In the Matter of Arbitration

Between

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245,

Union,

and

PACIFIC GAS AND ELECTRIC COMPANY,

Company.

OPINION AND AWARD

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Involving Per Diem Payment to Certain Keypunch Operators

Before an Arbitration Board Composed of:

MORRIS L. MYERS, Chairman

Union-Appointed Members

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Company-Appointed Members

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Appearances for the Parties:

For the Union

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For the Company

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PARTIES TO THE DISPUTE

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245 (herein called "Union") and PACIFIC GAS AND ELECTRIC COMPANY (herein called "Company" are parties to a Collective Bargaining Agreement applying to Office and Clerical Employees (Jt. Ex. 1). Pursuant to that Agreement, an arbitration hearing was conducted in San Francisco, California, on September 5, 1973, at which hearing evidence was presented with respect to the issue as set forth below. Supplementary testimony was taken on October 18, 1973. It was stipulated by the parties that the prior steps of the grievance procedure had been followed and that the matter was properly before the Arbitration Board (herein called "Board") for final and binding decision (Tr. pp. 5-6) Post-hearing briefs were submitted by the Company on December 20, 1973, and by the Union on February 7, 1974. Based upon such evidence and argument, the Board finds as follows:

ISSUE

Was the discontinuance of a per diem payment of $2.50 to certain keypunch operators employed at the Company's General Office a violation of the Clerical Labor Agreement? If so, what is the appropriate remeday? (Jt. Ex. 2; Tr. pp. 4-5)

PERTINENT CONTRACTUAL PROVISIONS

AGREEMENT

This Agreement made and entered into this first day of July, 1953, by and between Pacific Gas and Electric Company, hereinafter referred to as Company, and Local Union No. 1245 of International Brotherhood of Electrical Workers, (affiliated with the American Federation of Labor -- Congress of Industrial Organizations), hereinafter referred to as Union,

* * *

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

* * *

1.3 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; to introduce new or improved methods or facilities, 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.

* * *

20.2 Company shall not by reason of the execution of this Agreement (1) 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 (2) reduce the wage rate of any employee covered hereby or change the conditions of employment of any such employee to his disadvantage. The foregoing limitations 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.

* * *

24.1 This Agreement, having taken effect as of July 1, 1953, and having thereafter been amended from time to time, shall continue in effect as further amended herein for the term July 1, 1970 to June 30, 1973, and shall continue thereafter from year to year unless written notice of termination shall be given by either party to the other 60 days prior to the end of the then current term.

24.2 (a) If either party desires to amend this Agreement it shall give notice thereof to the other party 50 days prior to the end of the then current term, in which event the parties shall commence negotiations on any proposed amendment as soon as practicable after such notice has been given. Failure of the parties to agree on such proposed amendment shall not cause termination of this Agreement unless either party has given notice of termination as provided in Section 24.1.

* * *

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.

(Jt. Ex. 1)

DISCUSSION

Prior to January 20, 1969, all female keypunch operators (Machine Operators "B") were on the day shift. Commencing on that date, however, two female keypunch operators were assigned to work the second shift, which started at 4:50 p.m. and ended after midnight. (The operators so assigned volunteered to work the second shift.) The Company at that time made arrangements with a cab company to pick up these two employees after work and transport them home at Company expense. On or about August 11, 1969, two more female keypunch operators were added to the second shift and were given the option of either the taxi service or being paid a $2.50 per day "transportation allowance", and they both chose the $2.50 per day option. (Both of these employees also volunteered to work the second shift.) In November, 1969, the second shift was increased to seventeen female keypunch operators, all volunteers or new hires, and practically all of them received the $2.50 per day transportation allowance instead of taking the taxi service option. In April, 1970, the option of the taxi service was discontinued and all of the female keypunch operators were paid the $2.50 per diem transportation allowance.

During this time, the employees were working in the Company's "old headquarters" at Mission and Fremont, and were permitted time off work shortly after 5:00 p.m. to move their cars in front of the building, so that at the end of their shift they could walk to their cars in sight of the Company guard. In February, 1971, the department in which the subject employees worked moved to the Company's new headquarters located at 77 Beale Street which had parking accomodations in it that were made available to these employees.

Notwithstanding the move into the new building, the $2.50 per diem transportation allowance continued to be paid to these employees. In August, 1971, the data recording section, in which the female keypunch operators worked who were receiving the $2.50 per day transportation allowance, was merged into computer operations. The acting manager of computer operations brought to the attention of the Company's Industrial Relations Department the fact that two female employees who had been working in computer operations for some time on the second and/or third shifts were not receiving the $2.50 per day transportation allowance, and, thus, there seemed to be an inconsistency. A determination was made shortly thereafter by the Company to discontinue the transportation allowance being paid to the second shift female keypunch operators. In late September, 1971, the Company advised the keypunch operators that the transportation allowance was no longer required by law, that if it were continued it would be discriminatory as against male employees, and that, therefore, it would be discontinued effective November 11, 1971. (Male employees who worked the second and/or third shifts were never paid a transportation allowance or provided cab service at Company expense.) The Union's challenge to the discontinuance of the $2.50 per day transportation allowance payment to the keypunch operators is the subject matter of this case.

The evidence shows that during the time the transportation allowance was paid, women who were interviewed as new hires for the second shift keypunch operator jobs or were asked to consider transfer on a voluntary basis to the second shift were told that they would be paid a $2.50 per day transportation allowance in addition to their base salary and shift differential pay. The base salary, the shift differential, and the transportation

allowance were tabulated and presented to the employees during interviews/discussions as the amount of pay they would receive for these jobs. No mention was made in those interviews/discussions that the transportation allowance was being paid because of any legal requirements or that it was subject to possible discontinuance by the Company if the law should change. The amounts involved --i.e., the base salary, shift differential, and transportation allowance -- were simply tallied up and presented to the prospective second shift employee as the total amount of daily and weekly pay she would receive for the keypunch operator job (Union Ex. 7A through 7E).

It is the position of the Company that when the keypunch operators were first assigned to the second shift in January, 1969, Wage Order 4-68 of the Industrial Welfare Commission (IWC) required that they be provided cab service home at Company expense. (Wage Order 4-68 reads in pertinent part as follows: "No woman employee shall be required to report for work or be dismissed from work between the hours of 10 p.m. and 6 a.m. unless suitable transportation is available," Jt. Ex. 3.) Later, in August 1971, when one of the volunteers for the second shift who had her own transportation protested the inequity of providing free taxi service to others, the Company decided that equity would be served by giving her a $2.50 per day transportation allowance in lieu of the cab service. However, asserts the Company, the genesis for the $2.50 per day in lieu payment lay in the IWC Wage Order to provide "suitable transportation." That is the only reasonable explanation for the $2.50 per day payment, says the Company, noting that male employees working the second and third shifts have never been paid a transportation allowance or been provided with cab service at Company expense.

The Company points out that the Union's Business Representative was informed of the taxi service and the $2.50 per day in lieu transportation allowance to the female employees on the second shift and had he believed that such service and/or payment was attributable to anything other than State IWC requirements he indeed would have filed a "discriminatory practice" grievance against the Company for not providing the same service and/or payment to second and third shift male employees.

Moreover, contends the Company, just as it was "the law" that prompted the institution of the $2.50 per day transportation allowance for female employees who worked the second shift, it was also "the law" that was responsible for its discontinuance. More specifically, according to the Company, Title VII of the Civil Rights Act of 1964, as interpreted by the Courts, most particularly by the United States Court of Appeals, Ninth Circuit in Rosenfeld vs. Southern Pacific Company, 3 FEP Cases 504, decided June 1, 1971, rendered invalid such state protective laws and regulations as IWC Wage Order 4-68. Therefore, says the Company, it would be violative of Title VII of the Civil Rights Act of 1964 were this Board to decide that the $2.50 per diem transportation allowance is required to be paid to the female keypunch operators involved in this case, since male employees are not paid such allowance. Moreover, asserts the Company, such a decision by this Board would be violative of the sex discrimination provisions of the Agreement (Section 1.2 of Jt. Ex. 1). Still further, says the Company, it would be proscribed from giving such a decision effect in light of Section 24.4 of the Agreement which states that any provision of the Agreement "which may be in conflict with any federal or state law ... shall be suspended and inoperative to the extent of and for the duration of such conflict."

In any event, contends the Company, leaving the law and the provisions of the Agreement aside, it was appropriate for it to terminate the transportation allowance in light of the fact that all shift employees were provided "'adequate' arrangements for their safe being" by furnishing parking spaces to them in the new headquarters building.

As for Section 20.2 of the Agreement, the Company contends that that Section is not applicable to the instant case because the practice of making the per diem transportation allowance did not begin until 1969. According to the Company, Section 20.2 obligates it to continue those "conditions of employment" that were in effect as "of the execution of this Agreement." The execution date of the Agreement is July 1, 1953, says the Company, calling attention to (1) the page of the Agreement following the Table of Contents, wherein it is stated: "This Agreement dated July 1, 1953, has been amended on the following dates:" /Emphasis supplied/, (2) page 1 of Joint Exhibit No. 1 wherein it is stated, "This Agreement made and entered into this first day of July, 1953" /Emphasis supplied/, and (3) Section 24.1 of the Agreement wherein it is stated, "This Agreement, having taken effect as of July 1, 1953, and having thereafter been amended from time to time, shall continue in effect as further amended herein for the term July 1, 1970, to June 3, 1973..." /Emphasis supplied/. Thus, says the Company, since the practice of paying the transportation allowance began after July 1, 1953, it was free to discontinue that practice without violating Section 20.2 of the Agreement.

The Company asks the Board to pay particular note to the testimony of Mr. Vernon J. Thompson, who participated on behalf of the Company in negotiations with the Union for many years, both before and after 1953.

According to Thompson, the intent of Section 20.2 was to protect the Union in the early days of the relationship between the Company and the Union with regard to local practices that the Union was unaware of, leaving in mind that the operation of the Company encompasses a wide geographical area with many headquarters. Moreover, Thompson testified, it was not possible in the early bargaining sessions to cover in the collective bargaining agreement all the practices that were known. As the bargaining relationship matured and the Union representatives became more familiar with local practices, the need for a "savings clause" no longer existed, except for protecting the practices that were in effect in the early days, Thompson testified. Thompson's testimony, the Company argues, supports its position that Section 20.2 only protects practices that were in effect prior to 1953. If the intent of the parties were otherwise, says the Company, Section 20.2 would provide, "...by reason of the execution or amendment of this Agreement..."

The Union contends that payment of the transportation allowance for almost three years constitutes a binding past practice which the Company cannot unilaterally terminate. This is so, asserts the Union, because Section 20.2 clearly prohibits the elimination of an established past practice absent agreement between the Company and the Union. The Union contends that the transportation allowance became an established and recognized part of the regular compensation of the subject employees, and that the transportation allowance was relied upon by such employees when they accepted offers of employment for the jobs in question.

The Union is in basic disagreement with the position of the Company

that Section 20.2 protects only those conditions that existed prior to 1953. According to the Union, the Agreement is basically a standard "automatic renewal" contract. That is to say, the Agreement "expires" at the end of each term and in effect is "re-executed" with the commencement of the new term. Thus, argues the Union, the Agreement expired as of June 30, 1970; certain amendments were negotiated, and the Agreement, as so amended, became effective July 1,1970 for its new term; when the new term began, Section 20.2 protected any benefits or conditions in effect at that time, and specifically with respect to this case, the transportation allowance payments.

The Union also takes issue with the Company's contention that the transportation allowance was required by law. The Union contends that it is questionable whether IWC Order No. 4-68 required even the taxi service, let alone the $2.50 per day transportation allowance, inasmuch as (1) the employees voluntarily elected (as opposed to being "required") to work at night and (2) the work location was directly across a well-lighted street from a large transportation terminal. The Union further notes that the subject employees were allowed to leave the building while it was still light to move their cars to the front of the Company's headquarters; thus, when they left work at the end of their shift, they got to their cars in a well-lighted area under the watchful eye of a Company guard. The Union still further notes that the Company at no time contacted the State Department of Industrial Relations, Division of Industrial Welfare to determine its obligations under IWC Order No. 4-68 with respect to the situation. In any event, says the Union there was no relationship between the payment of a straight $2.50 per day transportation allowance and the IWC Order No. 4-68

requirement that "suitable transportation" be available, particularly from April, 1970 onward when all of the subject employees were receiving the allowance --i.e., after the Company had discontinued the taxi service-- and were parking their cars in front of their work building. In short, asserts the Union, the Company made the allowance payments out of "equity" considerations rather than because of any legal requirements.

The most logical explanation for the institution of transportation allowance payments, the Union contends, is that they were needed as added inducement to get the women to volunteer for the night shift. It is clear, says the Union, that the women were never told that the payments were thought by the Company to be required by law or that there was a possibility of the payments being discontinued. Rather, the payments were "promised" to the women as an incentive for them to volunteer for the night shift relative to those who were on the day shift, or as an incentive for applicants for employment to take jobs with the Company, and the women who volunteered for the night shift or who took jobs with the Company did so in reliance upon receiving those payments. Thus, claims the Union, as a benefit, the payments "constituted a binding practice and a plan beneficial to employees under Section 20.2" of the Agreement (Union brief, p. 15).

As for the Company's contention that the discontinuance of the transportation allowance was attributable to its concern over Title VII of the Civil Rights Act of 1964 and the Rosenfeld decision, the Union asserts that such a contention is only a smokescreen for its real reason for discontinuing the allowance, that reason being its fear that the two women who were working in the merged department on the night shift and who were not receiving the allowance would ask for it. According to the Union, the

Rosenfeld case stands only for the proposition that employees otherwise entitled to a position, whether male or female, can be excluded only upon a showing of individual incapacity; it did not decide, nor purport to decide, that transportation payments such as are herein involved are unlawful under Title VII of the Civil Rights Act of 1964. Furthermore, the Union contends, there is no authority for the proposition that Title VII requires the withdrawal of benefits secured under a collective bargaining agreement and that the only federal Court of Appeals to consider the issue -- Hays vs. Potlack Forests, Inc., 4 FEP Cases 1037 (C.A. 8, 1972) -- held that withdrawal of benefits is always improper under Title VII. In short, the Union argues, the Company acted out of economic self-interest in terminating the transportation allowance and merely used Title VII as a convenient excuse to do so.

OPINION

The threshold question to be answered in this case is whether, as the Company contends, Section 20.2 of the Agreement applies only to practices or conditions of employment that were in effect prior to July 1, 1953, or whether, as the Union contends, that Section applies to practices or conditions of employment that were in effect prior to July 1, 1970. The Board is convinced that this question must be answered in the Union's favor for the following reasons.

The parties have periodically sat down since 1947 and bargained over the terms and conditions of employment for employees in the bargaining unit. When an understanding has been reached between the parties, that understanding has been memorialized in a written agreement. That has

happened any number of times since 1947, the last time having been in 1970. The Company would have this Board find that because the parties since 1953 have cast their periodic understanding into the memorialized form of having amended the 1953 Agreement in certain regards, a different result should obtain than had the parties memorialized their understanding in the form of a newly executed complete Agreement. As the Board sees it, this is placing form above substance. The substance is that each time the parties have entered into collective bargaining, as they did in 1970, the results thereof constituted a new Agreement for the specified term. Thus, the word "execution" as it appears in Section 20.2 means the stated effective date of their last memorialized "deal". In this case, that date is July 1, 1970. It may well have been the intent of the Company that only those practices in effect prior to July 1, 1953 be protected under Section 20.2. However, assuming that to be so, the record is clear that such an intent was never disclosed or revealed to the Union, either in negotiations or in past grievance settlements and, therefore, cannot be binding upon the Union (See Union Ex. 2, 3, 4; Emp. Ex. 4).

Having found that Section 20.2 of the Agreement applies to conditions of employment that were established subsequent to 1953, the next question to be answered by the Board is whether the $2.50 per day transportation allowance was such a protected condition of employment under Section 20.2. The Board believes that it was for the following reasons. Ever since April, 1970, some three months prior to July 1, 1970, all the subject employees received the $2.50 per day transportation allowance, notwithstanding the undisputed fact that their cars were parked immediately in front of the building

in which they worked and that they were in full view of the Company guard as they walked to their cars. There was no connection, as the Board sees it, during that period --indeed, if there ever was-- between the payment of the transportation allowance and the requirements of IWC Order No. 4-58 regarding the availability of "suitable transportation". The origin for the $2.50 per day transportation allowance back in August, 1969, may have been out of considerations of "equity" for those who already had "suitable transportation", but it can hardly be argued that "equity considerations" are the same as legal requirements.

The fact is that what evolved over the course of time was an established practice of paying the keypunch operators the $2.50 per day transportation allowance without regard to requirements of law. Moreover, and this is the "key" so far as the Board is concerned, the subject employees were promised, as an inducement for either transferring to the night shift or taking jobs on the night shift "from the outside", that they would be paid the transportation allowance, and they did transfer or take the jobs in reliance upon that promise. In short, it was considered by them to be a part of their over-all compensation for their jobs on the night shift. All the elements of estoppel are, therefore, present so as to prohibit the Company from unilaterally discontinuing the payment. More specifically, the practice that the Board finds was protected by Section 20.2 relates to the individual employees who were paid the transportation allowance until November, 1971, and to no other employees.

As the Board sees it, its decision, resting as it does upon an estoppel principle as that principle is related to Section 20.2 of the Agreement,

moots the question of the legality or illegality of the payment of the transportation allowance to the subject employees as regards Title VII of the Civil Rights Act of 1964. That is to say, since the Board's decision is limited to those specific employees who were receiving the transportation allowance prior to its discontinuance in November, 1971, and to no other employees, male or female, the issue of sex discrimination under Title VII does not arise.

In conclusion, the Board wishes to state its recognition of the fact that its decision in this case has the effect of establishing a "red circle" compensation for certain keypunch operators. For example, a keypunch operator hired after November, 1971 who was never paid the transportation allowance is not entitled to receive that allowance under this decision. The Board is aware that paying some keypunch operators the transportation allowance and not paying others may be a problem to the Company and, for that matter, to the Union as well. However, notwithstanding the "mischief" which may be created in that regard, the Board believes that it has no recourse to decide this case other than the way it has done so.

Accordingly, the Award in this case is as follows:

AWARD

The discontinuance of a per diem payment of $2.50 to certain keypunch operators employed at Company's General Office was a violation of the Clerical Labor Agreement.

As a remedy for such violation, those specific keypunch operators who were paid the $2.50 per diem prior to the termination of such payment, and no other keypunch operators, shall receive $2.50 for every night shift they have worked after the Company discontinued such payment.

The Board hereby retains jurisdiction in this case in the event there is disagreement between the parties as to the implementation of this Award.

Respectfully submitted,

ARBITRATION BOARD

Dated: July 10, 1974

Morris L. Myers, Chairman

Lawrence N. Foss, Union Member

Shirley M. Storey, Union Member

Wayne K. Snyder, Company Member

David J. Bergman, Company Member