In the Matter of a Controversy INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO LOCAL 1245 and Complainant PACIFIC GAS & ELECTRIC COMPANY Respondent	OPINION AND DECISION CASE NO. 15 A

This arbitration arises under a collective bargaining agreement dated August 2, 1960, between the PACIFIC GAS & ELECTRIC COMPANY and LOCAL UNION NO. 1245 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AFL-CIO. Pursuant to the provisions of Title 102 of said Agreement captioned "Grievance Procedure", the parties have designated an Arbitration Board composed of the following members: L. L. Mitchell and K. E. Stevenson appointed by the Union; V. J. Thompson and R. B. Hinman appointed by the Company; and Laurence P. Corbett, impartial chairman selected by both parties. The parties have also agreed to a joint Submission Agreement dated November 18, 1960, which sets forth the procedure to be followed in this case and poses the question to be arbitrated.

A hearing was held in accordance with said Submission Agreement in the Conference Room, General Offices of the Pacific Gas and Electric Company, 245 Market Street, San Francisco, California, on December 1, 1960. Appearances were made on behalf of the Union by Joseph R. Grodin, Esq., of the law firm of Neyhart and Grodin and on behalf of the Company by Henry J. La Plante Esq., of the Pacific Gas & Electric Co., Law Department.

THE QUESTION

By mutual agreement the parties have phrased the question to be determined as follows:

> "In the interpretation and application of Title 102 and Title 210 of the Agreement between the Company and Union entered into on September 1, 1952, and as thereafter amended, may a probationary employee exercise the right to process a grievance relating to his "lay off" (as the Company contends) or his "involuntary termination" (as the Union contends) other than for lack of work."

BACKGROUND

There appears to be no disagreement in respect to the facts giving rise to the question. They are contained in a joint statement signed by employer and union members of the Joint Grievance Committee on October 1, 1959. These facts are stated as follows:

> "On February 4, 1959, [redacted] was employed as a laborer on a temporary basis, pending an expectant vacancy in the San Francisco Gas Street Department.
>
> On February 20, 1959 he filled an authorized vacancy as a probationary Laborer succeeding another employee.
>
> On August 3, 1959, Weible was laid off and the reason for terminating his employment was "not suited to this type of work."
>
> Union upon request was given the reason verbally for the termination of W[redacted]'s employment, but their request in writing pursuant to Section 102.14 was denied.
>
> Division disagreed with Union that this lay-off or discharge of probationary employees was a proper subject under the grievance procedure.
>
> Union filed a formal grievance by letter dated August 5, 1959, and the Division replied by letter dated August 11, 1959.
>
> The grievance was discussed in the Joint Grievance Committee Meetings on August 6 and September 3, 1959. At the September 3 meeting of the Joint Grievance Committee, Union requested that the grievance be referred for Review."

The dispute before the arbitrator relates solely to the question of whether or not a probationary employee may process a grievance relating to his termination other than for lack of work. It in no way involves the merits of the employee's termination.

POSITION OF THE UNION

The Union contends that laying off an employee who is one day short of six months service on the ground that he is unsuited to the type of work he is performing is not a lay off, but is in fact a discharge. Furthermore, the Union points out that Section 210.2 refers to the title headings in the agreement relating to two types of rights and privileges. First there are the rights with respect to other employees such as seniority (Title 106); Job bidding and promotion (Title 205); and Demotion and Lay off (Title 206). Then there are rights or benefits involving accumulation of service such as vacations (Title 211); holidays (Title 103); leave of absence (Title 101); and sick leave (Title 209). As a consequence of the above classifications, the Union submits that discharge is not excluded by Section 210.2 since discharge for cause does not fall into either category.

The Union argues that lay off means an involuntary termination for reasons other than cause, the best example of which is lay off in connection with reduction of force or lack of work. Discharge is an involuntary termination which involves fault on the part of the employee or lack of ability on his part. Since the terms lay off and discharge are used separately in the agreement, the Union contends the parties recognize the sharp distinction between the two. It follows, therefore, according to the Union that termination for reasons other than lack of work, is a discharge and not a lay off.

Discharges as such are not enumerated in 210.2. Moreover, discharges are not within the concept of similar rights and privileges, vis a vis, other employees or rights and privileges based upon accumulation of service. For these reasons the Union believes it may rightfully raise a grievance

concerning the propriety of discharging a probationary employee under Section 102.6 although the Union admits that the same standards of just cause may not apply to a probationary employee as they apply to a regular employee. The Union noted that the contract does not include any standards governing the discharge of a regular employee but that such discharges are clearly subject to the grievance procedure. In support of its position, the Union cites the following cases: American Republic Corp. and Oil Workers 5 ALAA 69018; Seamless Rubber Co. 28 LA 456; and Phillips Petroleum Co. 34 LA 633.

POSITION OF THE COMPANY

The Company first calls attention to the Joint Statement of Facts set forth above and in particular paragraph 3, which reads as follows:

> "On August 3, 1959, W[redacted] was laid off and the reason for terminating his employment was 'Not suited to this type of work'."

On this basis, the Company urges the Arbitration Board to find that the case involves a "lay off" and in effect to enter judgment on the pleadings in favor of the Company by applying Section 210.2 wherein the lay off of a probationary employee is not subject to challenge.

Without waiving this position, the Company submits evidence to show that W[redacted]'s termination was in fact a lay off. In furtherance thereof, the Company introduced W[redacted]'s employment record. Translation of company symbols indicated that W[redacted] succeeded Mr. A[redacted] as a laborer on 2/20/59 under the Division Manager's authorization. Further, the record showed that W[redacted] was laid off because he was not suited to the type of work in which he was employed.

It is the contention of the Company that Section 210.2 specifically states that a probationary employee does not acquire any rights whatsoever concerning certain enumerated subjects, one of which is lay off and the Company submits that W[redacted]'s termination was clearly a lay off.

The Company introduced testimony by calling the Assistant Manager of Industrial Relations who participated in negotiations and who reduced the Agreement of the parties to writing. He stated that prior to 1954, the Company had four classes of employees: casual employees, casual weekly employees, probationary employees and regular employees.

He testified that in 1954, the Company and Union agreed to two classifications, namely: probationary employee and regular employee. He said that the Company gave up the requirement by which a probationary employee had to qualify for a regular job upon completion of six months service. Now, upon completion of the probationary period, an employee who is continued in employment automatically becomes a regular employee.

The witness further testified that a probationary employee could not raise grievances in respect to certain subjects enumerated in Section 210.2 as it now appears. He said the Union gave up provisions permitting probationary employees to bid on regular jobs and to receive notice of lay off. Although the probationary employee had the right to raise a grievance concerning some matters, he was proscribed from submitting a grievance on the enumerated subjects in Section 210.2 as well as in respect to "similar rights and privileges". The witness characterized these rights and privileges as arising from the probationary employee's employment with the Company and the benefits he accrued from seniority. He stated that following agreement in 1954 he advised supervision from subforemen up, that the Union had relinquished its right to challenge the termination of a probationary employee. In completing his testimony, the witness said that out of approximately five hundred terminations a year, which involved probationary employees, only one grievance was raised in the past, and this grievance was subsequently dropped.

In its concluding statement, the Company argued that the term "lay off" was broad enough to include "involuntary termination" for any reason. In that event the Company argued that involuntary termination "clearly fell within the residual phrase of section 210.2, "similar rights and privileges." The Company contended that in giving up the right to require a probationary employee with six months of service to qualify for a regular job, it gained the unrestricted right to terminate a probationary employee for any reason at any time during the probationary period. The Company urged that the meaning of "probationary" in itself carries with it the right of the employer to terminate a probationary employee without challenge through the grievance procedure and in support thereof cited the following cases: International Harvester Company 13 LA 980; Lyon Inc. 24 LA 353.

DISCUSSION

I

There is no dispute between the parties concerning the right of the Company to lay off a probationary employee for lack of work without challenge under the grievance procedure. The controversy concerns the construction of the term "lay off" and whether in fact the Company's action was a lay off under the agreement. The first matter to be determined therefore is whether the third paragraph of the Joint Statement of Facts signed by Union and employer members of the Joint Grievance Committee estops the Union from bringing this case to arbitration. In construing the Joint Statement in its entirety the chairman finds that the Union is not so estopped. The third paragraph appears to be a statement based upon [redacted]'s employment record, descriptive of the Company's action. The fifth paragraph shows on its face that there is a difference of opinion between the parties as to whether [redacted]'s termination was a lay off or a discharge. Whether there is a distinction between lay off

and discharge under the agreement and whether there is any consequence connected with it, is essential to the resolution of the question before the Arbitration Board and is therefore properly subject to the grievance procedure under Section 102.6 (c).

II

To determine if there is a clear distinction between discharge and lay off, the Agreement must be analyzed. The term lay off has a limited meaning as it is defined in Section 210.2. The reference is to demotion and lay off which is governed by Title 206. In general, lay off occurs where there is reduction of force due to lack of work and the employee through no fault of his is terminated. Section 206.3 suggests a definition when it states, "if there is no job to which the Company can demote an employee under Section 206.2 or if an employee does not effect a displacement under any of the elections in Section 206.4 and 206.5, he will be laid off."

Discharge is not defined specifically in the Agreement, although Section 102.13 infers cause in any violation of a Company rule, practice or policy. Under Section 102.6 (b) grievances can be raised in connection with discharge, demotion or discipline of an individual employee. Moreover, Section 102.8 provides for procedures concerning discipline and demotion grievances and Section 102.9 establishes an expedited process for discharge cases.

There is no question concerning the fact that probationary employees are proscribed from raising a grievance in respect to lay off under Section 210.2 since lay off as discussed above is directly named. But the difficulty arises in respect to the Company's contention that discharge is covered by lay off. The construction of Title 210 in its entirety resolves this question. Section 210.3 and 210.4 together indicate that a probationary employee becomes a regular employee upon completion of six months of continuous service

"uninterrupted by (1) discharge ... or (3) absence for a cumulative total of 30 days due to (a) Lay off." Sections 210.5 and 210.6 make clear distinctions between the effect of lay off on regular employees and the effect of discharge on all employees, probationary and regular.

Review of these sections is enough to convince the chairman that the parties referred to lay off and discharge separately and individually. The terms are not used interchangeably and there is no evidence to support the conclusion that discharge is included in the term lay off.

III

If discharge and lay off are separate matters and if grievances concerning discharge are not proscribed by reference to lay off in Section 210.2, can a probationary employee process a grievance relating to involuntary termination or discharge?

First of all, Section 102.6 provides generally for grievances concerning interpretation and application of the agreement. Section 210.2 lists named rights to which probationary employees are not entitled. Except for seniority which is out of order for emphasis, the named rights refer to Titles of the Agreement in order of appearance. Leave of Absence and Holidays are listed consecutively in Section 210.2 and this listing leaves out Grievance Procedure which appears between these two Titles in the Agreement. The parties did not, as they might have done in passing the grievance clause, provide as follows: "A probationary employee. . . shall not acquire . . . any rights with respect to leave of absence, grievance procedure concerning discharge" etc. The conclusion to be drawn from this omission is that probationary employees have some rights under the Grievance Procedure article and rights are denied under [illegible]

procedure by probationary as well as regular employees. In fact a witness for the Company testified that it was agreed probationers had some rights under the grievance procedure.

Section 102.6 (b) provides for grievances relating to the "discharge, demotion or discipline of an individual employee." The word "employee" is not qualified by the adjective regular or any other limitation. No qualification of employee appears in Section 102.14 where the Company is required upon request to give a written statement in connection with discipline, demotion or discharge. It is significant in this respect that although lay off is specifically excluded as a right and privilege of a probationary employee in Section 210.2, the parties have seen fit to state clearly in Section 206.11, "... notice of lay off need not be given to employees who are employed on a temporary basis." In analyzing this comparison, the chairman concludes that in cases of discharge of a probationary employee subject to the grievance procedure, the Company must, upon request of the Union, state in writing the reason for such discharge.

The direct evidence introduced to show the Company's intent was not probative. There is no clear and convincing proof that at the time of negotiations, the matter of discharge or involuntary termination was discussed and that the parties actually agreed discharge was similar in nature to lay off. This is not in any way to discredit the testimony of the Company's witness who said that he advised supervision following negotiations, that employees could be terminated for any reason during the probationary period. But it is not proof that the parties mutually agreed to this concept. Further, the Agreement does not reflect the Company's evidence introduced to show that in giving up the Company's right to require an employee to qualify upon completion of six

months employment the Union gave up the right to challenge all types of terminations. The question, therefore, of whether a discharge is included in the phrase "other rights and privileges" contained in Section 210.2, must be solved by construing the agreement and not by reliance upon the evidence submitted.

The second sentence of Section 210.2 reads:

"As long as a probationary employee retains such status, he shall not acquire any seniority rights or rights with respect to leave of absence, holidays, job bidding and promotions, demotion, and lay off, sick leave, vacation or similar rights and privileges."(emphasis supplied)

The Union has pointed out that the named rights refer to Title Headings. With the exception of seniority, these rights are listed in order of appearance in the agreement and seniority is out of order because it is the basis upon which all these rights depend in the case of a regular employee. As the Union suggests, length of service is the factor by which a regular employee exercises his rights in respect to other employees or in respect to certain postponed benefits.

On the other hand, discharge for cause and particularly discharge for violating a Company rule, practice or policy as referred to in Section 102.13, is not directly contingent upon length of service. It is based upon a failing of the employee and length of service is considered only in connection with the severity of the punishment. An employee with little service with the Company, for example, who is guilty of violating a Company rule, may be discharged far more readily than an employee with long service who commits an offense for the first time. Yet seniority as such, or a specific interval of time, is not the ground or the basis on which the employee is discharged.

It is not contested that a probationary employee may be laid off for lack of work out of seniority. If the work force is contracting, the Company may select the probationary employees to be laid off without regard to length of service. The private reasons for such selection are generally unsuitability

for the job - incompetence - poor performance - the elements that lead up to qualification. However, under Section 210.2, provided the employee is laid off for lack of work or in other words, provided he is terminated when the work force is contracting, no reason other than lay off for lack of work need be given. Moreover, the laid off employee having no seniority rights as a probationer can be laid off permanently. If following a lay off, the Company's work force expands, he has no right to be reinstated or called back to work. Does this mean the Company's right under the Agreement to practice selectivity in the continued employment of its probationers depends on whether the Company's work force is contracting? Would the necessity for proving cause for discharge under the grievance procedure, in a stable or expanding work force period, give the employee some form of seniority to which he is not entitled under Section 210.2? Is it not true that the probationary employee who is laid off permanently out of seniority suffers the same consequences as the probationary employee who is discharged? These questions depend in part on the construction of Section 102.13 where, upon investigation, if the Company finds an employee did not violate a Company rule, practice or policy for which he was discharged, he shall be reinstated and paid for lost time. Applying this section, a probationary employee who was wrongfully discharged for violating a Company rule, practice or policy would be entitled to reinstatement. A probationary employee who was permanently laid off during a time of reduced working opportunity has no redress.

Yet if the discharge of an employee is effected, it carries with it, as the American Republic Co. case cited by the Union suggests, an inference of personal fault, misconduct or occupational dereliction of duty. In such instances, this could prejudice the employee's job opportunities elsewhere. Furthermore, the importance of discharge as contrasted with other rights is emphasized by special provision under the Grievance Procedure in Section 107.9. If an employee is faced with discharge and its attendant consequences, does a probationary

employee have the right to set the record straight in respect to the charges made by the employer? The chairman finds that he does have such right to a limited extent under this Agreement.

In the case of regular employees, discharge may be sustained on the ground of just cause, and lay off may be effected in accordance with seniority. Probationary employees may be laid off permanently on grounds of lack of work without regard to seniority. In selecting probationary employees to lay off, the Company may make such selections without regard to seniority and base its decision on job performance in general as contrasted with violation of rules, practices or policies. The probationer has no right under lay off to challenge such selection. Permitting him to do so in connection with discharge would, in effect, provide him with a greater right solely because the work force was not being reduced. This would be contrary to the similar rights and privileges denied probationary employees under the agreement. Thus, the probationary employee has no right to challenge permanent lay off for lack of work or discharge for reasons which would normally be applied in selecting probationary employees for lay off.

However, Section 102.13 refers to specific grounds for discharge, namely: violation of a Company rule, practice or policy which carries with it more serious consequences than selectivity on the basis of performance. Such alleged violations, if charged without foundation and without the opportunity to set the record straight, could affect an employee's future employment possibilities. Selection for lay off may be a reflection upon capability but violation of a Company rule is a serious reflection upon an employee's character.

The chairman therefore concludes that a probationary employee does have some rights under the grievance procedure. Parties experienced in labor relations in drafting the agreement did not deny probationers some protection.

Violation of a Company rule, practice or policy is not the ground upon which probationary employees are laid off out of seniority and the attendant consequences of such a charge are considerably more serious.

Therefore a grievance challenging discharge for such violation is not proscribed by the "similar rights and privileges" language of Section 210.2.

FINDINGS

1. The Union is not estopped from pursuing an interpretation of the Agreement by reason of the Joint Statement of Facts signed by the Union and the Company.

2. Discharge or involuntary termination of a probationary employee is not included in the term lay off in Section 210.2 of the Agreement.

3. The Company is obliged upon request of the Union to state the reason for discharge of a probationary employee in accordance with Section 102.14 of the Agreement.

4. The Union has a limited right to process a grievance relating to the discharge or involuntary termination of a probationary employee, if such discharge is based upon violation of a Company rule, practice or policy.

A W A R D

In the interpretation and application of Title 210 of the Agreement between the parties, a probationary employee may exercise the right to process a grievance relating to his involuntary termination, as distinguished from lay off, for violation of a Company rule, practice or policy.

Respectfully submitted,

Laurence P. Corbett

Laurence P. Corbett
Chairman of the Arbitration Board

Chairman

L. L. Mitchell Dissent

Kenneth E. Stevenson Dissent