emphasis added)

S [REDACTED] next interviewed P [REDACTED]. S [REDACTED] testified:

"Then I talked to P [REDACTED]. And he said that he had struck matches. He had thrown them in the flume. As far as he knew, he had not caused any fires.

"Q. [by Employer's representative] With regard to the flicking, did he describe how he flicked them and where they would go?

"A. I think the way I took it he said it, was he used his thumbnail to strike the head of the match, and he flicked the match to put it out and threw it in the flume. I didn't take it to mean he flicked it off the flume." (Tr. 70, emphasis added)

Another Employer witness, John De Mattei, the Mother Lode District Manager, Stockton Division, testified that he discussed the fires briefly with P [REDACTED] and that as he recalled P [REDACTED] told him that: "They lit matches, he and Mr. S [REDACTED], lit matches and threw them down on the flume." (Tr. 75, emphasis added)

Thus, the testimony of the Employer's witnesses tends to support P [REDACTED]'s testimony that he never flicked matches, throwing the lit matches off the flume, the alleged act for which he was suspended and subsequently discharged, and which apparently constitutes the claim of negligence.

The evidence of S [REDACTED]'s complicity in the fires is even more tenuous than that against P [REDACTED] and consists of the fact that he and P [REDACTED] worked together on November 27 and that they were the last known persons to leave the flume area on that date. To sustain his suspension on these grounds, one would have to assume that he either actively participated in the setting of the fires or

condoned P█████s doing so. On the facts presented, this assumption is not justified.

Even though the strict standards of evidence applicable to criminal proceedings do not apply to arbitration proceedings, discipline imposed by the Employer must be just under the circumstances. In this case the Employer's suspicions regarding P█████ and S█████, augmented by the arson investigation centering on them, were not sufficient to justify their suspensions.

Negligence:

The Employer urges that even if P█████ and S█████ are not considered to have been directly responsible for the damage to the flume, their careless behavior imposed a serious threat to the Employer and would by itself justify the suspensions and discharge.

The record does not establish that either P█████ or S█████ engaged in "careless behavior" that would justify either suspension or discharge.

It should be noted that at the time of the fires P█████ was 22 years old and prior to the time he began working for the Employer he had never worked on a burn crew. He testified that he received no training on how to burn the debris along the flume, an allegation which was supported by ██████ (Tr. 72), and that the burn crew never had a Supervisor prior to November 27 (Tr. 83). He also stated that during the approximately

30 days prior to November 27 that he was on the burn crew, he had left debris fires burning unattended and that even though there were foot and helicopter patrols in the area, he was never reprimanded for this practice (Tr. 105).

Conclusion:

The Employer contends that it has presented a prima facie case against P [REDACTED] and S [REDACTED] which the Union has failed to rebut and that, therefore, the suspensions and discharge must be upheld. However, the record establishes that the case against P [REDACTED] and S [REDACTED] is based wholly upon the Employer's conjecture as to what might have occurred on the 27th. The suspensions and discharge cannot be justified on this basis.

Title 7 of the Parties' Agreement provides that the Employer may

"hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause;" (Jt. Ex. 1, p. 10).

The record in this case establishes that there was not just cause for the suspensions of [REDACTED] S [REDACTED] and [REDACTED] P [REDACTED], nor for the discharge of [REDACTED] P [REDACTED]. Accordingly, the suspensions and discharge were in violation of the Parties' Agreement.

DECISION:

1. The suspensions of [REDACTED] S [REDACTED] and [REDACTED]

P [REDACTED] and the discharge of [REDACTED] P [REDACTED] were in violation of the Physical Labor Agreement.

2. [REDACTED] P [REDACTED] shall forthwith be reinstated with full back pay and benefits under the terms of the Collective Bargaining Agreement, less any outside earnings, for the period January 8, 1973 to the date of this Award. With regard to [REDACTED] S [REDACTED], the Employer is directed to pay to his estate full back pay, less any outside earnings, for the period January 8, 1973 to the date of his death on May 6, 1973. His estate shall also be paid the proceeds of any insurance benefits due S [REDACTED].

3. Computation of the moneys due P [REDACTED] and S [REDACTED]'s estate, if any, is remanded to the Parties, the Board of Arbitration retaining jurisdiction in the event they cannot agree thereon.

Sam Kagel
Chairman

Concur/~~Dissent~~

Nov 9, 1976
Date

W. W. Bright
Company Member

~~Concur~~/Dissent

9 November 1976
Date

D. J. [REDACTED]
Company Member

~~Concur~~/Dissent

11-9-76
Date

Lawrence H. Joss
Union Member

Concur/~~Dissent~~

11-9-76
Date

Peter R. Dutton
Union Member

Concur/~~Dissent~~

11-9-76
Date