REVIEW CASE #8
ARBITRATION CASE #2

ISSUE:

THE SOLE ISSUE FOR DETERMINATION IN THE ABOVE NUMBERED CASE IS:

WERE S[illegible], M[illegible], B[illegible], M[illegible] AND W[illegible] "REGULARLY EMPLOYED IN A FLOATING CREW" WITHIN THE MEANING OF SAID SECTION 301.1 ON FEBRUARY 1, 1952, THE DAY ON WHICH THEY WERE LAID OFF AT STOCKTON, CALIFORNIA? (JOINT EXHIBIT 1)

IN SUMMARY: (DECISION)

IF SECTION 301.1 OF THE AGREEMENT IS VIEWED EXACTLY AS WRITTEN, THE COMPANY'S CONTENTION IS NOT SUSTAINED. THERE IS NOTHING IN THE AGREEMENT WHICH PROVIDES DIRECTLY OR INDIRECTLY THAT, FOR AN EMPLOYEE TO BE "REGULARLY EMPLOYED" IN A FLOATING CREW, HE MUST HAVE BEEN TRANSFERRED AT LEAST ONCE BEFORE OBTAINING SUCH STATUS. NOR DOES THE LANGUAGE PROVIDE THAT SUCH STATUS IS OBTAINED SIMULTANEOUSLY AT THE TIME OF THE FIRST TRANSFER. AND CERTAINLY NOTHING IN THE AGREEMENT INDICATES THAT SECTION 301.1 IS ONLY LIMITED TO THOSE EMPLOYEES THAT THE COMPANY TRANSFERS.

ON ITS FACE, SECTION 301.1 IS CLEAR THAT IN ADDITION TO THOSE EMPLOYEES WHO MIGHT BE TRANSFERRED BY THE COMPANY, IT ALSO INCLUDES EMPLOYEES "LAID OFF" AND REHIRED WITHIN THIRTY DAYS.

ACCEPTING THE COMPANY'S CONTENTION AS TO PAST PRACTICE, THIS MAY BE RECOGNIZED AND GIVEN WEIGHT, PROVIDED IT IS USED AS AN AID TO INTERPRET ALL OF SECTION 301.1. BUT PAST PRACTICE MAY NOT BE USED TO WIPE OUT THE SUBSTANTIVE FEATURES OF SECTION 301.1 AS APPLIED TO "LAID OFF" EMPLOYEES. IF THE PAST PRACTICE IS APPLIED EQUALLY TO BOTH "TRANSFERRED" EMPLOYEES AND "LAID OFF" EMPLOYEES, THEN IT MAY BE CONSIDERED AS APPLICABLE TO SECTION 301.1.

IT IS CLEAR FROM THE RECORD THAT THERE IS NO EVIDENCE INDICATING THAT THE UNION AT ANY TIME SPECIFICALLY AGREED TO ELIMINATE THE OPERATION OF SECTION 301.1 TO "LAID OFF" EMPLOYEES. THUS, WHETHER CONSIDERED IN TERMS OF THE SPECIFIC LANGUAGE OF THE AGREEMENT, OR WHETHER CONSIDERED IN TERMS OF PAST PRACTICE, EQUITABLE APPLIED TO ALL EMPLOYEES COMING WITHIN SECTION 301.1, IT IS CLEAR THAT THE CLAIMANTS IN QUESTION WERE "REGULARLY EMPLOYED" IN A FLOATING CREW WITHIN THE MEANING OF SECTION 301.1, SINCE THEY WERE RE-EMPLOYED WITHIN THIRTY DAYS IN ACCORDANCE WITH THE PROVISIONS OF SECTION 301.1.

DECISION:

S[illegible], M[illegible], B[illegible], M[illegible] AND W[illegible] WERE REGULARLY EMPLOYED IN A FLOATING CREW WITHIN THE MEANING OF SECTION 301.1 ON FEBRUARY 1, 1952, THE DAY ON WHICH THEY WERE LAID OFF AT STOCKTON, CALIFORNIA.

FOR UNION:

RAY MICHAELS
DON GRANDSTAFF
L. L. MITCHELL

BY: /s/ L. L. MITCHELL

DATE: 1-22-53

FOR COMPANY:

H. F. CARR
R. J. TILSON
V. J. THOMPSON

BY: /s/ V. J. THOMPSON

DATE: 1-20-53

R. C. FILE #11

In the Matter of a Controversy between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1245, AFL, Complainant and PACIFIC GAS AND ELECTRIC COMPANY, Respondent Involving appropriate determination and disposition of the issue: "Were [illegible] regularly employed in a floating crew within the meaning of Section 301.1 on February 1, 1952, the day on which they were laid off at Stockton, California?"	CASE NO. 2 OPINION AND DECISION July 26, 1954

ISSUE:

The sole issue for determination in the above numbered case is:

Were [illegible] "regularly employed in a floating crew" within the meaning of said Section 301.1 on February 1, 1952, the day on which they were laid off at Stockton, California? (Joint Exhibit 1)

AGREEMENT PROVISION:

Section 301.1 When an employee who is regularly employed in a floating crew at the established Company rate of pay is transferred from a present job to one at a new location,

or when any such employee is re-employed at a new location, within thirty (30) days after lay off for lack of work at a previous location, he shall be entitled to an expense allowance under Section 301.3 hereof provided he remains on the job for a minimum of twenty-eight (28) consecutive days or as long as his services are required, whichever period is shorter.

FACTS:

The five claimants were employed at Stockton, California, some time prior to February 1, 1952; on February 1, 1952, they were laid off at Stockton for lack of work; on February 18, 1952, they were re-employed at Panoche Substation, 19 miles from Mendota and 100 miles from Stockton (Tr. p. 9). Most of the claimants had worked at Stockton for about three years (Tr. p. 8). The claimants when working in Stockton were members of a crew engaged in the maintenance and installation of gas mains and services (Tr. p. 10).

UNION'S POSITION:

That when the claimants were employed at Stockton they became members of a floating crew and were "regularly employed in a floating crew" within the terms of Sec. 301.1 of the Agreement; that no additional condition or qualification is required as a prerequisite to "...attaining floating crew status;" that since less than thirty days elapsed between the claimants' lay off at Stockton and re-employment at Panoche,

the claimants therefore are entitled to expense money under Sec. 301.1; that both a strict legal interpretation of Section 301.1 "...as well as a consideration of the equities involved..." supports the Union's contention in this case (Union Brief, pp. 2-4).

COMPANY'S POSITION:

That the phrase in Section 301.1 at issue is "regularly employed in a floating crew;" that the phrase is ambiguous; that an employee does not become a member of a floating crew until he "...has floated at least once;" that is, until he has had at least one transfer from a job to another on Company instructions; that an employee does not become a member of a floating crew on his first employment (Company's Brief, pp. 3, 6-7); that the Company's position is sustained by practice or custom; that the Union has by its actions acquiesced in this interpretation of Section 301.1; that claimants were not transferred from Stockton to Panoche; that claimants, not having been transferred prior to their employment at Stockton, did not acquire floating crew status which "...qualified them for expenses when they obtained employment at..." Panoche (Company's Brief, p. 10).

DISCUSSION:

On its face, Section 301.1 provides that employees

who are regularly employed in a floating crew may under certain circumstances receive an expense allowance under Section 301.3. The events which may qualify an employee for an expense allowance are two:

1. If he is transferred from a present job to one at a new location. Hereinafter, such employee will be referred to as a "transferred" employee.

2. If he is re-employed at a new location within thirty days after lay off for lack of work at a previous location. Hereinafter, such an employee will be referred to as a "laid off" employee.

For either a "transferred" or "laid off" employee to be eligible for expenses, he must have been "regularly employed in a floating crew." Thus, we are mainly concerned with the meaning of the words "...regularly employed in a floating crew." The underlined words are those which particularly require definition in this case.

First, what is a "floating crew?" According to Company witnesses, most of the crews in the general construction department are floating crews. Such crews could number from two to three men or up. They are designated as floating crews because they "...are subject to transfer to any location in the P. G. & E. system." All employees hired in the general con-

struction department are assigned to some crew (Tr. pp. 48-49).

The basic differences between the parties seem to be these:

The Union contends that once an employee is assigned to a "floating" crew, he becomes regularly employed in such a crew.

The Company distinguishes between the "transferred" employee and the "laid off" employee. In the case of either type of employee, the Company contends that he must have "... at least one transfer from a job to another on Company instructions" before he becomes regularly employed in a floating crew. However, the Company applies different standards to each of these classes of employees as a condition of their obtaining floating crew status.

Example: Employee hired at A and <u>transferred</u> by the Company to B (other qualifications being met) is considered eligibile for expense under Section 3o1.1. This employee, because he was <u>transferred</u>, acquired proper status "coincident with the transfer." (Company Brief p. 8) That is, the transferred employee, simultaneously with his transfer, became a regularly employed member of a floating crew. (Tr. pp. 52-54)

However, if this same employee were hired at A, laid off there for lack of work, and then was re-employed at B within thirty days, unless he had a previous "transfer" on his record,

he was not entitled to expenses under Section 301.1. (Tr. p. 50)

The "laid off" employee does not according to the Company simultaneously attain the status of a regular member of a floating crew by being re-employed within the thirty day period. In this important regard therefore the "laid off" employee is treated differently than the "transferred" employee. Even though both these classes of employees are covered by Sec-301.1, and that section contains nothing on its face indicating that they should be treated differently.

It may be helpful to review the development of the "expense" provision in the Agreement. Prior to the first collective bargaining agreement between the Union and the Company, the Company had certain rules concerning expense. On March 1, 1942, the Company in a circular letter (Company Exhibit 1) recognized under certain conditions expense money for those employees transferred to a new location or those employees re-hired or re-employed within thirty days after a lay off. In this circular letter of 1942 nothing appears to indicate that the condition of a prior transfer was an additional prerequisite for a laid off employee before he could obtain expenses when rehired within thirty days of his lay off.

The first temporary collective bargaining agreement between the Company and the Union, dated November 1, 1943,

provided expense money for employees regularly employed in a floating crew who (1) transferred from their present job to one at the new location and (2) when such employee was rehired within thirty days after a lay off. The 1946 agreement between the parties contained the same condition.

Neither the 1943 nor 1946 agreement provided that a transfer on the record of a "laid off" employee was a condition precedent to receiving expenses under Section 301.1.

On August 1, 1946, a letter was written by a Company official to the foremen and field clerks in which it was stated that expenses are to be granted only to employee regularly employed in a floating crew when transferred from a job in another location. The letter than goes on to state

> "It does not apply to persons hired <u>on or for</u> a particular job. Such employees not having been transferred from a job to another location, are not 'regularly employed in a floating crew'." (Company Exhibit 6)

It should be noted that neither this letter nor the quoted sentence refers to a person re-employed within a thirty day period, in accordance with the language appearing in both the 1943 and 1946 agreements.

On August 1, 1947, the parties signed another collective bargaining agreement which neither stated nor indi-

cated that "transferred" employees and "laid off" employees were to be treated differently.

In September 1947, the Company issued a circular letter in which it pointed out that when an employee was transferred from a present job location to another job, the employee is "...immediately considered as being regularly employed in a floating crew." Thus the Company took the position that simultaneously with the transfer, the employee attained the status of "being regularly employed in a floating crew." This circular letter seems to speak only of a "transferred" employee and contains nothing about "laid off" employees (Company Ex. 5).

On January 28, 1952, for the first time, a letter was issued by the Company to its supervisory personnel in which it states the position with reference to "laid off" employees that it assumes in this case. In that letter it is stated that floating crew status was <u>not</u> conferred by

> "(1) Re-employment at a new location within thirty days after lay off for lack of work at a previous location, unless employee had FCS (Floating Crew Status) at time of lay off."

A review of these Company Exhibits indicates that in 1946 for the first time there appeared in writing the concept that a "transferred" employee simultaneously with his transfer became regularly employed in a floating crew.

Not until January 1952 was the exception for "laid off" employees stated in letter form to the Company's personnel.

In none of the collective bargaining agreements did the appropriate provisions as to expenses indicate that "transferred" and "laid off" employees were to be treated differently.

The Company contends, however, that the Union acquiesced in its interpretation of the application of the expense provision.

In this regard, the Company points out that in 1949 a grievance was filed by the Union in which they sought expense money for certain employees who were rehired within thirty days. The Company refused such payment because, according to the Company, these employees had not qualified as regular members of a floating crew (Company Exs. 8, 9, 10, 10A, 10B and 10C). The Company argues that since the Union did not pursue this grievance beyond the Joint Grievance Committee meetings, the Union was accepting the Company's position with reference to "laid off" employees. This does not follow. No evidence was introduced indicating acquiescence by the Union in the Company's position on this subject. The Company representative who acted as Secretary of the Joint Grievance Committee meetings testified specifically:

> "Ordinarily I have recorded in the minutes that the Union representatives agreed or asked that it (the grievance case) be carried over to another meeting or indicated how it was definitely disposed of. It is unfortunate in this case that the minutes are incomplete I would say." (Tr. p. 97)

Again, this official testified further as follows (Tr. p. 98):

"Q. Do you know from your own knowledge whether any Union representative at that particular meeting said that he was in agreement with the position as stated in Mr. Mason's letter? Now, that you know from your own knowledge, having been there.

A. No.

Q. You do not know. And do you have any minutes of any meetings, either this one or any subsequent meeting, which indicate that the Union stated that it was in accord with the interpretation and with the decision of the Company insofar as this particular grievance was concerned?
A. I do not know."

The Company agrees that Section 301.1 does not read as it has been applied by it. The Company, however, argues that past practice and custom sustain its contention in this case.

Past practice may be an aid in determining what the parties intended by language which on its face may be ambiguous. But in this case the Company's contention that past practice be recognized would not alone aid in interpreting language. It would in effect nullify and wipe out that portion of Section 301.1 applicable to "laid off" employees.

The transfer of an employee in a formal sense is within the absolute control of the Company. As a matter of practice, the Company always "transferred" employees in the skilled and semi-skilled classifications. Thus, according to the Company's interpretation of Section 301.1, such employees

always became "regularly employed in a floating crew" (Tr. pp. 88-90; 103-108). Laborers, for example, or classifications that were generally "easy to get" at each locality, are laid off rather than transferred to another location. Under this practice of the Company, no laborer could ever be considered a regularly employed member of a floating crew; and therefore he could not be entitled to expense money under Section 301.1 even if re-employed at a new location within thirty days. Though of course the Company would not do so, there would be nothing to prevent it from applying this same practice to even the skilled classifications, so that for all intents and purposes Section 301.1 could be made inoperative.

The point is that whereas past practice may be used as an aid in interpreting or applying existing language in an agreement, it may not fairly be used to either wipe out a portion of an agreement or to make it, for all practical purposes, inoperative.

The Company takes the position that past practice must control, even though the agreement may be silent on the practice. The Company in its Brief, page 20, cites American Seating Co., 16 L.A. 115, as supporting its position. A portion of the award in that case cited by the Company reads:

> "Such an agreement (referring to the collective bargaining agreement) has the effect of

> eliminating prior practices which are in conflict with the terms of the agreement, but, unless the agreement specifically provides otherwise, practices consistent with the agreement remain in effect." (Emphasis supplied)

It will be noted that the standard against which past practices are approved or rejected is the agreement between the parties. Not the historical fact of the past practice alone; not the policy or practice of the Company alone.

In this case to recognize a past practice of the Company which applies a different standard as between "transferred" and "laid off" employees would not be consistent with the agreement. The agreement nowhere states or indicates that these classes of employees should be treated differently. In fact, to treat these classes of employees differently, in the absence of a specific agreement provision, would be inconsistent with the agreement. A collective bargaining agreement assumes (unless it is stated otherwise) equal treatment of all employees covered by the agreement.

In this case, past practice may be recognized as applicable to all of Section 301.1. One may accept the view that an employee becomes "regularly employed" in a floating crew simultaneously and coincidentally with his transfer by the Company to another job. But fairly and equitably the same principle must be applied to those employees who are "laid off" by the Company and under Section 301.1 are re-employed within

the thirty day period. So that an employee laid off but rehired within thirty days, also simultaneously and coincidentally becomes regularly employed in a floating crew and thus entitled to expense.

IN SUMMARY:

If Section 301.1 of the agreement is viewed exactly as written, the Company's contention is not sustained. There is nothing in the agreement which provides directly or indirectly that, for an employee to be "regularly employed" in a floating crew, he must have been transferred at least once before obtaining such status. Nor does the language provide that such status is obtained simultaneously at the time of the first transfer. And certainly nothing in the agreement indicates that Section 301.1 is only limited to those employees that the Company transfers.

On its face, Section 301.1 is clear that in addition to those employees who might be transferred by the Company, it also includes employees "laid off" and rehired within thirty days.

Accepting the Company's contention as to past practice, this may be recognized and given weight, provided it is used as an aid to interpret all of Section 301.1. But past practice may not be used to wipe out the substantive features of Section 301.1 as applied to "laid off" employees. If the past practice is applied equally to both "transferred" employees and "laid off" employees, then it may be considered as applicable to Section 301.1.

It is clear from the record that there is no evidence indicating that the Union at any time specifically agreed to eliminate the operation of Section 301.1 to "laid off" employees. Thus, whether considered in terms of the specific language of the agreement, or whether considered in terms of past practice, equitably applied to all employees coming within Section 301.1, it is clear that the claimants in question were "regularly employed" in a floating crew within the meaning of Section 301.1, since they were re-employed within thirty days in accordance with the provisions of Section 301.1.

DECISION:

and were regularly employed in a floating crew within the meaning of Section 301.1 on February 1, 1952, the day on which they were laid off at Stockton, California.

Sam Kagel
Chairman

M A Walters

Lee R. Dedrick

[illegible]

Makinen - Dissent