IN ARBITRATION PROCEEDINGS BEFORE

A BOARD OF ARBITRATION

In the Matter of a Controversy Between LOCAL UNION 1245, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, Union, and PACIFIC GAS AND ELECTRIC COMPANY, Employer.	OPINION AND AWARD
Arbitration Case 196 (General Construction Layoffs)	

MEMBERS OF BOARD OF ARBITRATION:

Union Members:
Roger Stalcup and Ron Van Dyke
IBEW LOCAL 1245
P.O. Box 4790
Walnut Creek, CA 94596

Company Members:
Rick R. Doering and John Moffat
PACIFIC GAS & ELECTRIC COMPANY
215 Market Street
San Francisco, CA 94106

Neutral Chairperson:
Walter L. Kintz, Arbitrator
P.O. Box 11012
Oakland, CA 94611-0012

APPEARANCES:

On behalf of the Union:
Tom Dalzell
Attorney at Law
IBEW, Local Union No. 1245
P.O. Box 4790
Walnut Creek, CA 94596

On behalf of the Employer:
James F. Goodfellow
Attorney at Law
PACIFIC GAS AND ELECTRIC COMPANY
Law Department
P.O. Box 7442
San Francisco, CA 94120

This arbitration arises out of a dispute between Local Union 1245, International Brotherhood of Electrical Workers, AFL-CIO ("Union") and Pacific Gas and Electric Company ("Employer" or "Company") involving the Employer's change in work assignment policy. Employer and Union are parties to a collective bargaining agreement ("Contract"), pursuant to the provisions of which Walter L. Kintz was named as Chairperson of a Board of Arbitration. The parties stipulated that all procedural requirements of the Contract have been met, and the matter is properly before the Board with jurisdiction to render a final and binding award.

Hearing was held on June 18, 1993 in San Francisco, California. The parties were given full opportunity to examine and cross-examine witnesses, to introduce relevant evidence, and to file post-hearing briefs. The matter having been submitted on the briefs, the following opinion and award is issued:

ISSUES

1. Did the Company's implementation of the policy set forth in the memorandum dated August 25, 1992, violate the terms of

the Labor Agreement; and if so

2. What is the remedy?

RELEVANT CONTRACT PROVISIONS

7.1 MANAGEMENT OF COMPANY

The management of the Company and its business and the direction of its working forces are vested exclusively in Company, and this includes, but is not limited to, the following: to direct and supervise the work of its employees, to hire, promote, demote, transfer, suspend, and discipline or discharge employees for just cause; to plan, direct, and control operations; to lay off employees because of lack of work or for other legitimate reasons; . . . provided, however, that all of the foregoing shall be subject to the provisions of this Agreement, arbitration or Review Committee decisions, or letters of agreement, or memorandums of understanding clarifying or interpreting this Agreement.

302.1 BASIC WORKWEEK AND BASIC WORKWEEK DEFINED

A workweek is defined to consist of seven consecutive calendar days, and a basic workweek is defined to consist of five workdays of eight hours, each. The days in the basic workweek shall be known as workdays and the other days in the workweek shall be known as non-workdays. Employees may be scheduled to work more or less than five days per week or for more or less than eight hours per day, but in any such event the basic workweek shall continue to be as herein defined.

302.2 BASIC WORKWEEK

The basic workweek shall be from Monday through Friday.

302.3 CHANGES

Notwithstanding the provisions of Section 302.2 hereof, Company's Foreman or other Supervisor and the employees involved, together with Union, may mutually establish a different basic workweek of five consecutive workdays.

306.1 EMPLOYEES (TWO OR MORE YEARS SERVICE)

The provisions of this Title 306 which are

applicable to regular employees with two years or more of Service in cases of displacement, demotion or layoff due to lack of work or the return of an employee from leave of absence for Union business or military service, but not to layoffs due to inclement weather, lack of material and similar causes, shall be applied in such manner as to give effect to the following:

(a) Provided that the employee is fully qualified to perform the duties of the classification to which such employee is to be demoted or transferred, Service, as defined in Section 106.3, shall be the determining factor in the application of this Title.

(b) An employee may not elect to displace another employee with equal or greater Service. . . .

308.1 DEFINITION (OVERTIME)

Overtime is defined as (a) time worked in excess of 40 hours in a workweek, (b) time worked in excess of eight hours on a workday, (c) time worked on a non-workday, (d) time worked on a holiday as provided for in Title 103, and (e) time worked outside of regular work hours on a workday. . . .

CONTENTIONS OF THE PARTIES

The Union contends that the Employer's August 25, 1992 policy promulgation breached Title 302.2 of the Contract by unilaterally establishing a regular workweek for general construction employees which was inconsistent with the workweek required by the Contract. The Union argues that this policy change was an attempt to obtain what the Employer was unable to obtain at the bargaining table. The Union also argues that this policy resulted in the layoff of employees without regard to seniority in breach of Title 306 of the Contract.

The Employer contends the policy was a permissible reduction in hours which did not alter the basic workweek and was

consistent with a prior arbitration award interpreting the critical provisions of the Contract. The Employer also contends the policy effecting a reduction in regular workweek hours was not a layoff and was privileged under the Contract.

FACTS

On August 25, 1992, Byron Tomlinson, Manager of the Employer's General Construction Electric T & D Department ("Dept."), issued the following policy statement which gave rise to this grievance:

> The economic recession gripping the nation and the resulting decrease in new business activity in the Company's service territory is having a significant impact on our workload. All of the information that I'm getting reinforces the need for us as a department to get smaller. The Strategic Leadership Team (Superintendents, General Foremen and myself) has taken several actions to manage our getting smaller without having to lay anyone off. These actions include:
>
> * Not replacing crew members that leave the department. We have reduced our workforce over 60 people since January.
>
> * Loaning crews and individuals to the divisions and other ENCON departments. We have about 120 people on loan at this time.
>
> Even with the actions we have already taken, our backlog remains small. In spite of the light workload, our overtime rates are running between 8 and 10 percent of straight time. At this rate we "burn-up" between 70 and 85 man-months of work each month on overtime. Therefore, I am instituting the following policy effective immediately:
>
> **'Whenever a crew works a full day or more on a non-workday, except for emergencies, the first or last workday of the following week will not be worked without prior approval of the General Foreman.'**
>
> The intent of this policy is to extend the current workload as much as possible and increase the chances

> that we can manage our workforce reduction without layoffs. You need to be aware, however, that if our clients take back work or cut back significantly in assigning us work, we could be into a layoff situation. The same holds true if a significant number of our people on loan to other departments are returned to us.

There is no dispute concerning the stated motivation for this policy change. For reasons that need not be detailed here Tomlinson, in January 1992,[1] perceived that the workload of the Dept. was declining and began to make plans to avoid layoff and to attempt to recapture work for the Dept. One aspect of this planning focused on increased performance of work on weekends. As weekend work required overtime pay Tomlinson attempted to obtain the Union's agreement to waive the overtime for weekend work requirement of the Contract.

A meeting was held with Union representatives on July 10 for the purpose of discussing these proposals. Tomlinson presented as the preferred proposal a change in the basic workweek to include weekend days as part of the regular workweek. This proposal was based on the assumption that a lower hourly rate would enhance the ability to compete for available weekend work. Tomlinson acknowledged that this change would require the Union's consent. As an alternative he also suggested essentially the program which is at issue here.

Subsequent to the July 10 meeting the Employer presented the first of these proposals as a formal written request to the Union. The Union informed the Employer that the Dept. employees

---

[1]All dates hereinafter are in 1992 unless otherwise stated.

did not view the first proposal favorably.[2]

The Union presented evidence that during the 1987 and 1990 contract negotiations the Employer proposed modification of Title 302.2 of the Contract which would have altered the definition of the basic workweek to include Saturdays and/or Sundays in some circumstances.

There is no prior example of a comparable unilateral assignment of employees to work less than the regular workweek. The parties have agreed to modifications of the regular workweek.

The Contract provisions at issue here have existed as part of the parties' bargaining relationship for 40 years or more.

It is unnecessary to discuss in detail the results of the implementation of the policy.[3] It was not consistently or uniformly applied and to some extent was misapplied.[4] The policy had limited impact in capturing work and postponing or preventing layoffs.

ANALYSIS AND CONCLUSION

The 1970 arbitration award of Arbitrator Eaton (Arb. 33) must be carefully evaluated for its precedential weight and

---

[2]There is some dispute as to the relative responsibility of each party for the delay in acting on the Employer's proposals. It is unnecessary to consider the issue as it does not affect the result of this arbitration.

[3]There is no dispute that the policy was a good faith effort to deal with the loss of work. Success or failure does not illuminate the intent of the Contract or the permissibility of the policy.

[4]This arbitration is confined to the propriety of the policy. The issue presented does not encompass possible misapplication.

application to this dispute. The Union correctly notes that Arb. 33 did not present the identical issue presented by this dispute. The issue before Arbitrator Eaton was whether the Employer was required to pay employees for their regular shift hours even if they were not assigned to work all of those hours in addition to paying them the overtime rate for hours outside their regular shift. The issue presented in this grievance is whether the Employer must pay employees for each day of their regular workweek when it schedules them to work at overtime one day in lieu of straight time for one day of the regular workweek.[5]

Arbitrator Eaton viewed Title 302.1 as a clear indication of the general intent of the Contract in defining the workweek and the workday. It was not intended to guarantee that "work would... necessarily be available on those days or during those weeks." He examined various provisions of the Contract, notably 302.5 and 302.7, and found nothing indicating a requirement that employees be paid for regularly scheduled times not actually worked. Even if Arbitrator Eaton's award is not direct precedent, it nonetheless provides guidance as to the historical application of critical provisions of the Contract.

As Arbitrator Eaton observed, the unambiguous language of 302.1 permitted the Employer to schedule employees to work "more or

[5]The Union asserts that Arb. 33 is distinguishable on the additional grounds that it involved a temporary assignment of only two employees. Those differences do not dispose of Arbitrator Eaton's award. His award purported to define the parties' rights and obligations under the Contract and was not narrowly limited based on the duration of the assignments or the number of employees assigned.

less" than five days per week just as it permitted workdays of more or less than eight hours. The definition of the basic workweek in 302.2 does not provide a basis to reject the plain meaning of Title 302.1. Consideration of these two provisions and the Contract as a whole indicates intent to define the basic workweek as setting forth the perimeters of a workweek which may be worked without paying overtime.

The Union relies on a well recognized principle of contract interpretation that a party should not obtain through arbitration what it failed to obtain through collective bargaining. It sees the policy at issue in this arbitration as accomplishing the same result as the Employer's proposals to change the workweek to include weekends. However, the concession which the Employer sought at the bargaining table involved the avoidance of overtime payment for weekend work which is not the result of the policy at issue here.[6] Therefore the Employer's unsuccessful efforts to obtain concessions in contract negotiations do not provide a persuasive basis to ignore the language of the Contract.

Alternatively the Union contended the policy denying pay for a day of the regularly scheduled workweek on which employees did not work amounts to a layoff which breaches the seniority in layoffs required by Title 306.

The Contract does not clearly define layoff. A reasonable

---

[6]The effort to obtain a more generous concession does not support the conclusion that a contract does not permit some lesser privilege. Elkouri & Elkouri, How Arbitration Works, 4th ed., pg. 359.

definition of the term layoff would not apply in a situation such as this where the employees continued to receive 40 hours of work per week and received more wages than they would have working their full regular 40 hour workweek. Layoff is commonly understood as involving an interruption of employment which is not compatible with a continuing 40 hour week.

The Employer points out that in Arb. 33 the employees received less than 40 hours work a week. From this fact it argues for an application of Arb. 33 as precedent on the layoff question. A careful reading of Arb. 33 does not disclose whether the issue of layoff was raised or considered. Therefore, Arb. 33 does not define the contractual meaning of the term.

The Employer cites arbitral authority for the proposition that a reduction in hours is not the equivalent of a layoff. Brief periods without pay may not normally be thought of as amounting to a layoff; however, the Union points out the first paragraph of Title 306.1 suggests the parties intended to use the term layoff to encompass brief interruptions such as those resulting from inclement weather or material shortages. The argument has obvious logic but it is not sufficient to meet the Union's burden when applied to the facts of this dispute. Here the policy did not deny the employees work or pay, rather it substituted overtime hours for straight time without diminishing the 40 hour week. Those facts indicate the Employer did not by indirection achieve a result which is tantamount to a layoff.

Implicit in the Union's argument is, as the Employer

notes, the suggestion that the Employer should have chosen to lay off employees according to seniority and employ more senior employees for the regular workweek plus the overtime needed (or intended) to capture weekend work. Under the language of Title 7.1 the Employer retains the option to determine when to lay off employees "because of lack of work" or "for other legitimate reasons." The Contract should be applied so as to give meaning to all its provisions. Denial of this grievance avoids the tension between Title 7.1 and an interpretation which would compel the Employer to lay off employees.

The weight of the evidence does not support the Union's interpretation of the Contract.

The Company's implementation of the policy set forth in the memorandum dated August 25, 1992, did not violate the terms of the Labor Agreement, and the grievance is denied.

Date: Oct 15, 93

WALTER L. KUNTZ
Chairperson

Roger Stalcup, Union Member — 10/22/93 Date — ~~Concur~~/Dissent

Ron Van Dyke, Union Member — 10/25/93 Date — ~~Concur~~/Dissent

Rick Doering, Company Member — 10/18/93 Date — Concur/~~Dissent~~

John Moffat, Company Member — 10/21/93 Date — Concur/~~Dissent~~