A MATTER IN ARBITRATION

In a Matter Between: PACIFIC GAS AND ELECTRIC COMPANY (Employer) and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 (Union)	Grievance:	Termination
	Hearing:	May 20, 1996
	Award:	August 21, 1996
	McKay Case No. 96-97	
	Arbitration Case No. 217	

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR
ROGER STALCUP and LULA THEARD-WASHINGTON, UNION REPRESENTATIVES
MARGARET SHORT and LAURA SELLHEIM, COMPANY REPRESENTATIVES

Appearances By:

Employer:

Stacy A. Campos, Esq.
Pacific Gas and Electric Company
Law Department
P.O. Box 7442
77 Beale Street
San Francisco, California 94120-7442

Union:

Tom Dalzell, Esq.
Staff Attorney
International Brotherhood of Electrical Workers, Local 1245
620 Contra Costa Boulevard #204
Pleasant Hill, California 94523

A MATTER IN ARBITRATION

In a Matter Between:	Grievance:	Termination
PACIFIC GAS AND ELECTRIC COMPANY (Employer)	Hearing:	May 20, 1996
and	Award:	August 21, 1996
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245 (Union)	McKay Case No. 96-97	

STATEMENT OF PROCEDURE

This matter arises out of the application and interpretation of a collective bargaining Agreement which exists between the above-identified Union and Employer[1] Unable to resolve the dispute between themselves, the parties selected this arbitrator in accordance with the terms of the Contract to hear and resolve the matter along with the panel of arbitrators consisting of: Roger Stalcup and Lula Theard-Washington, Union Representatives and Margaret Short and Laura Sellheim, Company Representatives.. A hearing was held in San Francisco, California on May 20, 1996. During the course of the proceedings, the parties had an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to file written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or about August 7, 1996. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

---

1 Joint Exhibit #1

ISSUES

1) Was the grievant terminated for just cause? If not, what is the appropriate remedy?

2) Did the Company terminate the grievant because of his Union activities?[2]

RELEVANT CONTRACT LANGUAGE

GENERAL

TITLE 1. PREAMBLE

. . . . . .

1.2 NON-DISCRIMINATION

It is the policy of Company and Union not to discriminate against any employee because of race, creed, or religion, physical or mental handicap, sex, sexual orientation, color, age, national origin or veteran's status as defined under any Act of Congress or any other non-job related factor. (Amended 1-1-91)

. . . . . .

TITLE 3. CONTINUITY OF SERVICE

. . . . . .

3.3 Employees who are members of Union shall perform loyal and efficient work and service, and shall use their influence and best efforts to protect the properties of Company and its service to the public, and shall cooperate in promoting and advancing the welfare of Company and in preserving the continuity of its service to the public at all times.

. . . . . .

---

2 Tr. Pages 4 and 5, Joint Exhibit #5

TITLE 5. UNION ACTIVITY

. . . . . .

5.3 NON-DISCRIMINATION

Company shall not discriminate against any employee because of membership in Union or activity on behalf of Union. (Amended 1-1-91)

. . . . . .

TITLE 7. MANAGEMENT OF COMPANY

. . . . . .

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.

BACKGROUND

The grievant began working for the Employer as a full-time, regular employee in 1992 as a garageman in the Employer's 50 Main Street and 77 Beale Street garages. As a result of a work-related injury in late 1994, the grievant was placed in a temporary, light-duty assignment away from the garage. The light duty, which was clerical work in the engineering records department, ended after approximately seven months. In May of 1995, the grievant received a report from his treating physician, Dr. Lee, recommending the grievant be placed back in his regular job in order to try to see whether performing the work would create any problems for the grievant. The grievant disagreed with Dr. Lee's report and told Rita Sabadell, one of the Employer's human resources advisors, that he disagreed with Dr. Lee and did not feel he was

capable of working. After a series of examinations, it was ultimately determined the grievant could not return to his regular duties, and the grievant was informed that the Employer would initiate a sixty-day internal search for alternative employment to accommodate the grievant's work restrictions. During the sixty-day period, the Employer claimed that it found no fewer than four available jobs that seemed to meet the grievant's physical limitations, but the grievant refused to consider all but one of the jobs. When the grievant's injuries were determined to be permanent and stationary for sixty consecutive days and he had not secured other employment within the Company, the Employer terminated the grievant in accordance with its standard policy. It is the position of the Union that the grievant should not have been terminated and should be reinstated with full back pay and benefits.

The grievant testified that his duties as a garageman involved parking cars all day.[3] In approximately three years prior to injuring his arm and leaving for light duty, the grievant stated, he changed no more than two or three batteries. He would change three to four tires a week, but during some weeks, there were no tires at all to change. The report from Dr. Pugh indicated the grievant would have difficulty washing, waxing, polishing and sweeping. It was the grievant's opinion that he did not wash cars, waxed cars or polished cars. If a car came in dirty, it was vacuumed, gassed and then put through the car wash. Vacuuming, according to the grievant, did not cause problems with his wrist. The grievant testified he could see no reason why the Employer would not assign him to 50 Main Street just to handle parking and valet duties. The grievant testified that his doctors would release him without restrictions if he had an operation. The grievant chose not to have the operation, but when it became apparent that he would be terminated unless he could be fully released, he then sought to have the operation. However, once he was

---

3 Tr. Page 183

terminated, the grievant then chose not to have the operation, stating to himself, "Well, why should I have the operation?"[4] The grievant indicated that he has received rehabilitation benefits.

The grievant testified that in his capacity as an employee in the garage, he served as a Union shop steward. He described one matter which he handled that involved the Employer hiring ". . . agency workers into the materials department." When this was brought to the grievant's attention by some of the employees in that area, the grievant lodged a complaint. He told the supervisor, "It's against Union Contract to hire agency workers to do physical work."[5] The supervisor was told to let the two agency people go. The grievant described other occurrences involving agency workers during this same time period as well in which he also was involved. The grievant testified that he filed several other grievances against Clyde Broussard when he became supervisor over the garagemen. One involved Mr. Broussard's giving away the head clerk's job; another involved attendance records. He represented Robert Briley, an employee who was terminated by Mr. Broussard and who ultimately was reinstated.

Mr. Broussard testified that he began working for the Employer in January, 1978. He served as a shop steward for the Union from 1978 until 1987 when he moved into a management position.[6] Mr. Broussard stated that he supervises the garagemen, and he described the duties which those individuals perform in the two downtown garages. He stated,

> It would include minor servicing of vehicles, such as an oil change, lube the vehicle, filter, air, things that are just, what we call, just replace, not repair type of work.

---

4 Tr. Page 223
5 Tr. Page 185
6 Tr. Page 13

> It would also include battery servicing, flat tire repair and changing. Lifting of a vehicle, you know on jack stands.
>
> Also, here it includes detailing of a vehicle, washing, cleaning, vacuuming, parking, fueling, and sometimes providing some form of executive, you know, driving privileges. We would drive as far as for executive drivers.[7]

At 50 Main Street, the employees working there also park cars for individuals in addition to the pool cars. In December, 1994, there were 330 pool cars. Currently, there are 230 pool cars. There are 300-400 individual cars that might park at 50 Main Street and would need to be parked by the garagemen. There may be as many as several hundred at 77 Beale Street that would need to be parked.

Mr. Broussard described the duties of the garagemen in assisting mechanics. He stated,

> The long is a long inspection, that they would do brakes, inspections of the -- inspection of the suspension area. And that's performed once a year.
>
> The short or the long is basically the lube, where they would actually change the oil, change the filter.
>
> So a garageman here would actually be assisting the mechanic. You know, after he performed his functions he would go behind and perform a short.
>
> Or if the vehicle was just in for a short, he would just be performing a minor maintenance, which is lube, maybe changing the battery, something like that.[8]

The duties of the garagemen vary with some assigned primarily to assist mechanics and others to park cars with some working only at one garage and others working at both garages, depending on what time the garagemen start for the day.

---

7 Tr. Page 18

8 Tr. Pages 23 and 24

Mr. Broussard first met the grievant shortly after he came to the garage in 1993 in a positive discipline meeting in which the grievant's attendance was being discussed. During the course of working with the grievant since 1993, Mr. Broussard stated, there were three separate occasions on which the grievant was not able to fulfill his job duties. In September, 1993, he filed a stress claim. In 1994, the grievant had problems with his wrist and brought back medical slips indicating that he was not able to drive more than two hours which precluded the grievant from working as a garageman based on the duties of the garageman. It was Mr. Broussard's recollection that the grievant had a number of other restrictions imposed from time to time by doctors including not driving any vehicle and certain lifting restrictions. Because of the grievant's inability to perform his duties as a garageman, an alternative position was found for him on a temporary basis in the engineering group. However, based on the restrictions imposed on the grievant by his doctors, Mr. Broussard stated, he was not able to find any position as a garageman which would accommodate the grievant's injuries.

At no point, Mr. Broussard stated, did the grievant's role as a shop steward or any of his Union activities affect any of the decisions made by the Employer which affected the grievant. It is not the Company's position, Mr. Broussard testified, that accommodation requires the Employer to bump existing employees out of their current position in order to find a place for the injured worker. The choice of jobs to some extent in the garages is dependent on seniority, according to Mr. Broussard. It is imperative, according to Mr. Broussard, that all the garagemen whom they employ in the two garages be capable of performing all of the duties that are expected of a garagemen and not simply park cars. He stated,

> . . . the way the facility is staffed, we used to have eight garagemen; now we only have seven. And with the amount of hours that we operate, each of the garagemen perform a vital function.

> The early guys, like Andy, when he opens the facility, he had to be prepared to do anything, like drive a stick shift, or anything like that.
>
> As far as the later garagemen that start like at 9:30, they have -- at times they would close down the 77 Beale Street garage, which means that if a client had any type of problem as far as a tire or battery they would have to accommodate that request.
>
> Likewise, they would also have -- the other two garagemen would help out the 50 Main garage. So there again, they would either be retrieving or parking a car that would have possibly a stick shift or something.[9]

Linda Lasagna, who at the time of the grievant's injuries was the Employer's senior worker's compensation representative, testified that she was responsible for handling the grievant's worker's compensation claim. It was her opinion based on reports that she had received back from Dr. Lee, a specialist in wrist surgery, that as of June, 1995, the grievant was able to return to his duties as a garageman insofar as the injury to his wrist was concerned. However, the grievant had a second complaint, according to Ms. Lasagna which was his inability to work with Mr. Broussard. She described the medical information that she had available indicating the grievant's unwillingness to work with Mr. Broussard. She stated,

> According to the medical information that we had received he was released to his full, unrestricted regular job as a garageman, yet he wasn't returned because of the other issue that he had raised, his concern about working with Mr. Broussard.
>
> Human resources had arranged for the fit-for-duty examination and received a simple, "No, he can't work with him."
>
> And at that point human resources needed to decide where they were going to put him or what to do with him.
>
> I had a release to have him go back to his regular job, so therefore he was not entitled to workers' compensation benefits.[10]

---

9 Tr. Pages 47 and 48

10 Tr. Page 59

At this point in time, according to Ms. Lasagna, the grievant was not entitled to worker's compensation since he had received a full release. Within a week, the grievant called her, according to Ms. Lasagna, contesting the claim of Dr. Lee that he was able to go back to work indicating that his regular treating physician, Dr. Lungu, had not released him to go back to work. In a conversation that Ms. Lasagna had with Dr. Lungu, Dr. Lungu suggested a different opinion be sought concerning the grievant's wrist, but she also told Ms. Lasagna that she believed the grievant was able to return to work.

In a conversation that Ms. Lasagna had with Dr. Lungu on June 22, 1995, Dr. Lungu indicated that the grievant was refusing to return to work. Ms. Lasagna stated,

> At this point she had relayed to me that Mr. W refused to return to work, saying that the supervisor and the director didn't want him.
>
> I explained to her briefly the other issue that he had brought up, Mr. W had brought up, concerning his concern and inability to work with Clyde Broussard.
>
> And that she further indicated to me that she had discussed Dr. Lee's report with another Kaiser physician, and that they agreed that he should try modified duty at least until the appointment with Dr. Pugh.[11]

During this conversation, Ms. Lasagna stated, Dr. Lungu was vacillating between whether to release the grievant for regular duty or to release him for modified duty. On June 21, Dr. Lungu was in favor of releasing the grievant to full duty, but on June 22, she changed her mind and released him for modified duty. On worker's compensation, the grievant was receiving 85 percent of his basic wage.

---

11 Tr. Page 64

Ms. Lasagna testified that she has had experience working with the grievant in the past on four other worker's comp claims and has found him very difficult to pin down with respect to a fixed position. She stated,

> . . . it's been my experience through the claims, the four claims, all together, that I've dealt with, with this particular individual, is that when things don't seem to go exactly his way there's -- there's a new bit of information that switches. So it's -- it's hard to pin him down. You can't get any real clear answer. It's vague, ambiguous, and -- and it's been difficult to handle.[12]

As of the time when she transferred the grievant's file in the summer of 1995, Ms. Lasagna stated, the grievant was considered to be permanent and stationary and, therefore, qualified as an injured worker. The file was then taken over by Polly Sheker. Ms. Sheker works as a contract employee performing worker comp examinations for the Employer. Since the grievant was now considered permanent and stationary, he was referred for vocational rehabilitation and a job search was undertaken for one which did not involve the rotation of the wrist. The Employer has a sixty-day internal job search which is done initially for the injured worker in an attempt to keep the employee with PG&E. The internal search, by law, is only thirty days, but the Employer provides an additional thirty days over and above what the law requires. Jacqueline Jacobs, the rehabilitation coordinator in the safety, health and claims department, testified that the Employer in addition to the sixty days, on occasion, will grant an additional thirty days if a job is pending within that thirty days for which the injured worker would likely become qualified. Unless a job is pending, however, a thirty-day extension is not granted by the Employer.

Ms. Jacobs testified that Rob Towle, a human resources advisor, was assigned to assist the grievant in a job search during the sixty days. According to Ms. Jacobs, Mr. Towle did locate a

---

12 Tr. Page 69

number of jobs. When asked whether the grievant expressed any interest in the jobs Mr. Towle found, Ms. Jacobs testified she was not sure. Then she stated, "I don't know if he expressed any serious interest in any of those jobs, but I know he was advised of one particular job and he was encouraged to contact Mr. Towle right away."[13] However, according to Ms. Jacobs, Mr. Towle never received a call from the grievant concerning the job. She described her understanding of how an injured employee is to cooperate in the job search. She stated,

> The employee should be in contact with the human resources advisor, either by phone and/or in person, to put in or bring up to date any bids or transfers they may already have in the system.
>
> And they should also be looking on the job board and BBCorp to see if there are any jobs that they would like to put in a bid for, a transfer for or an application for.
>
> If a resume is needed, that is a function that I could provide for the injured worker for HR, or HR could do that for them.
>
> But they are encouraged to be actively involved with HR and, also, take any tests that would qualify them for other jobs.[14]

The grievant's internal job search was unsuccessful, and an agreement was reached with the Employer with respect to an alternative profession in which the grievant elected self-employment to continue with a business he was operating already on the side.

POSITION OF THE PARTIES

EMPLOYER

The Employer stated that it had just cause to terminate the grievant's employment. The Employer noted that the grievant's termination was premised on his inability to secure an

---

13 Tr. Page 150
14 Tr. Page 151

alternative position with the Employer during the sixty-day internal job search in light of the grievant's permanent and stationary injury which precluded him from returning to his regular job. The Employer argued that it believes the dispute between the parties consists of first, whether the grievant was actually permanent and stationary on September 27, the final day of the sixty-day job search, and secondly, whether the grievant should have been granted his request for an extension of the sixty-day period. The undisputed testimony, the Employer stated, establishes clearly that during the sixty-day job search period, the grievant was considered permanent and stationary by his treating physician. Secondly, the grievant did not meet the Employer's criteria for receiving an extension to the sixty-day search period.

The grievant's physician, Dr. Lungu, informed the Employer on July 27 and again on September 27 that the grievant's injury was permanent and stationary and that his injury precluded him from returning to unrestricted duty in the garage. In spite of this evidence, the Union asserts that the grievant's permanent and stationary status changed on the afternoon of the 59th day of the 60th day internal job search when the grievant decided to change his treating physician to Dr. Lee and inform the Company that he decided to undergo surgery. The Employer asserted that this amounts to an argument that the grievant should have been able to assume the role as his own treating physician and decided for himself whether or not his injury was permanent and stationary. The Union's position is contrary to the California Worker's Compensation Act and is unreasonable. Ms. Sheker, the Employer's worker's compensation representative, testified that under California law and the Employer's policy, it is undisputed that only the treating physician can deem an industrially injured employee to be permanent and stationary and determine whether the employee can return to work on unrestricted duty. The treating physician was Dr. Lungu, not Dr. Lee. To allow the employee to substitute himself for his treating physician would pose a significant safety risk to the employee as well as to the employee's coworkers.

The grievant did not qualify for an extension of the job search period. The Employer's decision to deny the grievant's request for an extension was in accordance with its extension policy. Ms. Jacobs indicated that industrially injured employees are rarely granted an extension because the Employer doubles the amount of search time required by the State. Extensions are limited to situations related to the job search process, such as when the injured employee needs to take a special test or to undergo an interview for a job that has been identified for him or her during the sixty-day period. Extensions are not given for medically related reasons. The grievant did not have any job prospects suited to his physical limitations when he requested an extension. The grievant requested an extension because he needed additional time to locate a physician that would advise the Company that he could return to unrestricted duty in the garage.

The management's rights clause of the Contract affords the Employer the right to manage its workforce. It is well settled that it is within the management's rights to establish and enforce rules to ensure the health and safety of employees or others. In this case, the Employer refused to return the grievant to the garage on the basis of his treating physician's opinion that doing so would aggravate the injury to his wrist. The Union has not presented the board with any evidence that the Company had a duty under the Agreement to allow the grievant to return to the garage on light duty and/or to let him remain a PG&E employee. When an injured employee is unable to perform all of the duties of his or her job, cause exists to terminate the employee. With respect to the extension of time, management's rights allows the Employer to promulgate reasonable rules to manage its workforce, including the criteria for granting extensions. The Employer applied its policy with respect to extensions uniformly as it would to any other employee. The grievant was not treated in any manner different than other employees would have been treated in similar circumstances.

The grievant was not terminated because of his Union activities. All of the persons responsible for administratively terminating the grievant testified that the grievant's Union affiliation or activities did not factor into their decision. The grievant's only evidence of anti-Union animus is his testimony that he believes his supervisor, Clyde Broussard, retaliated against him 11 months after he last worked in the garage because he had served as one of the shop stewards in the garage. The grievant's personal beliefs are not enough to sustain a finding that the Employer discriminated against him based on Union activities. For all these reasons, the Employer asked that the grievance be denied.

UNION

The Union argued that because the grievant opted for surgery on September 26, his condition was not permanent and stationary. The Employer's decision to terminate the grievant was predicated entirely upon the assumption that the grievant's medical condition was permanent and stationary. Dr. Lungu referred the grievant to Dr. Lee who did not consider the grievant's status to be permanent and stationary if he would undergo surgical treatment. Dr. Pugh also concluded that the grievant was not permanent and stationary if he would submit to surgery. Clearly, the determination of whether the grievant was permanent and stationary depended entirely on whether he chose to undergo surgery or not. The grievant was never told that there was a cutoff on his decision to undergo surgery. To the contrary, Polly Sheker, the worker's compensation claims examiner, testified that the grievant could always elect to have surgery. September 26, one day before he would be terminated if he did not find another job inside the Company, the grievant visited Dr. Lungu at Kaiser and obtained a release to modified duty. The grievant attempted in vain to convince the Employer that he could return to work with the modified

release. Frustrated but afraid that he was about to lose his job, the grievant returned to Kaiser and told Dr. Lungu that the Employer would not let him work in the garage with the modified release. He would opt, therefore, to receive the operation. Dr. Lungu then released the grievant to Dr. Lee for surgery. The Employer knew before it decided to terminate the grievant that he had opted to have surgery on his wrist. Despite the grievant's decision to undergo surgery, the Employer continued its decision to terminate the grievant. If the grievant was not permanent and stationary, he should not have been fired.

The grievant should have been given a thirty-day extension on his internal job search. In a letter dated August 3, 1995, the Employer advised the grievant that he had a sixty-day period in which to conduct an internal job search which would conclude on September 27, 1995. He was told, furthermore, this date may be extended an additional thirty days with your agreement. In September, the grievant asked that the date be extended an additional thirty days. Ms. Jacobs and Mr. Towle conferred and decided to deny the request. Ms. Jacobs indicated that extensions were only granted in certain circumstances but acknowledged that the grievant had not been told of these extenuating circumstances. The extension should have been granted because there were no restrictions in the letter the grievant received and because the Employer lost the grievant's medical file and the grievant's treating physician was not available for most of the sixty-day job search period. Because of these problems, the extension should have been granted and, therefore, the grievant's termination was not for just cause.

The Company's reliance on the fitness for duty examination is misplaced. The Company failed entirely to accommodate the grievant's limited release to return to work. The grievant's normal supervisor, Clyde Broussard, was not asked if it was in his opinion possible to

accommodate the grievant's medical restrictions. Acting garage supervisor, Lory Engell, recommended the grievant be assigned to 50 Main Street just to park cars. No action was taken on this recommendation. The Company had 4.5 positions working at 50 Main Street garage only parking and retrieving cars. The grievant was doing nothing more than parking and retrieving cars when he was given the light duty assignment away from the garage. The Employer inadvertently was using a dramatically incorrect job description in analyzing the grievant's ability to work with a slight medical restriction imposed by Dr. Lungu. The Employer clearly could have returned the grievant to work in the garage, assigning him to one of seven positions which did nothing more than park and retrieve cars.

Because the Employer cannot show just cause for the grievant's termination, the grievant's Union activities must have been the reason for his termination. While acting as a shop steward for Local 1245, the grievant prevailed in several high profile cases which cast Mr. Broussard in a less than favorable light. There must have been some reason for the Employer to have fired the grievant. The articulated reasons are without merit, meaning that there must have been some other reasons. Given the grievant's vociferous and successful advocacy on behalf of his fellow employees, one must conclude that his advocacy led to his termination. For all these reasons, the Union asked that the grievant be reinstated to his former position with full back pay and benefits.

DISCUSSION

The present dispute before the arbitrator is one which comes with several layers. It is not unlike a wedding cake (or in this case a divorce cake) which one eats a layer at a time. On the surface, the Employer terminated the grievant administratively because the grievant was allegedly

unable to perform his regular duties as a garageman and had been determined to be permanent and stationary by his treating physician. After conducting a sixty-day internal job search, the grievant's employment was terminated. To counter this, the grievant claims that he was not permanent and stationary because at the very last minute, he opted to undergo surgery which would have improved his condition and removed the permanent and stationary designation. Furthermore, the grievant believes that he should have been granted a thirty-day extension of the job search in order for him to pursue his medical options more fully. These two positions, of course, reflect the top layer of the cake.

When one cuts below the top layer, it is apparent that this individual is a relatively short-term employee who was not an enthusiastic worker and who did not like his boss, Mr. Broussard. The grievant appears to have been a skillful master of the worker compensation process and took advantage of it on a number of occasions. In June when it appeared that he would be forced to go back to work, the grievant found alternatives to keep him from having to go back, namely, that he could not stand the stress of working for Mr. Broussard. However, when this alternative proved likely to knock him off of the benefit wagon, he was able to persuade Dr. Lungu to agree with him that he should not return to work in spite of Dr. Lee's recommendations and remain on a modified release. However, unfortunately for the grievant, this led to the conclusion that the grievant was permanent and stationary so long as he chose not to undertake the treatment proposed by Dr. Lee. The arbitrator is not entirely sure whether the grievant fully understood the impact of a permanent and stationary diagnosis. It worked well in July and August while the grievant continued to pull in 85 percent of his wages, but it proved to be problematic when it threatened to throw the grievant off the system entirely and out the door.

In the arbitrator's opinion, when it became apparent to the grievant that he could no longer receive worker compensation benefits at the rates he had been receiving and that he would have to go back to work or find some alternative, he opted to try the surgery ploy in order to extend his worker's compensation benefits and delay the requirement to go back to work or be fired. It is interesting to note that the grievant waited until the very last day before allegedly opting to undergo surgery. This, in the arbitrator's opinion, is consistent with the grievant's behavior in the past where he has obviously attempted to manipulate the worker's compensation system. The grievant counted on the medical excuse and the thirty-day extension to save him from the brink of disaster. Unfortunately, the extension was not as flexible as the grievant must have believed.

The Employer stated that it provides a sixty-day search period for injured workers. State law requires a thirty-day period. The Employer's period more than adequately meets any State requirement. The thirty-day extension beyond the sixty days is purely discretionary and has been applied in the past by the Employer in situations where an employee has found a potential job but needs additional time for an interview or something else related to obtaining the job. Since the grievant expressed little or no interest in any of the jobs which were found for him during the sixty-day period, the Employer's policy had no relationship to the grievant's situation. The grievant was not interested in finding a job; he was interested in finding a way to extend his worker compensation benefits without having to work. When the Employer chose not to grant the grievant an extension in this circumstance, it did not abuse its discretion nor did it change its policy specifically for the grievant. The Employer had no obligation to grant the grievant an extension, and it did not violate either the Contract or its policy when it chose not to do so.

The Union argued that since it could not determine a legitimate reason in its opinion for the grievant's termination, the Employer must have fired the grievant because of his Union activities. The grievant's Union activities consisted of acting as a shop steward and filing several grievances. Mr. Broussard appears to have been the target of the grievances filed by the grievant. Mr. Towle and Ms. Jacobs, who essentially made the decision not to extend the grievant's search period and, therefore, terminate the grievant, do not have anything to do with the grievances filed by the grievant or with Mr. Broussard. There is no evidence of any relationship between Mr. Broussard and those two individuals with respect to the decision to terminate the grievant. What the Union has presented is pure speculation. It is, of course, possible that the Employer supervisors were so upset with the grievant they conspired to get his physician to declare him to be permanent and stationary and then allow the grievant a sixty-day job search period, cutting him off at the last day refusing to extend the search for another thirty days. While it is possible that the supervisors conspired to do this, in the arbitrator's opinion, it is highly unlikely. Since this was the cause of the grievant's termination, it is difficult for the arbitrator to understand how any of the grievant's Union activities had much to do with the cause of the grievant's termination. In the arbitrator's opinion, the grievant had far more to do with his own termination than did any of the Employer supervisors who may have disliked the grievant because of his Union activity.

In the arbitrator's experience, there are a number of employees who choose to skate near the edge of disaster with respect to taking advantage of various benefit programs. A number of employees whom this arbitrator has worked with over the years appear to prefer receiving benefits than working. Many of the employees found very ingenuous ways to continue their relationship with the benefit programs far beyond the periods of time normally contemplated when those programs were created. It is the arbitrator's opinion that the grievant fits in with this group of employees that the arbitrator is discussing. Clearly, the grievant has been more interested in

receiving benefits than he has been in working. The grievant has done little or nothing to rehabilitate himself so he could continue working. The grievant's solution to his problem was to allow him to park cars which is only a portion of the garageman's duties, placing all the other work responsibilities on the other garagemen. The grievant, of course, failed to explain why he should have been treated in this favorable manner at the expense of his colleagues.

The grievant does not appear to have taken the job search very seriously and does not appear to have spent much time or effort pursuing any of the jobs which were identified. The grievant allegedly opted for surgery in order to repair his wrist condition and, therefore, make him eligible to return to work as a garageman. However, once it was clear that the grievant was going to be terminated anyhow, the grievant opted out of surgery even though the costs would have been covered by the worker's compensation program. The arbitrator wonders what the grievant would have the arbitrator do under the circumstances. If the arbitrator were to reinstate the grievant as he has requested, he would still be unable to return to work and would, therefore, still be permanent and stationary. Under those circumstances, at most, a new sixty-day search would be undertaken. The grievant could, of course, opt for surgery and that would delay and continue his worker's compensation for perhaps another year. All of the rehabilitation, of course, could have been done by this time had the grievant been truly interested and the grievant would now be in a position to go back to work.

When all the layers of the cake are finally removed, it is clear that this is a case involving an employee who has, for some time, taken advantage of the Employer's worker's compensation program to avoid having to work. The grievant played on the edges of the program in an effort to extend the length of benefit periods. Ultimately, the grievant slipped over the edge in September

when he attempted on a last-minute basis to allegedly opt for surgery which, in the arbitrator's opinion, is simply an additional pretense to extend benefit payments. The grievant received everything from the Employer with respect to worker's compensation to which he was entitled. When the Employer terminated the grievant on an administrative basis, it did so within the parameters of its worker's compensation program and within the parameters of the collective bargaining Agreement. The Contract contemplates that employees are willing to work a full day for a full day's pay. Individuals such as the grievant who appear unwilling to do so are not to be accorded any special treatment under the terms of the collective bargaining Agreement. The grievant's allegation that he was terminated because of his Union activity is not supported by the evidence in the record. For all these reasons, the Employer had just cause to terminate the grievant.

AWARD

The Employer had just cause to terminate the grievant. The grievant was not terminated because of his Union activity.

It is so ordered.

August 21, 1996

Gerald R. McKay, Arbitrator

Roger Stalcup, Union Representative

Lula Theard-Washington, Union Representataive

Margaret Short, Company Representative

Laura Sellheim, Company Representative