IN ARBITRATION PROCEEDINGS BEFORE

A BOARD OF ARBITRATION

In the Matter of a Controversy Between LOCAL UNION 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Union, and PACIFIC GAS AND ELECTRIC COMPANY, Employer.	OPINION AND AWARD
Arbitration Case 208	

MEMBERS OF BOARD OF ARBITRATION:

Union Members:
Roger Stalcup and Darrel Mitchell
IBEW LOCAL 1245
P.O. Box 4790
Walnut Creek, CA 94596

Company Members:
Rick Doering and David J. Bergman
PACIFIC GAS & ELECTRIC COMPANY
215 Market Street
San Francisco, CA 94106

Neutral Chairperson:
Walter L. Kintz, Arbitrator
P.O. Box 11012
Oakland, CA 94611-0012

APPEARANCES:

On behalf of the Union:
Tom Dalzell
Attorney at Law
IBEW, Local Union No. 1245
P.O. Box 4790
Walnut Creek, CA 94596

On behalf of the Employer:
James F. Goodfellow
Attorney at Law
PACIFIC GAS AND ELECTRIC COMPANY
Law Department
P.O. Box 7442
San Francisco, CA 94120

This arbitration arises out of a dispute between Pacific Gas and Electric Company ("Employer") and International Brotherhood of Electrical Workers, AFL-CIO, Local Union 1245 ("Union") involving the applicability of Letter Agreement 93-91 to 1995 CES Displacements. Employer and Union are parties to a collective bargaining agreement ("contract" or "agreement"), pursuant to the provisions of which I was named as Neutral Chairperson of a Board of Arbitration. The parties stipulated that all procedural requirements of the contract have been met, and the matter is properly before the Board with jurisdiction to render a final and binding award.

Hearing was held on January 30, 1995 in San Francisco and on February 1, 1995 in Walnut Creek, California. The parties were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to file post-hearing briefs.[1] The matter having been submitted on the briefs, the following opinion and award is issued:

ISSUE

Did the Employer, by its current announced intent to displace, demote and/or lay off employees in Customer Energy

[1]The Union's March 26, 1995 motion to reopen the record was denied.

Services, violate Letter Agreement 93-91?[2]

RELEVANT CONTRACT PROVISIONS

Title 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 plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; . . . .

Title 102.3(a)(2) - Time Limits

> A grievance which does not involve the grievant's discharge must be filed not later than 30 calendar days after the date of the action complained of, or the date the employee became aware of the incident which is the basis for the grievance, whichever is later.

RELEVANT PROVISIONS OF LETTER AGREEMENT 93-91 (93-91)

In October 1993 the parties entered into a written agreement under the Contract which provided as follows:

> Pursuant to Sections 205.19 and 206.12 of the Physical Agreement and Sections 18.17 and 19.12 of the Clerical agreement, Company proposes the following in order to accomplish the restructuring within the Customer Energy Services Business Unit:. . . .

This agreement also included, inter alia, approximately seven specific benefits mitigating the impact of the restructuring on employees.

CONTENTIONS OF THE PARTIES

The Union argues that the grievance was timely filed (11/23/94) with respect to the Employer's 11/17/94 announcement of its intent to eliminate 1,562 CES positions without regard to the

[2]The parties were unable to agree on a statement of the issue. This statement was formulated, pursuant to their agreement, after consideration of their respective positions.

provisions of 93-91.

On the merits the Union sees this dispute as involving the application of the unambiguous language of 93-91 which does not include a termination date. Therefore, the Union contends 93-91 continued in effect and by its terms covered the displacements at issue here. While the Union disputes the relevance of parol evidence concerning the intent of 93-91, it also argues that the parol evidence if considered supports the applicability of 93-91.

The Employer argues the grievance was not timely with respect to its unequivocal repudiation of 93-91 which its regards as the event triggering the Contract time limits. Further it argues this defect is not a technical deficiency but substantive because it resulted in prejudice to the Employer in subsequent negotiations.

On the merits the Employer relies on the context in which the 93-91 agreement was reached and other parol evidence to support its contention that it was intended only to apply to the restructuring contemplated when the agreement was reached.

FACTS

A. Background:

In view of the resolution reached below it is unnecessary to present a detailed account of the facts relevant to the merits of this dispute. It is, however, significant to note that the face of 93-91 contains no indication of an expiration date nor does it expressly limit its application other than by stating it was intended to "accomplish the restructuring within the Consumer

Energy Services (CES) Business Unit." The restructuring referred to is not expressly limited by reference to the then current restructuring. However, it is undisputed that this agreement was negotiated in September and October 1993 in response to the Employer's announced intent to restructure and/or eliminate approximately 1200 CES positions.

There is no factual basis for an analysis of whether at the time of the agreement either party intended it would continue in effect to apply here. Neither party knew or had a specific basis to anticipate the subsequent displacement which gave rise to this dispute. It is more realistic to see the Union as filing this grievance in an effort to use the literal language of the 93-91 agreement to obtain the maximum protection possible for its constituents; while the Employer construes 93-91 as confined to a resolution of the then current displacement issues.

The management rights provision of the Contract cited above grants management a privilege to lay off employees because of lack of work.

Both the round of displacements extant during the 93-91 negotiations and the round of displacements at issue in this proceeding resulted from actions of the California State Public Utilities Commission (PUC).

B. Procedural Issues:

On November 17, 1994,[3] the Employer announced a second round of displacements (the displacements at issue here) as a

[3]All dates hereinafter are in 1994 unless otherwise stated.

result of a PUC April directive, and on November 23 the Union responded by the filing of the instant grievance.

In May the parties were engaged in an arbitration proceeding in which David Bergman, the Employer's Industrial Relations Director, was a member of the Board of Arbitration. Some aspect of statements made by Union representatives in the course of that arbitration caused Bergman to be concerned that the Union was contending 93-91 continued in effect and applied to the November 17 displacement. As a consequence, on June 2 he wrote the Union as follows:

> The restructuring of Customer Energy Services Business Unit has been accomplished with the exception of the Service Operators. Once the Service Operators consolidate to the 14 locations the provisions of Letter Agreement 93-91 will no longer be in effect as agreed.[4]

It appears that within a month Darrel Mitchell, the Union's Senior Assistant Business Manager, had an equivocal conversation with Bergman concerning this letter. On August 16 the Union responded, disputing Bergman's position as follows:

> This letter is in response to your letter dated June 2, 1994 in which Company stated their opinion concerning the status of letter agreement 93-91.
>
> Given the ongoing CES organization including the recent decision to eliminate the regions, IBEW Local 1245 does not concur with the suggestion letter agreement 93-91 would be inoperative at the conclusion

[4]The reference to Service Operators refers to the parties' agreement to place these employees under the protection of 93-91. The implementation of this agreement was delayed pursuant to an April agreement between the parties to apply Title 201 of the Contract to a partial consolidation of the Service Operators' function pending a complete reorganization of their activities and reporting headquarters.

of the consolidation of Service Operators.

Please advise if you believe it is necessary at this time to continue to discuss the matter.

On August 24 Bergman replied as follows:

> This letter is in response to your letter dated August 16, 1994 in which you disagree with the Company's June 2, 1994 letter concerning the CES restructuring.
>
> The intent of Letter Agreement 93-91 was to be a method to offer employees impacted by Titles 206 and 19 an employment option during the CES restructuring. The restructuring the Company was discussing in Letter Agreement 93-91 has been accomplished with the exception of Service Operator consolidation. The agreement was never intended to continue beyond the initial wave of displacements and the subsequent 'bumps.' The elimination of the Regions was not a consideration at the time of the restructuring.
>
> The Company is available if you would like to discuss this issue further.

The Union did not respond to this letter.

On or about September 6 the Employer announced a displacement effecting Title 200 CES materials men which required them to move their place of employment. The Union was notified of this displacement, which did not include the 93-91 options, but took no action to invoke the protections of 93-91.[5]

Within approximately two week of August 24 the parties entered into new negotiations concerning the mitigation of the impact of a new, large scale displacement of unit employees which was the consequence of the April PUC order. These negotiations resulted in an agreement to offer voluntary retirement and

[5]The record establishes the Union, particularly its shop stewards, had notice of the Employer's action. It is less clear that the responsible Union officials knew the extent to which this action implicated the 93-91 protections.

voluntary severance programs identical to those which existed at the time of the negotiation of 93-91 (and which were referred to in 93-91).

Bergman testified that these negotiations were conducted based on his understanding that the Union accepted his position repudiating the continued application of 93-91 and concessions were made which would not have been made had 93-91 continued to be in effect or had the Union continued to pursue that contention.

On November 17 the Employer promulgated a notice to employees describing a new round of displacements in CES, making clear these displacements would be completed without 93-91 protections. It is this event which the Union contends triggered the Contract time limits on the filing of this grievance.

ANALYSIS AND CONCLUSIONS

In the face of reductions in force and displacements resulting from a PUC ruling the Union was not in a position to avoid all consequences to its constituents. It was, however, in a position to bargain to minimize and mitigate the impact of those. Having obtained the 93-91 protections the Union may have viewed this agreement as a floor for the protections available in a subsequent displacement. The record is susceptible of an interpretation indicating the Union avoided a resolution of the question of the ongoing viability of 93-91 while it attempted to obtain a new agreement concerning the impact of a new displacement. Whether or not this is what happened, it is clear the Employer unequivocally repudiated 93-91 prior to the November displacements

and prior to the negotiations concerning the effect of those displacements. This repudiation presented the Union with alternatives; either grieve and resolve the question of ongoing 93-91 applicability or attempt to obtain a new group of mitigations for the impacted employees. It negotiated and obtained lesser concessions and then sought to enhance its position by invoking 93-91 in this grievance. The prejudicial result is obvious without regard to whether this was a conscious strategy. The unequivocal repudiation of 93-91 put the Union on notice the Employer was entering the new round of negotiations on the assumption it was not also obligated by 93-91. When it received no grievance in response to this repudiation it had reason to rely on the absence of a challenge and conducted new negotiations under its understanding.[6]

An employer's unequivocal statement that it will no longer abide by an agreement may or may not trigger the time limits for the filing of a grievance. The prevailing view in arbitration suggests the union may file then or wait until the announced intention or repudiation impacts the bargaining unit.[7] However, that view is subject to the proviso that no prejudice results from

---

[6]Nothing in the content of the new negotiations provided a contrary indication, and the absence of a challenge to the materials men displacements gave an additional basis for this reliance.

[7]Elkouri & Elkouri, How Arbitration Works, 4th ed.; Norwalk Furniture Corp., 100 LA 1051, cited in the Union's brief, supports this point generally although these authorities do not address the critical factual aspects present here. Koch Refining Co., 99 LA 733, also cited by the Union, involved an employer's intent to achieve a stated policy at a future date. A factual context which is distinguished from this Employer's unequivocal statement repudiating the current applicability of 93-91.

the delay.[8] Here the Employer's repudiation was followed by negotiations in which the Employer was prejudiced by proceeding under the express belief that it was no longer bound by 93-91. This belief gave rise to a context for negotiations in which the Employer relied, to its detriment, on the absence of a challenge to its repudiation. These facts present a classic situation for the application of the doctrine of estoppel.[9] Application of this principle to the question of timeliness requires the conclusion the grievance was not timely.

It is not desirable to resolve grievances, especially those which have a serious effect on employees, on a procedural question of this type. However, in these circumstances the result is neither a technical nor mechanical imposition of contract time limits. Rather it is a necessary application of principles of fairness and equity.

This award does not reach a general interpretation of contract time limits and is confined to the facts presented. The Union may in other circumstances wait to file a grievance until a proposed course of conduct occurs and impacts the bargaining unit or contract obligations. This award merely holds that on the circumstances presented here it is estopped from doing so.

AWARD

The Employer did not, by its current announced intent to

---

[8] Celanese Corp. of America, 47 LA 707; Continental Distilling Sales Co., 52 LA 1139; Bendex Corp., 76 LA 498.

[9] Continental Distilling Sales Co., supra.

displace, demote and/or lay off employees in Customer Energy Services, violate Letter Agreement 93-91, and the grievance is denied.

Date

WALTER L. KINTZ
Chairperson

Union Board Member — 6-29-95 Date — [redacted]/Dissent

Union Board Member — 6/7/95 Date — ~~Concur~~/Dissent

Company Board Member — 5-18-95 Date — Concur/Dissent

Company Board Member — 5/11/95 Date — Concur/Dissent