A MATTER IN ARBITRATION

In a Matter Between:	Grievance:	Termination/Sick Leave Allowance
PACIFIC GAS AND ELECTRIC COMPANY		
(Employer)	Hearing:	January 24, 1990
and	Award:	July 5, 1990
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245	McKay Case No. 89-264	
	Arbitration Case No. 172	
(Union)		

DECISION AND AWARD

GERALD R. McKAY, ARBITRATOR
DAVID J. BERGMAN, COMPANY MEMBER
RICK R. DOERING, COMPANY MEMBER
ROGER STALCUP, UNION MEMBER
DOROTHY FORTIER, UNION MEMBER

Appearances By:

Employer:

Tim J. Emert, Esq.
Corbett & Kane
88 Kearny Street, Suite 1700
San Francisco, California 94108

Union:

Jane Brunner, Esq.
Staff Attorney
IBEW Local 1245
P.O. Box 4790
Walnut Creek, California 94596

A MATTER IN ARBITRATION

In a Matter Between:		
PACIFIC GAS AND ELECTRIC COMPANY	Grievance:	Termination/Sick Leave Allowance
(Employer)	Hearing:	January 24, 1990
and	Award:	July 5, 1990
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245	McKay Case No. 89-264	
(Union)		

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. A hearing was held in San Francisco, California on January 24, 1990. During the course of the proceedings, the parties has an opportunity to present evidence and to cross-examine the witnesses. At the conclusion of the hearing, the parties agreed to submit written briefs in argument of their respective positions. The arbitrator received copies of those briefs on or about March 12, 1990. The arbitrator also received a copy of an arbitration

1 Joint Exhibit #1

decision submitted by the Union on or about March 15, 1990. Having had an opportunity to review the record, the arbitrator is prepared to issue his decision.

ISSUE

Did the Employer's calculation of the grievant's termination sick leave allowance violate the Contract? If so, what is the appropriate remedy?[2]

RELEVANT CONTRACT LANGUAGE

TITLE 106. STATUS

. . . . . .

106.3 SERVICE

Service is defined as the length of an employee's continuous employment since his/her Employment Date with Company, a Predecessor Company, any Company or association named in Section 106.2 above, and as provided hereafter in Section 106.4. The continuity of an employee's Service shall be deemed to be broken by termination of employment for any reason or layoffs for lack of work which is in excess of the time provided for in Subsection (a) below. The following periods of absence shall count as service for purposes of this Agreement and shall not constitute a break in service: (Amended 1-1-88)

(a) Absences caused by layoff for lack of work:

(1) If the employee has regular status but less than five years of Service at the time of layoff and has been absent less than one continuous year. (Amended 1-1-88)

---

2 Tr. Page 6

2) If the employee has five years of Service or more at the time of layoff and has been absent less than two continuous years. (Added 1-1-84)

. . . . . .

(c) Absence because of illness or injury as long as the employee is entitled to receive sick leave pay or is entitled to receive benefits under the provisions of the Voluntary Wage Benefit Plan, a state disability plan, the Long Term Disability Plan, or a Workmen's Compensation Law, provided that the employee returns to active work with Company immediately following his recovery from the illness or injury.

. . . . . .

(e) . . . . . .

If an employee fails to return to active work within the above time limits for any reason except death or disability, his Service shall be deemed terminated as of the expiration of the time limit.

. . . . . .

TITLE 112. SICK LEAVE

112.1 QUALIFICATION AND RATE OF COMPENSATION

After completing one year of Service and for each year of Service thereafter, a regular employee shall be allowed sick leave with pay for a total of 80 hours per calendar year; and a regular part-time employee shall be allowed sick leave with pay for such portion of 80 hours per calendar year as the average number of hours he regularly works in a week bears to 40.

112.2 ACCUMULATION

A regular employee, in addition to his annual sick leave which he is allowed under the provisions of Section 112.1, shall be allowed further sick leave with pay which shall not exceed the total of his unused annual sick leave in the eight years immediately preceding.

112.3 ADDITIONAL SICK LEAVE AFTER 10 YEARS

In the calendar year in which Company anticipates that an employee may attain ten years of Service and in any calendar year thereafter, an employee whose sick leave record qualifies him in

accordance with the formula shown below shall, upon exhausting his accumulated and current sick leave, be allowed additional sick leave, if needed, not to exceed 160 hours in such calendar year.

(a) For each of the preceding eight calendar years, calculate the employee's annual sick leave accrual by subtracting from 80 hours each year the hours (not exceeding 80 hours) of sick leave he used in such year.

(b) Total such annual sick leave accrual for the eight years involved.

(c) If such total is 320 hours or more, the employee shall be qualified for the additional allowance.

(d) Once the employee has qualified for such additional allowance, such additional allowance shall be renewed in full on the first day of each succeeding calendar year.

112.4 ADDITIONAL SICK LEAVE AFTER 20 YEARS

In the calendar year in which Company anticipates that an employee may attain 20 years of Service, an employee who has qualified for additional sick leave under Section 112.3 shall, upon exhausting such additional sick leave as provided in Section 112.3, be allowed, if needed, an additional 160 hours in such calendar year. Once the employee has qualified for such additional allowance, such additional allowance shall be renewed in full on the first day of each succeeding calendar year.

. . . . . .

112.9 TERMINATION DUE TO PHYSICAL DISABILITY

If a regular employee is required permanently to leave the Service of Company because of physical disability, he shall, on termination of employment, be entitled to an allowance which shall be the equivalent of the sick leave to which he would be entitled under the provisions of Sections 112.1, 112.2, 112.3, and 112.4.

BACKGROUND

The grievant was employed by the Employer as a gas mechanic. On or about April 28, 1981, the grievant suffered an industrial injury which caused him to become totally disabled and prevented him from performing his normal duties. According to the Union, the grievant initially received sick leave from April 27 through August 26, 1981. During this period of 83 days, the grievant received one paid holiday for May 25, 1981. Because that 83 days was determined to be chargeable to an industrial injury and, therefore, covered by worker's compensation, the grievant's sick leave was restored to him when he repaid the Employer an amount of $8,386.56. The grievant then applied for and was granted long-term disability status. When the grievant applied for retirement status on June 1, 1988, he requested the Employer pay him for his accumulated sick leave as provided for in Section 112.9 of the Contract. Initially, the Employer refused to pay the grievant's accumulated sick leave but later changed its position and paid the grievant eighty days of accumulated sick leave at the rate the grievant was earning when he was injured in 1981. It is the position of the Union that the grievant is entitled to receive 83 days of sick leave rather than 80 and to be paid the sick leave at the rate the grievant would have been earning in 1988 when he retired.

The Union's only witness, Mr. Roger Stalcup, a representative for the Union, testified that in his opinion, an employee retains his seniority while the employee is on long-term disability or worker's compensation, citing Section 1.06.3(c) of the Agreement in support of that assertion. Further, Mr. Stalcup asserted, under Section 206.9 in conjunction with Section 205.7(a), the grievant retained the right to bid on positions during his disability in

anticipation of returning to work.[3] As further support that the grievant retained his status as an active employee, Mr. Stalcup cited Sections 4.01 and 4.03 dealing with the Employer's 401(k) Plan in which the term "service" and the term "covered compensation" are used. These are defined, according to Mr. Stalcup, on pages 94 and 95 of the Agreement in a manner which made the grievant eligible to participate in the 401(k) Plan. Mr. Stalcup pointed out that the grievant continued to receive vision and dental care while on long-term disability. Mr. Stalcup also cited Section 111.7 dealing with vacation which he asserted allowed employees to receive accrued vacation benefits at the rate when the vacation benefit is taken and not at the rate when it was earned. In Mr. Stalcup's opinion, these and other sections of the Agreement all lead to the conclusion that the parties intended an employee who received a payoff of accumulated sick leave to receive it at the rate the employee would have been earning at the time of the payoff rather than at the date of the employee's last date of work.

Ms. Sandy Edens, who currently works as the human resources manager in the Employer's coast division in Santa Cruz, testified that during the period 1981 to 1984, she was responsible for administering the Employer's long-term disability benefits.[4] When the issue of whether the Employer should pay employees who were on long-term disability and who converted to retirement their accumulated sick leave, Ms. Edens stated, she raised the question with Mr. Wayland Bonbright, the Employer's manager of industrial relations, who told her that in his opinion the Employer should be paying employees the accumulated sick leave at the time they

---

3 Tr. Page 17

4 Tr. Page 37

converted from long-term disability to retirement.[5] It was Ms. Edens' opinion that the rate at which the sick leave should be paid is the rate the employee earned on the employee's last day of work. This, according to Ms. Edens, is the rate an employee receives for a pension.[6]

Mr. Gene Martinez, a unit supervisor in the Employer's payroll department, testified that in his capacity, he is responsible for the payment of LTD benefits as well as for paying off sick leave if an employee is eligible to receive it. When a sick leave benefit needs to be calculated for purposes of a buy-out, Mr. Martinez testified, he does the calculation.[7] He has done this, he stated, since 1983. During this period of time, a number of employees have been eligible for sick leave buy-out, and Mr. Martinez has made the calculation. All of these calculations have always been done at the rate of pay the employee was receiving on the employee's last day of work. As an example of an employee who was paid sick leave benefits at the rate he was earning on his last day of work, Mr. Martinez cited an employee named L .[8] As another example, Mr. Martinez used an employee named Mr. B [9] The only other example Mr. Martinez presented was that of the grievant in which the calculation again was made at the rate of pay the grievant was earning on his last day of work.

---

5 Tr. Page 38
6 Tr. Page 41
7 Tr. Page 45
8 Tr. Page 50
9 Tr. Page 53

POSITION OF THE PARTIES

UNION

The Union argued that neither the Employer's assertion that past practice supports interpretation of the Contract or that the Contract supports its position is accurate. The language in Section 112.9 has been in the Agreement since 1950. The Employer's evidence of past practice only extended back to 1984. Before an act on the part of the Employer can be considered a past practice, it must have the following qualities: (1) clarity and consistency, (2) longevity and repetition, (3) acceptability, (4) underlying circumstances which give a practice its true dimensions, or (5) mutuality. Citing several arbitration decisions, the Union argued that these criteria have not been established by the Employer in the present case. The Employer failed to show that any Union official had any notice of the Employer's practice in the case of Mr. L or in the case of Mr. M The Union pointed out further that the employees of the personnel department as late as 1983 were unaware of the eligibility of an employee to receive accumulated sick leave as established by the testimony of Ms. Edens. There was no mutuality between the Employer and the Union, particularly in light of the fact that management has not consistently interpreted the language of Section 112.9. In light of all this, no argument of a past practice can be sustained.

The Union asserted its analysis of the Contract establishes that for a contractual purposes, the grievant was deemed a regular employee, accruing seniority during the period from the onset of

his disability in 1981 until his termination in 1988 upon his retirement. Citing Section 111.7(a), Section 111.9(a) and Section 112, the Union noted that these provisions are all paid at the current rate. Section 112.10 and Section 2.16 of the Benefit Agreement are paid at the former rate where a specific provision to that effect is provided. In every situation, even where the Contract is silent, the current rate is paid rather than the former rate. When the parties have intended to freeze a fringe benefit at a former rate, they have stated this specifically in the Contract language. Citing a decision by arbitrator Kelly, the Union noted that if the parties had intended sick leave to be paid at the former rate in a buy-out situation, it would have been stated so specifically in the Agreement. In light of the parties interpretation of various Contract sections, the best conclusion which can be drawn is that the parties intended a sick leave buy-out to be paid at the current rate an employee would have been earning at the time of the buy-out rather than the rate the employee earned on the last day of work.

EMPLOYER

The Employer argued that upon his retirement, the grievant was paid for all accumulated sick leave based on his rate of pay on the last day he actively worked for the Employer. Sick leave buy-out at the wage rate effective on the employee's last day worked is consistent with the terms of the collective bargaining Agreement. To the extent that the Agreement is ambiguous, the Employer's practice represents a reasonable interpretation of the Contract. The Employer has a well-established and consistent practice of calculating sick leave buy-out in the manner that it calculated the sick leave for the grievant. The Union has failed to carry the burden of establishing a violation of the Agreement, and the grievance must be denied.

The Employer argued that Section 112.9 permits sick leave buy-out of ". . . the equivalent sick leave to which (the employee) would be entitled under . . ." other provisions of the Contract. All the other provisions of the Agreement contemplate entitlement to sick leave only when an active employee must miss regular work due to injury or illness. The employee is paid sick leave benefits at the wage rate last worked. The grievant was a gas mechanic at the time of his injury. He was not classified as a gas mechanic at the time of his retirement. At that point, he was totally and permanently disabled from performing the work of a gas mechanic. If the grievant had exercised his bidding rights to obtain a suitable position for which he was qualified, he would have been entitled to sick leave benefits at the wage rate of the new classification if he were actively working. However, due to his disability, the grievant had no job classification at the time he retired because he was on the LTD payroll. Because the grievant was not a gas mechanic, the Union's argument that he must be paid at the wage rate of gas mechanic in 1988 finds no basis of support in the Contract and no basis in reason or logic.

For an employee who is retiring, even one who has been inactive for many years, the wage rate on the last day of active work determines the benefit level. Mr. Martinez testified that the rate at which a sick leave buy-out has been made since 1984 has always been at the rate earned by the employee on his last active day of employment. The Union has failed to meet its burden of proof to undermine the Employer's established practice. There is no express language in the Agreement which was allegedly violated by the Employer. The only evidence provided by the Union was the understandings of Mr. Stalcup. The Employer asked that the grievance be denied.

DISCUSSION

In a dispute where the Union asserts that the Employer has violated the terms of the Contract, the burden is on the Union to show by a preponderance of the evidence that, in fact, the Employer has done just that. The Employer is not under any obligation to come forward and prove that it has not violated the Contract. In the present dispute, the Union chose to come forward with the testimony of Mr. Stalcup which consisted primarily of Mr. Stalcup's opinion with respect to what the various provisions of the Contract meant and what the parties must have intended. While Mr. Stalcup is a very knowledgeable individual, his testimony consisted basically of argument. If all of the evidence available is simply Contract language, then all that is needed is an argument to assert that the language supports the Union's position. Normally, however, in this arbitrator's experience, the Contract language is never so clear that a party with the burden of proof can prevail by resting only on the language in the Contract.

While the Employer asserted that it has established a past practice, the evidence presented by the Employer is not really adequate to show that a legal past practice exists. Both the Employer and the Union are relegated to the words contained in the Contract to support their respective positions. The most relevant provision is Section 112.9 which promises regular employees who are forced to leave the service of the Employer because of a physical disability that the employee will be entitled to an allowance of sick leave to which the employee would have been entitled under Section 112.1. That Section, in relevant part, provides that a regular employee shall be allowed sick leave with pay for a total of eighty hours per calendar year. The Employer has conceded that

under Section 112.9, it owes the grievant eighty days of sick leave. It is the Employer's position that under Section 112.1, it owes the grievant the sick leave at the rate of pay the grievant was earning when he left the Company initially to go on sick leave in 1981.

Section 106.3 defines service. In part, that section states, "The following periods of absence shall count as service for purposes of this Agreement and shall not constitute a break in service. . . ." The Contract goes on to provide in subparagraph (c) that,

> . . . absence because of illness or injury as long as the employee is entitled to receive sick leave pay or is entitled to receive benefits under the provisions of the Voluntary Wage Benefit Plan, a State disability plan, the Long-Term Disability Plan, or Workmen's Compensation Law, provided that the employee returns to active work with the company immediately following his recovery from the illness or injury.

If the employee returns, then the absence is counted as service. If the employee does not return, then that period of absence is not counted as service. Section 112.1 speaks of "service." The last year of service the grievant had based on the language in 106.3 was 1981 since the grievant did not return to work in accordance with the provisions in Section 106.3(c). When the grievant failed to return to work, the years between 1981 and 1988 were not counted as service years for purposes of Section 106 or for purposes of Section 112. Because the grievant's last service year was 1981, the grievant's entitlement to sick leave would be whatever he was entitled to as of 1981. The relevant language states, ". . . and for each year of service thereafter, a regular employee shall be allowed sick leave with pay for a total of eighty days per calendar year. . . ." The last year of service during which the grievant earned sick leave was 1981. If he had returned to work after his

disability under Section 106.3, then each year in between would have been a service year, and the grievant's entitlement to sick leave would have been controlled on that basis, entitling the grievant to a sick leave payout at the current earnings in contrast to the past earnings.

In summary, the burden was on the Union to establish by a preponderance of the evidence that the Employer violated the terms of the Contract. The Union presented no evidence to support its case, except for the opinion of Mr. Stalcup, which was inadequate either to establish a practice or to establish negotiating history to support the Union's position. The language of the Contract read in context does not support the Union's conclusion that the grievant was entitled to sick leave pay at the rate he would have earned wages in 1988 as a gas mechanic. To the contrary, since the grievant's last year of service as defined by Section 106.3(c) was 1981, the grievant's entitlement to sick leave under Section 112.1 has to be paid at that rate in effect at the time of his last day of work. If the grievant had returned to work in accordance with the provisions of 106.3(c), then the grievant's entitlement would have been to the current rate of pay in effect upon his retirement, or in effect at the time he took his sick leave. Because the grievant did not return, he had a break in service for purposes of benefits found in Section 112 as of the last date he worked.

The Union claimed that the grievant was entitled to 83 days of sick leave in contrast to the 80 days of sick leave the Employer paid. The Union's claim is based on the fact that the grievant took 83 days of sick leave when he was initially injured in 1981 and reimbursed the Employer for 83 days of sick leave. The Employer presented no evidence to refute the grievant's claim that he was paid 83 days of sick leave and repaid the Employer 83 days of sick leave. In the absence of

any contrary evidence, it is the arbitrator's conclusion that the grievant is entitled to 83 days of sick leave at the rate he would have been paid that sick leave in 1981.

AWARD

To the extent the Employer's calculation of the grievant's termination of sick leave allowance paid the grievant 80 days instead of 83 days, the Employer violated the terms of the Contract. However, to the extent the Employer calculated the grievant's rate of pay based on what he would have been entitled to in 1981, the Employer did not violate the terms of the Contract.

The grievant is entitled to 83 days of sick leave at the rate of pay he was earning in 1981 on the last day of work.

It is so ordered.

July 5, 1990

Gerald R. McKay, Arbitrator

Dissent on number of days
Concur rate of pay

David J. Bergman, Company Member

Dissent on number of days
Concur on rate of pay

Rick R. Doering, Company Member

Roger Stalcup - Dissent - 8/9/90

Roger Stalcup, Union Member On rate of pay.

Dorothy Fortier - 8/9/90

Dorothy Fortier, Union Member Dissent on rate of pay