INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,	**Opinion & Decision**
Complainant,	**of**
and	**Board of Arbitration**
PACIFIC GAS & ELECTRIC COMPANY,	
Respondent	-oOo-
Arbitration Case No. 248. Discontinuation of PSEBA Voluntary Wage Benefit Plan.	

APPEARANCES

On Behalf of the Union:

Tom Dalzell, Esq.
IBEW Local 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Company:

Stacey A. Campos, Esq.
PG&E
Law Department
P.O. Box 7442
San Francisco, CA 94120

BOARD OF ARBITRATION

Dorothy F. Fortier and Bob Choate, Union Board Members

Kathy Price and Margaret Short, Company Board Members

Barbara Chvany, Neutral Chair

INTRODUCTION

This dispute arises under the Labor Agreement applicable to Operation, Maintenance and Construction Employees (JX 1A) and to Office and Clerical Employees (JX 1B) (referred to collectively herein as "the Agreement"), effective January 1, 2000 (TR 3-4). A Submission

Agreement ("the Submission") dated November 13, 2000 was executed in this case. Pursuant to the Agreement and the Submission, a Board of Arbitration ("the Board") was appointed and a hearing was conducted on November 13, 2000, in San Francisco, California.

At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant evidence and argument. The Parties stipulated that the grievance has been pursued through the grievance procedure contained in the Agreement (JX 2; TR 4). As a procedural matter, the grievance is properly before the Board for final and binding decision, but the Company raises an issue of substantive arbitrability (JX 2, 3). A verbatim transcript of the proceedings was taken.[1] The matter was submitted for decision upon receipt of post-hearing briefs, in March 2001.

This dispute arose when the Union became aware that a Voluntary Wage Benefit Plan ("VWBP" or "the Plan") would be discontinued on December 31, 2000. The Union took the position that the unilateral discontinuance of the VWBP violated the Agreement. The Company took the position that no grievable action or violation of the Agreement had occurred because the VWBP is not a Company-provided or bargained-for benefit, but a voluntary plan provided by another entity. The dispute was not resolved in the lower steps of the grievance procedure, leading to this arbitration proceeding (JX 3).

ISSUE

The Parties were unable to agree upon a joint statement of the issue. The Company proposes the following issue:

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[1] References to the transcript are cited herein as (TR #); references to Joint Exhibits are cited as (JX #).

> Since PSEBA is not owned by Pacific Gas and Electric Company, is its elimination of the voluntary wage benefit plan, effective January 1, 2001, a proper subject of the grievance procedure?

The Union formulates the issue, as follows:

> Did the Company violate the agreement by refusing to negotiate over discontinuance of the voluntary wage benefit plan?

Based upon the parties' proposals and the record as a whole, the Arbitrator hereby adopts the following issue statement:

1. Is the grievance concerning the Company's alleged elimination of the voluntary wage benefit plan effective January 1, 2001 substantively arbitrable?

2. If so, did the Company violate the Agreement by refusing to negotiate over the discontinuance of the voluntary wage benefit plan?

3. If so, what is the appropriate remedy?

REMEDY REQUESTED

The Union requests that the VWBP be restored, that employees be made whole for any losses suffered as a result of the discontinuation of the Plan, and that PG&E be directed to negotiate any future changes in the Plan with Local 1245. (TR 11-12; Un. Brf. 2)

RELEVANT AGREEMENT PROVISIONS

TITLE 107 MISCELLANEOUS

> 107.1 Company shall not by reason of the execution of this Agreement (a) abrogate or reduce the scope of any present plan or rule beneficial to employees, such as its vacation and sick leave policies or its retirement plan, or (b) reduce the wage rate of any employee covered hereby, or change the conditions of employment of any such employee to the employee's disadvantage. The foregoing limitation shall not limit Company

in making a change in a condition of employment if such change has been negotiated and agreed to by Company and Union. (JX 1A)[2]

BACKGROUND

PSEA:

Pacific Service Employees Association (PSEA) is a not-for-profit organization that provides a variety of voluntary benefit programs to Company employees, former employees, and retirees (TR 15). Over the many decades of its existence, PSEA has offered such programs as accidental death, homeowner's and auto insurance, sporting events and tournaments, travel and entertainment discounts, and other benefits (TR 30, 32; JX 3, pp. 43-45).

Historically, PG&E donated a million dollars annually to the organization, which funds were allocated at the discretion of PSEA (TR 38, 40-41). All Company subsidies of PSEA were eliminated in 1995 (TR 38-40). Since that time, PSEA has been self-funded by the annual dues of its members (TR 31).

Over the years, the programs and benefits offered to employees by PSEA have changed (TR 32-33). Neither the implementation of PSEA programs or benefits, nor changes to them, have ever been negotiated between PG&E and the Union (TR 30, 33, 66-68). PG&E does not have authority or control over the benefits, plans and programs PSEA offers its members (TR 30, 32, 34-35).

PSEBA and the VWBP:

In 1949, PSEA established the Pacific Service Employees Benefit Association (PSEBA), an entity with its own Bylaws and elected Board of Directors, to operate the VWBP (TR 16, 17-18;

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[2] Section 24.3 in Joint Exhibit 1B.

JX 3, p. 23 *et seq.*). Any employee of the Company (not limited to bargaining unit members) could participate, unlike other programs offered by PSEA, the employee did not have to be a PSEA member (TR 43). Participation in the VWBP plan was voluntary; members had to apply (Section 15, p. 30, JX 3).

Standards set by the State Employment Development Department prohibited the Plan from requiring a contribution rate above the amount required to participate in the State Disability Insurance (SDI) Plan, and mandated that the benefits offered under the VWBP be equal to or better than those offered by SDI (TR 16-17; JX 3, Section 14, p. 30 and Section 16, p. 32). Participating employees contributed a percentage of wages to the Plan, which were deducted from their salary or wages by PG&E pursuant to authorized instructions included in the application signed by the Plan member (Section 16.1, p. 32, JX 3). None of the contributions PG&E made in the past to PSEA were used to fund or administer the VWBP (TR 41, 50).

The PSEBA Bylaws also spelled out the benefits available under the VWBP, the process for making changes in contributions or benefits, and provided that the funds of the Plan were not to be co-mingled with other moneys or funds of the PSEBA (Section 18, p. 37, JX 3). The various changes made over the years to the VWBP, for example to the contribution amount, were not negotiated with the Union (TR 26). The Plan was in the "executive charge and control" of PSEBA, acting through its Board; and, its Board had "full and complete control of the operation and administration of the Plan and of Benefit Fund ..." (Section 7 and 7.1, p. 27, JX 3). The Board, by a two-thirds vote, could "at its discretion, suspend or dissolve" the Plan, subject to certain limitations and requirements (Section 12.2, p. 29, JX 3). PG&E had no authority or control over the Plan, changes to the Plan, or the decision to discontinue it (TR 19, 20).

The VWBP had two advantages over SDI: (1) the employee contribution rate was lower; and (2) there was no seven-day waiting period for benefits to commence, as there is with SDI (TR 28-29; JX 3, pp. 20-21). SDI and the VWBP were otherwise equivalent, and the State required an employee to contribute either to SDI or a voluntary plan (TR 28-29). Because of the more advantageous features of the VWBP, most PG&E employees chose that Plan over SDI (TR 18). Though the VWBP is mentioned in the Agreement in relation to the long-term disability benefit (JX 4, p. 2), it is undisputed that the VWBP is not expressly required by the Agreement, as contrasted with certain benefits that are specifically mandated (JX 4). PG&E's ERISA Information references the "PSE Voluntary Wage Benefit Plan" (JX 7).

Changes Leading to Dissolution of the Plan:

Over the period 1994 to 2000, due to excess reserves, SDI significantly lowered the contribution rate and increased the maximum benefit amount (TR 21-22; JX 3, p. 21). These changes impacted the VWBP as a result of the requirement that it maintain at least parallel contributions and benefits to SDI. These and other factors caused the VWBP to incur losses, and its reserves dwindled (TR 24-25, 44-45; JX 3, p. 22). In late 1999, after substantial research, the PSEBA Board voted to dissolve the VWBP (TR 26-27). Its level of reserves had dropped close to the amount required by the Plan's independent auditors to cover claims that were anticipated to be submitted after closure (TR 25). The record indicates that an additional $1 to $1.5 million in revenue would have been required on an annual basis to keep the VWBP solvent (TR 49, 55-56).

In 2000, PG&E and Plan participants were informed of the decision; and, effective January 1, 2001, the participants in the Plan were converted to SDI (TR 27; JX 3, pp. 8-13). The former VWBP participants are entitled to the same weekly benefit under SDI, for the same length of time (52

weeks) as they would have received under the PSEBA Plan (TR 28-29). However, the features of (a) no seven-day waiting period and (b) a lower contribution rate, both applicable under the VWBP, were lost with closure of the Plan.

POSITIONS OF THE PARTIES

The Union:

» Although the VWBP is not specifically provided for in the Agreement, it is precisely the type of "plan or rule beneficial to employees" that is contemplated in the anti-abrogation provision.

» The benefit to employees is clear. It is of greater value than many benefits or rules found in the past, in prior arbitration decisions and decisions from lower steps of the grievance procedure, to be protected by the anti-abrogation clause.

» The VWBP is not merely incidental to a primary purpose beneficial to the Company. It is a direct personal benefit to employees.

» The Company's affirmative defenses are without merit. First, the fact that the Union did not protest the discontinuation by PSEA of other benefits or programs in the past does not preclude it from challenging the elimination the VWBP. The VWBP, unlike every other benefit or program offered by PSEA, was available to all PG&E employees, not just PSEA members. Other plans or programs were offered by PSEA only to PSEA members; and the Union would not have had standing to grieve or an agreement under which to grieve.

» Second, the Company's contention that it is relieved from liability under its Agreement because PSEA offered the VWBP, not PG&E, is unpersuasive. PSEA was an administrator or

carrier of a PG&E health benefit plan. The ultimate responsibility for offering the plan rests with the Company.

» If PSEA is unwilling or unable to continue its role as carrier and administrator for the Company, the Company must either obtain another carrier or administer the program itself.

» If the costs of continuing the Plan might be prohibitive, that is an issue to bring to the bargaining table, not a valid defense to the grievance. If the Company is obligated to provide the VWBP, it is obligated to do so without regard to the cost, just as it would be obligated to provide other forms of insurance such as dental without regard to the cost of the program.

» By unilaterally discontinuing the wage benefit plan, the Company committed a direct and unambiguous violation of the Agreement.

» The grievance should be sustained and the remedy requested should be awarded.

The Company:

» The Union has failed to prove that the VWBP is part of the collective bargaining agreement between the parties, such that the Company is required to bargain with the Union about PSEBA's decision to eliminate the Plan.

» In its 51-year existence, the parties never negotiated about the VWBP. The Company has no obligation to bargain over a voluntary program that was never a part of the Agreement.

» Unlike the medical and dental insurance plans covered in the parties' benefit agreement, which the Company has agreed to provide Union members, the Agreement does not contain any obligation by the Company to provide a voluntary disability plan.

» Because the VWBP provided by PSEBA was never made part of the Agreement, and the Company never agreed it would provide such a plan for bargaining unit members, the Company had

no duty to bargain about PSEBA's decision to eliminate the program. The parties have never negotiated about its initiation or the many changes it has undergone.

» The anti-abrogation clause requires the Company to negotiate changes in conditions of employment, which would include changes to its pension, sick and retirement policies. But, the VWBP is not a Company provided program. Thus, there is no obligation for the Company to bargain about it.

» The Union's acquiescence over the last half century to the manner in which the VWBP and other PSEA benefits were administered and changed amounts to a waiver of any right it claims to bargain about this issue. For example, the Union did not assert any right to bargain with the Company in the past when PSEA made decisions that adversely impacted bargaining unit members, such as increasing the contribution rate.

» The decision of Arbitrator Kintz in Arbitration Case 183 finds that waiver can arise by acquiescence amounting to tacit consent. The doctrines of waiver and laches are applicable in these circumstances. After a long history of no bargaining over this Plan, which is offered on a voluntary basis by an independent organization, the Union cannot now require the Company to negotiate over PSEA's decision to eliminate the VWBP. Such a result would be unreasonable and unfair.

» The Union's sole remedy is at the bargaining table if it decides to pursue a voluntary wage benefit plan from the Company.

» For all these reasons, the Board should conclude that the Company did not violate the Agreement by refusing to bargain about PSEBA's decision to eliminate the VWBP. The grievance must be denied.

DISCUSSION

The Grievance is Substantively Arbitrable:

Because this case involves the interpretation and application of the anti-abrogation clause of the Agreement, it is substantively arbitrable. The Agreement expressly states that the interpretation and application of the terms of the Agreement are appropriate subjects for determination in the grievance procedure (JX 1A, §102.2(a); JX 1B, §9.2(a)). However, the authority of the Board of Arbitration derives solely from the Agreement, and is limited to the scope of the Agreement. The Board has no jurisdiction over parties not signatory to the contract, such as PSEBA or PSEA.

No Company Unilateral Action:

The evidence establishes that PSEA and PSEBA are separate and distinct entities from PG&E, over which PG&E has no authority or control. Moreover, PSEA and PSEBA are not part of the bargaining relationship and have no duty to bargain with the Union about their programs.

The authority to control decisions about the VWBP resided with PSEBA's Board of Directors, not with PG&E. The decision to terminate the Plan was not a decision made by PG&E, but an independent decision made by the PSEBA Board. PSEBA had the authority and discretion under its Bylaws to decide to dissolve the Plan. Therefore, the conclusion is required that the action grieved in this case, the discontinuance of the VWBP, was not performed by PG&E, but PSEBA.

VWBP Not a Company-Provided Benefit:

The record shows clearly that the VWBP was available through PSEBA to employees of PG&E, but it was not a Company-provided benefit. PG&E did not provide or fund the benefit; it was offered by PSEBA and it was funded by contributions from Plan participants. As found above, PG&E did not control or operate the Plan.

No express provision of the Agreement requires the Company to provide, maintain or pay for a voluntary wage benefit plan. PG&E did not do so, historically, as a matter of established practice. There is a complete absence of any history of bargaining between PG&E and the Union regarding the Plan. Past decisions made by PSEBA concerning the VWBP, such as changes in contributions or benefits, have not been negotiated between PG&E and the Union. No past decisions have been grieved by the Union under the Agreement as unilateral actions by PG&E. All of these factors provide firm support for the Company's position that the benefit in question is exterior to the bargaining relationship and to the Agreement.

Interpretation and Application of Anti-Abrogation Clause:

The anti-abrogation clause may be applied to protect beneficial practices that are not expressly incorporated in the Agreement. Indeed, that is its fundamental purpose. Thus, the fact that there is no express requirement that the Company provide a VWBP is not determinative. Nonetheless, for the clause to apply, it must be shown that, by established past practice, there is an existing Company plan or rule that is beneficial to employees, which the Company has unilaterally abrogated or reduced to the employee's disadvantage.

The findings above are that (a) this case does not involve a unilateral action taken by the Company, but an action by PSEBA; and (b) the discontinued benefit was not a Company-provided benefit or a benefit the Company was contractually obligated to provide, whether by express language or established past practice. These findings are significant to the application of the anti-abrogation clause.

The clause, as interpreted in prior arbitration decisions and grievance procedure resolutions, precludes "**the Company**" from acting unilaterally to abrogate or reduce the scope of any **present**

plan or rule beneficial to employees, such as "**its** vacation and sick leave policies or **its** retirement plan" (JX 1; emphasis added). The clause clearly pertains to actions by the Company to reduce or eliminate beneficial plans or rules that it has historically provided. The evidence clearly shows that the Company has not provided, funded or controlled the VWBP in the past; and it did not terminate the Plan. Thus, the discontinuance of the benefit falls outside the purview of the anti-abrogation clause.

These facts also distinguish this case from prior decisions and grievance resolutions under the anti-abrogation clause. Past cases have involved actions taken by the Company to change beneficial rules, plans or working conditions the Company has historically provided. Prior decisions and grievance resolutions do not find the Company is obligated under the anti-abrogation clause to assume a new responsibility for a benefit it has not provided in the past. To find for the Union in these circumstances would amount to a conclusion that the Company is contractually obligated by the anti-abrogation clause to continue the VWBP, when the evidence shows it did not provide it in the first place. Such an interpretation does not reasonably flow from the contract and would extend the application of the clause well beyond its plain meaning.

The Union's contention that PSEBA is only a carrier or administrator for a Company benefit must be rejected. PSEBA is the entity offering and providing the voluntary Plan, which is funded entirely by employee contributions with no contribution from PG&E. This is distinct, for example, from a carrier or administrator of an insurance or benefit plan which the Company is obligated by contract to provide or fund. In some respects, VWBP appears to be a PG&E-provided Plan because the employee contributions were deducted by the Company from employees' earnings, and the Plan was available only to PG&E employees. However, the Company's involvement

stopped there. The payroll deductions occurred pursuant to the express authorization of individual employees who chose to participate in the Plan; and PSEBA Bylaws determined who could participate in the Plan. Those facts do not convert the VWBP into a Company-provided benefit that PG&E is obligated to fund in the future, when it has never funded it in the past.

For all these reasons, the following decision is rendered:

DECISION

1. The grievance involving the Company's alleged elimination of the voluntary wage benefit plan effective January 1, 2001 is substantively arbitrable.

2. The Company did not violate the Agreement by refusing to negotiate over PSEBA's discontinuance of the voluntary wage benefit plan. The grievance is denied.

Kathy Price — CONCUR / ~~DISSENT~~ — 9-11-01
Company Board Member — Date

Margaret Short — CONCUR / ~~DISSENT~~ — 9/11/01
Company Board Member — Date

Bob Kent — CONCUR (DISSENT) — 9-17-01
Union Board Member — Date

Union Board Member — CONCUR / DISSENT — Date: 7-11-01

Neutral Board Chair — CONCUR / DISSENT — Date: 8-31-01