IN ARBITRATION PROCEEDINGS PURSUANT TO PROVISION OF TITLE 9

OF THE AGREEMENT BETWEEN THE PARTIES

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| LOCAL 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,<br><br>Complainant,<br><br>and<br><br>PACIFIC GAS & ELECTRIC COMPANY<br><br>Grievance of Mrs. Eleanor I. Constant, Case No. 42 | OPINION<br><br>of the<br><br>NEUTRAL ARBITRATOR<br><br>and<br><br>DECISION<br><br>of the<br><br>BOARD OF ARBITRATION |

WILLIAM EATON
Neutral Arbitrator

LAWRENCE N. FOSS
Union Arbitrator

I. WAYLAND BONBRIGHT
Company Arbitrator

ORVILLE OWEN
Union Arbitrator

P. N. LONG
Company Arbitrator

APPEARANCES:

FOR THE UNION:

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FOR THE COMPANY:

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## I. STATEMENT OF THE CASE

This is an arbitration to determine whether the Company violated any provision of the Labor Agreement when it bypassed Grievant Eleanor I. Constant for promotion to Clerk B at its Redwood City Headquarters on December 15 1969 because that facility lacked a women's restroom, and if so what the remedy shall be (JX 2). While the submission Agreement lists the date as December 15 1969, it is clear from the exhibits and the briefs that the date should be December 10 1969 (JX 5; CB 2; UB 4).

The facts of the case are largely undisputed. The Grievant was a Clerk C in the San Mateo office of the Electric Department of the Company at the time involved. It is agreed that she was in the proper line of progression at the top rate of pay in a job lower to the vacancy, which, together with her earlier employment date, would normally have entitled her to the vacancy then open, which was Clerk B. She was bypassed in favor of a male employee on the ground that there was no female restroom facility available at the Redwood City Service Center, where the opening had occurred, and that the cost of installing such facilities was "out of the realm of practicality" (JX 5).

The same position became vacant a second time on April 19 1971, and the Grievant was again bypassed for a male employee. On the second occasion the Company cited not only the allegedly excessive cost factor for providing a female restroom facility, but also contended that the Redwood City facility was to be abandoned

in the near future, and that the prospective short term occupancy was a further justification for the Company's refusal to incur the cost involved.

A grievance was filed in regard to both of these bypasses, and in addition the Grievant also filed a complaint with the FEPC over the same matter. on August 9 1971 (CX 6).

The job ultimately was awarded to the Grievant. The Company cited such "shifting factors" as the FEPC complaint, the fact that the completion of the Belmont Center, which was to be the substitute for the Redwood City facility, had "slipped considerably", and that alternative solutions to the restroom facility had been considered (CB 3). The solution effected as to the restroom problem was to partition off a corner of the existing restroom facility with a separate entrance. The Grievant occupied the job on October 1 1971.

It is the Union's argument that since the Company concedes that the Grievant was the senior bidder, and that she was fully qualified to do the work, "The burden is upon the Company to demonstrate that some provision of the Contract or of applicable State or Federal Law excuses it from its obligation under Section 18.8 (b) to award grievant the job" (UB 1).

The Union contends that the allegedly "temporary" nature of the Redwood City Center was not advanced as a reason for bypass at the time of the original grievance; that the Company's own past practice under the Agreement has established the principle that toilet facilities would be constructed where a woman employee was the senior bidder for a job; that the Company's cost estimates are excessive in that they do not take into account such factors

as possible tax savings, accelerated depreciation, and the like; and that, as a consequence of these considerations, the Company has not met its burden of proof to show why the Grievant should have been bypassed (UB 1-2).

The Company contends that it properly held up the appointment of the Grievant until the question of making a toilet facility available could be resolved; that it would have been a violation of the State Labor Code not to provide a separate female toilet facility; that the general rule should apply that an employee's qualifications to obtain a promotion should be measured at the time the vacancy becomes available; that the employee lacked the "physical ability" to fulfill the job at the time it became opened because of the toilet question; and that under the provisions of Section 1.3 of the Agreement, Management has the final responsibility to run the business in an economic manner. In the view of the Company, "This case lies dead center between these posts: to provide promotional opportunities for women, and, at the same time, operate a public utility in a way that it insures a low cost to its customers" (CB 6-7).

Based upon their respective arguments, the Company asks that its action be sustained, and the Union requests that the Grievant be paid the difference between the Clerk B and Clerk C rate which she would have earned subsequent to December 10 1969 had she been promoted at that time. It is agreed that this amount would be $1,467.52 (CX 4; TR 17).

## II. APPLICABLE PROVISIONS OF THE AGREEMENT

1.2 It is the policy of Company and Union not to discriminate against any employee because of race, creed, color, sex or national origin.

1.3 The Management of the Company and its business and the direction of its working forces are vested exclusively in Company...

18.1(a) The provisions of this Title shall be interpreted and applied in a manner consistent with the parties' purpose and intent in negotiating the job bidding and promotion procedure contained herein, namely that when an employee is qualified by knowledge, skill, and efficiency and is physically able to perform the duties of a job,the employee with the earliest employment date shall receive preference in accordance

with the sequence of consideration outlined in Section 18.8 or an appointment to fill a vacancy, and that the Company shall endeavor to expedite the filling of job vacancies.

(b) As used in this Title, "employment date" means the latest date on which an employee began a period of employment with Company which has been uninterrupted by layoff for more than one year, or by termination of employment for any other reason.

18.8(b) Bids made by regular employees in the Division and in the Line of Progression in which the vacancy exists who are:

. in the same classification as defined in Exhibit A, "Clerical Lines of Progression", as that in which the job vacancy exists, or

. in classifications which are higher thereto, or

. at the top rate of pay of the next lower classification, except as otherwise provided in Subsection 18.2(b).

18.11 Notwithstanding anything contained in this Title, Company may reject the bid of any employee who does not possess the knowledge, skill, efficiency, adaptability, and physical ability required for the job on which the bid is made....

24.4 Any provision of this Agreement which may be in conflict with any Federal or State law, regulation or executive order shall be suspended and inoperative to the extent of and for the duration of such conflict.

## III. DISCUSSION

The Cost Factor

It is the contention of the Union that the question of the "temporary" nature of the Redwood facility, and of its prospective abandonment, "was only belatedly proffered by the Company after its second bypass of Mrs. Constant in April, of 1971" (UB 1).

The Company presented testimony, through its manager of personnel relations, Thomas V. Adams, that Company policy has been to provide restrooms for women bidding for a job at a permanent facility (TR 46-48). Union business representative Orville Owen testified that, while the replacement of the Redwood facilities had been discussed for some time in the San Jose division, the Company did not given that as a reason for failure to furnish a restroom facility at the time of the 1969 grievance (TR 91-92). Both the Minutes and the Report for Review Commitee of the 1969 grievance support the Union's contention (JX 5; UX 1).

It is the Company's contention that its estimate of costs to run between $4000 and $5000 to build a toilet at the end of the existing facility, rather than inside as was eventually done, was

agreed to by both the Union and Company investigating Committee. The Company relies, for this position, on the last sentence contained in paragraph b. of the Report for Review Commitee on the instant grievance, dated 1-7-70:

> 3. STATEMENT OF FACTS
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> * * *
>
> b. On December 16, 1969, Union filed a formal grievance requesting that the job be awarded to the senior bidder. Company answered the grievance on December 19, 1969, stating in part that it was not practical to award this position to the grievant as there are no restroom facilities for females on the property nor are there any within a reasonable distance. Cost of installing these facilities would be between $4,000 and $5,000, which is obviously out of the realm of practicality.
>
> c. Union did not accept the Company's answer and referred the Grievance to the Division Grievance Committee...

It is the Union's position, and the testimony of Owen, that what the Union agreed to was, not that the cost would necessarily be as stated, but that paragraph b. merely set forth what the Company's answer to the grievance was, and that "the cost in their

mind was prohibitive" (TR 92). Owen reiterated that the "fact" to which the Union stipulated was the "fact of the Company's answer to the grievance" (TR 91), and that the language of paragraph b, "came directly from the answer of the grievance from the Company. It's verbatim" (TR 90).

The Company relies upon cross-examination of Owen, and upon his agreement that facts which are not agreed upon do not become a part of such a document as Joint Exhibit 5 (TR 104-105). This is no doubt generally so, and it is evident that Owen does not disagree. However, Owen's specific testimony that the "fact" which was agreed upon was the "fact" of the Company's answer, and not the "fact" of the Company's cost estimate is convincing.

Moreover, the sentence in question appears in the document itself to be a part of the Company's answer, which is the chief subject of paragraph b. Paragraph c. clearly indicates that the Union did not accept that answer.

This conclusion is further enforced by the unrebutted testimony of Owen that the Union suggested the possibility of a portable toilet, which would have cost a great deal less, but which the Company rejected (TR 89). The facility which was ultimately constructed by partitioning off a portion of the existing restroom facility cost approximately $2,000 (CX 3; TR 78). Though the Company had originally alleged that such a solution would lead to an "overcrowded" condition in the remaining facility (TR 15), the partitioning as actually carried out did not reduce the number of urinals, toilets, or wash basins in the existing facility, and there is no evidence that overcrowding resulted (TR 87).

Although the Company has argued in this arbitration that it anticipated that a replacement facility for the Redwood City Center would be available by 1970, therefore making a large expenditure for a new restroom unpracticable in 1969, Redwood City Manager Leland S. Borges conceded on cross-examination that he did not know who from the Company would be in a position to testify specifically why the Company took that position in 1969 (TR 62).

It is the Union's contention that the Company failed to present any evidence tending to show the "alleged temporary nature of the facility", and that it "did not even attempt to do so", allegedly failing to call one witness who was "only two hours away", and who was "one of the few people having first-hand knowledge of the Company's original decision" (UB 11).

Past Practice

As indicated above, the Company position is that it would be willing to construct separate toilet facilities under the circumstances of the present dispute where the facility in question is a "permanent" station. Two examples of this policy were offered, the construction of separate toilet facilities for a senior female bidder at Weaverville, and another at Cottonwood, in 1967 and 1968 respectively (TR 47). The Cottonwood substation toilet facility cost approximately $1,900, which was within $100 of the Company's estimate for the partitioning of the Redwood City facility which eventually occurred (TR 55).

On the basis of this evidence, which is undisputed, the Union argues that a "law of the shop" has been created and recognized which calls for the Company to construct such facilities where the cost is comparable to that of the past cost of similar facilities (UB 7).

Company Argues "Physical" Impossibility

The Company argues that, according to accepted practice, an employee's qualifications to obtain promotion must be measured at the time the vacancy becomes available, and that at the time the vacancy in question became available the Grievant did not have the "physical ability" to perform the work as required by Section 18.11 of the Agreement (CB 5-6).

The Company admits that it is using the term "physical ability" in "an extraordinary fashion" in making this argument. We agree. The "physical ability" referred to in Section 18.11 clearly relates to ability "required for the job on which the bid is made". The Company willingly concedes that there is no question regarding the Grievant's clerical skills (CB 4), and hence, by implication, that there is no physical inability on the part of the Grievant related to job requirements.

But the Company goes on to make the rather curious argument that because the State of California requires, by statute, separate toilets for men and women (Labor Code §2350; CX 2), that "not

withstanding her contractual rights to appointment, such an appointment without reconstruction of the headquarters to provide a female toilet was in conflict with the law; and therefore her entitlements under the Contract were suspended until the toilet was constructed " (CB 5).

The arguments raise not only the question of whether the "physical ability" required for the job by the Agreement means the type of physical ability here at issue, but also raises questions of possible conflict with applicable Federal and State Law which are much broader than the Company's argument in relation to Section 2350 of the California Labor Code.

Applicable State and Federal Law

The Union argues that Section 24.4 of the Agreement, requiring that any provision of the Agreement in conflict with Federal or State Law shall be inoperative, incorporates into the Agreement provisions of State and Federal Law which require the awarding of the job to the Grievant (UB 2).

The Union argues that Labor Code §2350 does not absolve the Company from its requirement to hire women without discrimination, but merely requires that male and female employees be provided with separate toilet facilities (UB 3). The Union also cites interrelated provisions of Federal Court cases, EEOC Regulations, and Title VII Requirements to reach the conclusion that applicable law requires that the Grievant be awarded the position at issue.

It is the Union's contention that the United States District Court held that any California protectice statutes, such as §2350, designed to protect female employees, but which in fact lessen job opportunities for such employees, are contrary to Title VII of the Civil Rights Act of 1964. The case cited is Rosenfeld v. Southern Pacific Company 293 S. Supp. 1219, 1 FEP cases 450, 69 LRRM 2822 (1968), affirmed 44 F. 2d 1219 (9th Cir. 1971).

Following the Rosenfeld decision the EEOC, by regulation, provided that whenever adherence to such statutes operates to the detriment of a woman employee, such adherence is in violation of Title VII, and that the local statute is invalid to that extent. EEOC Guidelines 34 Fed. Reg. 13367 (1969) (Revised August 18 1969). The time from which damages should run in such an event was made clear in a 9th circuit case, Schaeffer v. San Diego Yellow Cabs, Inc., 462 F. 2d 1002, 4 FEP 946 (9th Cir. 1972). As applied to the present dispute, this case would hold that damages may run from the time the Company had notice of EEOC policy, which the Union alleges to have been on approximately August 18 1969, and which the Company does not deny.

It is the Company's contention that the Union's reliance on the Rosenfeld case is misplaced, in that this case applies only to select provisions of the California Labor Code dealing with protective and wage considerations, and not to Section 2350 (CB 11-12). It is the Company's contention that Section 2350

"does not fall within the broad ambit of so-called 'protective' or wage legislation", but that the Section "simply provides that there will be adequate toilet facilities for both male and female when the population of the headquarters exceeds a very limited number" (CB 12).

Having examined the Rosenfeld case carefully, the Arbitrator must respectfully disagree with the Company's interpretation. This holding clearly is of a scope sufficiently broad to include the type of provision at issue here, where that provision operates, or is applied and interpreted, in effect, to deprive a female employee of a work opportunity on account of her sex.

So far as EEOC requirements are concerned, it is the Employer's argument that the exclusion of one sex is justified where a "bona fide occupation qualification" exists (CB 12). This is an argument closely related to the "physical ability" argument set forth above.

Finally, the Company cites EEOC decisions, which are undisputed, by the Union, to the effect that the Employer must make a "reasonable" accomodation to provide employment opportunities for women. The question which these decisions raise is a question of fact, and that is whether the accomodation requested by the Union in the present dispute was "reasonable" within the applicable requirements of the present Agreement, and the applicable requirements of State and Federal law.

## IV. CONCLUSIONS

Although the evidence indicates that both sides were aware of the possibility of abandonment of the Redwood City Headquarters, the evidence also demonstrates conclusively that that factor was never presented by the Company as a consideration for its initial bypass of the Grievant, and therefore not considered by the parties in attempting to resolve the dispute which arose as a result of that bypass.

It is also established that the Union did not agree to the Company's estimate of $4,000 to $5,000 as the necessary cost of providing toilet facilities for the Grievant. Indeed, the alternative suggestion of the Union, which was that a temporary toilet be utilized, was obviously far less expensive than the Company estimate. This was rejected by the Company for reasons which have not been made a matter of record.

Perhaps the most puzzling aspect of the Company's position is the fact that it rejected, in 1969, the solution which it finally accepted two years later — partitioning the existing facility as described above. Had the problem initially been recognized as a short term one, as argued by the Company, it is conceivable that other alternatives, understood to be short term in nature, might also have been considered. What the Company did instead, it would appear, was to burden itself with the highest conceivable estimate, and then to argue that to expend such a sum for a short term was "unreasonable".

The result was clearly to discriminate against the Grievant on the basis of sex, and to deny her a job for which she was

admittedly otherwise qualified. What the question finally boils down to , both under ordinary princples of arbitration, and under applicable State and Federal Law, is whether this action of the Company was "reasonable".

It must be concluded that the "physical ability" argument of the Company does not withstand analysis, nor does its argument that it is, in effect, being asked to reshape job requirements in order to employ the Grievant. The action required, building a separate toilet facility, is not job related, and is related solely to the fact of the Grievant's sex. Not only California law, but common decency, would require a separate restroom facility in the circumstances of this case.

A very strong case could be made that the Company is in violation of Section 1.2 of the Agreement without the necessity of relying on any further argument or reasoning. Looking to Title VII, and to the Court cases and EEOC regulations which have been cited, taken together with Section 24.4 of the Agreement, which incorporates such laws and rulings, the conclusion is even more compelling that the Grievant was improperly bypassed as a result of sex discrimination.

The Arbitrator would agree that the resulting discrimination was not "insidious" or "invidious"; nor is there intentional bias of any kind indicated by the evidence. We may also agree with the

Company's argument that it gave the matter careful and thoughtful consideration, balancing the Grievant's right to a job against its own obligation to manage its business economically, before arriving at a conclusion.

It seems to the Arbitrator that what occurred was discrimination of an inherent and unintended type which it is one of the primary purposes of Title VII, and of the Court decisions pursuant thereto, to eradicate. The Company had recognized the principle of this conclusion in the prior cases of Weaverville and Cottonwood, and subsequently came to a similar conclusion in ultimately awarding the Grievant her bid, and in discovering a reasonable financial solution for providing the facilities required. If this expenditure was reasonable in 1971, there is no convincing showing why it would not have been reasonable in 1969.

The Award is framed accordingly.

DECISION

1. For the reasons set forth in the foregoing Opinion, it is the decision of the Board of Arbitration that the Company violated the provisions of Sections 1.2, 18.8 (b), and 24.4 of the Office and Clerical Employees Agreement when it bypassed Grievant Eleanor I. Constant for promotion on December 10 1969 because the facility where the job was located lacked a women's restroom.

2. The amount of lost wages, as stipulated by the parties should an infraction be found, is $1,467.52, and that amount is hereby awarded to the Grievant as remedy for the violation shown.

3. The Board of Arbitration retains jurisdiction of the dispute until the provisions of this Award shall have been complied with.

Respectfully submitted,

William Eaton,
Neutral Arbitrator

Lawrence N. Foss,
Union Arbitrator

I. Wayland Bonbright - dissenting
I. Wayland Bonbright,
Company Arbitrator

Orville Owen,
Union Arbitrator

P. N. Long - dissenting
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Company Arbitrator

San Francisco
January 15 1974