In the Matter of a Controversy

between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, AFL-CIO

Complainant

and

PACIFIC GAS & ELECTRIC COMPANY

Respondent

Re: APPLICATION OF ARBITRATION CASE NO. 15.B

OPINION AND DECISION

This matter came on for informal hearing on July 23, 1964, before Laurence P. Corbett, attorney at law, the Chairman of the Arbitration Board in Case No. 15 decided in February of 1961, hereinafter called Case No. 15. Pacific Gas and Electric Company, hereinafter called the "Company", and Local 1245 of the International Brotherhood of Electrical Workers AFL-CIO, hereinafter called the "Union", agreed to refer the matter to decision by the arbitrator of Case No. 15. Thereupon, the parties stipulated in respect to the specific issue before the arbitrator and agreed to waive a transcript of the proceedings. Such stipulations were set forth in a letter dated June 30, 1964, signed by the Company's Manager of Industrial Relations, V. J. Thompson, and the Union's Business Manager Ronald T. Weakley. (Joint Exhibit 4)

A hearing was held, in accordance with the foregoing, in the Conference Room, General Offices of the Company, 245 Market Street, San Francisco, on July 23, 1964. Appearances were made on behalf of the Union by L. L. Mitchell, and on behalf of the Company by L. V. Brown and I. W. Bonbright.

THE QUESTION

By mutual agreement, the parties phrased the question to be determined by the arbitrator as follows:

> May a grievant under the following facts, process a grievance concerning discharge under Title 9, Grievance Procedure, of the Clerical Agreement?
>
> a. The grievant was hired March 25, 1963, and was discharged July 12, 1963.
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> b. The grievant is a probationary employee.
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> c. A grievance was filed on behalf of the discharged employee (by the Union). The Company answered: "This employee is on a temporary basis, not filling an authorized job and has not measured up to the required standards of the department. Error rate was discussed before and again on May 8, 1963. Poor attendance - absent 4/2, 4/3, 4/16, 4/17, 5/8 (2½ hrs.) 5/9, 5/10, 5/28, 6/19, 6/20. Total 9 days and 2½ hours between March 25, 1963 and June 28, 1963." (first parenthesi supplied)
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> d. A copy of the Office and Clerical Agreement was submitted as Joint Exhibit 3 and the parties stipulated at the hearing that the language bearing on the issue in such agreement was identical to the contract language construed in Arbitration Case No. 15. (entire paragraph supplied)

CONTENTIONS OF THE PARTIES

It is the position of the Union that the grievant's discharge was not justified and that the grievant should be reinstated as a Machine Operator B. (Joint Exhibit 1)

It is the position of the Company that the grievant, as a probationary employee, has no right to challenge permanent layoff for

lack of work or discharge for reasons which would normally be applied in selection of probationary employees for lay off. (Joint Exhibit 2.)

Both parties refer to Case No. 15 as the basis for their respective positions. The Union contends that, during the probationary period, the holding in the above-cited arbitration case could be circumvented by the use of alleged lay off reasons which would relieve the Employer from the consequences of stating the true basis for termination. The Company contends that if the actual reason for discharge is not violation of a Company rule, policy or practice, the application of Case No. 15 should give the grievant no more right to process a grievance than a probationary employee who has been laid off.

RELEVANT SECTIONS OF THE CONTRACT

Set forth below are relevant sections of the Office and Clerical Agreement. For purposes of comparison to Case No. 15, section numbers of the production contract construed in said arbitration case, are enclosed in parenthesis following applicable sections from the Office and Clerical Agreement.

> Section 9.5 (1) & (2) (102.6) (102.9)
> Grievances on the following enumerated subjects shall be determined by the grievance procedure established herein, provided they are referred to Company within the time limit specified:
>
> (a) Interpretation or application of any of the terms of this Agreement.
>
> (b) Discharge, demotion, suspension or discipline of an individual employee;
>
> (c) Disputes as to whether a matter is a proper subject for the grievance procedure.
>
> It is the desire of Company and Union that grievances be settled promptly. To facilitate their settlement, grievances

shall be filed on the form adopted for such purpose and within the time limits established in Subdivisions (1) and (2) hereof:

(1) A grievance which involves the discharge of an employee shall be initiated and processed without undue delay, but in any event, such grievance shall be filed not later than fourteen (14) calendar days after an employee's discharge becomes effective. Company shall make a written report thereon within two (2) work days after receipt of Union's written grievance.

(2) Grievances other than outlined in (1) above shall be filed not later than thirty (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 and the Company shall make a written report thereon within seven (7) calendar days after receipt of Union's written grievance. (As amended 7/1/59 7/1/60, 7/1/62)

Section 9.12 (102.13)
If an employee has been demoted, disciplined or dismissed from Company's service for alleged violation of a Company rule, practice, or policy and Company finds upon investigation that such employee did not violate a Company rule, practice, or policy as alleged, it shall reinstate him and pay him for all time lost thereby.

Section 9.13 (102.14)
In the event of the discipline, suspension, demotion or discharge of an employee, Company shall, at Union's request, state in writing the reason therefor. (As amended 7/1/62.)

Section 21.1 (210.1)
Employees shall be designated as probationary and regular, depending on the length of their service.

Section 21.2 (210.2)
New employees shall be hired as probationary employees at a daily rate of pay not less than the minimum wage established for the classification of work to be performed. As long as a probationary employee retains such status he shall not acquire any seniority rights, or rights with respect to leave of absence, holidays, promotion and transfer, displacement, demotion and layoff, sick leave, vacation, or similar rights and privileges. (As amended 7/1/62)

Section 21.3 (210.3)
On completion of his first six (6) months of continuous service a probationary employee shall be given a status of a regular employee, and shall be given a definite job classification, and placed on a weekly rate. (As amended 7/1/62).

Section 21.4 (210.4)
The term "continuous service" as used in Section 21.3 is defined as one uninterrupted by (1) discharge, (2) resignation, or (3) absence for more than a cumulative total of thirty (30) days due to (a) layoff, (b) sickness or industrial disability, or (c) other causes. The transfer of a probationary employee from one job to another without interruption of work time shall not be considered a break in continuous service.

DISCUSSION

Case No. 15 stated as a finding that, "the Union had the limited right to process a grievance relating to the discharge or involuntary termination of a probationary employee, if such discharge was based upon violation of a Company rule, practice or policy." The instant case poses the question as to whether the facts recited herein fall within the limited right to process a grievance.

It is not at all unexpected that the issue presented herein has been raised. What is perhaps surprising is that so much time has elapsed since the 1961 decision or that during a contract opening subsequent thereto the parties did not clarify the matter.

The Award in Case No. 15 was most difficult to reach because neither of the parties offered probative evidence supporting an agreed-upon meaning or mutual intent. Furthermore, no evidence was introduced concerning any posted written rules, policies or practices affecting the required standard of conduct of employees expected by the Company. In the absence of such evidence the bare language of the Agreement had to be construed and the Chairman of the Arbitration Board, hereinafter called the "Chairman", was constrained to make a determination on the record and exhibits presented to him. He could not therefore consider a more desirable result or anticipate future problems if the record would not support the Award. As the Supreme

Court of the United States said in Steelworkers v. Enterprise Wheel and Car Corp.363 US 593,597:

> " When an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem. This is especially true when it comes to formulating remedies. There the need is for flexibility in meeting a wide variety of situations. The draftsmen may never have thought of what specific remedy should be awarded to meet a particular contingency. Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award. "

Consequently, in analysing the Agreement, the Chairman could not in good conscience arrive at any other conclusion than was contained in Case No. 15. Under Section 21.2, it was clear and unambiguous that seniority in respect to lay off and similar rights could not be claimed by a probationary employee. Yet in enumerating the title headings which were not affected by the application of Section 21.2, Section 95 entitled Grievance Procedure, with its references to discharge was significantly omitted. Therefore, the right to contest a discharge under Section 9.5 unless based upon similar rights and privileges to lay off, as expressed in Section 21.2, was not proscribed.

The Chairman found that the parties referred separately to the action of discharge and lay off as in Section 21.4. The question then was what form of discharge in respect to a probationary employee was subject to the grievance procedure, since use of this provision was not limited exclusively to regular employees? To the Chairman,

" It is not contested that a probationary employee may be laid off for lack of work out of seniority. If the work force is contracting, the Company may select the probationary employees to be laid off without regard to length of service. The private reasons for such selection are generally unsuitability for the job - incompetence - poor performance - the elements that lead up to qualification. However, under Section 21.2, (Section 210.2) provided the employee is laid off for lack of work or in other words, provided he is terminated when the work force is contracting, no reason other than lay off for lack of work need be given. Moreover, the laid off employee having no seniority rights as a probationer can be laid off permanently. If following a lay off, the Company's work force expands, he has no right to be reinstated or called back to work. Does this mean the Company's right under the Agreement to practice selectivity in the continued employment of its probationers depends on whether the Company's work force is contracting? Would the necessity for proving cause for discharge under the grievance procedure, in a stable or expanding work force period, give the employee some form of seniority to which he is not entitled under Section 21.2 (210.2)? Is it not true that the probationary employee who is laid off permanently out of seniority suffers the same consequences as the probationary employee who is discharged? These questions depend in part on the construction of Section 9.12 (102.13) where, upon investigation, if the Company finds an employee did not violate a Company rule, practice or policy for which he was discharged, he shall be reinstated and paid for lost time. Applying this section, a probationary employee who was wrongfully discharged for violating a Company rule, practice or policy would be entitled to reinstatement. A probationary employee who was permanently laid off during a time of reduced working opportunity has no redress.

Yet if the discharge of an employee is effected, it carries with it, as the American Republic Co. case cited by the Union suggests, an inference of personal fault, misconduct or occupational derelection of duty. In such instances, this could prejudice the employee's job opportunities elsewhere. Furthermore, the importance of discharge as contrasted with other rights is emphasized by special provision under the Grievance Procedure in Section 9.5 (102.9) If an employee is faced with discharge and its attendant consequences, does a probationary employee have the right to set the record straight in respect to the charges made by the employer? The chairman finds that he does have such right to a limited extent under this Agreement.

In the case of regular employees, discharge may be sustained on the ground of just cause, and lay off may be effected in accordance with seniority. Probationary employees may be laid off permanently on grounds of lack of work without regard to seniority. In selecting probationary employees to lay off, the

the only clue was given in Sections 95.12 and 95.13. There it was provided that if an employee (probationary or regular) was wrongfully discharged for violating a Company rule, practice or policy, he would be reinstated. Immediately following, and presumably to insure this right, the latter Section required, upon request, a statement of the reason for discharge of a regular or probationary employee in writing. Consequently, the Chairman concluded the Union had a limited right to process a grievance relating to the discharge of a probationary employee for violation of a Company rule, practice or policy.

The "why" of such an application of the contract is of course not set forth but must be supplied from the body of common law of industrial relations referred to in United Steelworkers v. Warrior and Gulf Navigation Co. 363 US 574,579:

> " It is not unqualifiedly true that a collective-bargaining agreement is simply a document by which the union and employees have imposed upon management limited, express restrictions of its otherwise absolute right to manage the enterprise, so that an employee's claim must fail unless he can point to a specific contract provision upon which the claim is founded. There are too many people, too many problems, too many unforeseeable contingencies to make the words of the contract the exclusive source of rights and duties. One cannot reduce all the rules governing community like an industrial plant to fifteen or even fifty pages. Within the sphere of collective bargaining, the institutional characteristics and the governmental nature of collective-bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledged so plain a need unless they stated a contrary rule in plain words."

Drawing upon these sources the Chairman included the following in his discussion in Case No. 15:

the Company may make such selections without regard to seniority and base its decision on job performance in general as contrasted with violation of rules, practices or policies. The probationer has no right under lay off to challenge such selection. Permitting him to do so in connection with discharge would, in effect, provide him with a greater right solely because the work force was not being reduced. This would be contrary to the similar rights and privileges denied probationary employees under the agreement. Thus, the probationary employee has no right to challenge permanent lay off for lack of work or discharge for reasons which would normally be applied in selecting probationary employees for lay off.

However, Section 9.12 (102.13) refers to specific grounds for discharge, namely: violation of a Company rule, practice or policy which carries with it more serious consequences than selectivity on the basis of performance. Such alleged violations, if charged without foundation and without the opportunity to set the record straight, could affect an employee's future employment possibilities. Selection for lay off may be a reflection upon capability but violation of a Company rule is a serious reflection upon an employee's character."

In effect, the Chairman has ruled that the probationary period is a time when the employee is on trial. If, in the opinion of the Company, he is not meeting acceptable standards of performance he may be selectively laid off permanently without regard to seniority and without redress under the grievance procedure. It is submitted this action is tantamount to discharge for reasons which would normally be applied in selecting probationary employees for permanent lay off and thus the two concepts of lay off and discharge, in this sense, are similar rights and privileges.

If, on the other hand, the employee was alleged to have violated a posted safety rule designed for his protection and for others or if he violated an accepted policy for the orderly operation of the Company, such as stealing or being wilfully insubordinate, and if he was discharged for such reasons, the employee or the Union as his representative would have the right to demand proof. It bears repeating that, under these circumstances, the employee would have such a right under the Agreement because of the serious consequences which might attach in respect to the unfair reflection on his character.

Admittedly, the probationary employee's right to challenge discharge is narrow indeed. The Union has suggested that, by calling the termination lay off instead of discharge, the Company can avoid the grievance procedure. This would appear to be true if the reasons for termination were actually those associated with selectivity in a lay-off situation. If, however, the reason is based upon a specific infraction of a rule, policy or practice genrally accepted as misconduct under the industrial common law in the absence of posted regulations, such as violations of a safety rule or stealing or insubordination, the employee, if he feels wronged by the charge, has the right to set the record straight. Further, if it is obvious that the reason for such termination is actually such violation of a rule, policy or practice which would reflect on the character of the employee, he may process a grievance if he can prove that termination was not based upon considerations generally accepted for lay off, no matter what the official position of the Company is. To expand upon an example suggested above, if an employee is charged with stealing, insubordination, or similar infraction of rules of conduct and is laid off for unsuitability for the job, and if he wants the opportunity to prove that such stealing or insubordination charge with which others are aquainted but which is not stated as the specific reason for termination is in error, he has the opportunity to process a grievance to protect his future interest. Yet the parties should, nevertheless, keep in mind that as a probationary employee, his rights to reinstatement are not as great as a regular employee confronted with the same circumstances and his cumulative course of conduct may support termination. Nevertheless, the probationary

employee's right is to defend himself and his record against an arbitrary and unfair charge of violating a rule, policy or practice of the Company, if it is stated or if it appears that this is the reason in fact for termination.

Such a distinction in determining whether to file a grievance is indeed difficult for the Union to make under certain circumstances, and yet if permanent lay off out of seniority is without redress, legitimate discharge for the same reasons should not be attended by a greater right if the "similar rights and privileges" application of Section 21.2 is to be observed. Lay off under this contract is no more a greater right than discharge and discharge is no more a greater right than lay off. Like two overlapping circles, each has a common segment and each has its separate and individual segment.

In the instant case, the reasons given for discharge were those normally given in the selection of a probationary employee whose work performance is on trial. They included, according to the stipulation of the parties, accumulation of: 1. errors and 2. absenteeism. Such absenteeism was not shown to be wilful or a violation of any course of conduct. For example, the absences were not shown to be without adequate excuse nor were they shown to be taken in violation of any possible rule, policy or practice concerning notification to the Company. They were merely one of the elements during the trial period which the Company evaluated to determine whether or not the employee's performance upon attaining regular status would, in the opinion of the Company, be stable and reliable. Another element was the frequency of errors which, in the evaluation of the employee, was considered by the Company to be below its standard of competency.

In the light of the foregoing, the Company was justified in discharging the employee for such reasons.

As part of the discussion and in recognition of the Union's difficult task in determining whether or not to file a grievance, the arbitrator departs from the specific question which the parties have submitted for decision. For this reason, his comments should be considered only as dicta and should not be conclusively binding on the parties. It is offered in the hope that it will be helpfully constructive and with the caution that it is in no way exhaustive or necessarily the only opinion on the subject.

When the literal application of a collective-bargaining agreement presents such a delicate distinction as is involved in this case, the effectiveness of fair application rests upon the parties. They alone can make the agreement work and if they fail, a negotiated change to provide a fair working relationship appears to be the only solution. Some unions have construed the Reporting and Disclosure Act of 1959 to mean that the Union must undertake and process any and all grievances presented to them by a member whether or not the Union believes the member is right or wrong. The arbitrator does not subscribe to this view. The officers and executive board of the Union are, in fact, the trustees of the Union treasury. Since these funds belong to all the members, if the Union in its discretion sincerely believes that the expense and time involved in processing an unsound grievance to arbitration is not warranted, then is the Union not rendering a disservice to the members unaffected by the controversy in pursuing the matter? A relatively recent case, Black-Clawson v. Machinists CA 2 1962, 52 LRRM 2038, is worthy of note in this connection. The

Court
/in this case holds that, individual employees may not overrule the governing body of the Union and Unions should be encouraged to reject frivolous and disruptive grievance claims. Coming three years after the Disclosure Act, the Court cites, with approval as an expression of the state of the law, the 1959 case of Ostrofsky v. United Steelworkers 43 LRRM 2744. This case holds that the right to arbitration runs to the Union and not to the individual employee unless the Union acts unfairly in refusing to press a claim. In effect the decision states that, under the duty imposed upon the Union by the Labor-Management Relations Act, to represent fairly all employees under its jurisdiction, the Union may, in its experienced discretion and wisdom determine the question of whether or not to process a grievance. In conclusion, the arbitrator prays that the foregoing comments are not construed by the parties to be offensive or presumptuous for they are offered in a sincere effort to be helpful in applying a decision which has of necessity been troublesome to the arbitrator for the reasons heretofore stated. Yet, based upon the record, the arbitrator would be exceeding his authority if he came to any other result.

A W A R D

The grievant, under the facts herein stated, may not process a grievance concerning discharge under Title 9. Grievance Procedure of the Clerical Agreement.

September 14, 1964

LAURENCE P. CORBETT, Arbitrator