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8 IN ARBITRATION PROCEEDINGS PURSUANT TO
9 AGREEMENT BETWEEN THE PARTIES
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11 In the Matter of a Controversy)
12 between)
13 INTERNATIONAL BROTHERHOOD OF)
ELECTRICAL WORKERS, LOCAL UNION)
14 NO. 1245, AFL-CIO,)
15 and)
16 PACIFIC GAS AND ELECTRIC COMPANY.)
17 Involving discharge of F)
Grievant. (Arbitration Case No. 84))
18

OPINION AND AWARD
OF
BOARD OF ARBITRATION

19 This Arbitration arises pursuant to Agreement between INTERNATIONAL
20 BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245, AFL-CIO,
21 hereinafter referred to as the "Union," and PACIFIC GAS AND ELECTRIC
22 COMPANY, hereinafter referred to as the "Company," under which Messrs.
23 LAWRENCE N. FOSS and FRANK HUTCHINS were appointed by the Union to
24 serve on the Board of Arbitration (Board), Messrs. I. WAYLAND BONBRIGHT
25 and DAVID J. BERGMAN were appointed by the Company to serve on the
26 Board, and ARMON BARSAMIAN was selected to serve as Chairman of the
27 Board, and under which the decision of the Board shall be final and
28 binding upon the parties.

29 Hearing was held October 1, 1980, in San Francisco, California.
30 The parties were afforded full opportunity for the examination and
31 cross-examination of witnesses, the introduction of relevant exhibits
32 and for argument. Both parties filed post-hearing briefs on or about

1 November 3, 1980. Pursuant to agreement of the parties, the Chairman
2 issued his letter-award disposing of the stipulated issue on November
3 13, 1980.

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6 APPEARANCES:

7 On behalf of the Union:

8 Messrs. Neyhart, Anderson, Nussbaum,
9 Reilly and Freitas, by JOHN L. ANDERSON,
Esquire, 100 Bush Street, Suite 2600,
10 San Francisco, California, 94104.

11 On behalf of the Company:

12 L.V. BROWN, Jr., Esquire, Attorney,
13 Pacific Gas and Electric Company,
245 Market Street, Room 438, San
Francisco, California, 94106.

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16 ISSUE

17 Did the discharge of F violate
18 the provisions of the parties' Labor
Agreement? If so, what is the remedy?
(Joint Exhibit 2)

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22 RELEVANT TITLE OF AGREEMENT

23 Title 112. Sick Leave

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25 112.8 Abuse:

26 ... If an employee abuses the sick leave provisions of
27 this Agreement by misrepresentation or falsification,
he shall restore to Company all sick leave payments he
28 received as a result of such abuse. In case of recurring
offenses by the employee, Company may cancel all or any
29 part of his current and cumulative sick leave, and may
treat the offense as it would any other violation of a
condition of employment. ...

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FACTS

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2 The basic facts are undisputed (Joint Exhibit 3).

3 At the time of his discharge on December 27, 1979, Grievant was
4 employed as an Apprentice Electrician. He was initially employed by
5 the Company on November 19, 1973.

6 Preliminary to Grievant's discharge, he was suspended on December
7 7, 1979. At that time, he had three days' of paid sick leave available.
8 Grievant did not work on November 27, 1979, and only for a half hour
9 on November 28, 1979. He reported such absences as an illness, and
10 in support thereof, produced substantiation in the form of a patient
11 treatment verification dated November 27, 1979 and purportedly signed
12 by Dr. A. ADLER. The bona fides of that verification is the basis
13 of the instant dispute.

14 No dispute exists that the signature on the patient treatment
15 verification form is not that of Dr. ADLER. Indeed, Grievant acknow-
16 ledged that it was not, and that he had not discussed his absence or
17 an alleged illness with Dr. ADLER. In addition, a Kaiser Medical
18 Advice Section nurse informed the Local Investigating Committee
19 (Committee) that there was no record of Grievant having called that
20 Section for advice, nor was there a patient treatment or duplicate
21 verification record in his medical file. While Grievant's explanation
22 to the Committee was that his wife had procured the forged document
23 from a friend, a fact of which Grievant stated he didn't know until
24 he was so informed by the Company on December 7, 1979, neither his
25 wife nor the friend were produced as witnesses before the Committee
26 or the Board.

27 The Company discharged Grievant for submitting falsified infor-
28 mation concerning sick leave. This offense represents the first
29 for Grievant with respect to the relevant portion of 112.8.

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POSITION OF COMPANY

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It is undisputed that Grievant submitted a forged document to meet the requirement that he produce "satisfactory evidence" of his illnesses on the days in question. Notwithstanding his protestation of innocence to the act, the record is devoid of any credible evidence that he was unaware of the exact nature of the transaction. Indeed, he admitted that he had no contact with Dr. ADLER. The sum of the evidence before the Board cast grave doubts on Grievant's credibility. There is no basis upon which the Board can find that Grievant was not aware that the document was a forgery.

Unquestionably, this case focuses on the parties' intended meaning of the terms "abuse," "misrepresentation" and "falsification." The offers and counter offers leading up to the 1952 Agreement shed no light on the intended meaning of the terms. At best, it can be said only that Company gave up the right to immediately discharge an employee who "abused" the sick leave provisions by "misrepresentation" or "falsification." Although the provisions of Section 112.8 have remained intact for almost three decades, there is no record evidence that the application of the Section has ever been challenged through the Grievance Procedure. The critical point here, however, is that the same cannot be said as to the mutual undertakings of the parties.

The Union's position that the Employee Conduct Standard Practice conflicts, i.e., alters or amends the Agreement, is patently in error. Rather, it merely interprets or amplifies on the meaning and delineation of the provisions in dispute here. That is, those matters relating to misrepresentation and falsification of sick leave entitlement short of criminal conduct are still subject to the "one bite" provisions of Section 112.8. On the other hand, the policy clearly distinguishes acts of forgery, or passing forged documents, from those relating to falsification or misrepresentation.

Under the parties' Agreement, the Company could have chosen to put out its Employee Conduct policy unilaterally, leaving the

1 unilateral interpretation to challenge at a later date through these
2 same Grievance Procedures. Consistent with its labor policy of long-
3 standing the Company instead submitted the contemplated policy to
4 the Union for their suggestions and revisions. This course of action
5 resulted in meetings with the Union followed by the adoption of
6 revisions submitted by the Union. The final product thus being the
7 joint effort of Union and Company. Moreover, Grievant's misconduct
8 in this instance is specifically addressed in Standard Practice No.
9 735.6-1, Pages 1 and 2.

10 Concededly, the discipline in this case is harsh. But then acts
11 of a criminal nature are, as pointed out in the Employee Conduct
12 policy, serious breaches of the employer-employee relationship.
13 Therefore, we submit that the discharge was for just cause and does
14 not violate any provision of the Agreement.

15 The final matter to be addressed here concerns the Union's
16 proposed remedy. If, arguendo, the Board does not agree that the
17 discharge was for "just cause," the Agreement specifically denies
18 his reinstatement with back wages. To this end, the parties have
19 provided in the Agreement and the Submission Agreement that the Board
20 is confined to resolving a dispute within the confines of the parties'
21 Labor Agreement. Thus, back wages hinge on Grievant's not having
22 violated a Company policy as provided in Section 102.4.

23 In this regard, the testimony is unequivocal that Grievant
24 violated the provisions of the policy and is, therefore, not entitled
25 to retroactive wages or interest if reinstated by the Board.

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POSITION OF UNION

29 Both the plain language of Section 112.8 and its negotiating
30 history make it abundantly clear that misrepresentations and/or
31 falsifications concerning sick leave are unique. Punishment by the
32 Company for the first such offense may not exceed forfeiture of sick

1 leave pay secured through the "misrepresentation or falsification".
2 It is only when "recurring" offenses occur that normal disciplinary
3 actions may be invoked. Thus, Section 112.8 bifurcates the rights of
4 the Company to discipline an employee to (1) forfeiture of sick leave
5 procured, in the first instance of abuse, and (2) up to and including
6 discharge for "recurring" instances of sick leave abuse by reason of
7 misrepresentations or falsification.

8 While the Company may allege forgery, it has not proved that
9 Grievant "forged" anything. On the contrary, the only record
10 evidence submitted tends to prove that Grievant had nothing whatever
11 to do with the falsification of the sick leave slip here in question.
12 The quantum of proof required of an employer in cases such as alleged
13 by the Company here -- conduct involving moral turpitude or ordinarily
14 punishable by criminal law -- is "proof beyond a reasonable doubt".
15 Clearly, the Company has not met its burden in this case.

16 Finally, of course, even assuming that the Company could, despite
17 the plain language of Section 112.8, punish an employee for the
18 offense of "forging" any "payment paper", the Company must prove that
19 a sick leave verification slip is contemplated by the Standard
20 Practice to be a "payment paper." In addition, it must show that
21 employees were put on fair notice that forging such a document
22 would be considered the offense of forging a "payment paper" as
23 outlined in the Practice. It surely may not be said that the
24 Standard Practice gives such notice on its face, nor did the Company,
25 at hearing, submit any evidence that could lead one to believe that
26 employees were put on such notice.

27 It appears clear from the language and negotiating history that
28 no employee for whatever reason may be discharged for the first
29 offense of "falsification or misrepresentation" in connection with
30 the procurement of sick leave. Even were one to assume that the
31 Standard Practice provided an independent basis for discharge based
32 upon "forging ... of a payment paper", the Company here has proved

1 neither that Grievant engaged in a forgery nor that a sick leave
2 verification is a "payment paper" within the meaning of the Standard
3 Practice.

4 For these reasons and on the basis of the record as a whole,
5 the Union respectfully requests that the grievance herein be sustained.

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8 OPINION

9 Section 112.8 is clear and unambiguous. In consequence thereof,
10 the weight of arbitral authority holds that evidence of bargaining
11 history or intent of the parties (parol evidence) and evidence of
12 custom and past practice are irrelevant and immaterial. (See, generally)
13 Elkouri and Elkouri, How Arbitration Works, Third Edition, Page 362
14 (Parol Evidence) and Page 389 (Custom and Past Practice)). Given
15 the eminently clear language of Section 112.8, then, we need not
16 look to other evidence to dispose of the instant controversy.

17 Moreover, where, as here, the dispute is clearly and unambiguously
18 covered by the Contract, the Company's rules relative to employee
19 conduct are likewise irrelevant and immaterial. The parties
20 negotiated the Agreement; only the parties may change the Agreement.
21 And Standard Practice 735.6-1 cannot seriously be considered as
22 somehow equivalent to the collective Agreement, under the facts and
23 circumstances of this case, the scope of the Union's review thereof
24 notwithstanding. Quite simply, Standard Practice 735.6-1 is not
25 a document arrived at through collective bargaining.

26 Without question, the reason for which Grievant was discharged,
27 i.e., submitting falsified information with respect to sick leave,
28 is "misrepresentation or falsification" within the meaning of Section
29 112.8. Additionally, no contractual distinction exists between
30 "misrepresentation or falsification" under Section 112.8 and conduct
31 which may fall within the Penal Code of the State of California.

32 Further, even assuming, arguendo, that Standard Practice 735.6-1


1 was applicable to
2 exists that Grievant was guilty of "forgery" with respect to the patient
3 treatment verification dated November 27, 1979.* In any event, from
4 Standard Practice 735.6-1 read as a whole, it is difficult, if not
5 impossible, to conclude that patient treatment verifications rise to
6 the level of a "payment paper" within the meaning of that document,
7 and even assuming, without deciding, that Grievant was guilty of
8 "forgery", Section 112.8, by its very terms, gives employees one mis-
9 representation or falsification "on the house" before discipline or
10 discharge may be imposed.

11 With respect to the Company's argument concerning the appropriate
12 remedy herein, Section 102.4 cannot be asserted as a basis for with-
13 holding any backpay from Grievant where, as here, 1) the Company's
14 action in discharging Grievant was in direct violation of Section
15 112.8, and 2) Section 102.4, in any event, is inapplicable to the
16 facts and circumstances of this case.

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18 AWARD

19 The discharge of F violated the provisions of the
20 parties' Labor Agreement. Mr. F shall be reinstated
21 to his former position, shall be made whole for any loss
22 of earnings from the date of his discharge to the date he
23 is offered reinstatement, and shall suffer no loss of
24 seniority or other Contract benefits.

25 DATED: January 22, 1981.

26 
27 ARMON BARSAMIAN, Chairman

28 Concurring:

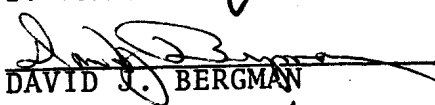
29 
30 LAWRENCE N. FOSS

31 
32 FRANK HUTCHINS

Dated: FEB 6, 1981

Dissenting:


I. WAYLAND BONBRIGHT


DAVID J. BERGMAN

Dated: 1/23/81

* It should be noted that this Arbitrator believes that reliance on the criminal law quantum of proof (beyond a reasonable doubt) in labor arbitration is misplaced. Labor arbitration arises under collective agreements; not the Penal Code. There are different rules, procedure forums and possible penalties. The highest standard of proof to which an employer should be held is that "clear and convincing" evidence be presented to establish just cause for discipline or discharge. That is the standard applied by this Arbitrator regardless of the reasons for the action taken against the employee.