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IN ARBITRATION PROCEEDINGS PURSUANT TO TITLE 9 OF THE CURRENT COLLECTIVE BARGAINING AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy

between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245, AFL-CIO,

and

PACIFIC GAS AND ELECTRIC COMPANY,

Arbitration Case #55

OPINION AND AWARD

OF THE

BOARD OF ARBITRATION

This Arbitration arises pursuant to Agreement between the INTERNATIONAL BROTERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 1245, AFL-CIO, hereinafter referred to as the "Union", and PACIFIC GAS AND ELECTRIC COMPANY, hereinafter referred to as the "Company", under which ADOLPH M. KOVEN was selected to serve as Chairman of the Board of Arbitration which was also composed of LAWRENCE N. FOSS, Union Board Member; JACK B. HILL, Union Board Member; I. WAYLAND BONBRIGHT, Company Board Member; and DAVID J. BERGMAN, Company Board Member; and under which the Opinion and Award of the Board of Arbitration would be final and binding upon the parties.

Hearing was held May 1, 1975 in San Francisco, California. The parties were afforded full opportunity for the examination and cross-examination of witnesses, the introduction of relevant exhibits and for argument. Both parties submitted post-hearing briefs.

APPEARANCES:

On behalf of the Union:

John L. Anderson, Esq.
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On behalf of the Company:

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Pacific Gas and Electric Company
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ISSUE

On the facts presented in this case, did the Company violate provisions of the Labor Agreement?

RELEVANT SECTIONS OF THE CONTRACT

Sec. 1.2

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

Sec. 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.

Sec. 1604.10(b) Guidelines on Discrimination because of Sex, EEOC

Disability caused or contributed to by pregnancy. . . . and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving such matters as. . . payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

EEOC Decision No. 73-0463 (January 18, 1973)

The condition of pregnancy must be treated the same as any other illness.

FACTS:

The two grievants were pregnant, and they sought to apply their sick leave to their absences at the termination of their pregnancies. The Company refused to allow them sick leave for this purpose, and one of the grievants ultimately used up her vacation time to have her baby. The other grievant did not seek to use her vacation time in this manner. Each of the grievants was afforded a six months leave of absence without pay before they returned to work. The Union claims that pregnancy is a disability for which an employee is entitled to use her sick leave time, and that the Company was guilty of sex discrimination and violated Sections 1.2 and 24.4 of the Contract, as well as Title VII of the Civil Rights Act by refusing to allow sick pay at the termination of the grievants' pregnancies. The EEOC guidelines require that payment of sick leave benefits be made for a normal pregnancy.

The Company demonstrated that sick leave pay had never been allowed for the normal termination of a pregnancy, although if complications resulted from the pregnancy, the employee was permitted to take sick leave. The question of leaves of absence without pay for pregnancy had previously been discussed with the Union, but the issue of sick leave pay for normal pregnancy had never before been discussed in negotiations. Between 1964 and 1973, if an employee was on leave of absence because of the birth of a child, she was entitled to be reinstated to her former job when she returned from the leave. This change in policy was made in order to comply with the guidelines of the Equal Opportunities Commission. Employees who are on leave of absence not due to pregnancy must demonstrate that the leave is justified by "urgent and substantial" reasons in order to be entitled to return to the job at the end of

the leave.

A program instituted by the Company for assuring a recently pregnant employee who had given birth to a child a job when she returned from sick leave involved a considerable cost to the Company for such expenses as training temporary employees to perform the job in place of the absent employee. If the Company were required to grant sick leave pay for pregnancy termination, the total wages subject to sick leave claims in 1974 would have been about $28,000.

In 1973, the Company and the Equal Opportunities Employment Commission entered into a voluntary agreement for the purpose of providing equal employment opportunities for women. The agreement does not mention sick leave policy for pregnancies. However, the agreement contains a provision that the EEOC does not waive its right to seek compliance with respect to the Company's pregnancy leave policy. The Company informed the EEOC of its pregnancy sick leave policy, and the EEOC representative inquired whether the Company intended to change that policy. The Company stated it did not intend to make a change, and the EEOC did not request such a change.

Aside from one prior grievance which was settled, the Union had not previously protested the Company's policy of not affording sick leave pay when an employee was compelled to leave work at the termination of her pregnancy.

POSITION OF COMPANY:

The fact that an employee who is pregnant receives a leave of absence without pay as a matter of right and is guaranteed a return to her job at the end of the leave substantially increases the Company's expenses. Maternity leaves average five months, and it is necessary to train, transfer, and hire employees in order to make up the work of the absent employee. In contrast, an employee who is afforded a leave under the "urgent and substantial" criter-

ion of the Contract, usually returns in three to six weeks so that his work can be parcelled out to other employees without hiring or training new personnel. Thus, pregnant women are allowed leaves of absence under less stringent conditions and at a greater cost to the Company than other employees. The Company may be permitted to offset these additional expenses due to pregnancy by disallowing sick leave benefits for the normal termination of pregnancy.

The Company has demonstrated that time off rather than income is the prime objective of pregnant employees. Of the 22 to 26 weeks that pregnant employees were off work on leaves of absence, more than 21 to 25 of those weeks in any event would have been without pay because these employees had used up more than half of their sick leave. The granting of preferential treatment to pregnant women in the matter of leaves of absence justifies the Company in holding back sick pay for the period of actual "temporary disability" at the termination of pregnancy. The Company and the Union bargained for this exchange of benefits.

Furthermore, the United States Supreme Court has made it clear that under some circumstances pregnant women can be treated differently with regard to disability resulting from pregnancy without violating the Fourteenth Amendment. (Geduldig v. Aiello (1974) 417 U.S. 404) Thus, it is clear that disparity of treatment of pregnant women or other classes is sometimes justified by the legitimate business interests of the employer. (See Miller Brewing Co., 64 LA 389, 396); CWA and AT&T Company, Long Lines Department, 8 FEP Cases 529.)

The Company does not claim that the additional $28,000 cost for providing sick leave benefits for pregnant women would break its treasury. But like any other aspect of collective bargaining, there is always some point at which the Company is entitled to minimize its liabilities. The fact that the EEOC, with knowledge of the Company's sick leave policy, failed to compel the Company

to change that policy is a significant factor in the Company's favor. The Arbitrator is confined to interpreting the provisions of the Contract rather than to interpreting general provisions of law regarding sex discrimination.

POSITION OF UNION:

By its language, the Contract incorporates Title VII of the Civil Rights Act and the Sex Discrimination Guidelines of the EEOC. The Arbitrator is not confined in determining the issue in this grievance to the provisions of the Contract, but should take into consideration the applicable statutes and principles of law so as to interpret the Contract in conformity therewith. Moreover, even if the Arbitrator confined himself to the four corners of the Contract, Sections 1.2 and 24.4 incorporate the provisions of Title VII and the EEOC Sex Discrimination Guidelines. These Sections show an intent to conform the Contract to the federal anti-discrimination laws. (Chippewa Valley Board of Education, 73-2 CCH ARB, par. 8623; Gulf States Utilities Co., 62 LA 1061) Even without such provisions it has been held that the anti-discrimination laws are incorporated in labor contracts. (Goodyear Tire & Rubber Co. v. Rubber Workers, Local 200, 8 CCH EPD, par.9657)

There can be no doubt that the EEOC Guidelines treat disability caused by pregnancy like any other temporary disability. (Sec. 1604.10(b) of Guidelines on Discrimination Because of Sex.) The EEOC has specifically determined that "/T/he condition of pregnancy must be treated the same as any other illness." (EEOC De.#73-0463, Jan. 18, 1973) Courts and arbitrators have come to a similar conclusion. (Dessenberg v. American Metal Forming Co., 8 FEP Cases 290; Chippewa Valley Board of Education, 73-2 CCH EPD par.8623; Satty v. Nashville Gas Co., 10 FEB Cases 73; Wetzel v. Liberty Mutual Insur. Co., 7 CCH EPD par.9097; Holthaus v. Compton & Sons, Inc., 9 CCH EPD par.7304)

What is significant is that a woman is unable to work because of disability. Whether that disability is caused by pneumonia or pregnancy is irrelevant. It is precisely for the purpose of "alleviating the economic burdens caused by the loss of income and the incurrence of medical expenses' that employers offer sick leave programs. (Wetzel, supra.)

The Geduldig case relied upon by the Company is not controlling. That case arose under the Fourteenth Amendment, and it was held that a state disability insurance program could discriminate between normal and abnormal pregnancies. Here, we are faced with whether the Contract prohibits such distinction. The Satty and Wetzel cases cited above were both decided after Geduldig, there were serious economic consequences to the state insurance program if normal pregnancies were covered, and here there is no actual business necessity for disparate treatment. In fact, the Company does not argue that the payment of sick leave benefits to persons in the grievants' position would be too expensive, and it is worthy of note that the $28,000 which would be involved for the payment of such benefits is considerably less than the Company's expense for the six-months leave of absence program.

There is no merit in the Company's argument that the Union bargained away the right to sick leave payments for normal pregnancy terminations. As early as 1972 the Union filed a grievance on this issue which was settled without prejudice.

The EEOC voluntary agreement upon which the Company relies is not binding on the Union. The Union was not a party to the negotiations which led to the agreement, and the agreement itself does not deal with sick leave policy. Furthermore, the EEOC representative made it clear to the Company that the EEOC Guidelines require payment of sick leave benefits for normal pregnancy. Finally, the agreement itself implies that the EEOC found the Company's sick leave policy in violation of the guidelines but deferred requiring

compliance for the time being. There is a provision in the agreement that the EEOC does not waive its right to seek compliance with Title VII with respect to the Company's maternity and/or pregnancy leave policy.

But independent of the EEOC guidelines, the Contract itself prohibits the denial of sick leave benefits to the grievants. Section 1.2 prohibits sex discrimination and the provisions which relate to sick leave do not exclude normal pregnancy from their scope.

The Company's argument that pregnant women receive more favorable treatment than other employees with regard to unpaid leave of absence is an attempt to create an illusion of more favorable treatment. The fact that pregnant women need not show that they are in "urgent" need of a leave of absence as must other employees in order to retain their job rights, is irrelevant since it is self-evident that the situation of a woman approaching the termination of her pregnancy is "urgent".

CONCLUSION:

Preliminarily, it should be noted that the Company does not deny that if the EEOC guidelines were followed the Union would prevail in this grievance since those guidelines provide that pregnancy must be treated like any other disability. Thus, it is not necessary to decide whether general law prohibits the denial of sick leave benefits to pregnant employees because the EEOC guidelines answer this question in the affirmative. It is also arguable that the Contract provides (Sec. 24.4) that any provisions of the Contract which are in conflict with federal regulations (such as EEOC regulations) are inoperative to the extent of such conflict. Thus, the Contract must be interpreted so as to be consistent with the EEOC guidelines.

There is no specific provision of the Contract relating to the question of sick leave for the normal termination of pregnancy.

However, it is clear that the provisions of the Contract regarding unpaid leaves of absence for pregnant women have been changed by the Company in order to comply with EEOC guidelines. That is to say, the provisions which required pregnant women to show that "urgent and substantial" reasons existed which would call for a leave of absence after a normal pregnancy was changed by the Company in order to comply with EEOC guidelines so that an employee is now automatically entitled to six months of sick leave at the termination of her pregnancy. The essence of the Company's argument is that the Union bargained away the right to sick leave pay at the end of pregnancy in exchange for the more liberal leave of absence benefits.

Even if we assume that the Union is in a position to bargain away non-discrimination rights of its employees under Title VII, the Company's argument is not persuasive that the Union in fact did so here. There is no evidence that the Union and the Company mentioned the question of sick leave for pregnant women in any of their negotiations. There is some evidence that the Company liberalized the leave of absence benefits after discussions with the Union, but so far as appears, there was no mention in these discussions of the question of sick pay at the termination of pregnancy. In the absence of convincing evidence that the Union bargained away the right to sick leave at the termination of a normal pregnancy, the Company's quid pro quo theory is unconvincing.

Nor is the Company's argument persuasive based on the voluntary agreement with the EEOC. That agreement is concerned entirely with the hiring and promotion of minorities. The fact that the EEOC did not insist that the Company conform its pregnancy leave procedures to the EEOC guidelines as a part of the agreement is not controlling. Even if we could assume that the EEOC was in a position to waive its non-discrimination guidelines, the agree-

ment specifically states that the EEOC did not effect such a waiver. Moreover, the Union was not a party to the EEOC agreement and cannot be found to have waived the rights of its members to enjoy the benefits of strict compliance with EEOC non-discrimination guidelines.

The Company's assertion that the Union failed to protest the Company's pregnancy sick leave policy is not decisive in the present context. First, a grievance was in fact filed in 1972 seeking sick leave pay for termination of pregnancy, and that grievance was settled without prejudice. Second, certainly the Company cannot successfully assert that the non-discrimination rights of employees may be waived by a failure to file grievances to protest discriminatory policies.

Thus, for all the reasons set forth in the foregoing, the conclusion follows that the Company violated the Contract on the facts presented in this case. The Arbitrator finds such violation based upon the provisions of the Contract as reinforced by the EEOC guidelines and sex discrimination cases in general, including Lockheed Missiles and Space Co. v. IAM (cited in Stone and Badenschneider, Arbitration of Discriminatory Grievances). This Arbitrator held in that case that even without contractual provisions like Sections 24.4, EEOC regulations supersede contractual provision. The reason for this determination seems obvious. If the rule were otherwise, an agreement between a union and a company to give preference in employment, wages or promotion to the members of one particular ethnic group would prevail over the non-discrimination requirements of the Civil Rights Act and this is a clearly untenable proposition.

Since the central core of this case essentially concerns a declaration of the rights of the parties, and since the Company has now been found to have improperly denied sick leave benefits to the grievants, the parties are hereby given an opportunity to

mutually fashion within 30 days the details of the remedy for the two grievants involved. The Arbitrator retains jurisdiction for the purpose of himself fashioning a remedy in the event that the parties are not able within 30 days to resolve the details of a specific remedy covering each of these two grievants.

AWARD

The Company violated the provisions of the labor agreement when it denied sick leave pay to the grievants.

The parties are given an opportunity to mutually fashion within 30 days the details of the remedy for the two grievants involved. The Arbitrator retains jurisdiction for the purpose of himself fashioning a remedy in the event that the parties are not able within 30 days to resolve the details of a specific remedy, if any, covering each of these two grievants.

Dated: 8/13/75 Adolph M. Koven

ADOLPH M. KOVEN, Chairman, Board of Arbitration

Concur:

Lawrence N. Foss

LAWRENCE N. FOSS, Union Board Member Dated: Aug 1, 1975

Jack B. Hill

JACK B. HILL, Union Board Member Dated: Aug 1, 1975

I. WAYLAND BONBRIGHT, Company Board Member Dated: _____

DAVID J. BERGMAN, Company Board Member Dated: _____

Dissent:

LAWRENCE N. FOSS, Union Board Member Dated: _____

JACK B. HILL, Union Board Member Dated: _____

DAVID J. BERGER, Company Board Member — Dated: 8-7-75