REVIEW CASE #17

ARBITRATION CASE #4

ISSUE:

"DID COMPANY HAVE GROUNDS FOR INVOKING 205.11 OF THE AGREEMENT OF SEPTEMBER 1, 1952, TO REJECT THE BID OF M FOR THE JOB OF TURBINE TENDER?"

STATEMENT OF FACTS:

TURBINE TENDER JOB POSTED JULY 1, 1952. , A RELIEF TURBINE TENDER - HIGH PRESSURE FIREMAN, BID BUT A JUNIOR EMPLOYEE WAS SELECTED BY THE COMPANY.

M HAD BEEN USED AS AN EMERGENCY RELIEF TURBINE TENDER EIGHT DAYS IN FEBRUARY, THREE WEEKS IN APRIL AND A FEW DAYS IN MAY. THE LAST ASSIGNMENT BEING MAY 31, 1952.

SIX SUPERVISORS HAD FILED REPORTS ON M . THE GIST BEING THAT M WAS CONSCIENTIOUS, ENERGETIC AND HARD WORKING, BUT UNDULY NERVOUS, EXCITABLE, ERRATIC IN EMERGENCIES; AND THAT IT WOULD BE UNWISE TO PROMOTE HIM.

THE INVESTIGATING COMMITTEE WAS UNABLE TO AGREE ON A SETTLEMENT OF THE CASE. IT PROCEDED THROUGH THE VARIOUS STEPS OF THE GRIEVANCE PROCEEDINGS ENDING UP IN ARBITRATION.

UNION POSITION:

COMPANY MUST SHOW THAT SUFFICIENT FACTUAL EVIDENCE EXISTS WHICH SPECIFICALLY AND SUBSTANTIALLY PROVES THAT M IS NERVOUS, EXCITABLE AND ERRACTIC TO THE DEGREE WHICH PRECLUDES HIM FOR PERFORMING THE JOB OF TURBINE TENDER.

COMPANY POSITION:

THAT THEIR DECISION TO BY-PASS SHOULD NOT BE DISTURBED UNLESS IT IS SHOWN THAT THE SUPERVISORS ACTED IN A DISCRIMINATING OR ARBITRARY MANNER. THE BURDEN OF PROOF RESTS WITH THE UNION. THE SUPERVISORY REPORTS ARE SUFFICIENT TO SHOW THAT THERE WAS REASONABLE GROUNDS FOR REJECTING THE BID; THAT STANDING ALONE, WITHOUT INVESTIGATION OR CONSIDERATION OF ANY FACTS UPON WHICH THEY ARE FOUNDED, THESE REPORTS, THOUGH THEY STATE OPINION RATHER THAN FACTS, CONSTITUTE COMPETENT AND RELIABLE EVIDENCE.

ARBITRATOR CONCLUSIONS:

1. Much depends on the wording of an agreement. Many agreements provides promotions on seniority only where ability and capacity are relatively equal. This agreement does not establish a standard of comparable ability. Title 205 clearly indicates the senior employee will receive preference unless disqualified under 205.11. The senior employee has a PRIMA FACIE claim on the promotion. The company should undertake to show that the employee did lack knowledge, skill, efficiency, etc.

2. The agreement does not limit promotion grievances to claims of arbitrary or discriminatory acts. Section 205.16 shows an intent of more than reiterating the sentence in 205.1 on review of "alleged arbitrary or discriminatory disregard"

3. The submission agreement of the issue states "Did the Company have grounds ...". This makes it incumbent on the company to present grounds for its action.

4. There are cases both "pro and con" on the issue on whether supervisory decisions should be upheld unless union shows them to be arbitrary or discriminatory; but it is hazardous to use such cases because of differences in language of Collective Bargaining contracts and submission Agreements.

5. Having concluded the Company must show grounds for disqualification. We determine the showing required.

   Considerable weight must be given to supervisors conclusions when supported by FACTUAL EVIDENCE.

   However, one man's conclusion to anothers personality are necessarily based on facts and occurrences and should be brought out as evidence even though they are unusually difficult to elucidate.

6. The supervisors reports were accepted over the Union's protest. The Arbitration Board requested that some of the supervisors be brought in to testify as to the factual basis for their decisions. Company acceded but argues that the reports alone are sufficient.

   They cite various cases to show witnesses were allowed to testify that an individual was nervous and excited. In these cases, however, witnesses were testifying as to his behavior ON A PARTICULAR OCCASION - e.g. at the time of arrest. They were not describing his personality in general. For this reason the cases cited are not strictly in point.

UNDER THE "INTIMATE ACQUAINTANCE" RULE A SUPERVISOR, IS CERTAINLY COMPETENT TO TESTIFY ON THE MENTAL CONDITION OF AN EMPLOYEE WHO HAS WORKED UNDER HIM FOR A CONSIDERABLE TIME. THE REPORTS ARE CLEARLY ADMISSABLE. BUT, THEIR SUFFICIENCY IS ALTOGETHER ANOTHER MATTER.

THEY DO NOT PROVE THE POINT BUT ONLY REAFFIRM THE ULTIMATE FACT TO BE PROVED. THEY CANNOT TAKE THE PLACE OF EVIDENCE CONCERNING SPECIFIC OCCURRENCES WHICH LED THE SUPERVISORS TO THEIR CONCLUSIONS. THE COMPANY WAS JUSTIFIED IN RELYING ON THESE REPORTS, BUT THE ARBITRATION BOARD IS NOT RESTRICTED TO THEM.

WHILE CONSIDERABLE WEIGHT IS GIVEN TO SUPERVISORY JUDGMENTS WHICH ARE BACKED BY SUBSTANTIAL EVIDENCE AND APPEAR REASONABLE, IN ARBITRATION, ALL AVAILABLE FACTS MUST BE PLACED ON THE TABLE IN ORDER TO DETERMINE WHETHER THERE WAS SUBSTANTIAL BASIS AND THE JUDGMENTS WERE REASONABLE.

THE UNION HAS PRESENTED ARGUMENTS SHOWING M ... HAS PERFORMED IN THE JOB AT VARIOUS TIMES. THAT HE HAS BEEN EMPLOYED SINCE 1943 AND THESE QUESTIONS WERE NOT RAISED TILL 1952.

THIS BOARD FEELS THE CHARACTERISTICS BEING QUESTIONED MIGHT NOT HAVE BEEN SO IMPORTANT IN THE JOBS M) PREVIOUSLY HELD. THIS PARTICULAR JOB IS ONE OF IMPORTANCE AND IS PERFORMED IN ISOLATION, AND FURTHER THAT PERSONALITY CHANGES OFTEN OCCUR OVER A COURSE OF TIME.

COMPANY SUPPORTED THE SUPERVISORY REPORTS WITH TESTIMONY OF ACTUAL INCIDENCES TO PROVE THE CONCLUSION DRAWN. CONSIDERABLE DETAIL WAS SUPPLIED. IT CAN BE FAIRLY CONCLUDED FROM THE TESTIMONY, THAT THE AGGRIEVED DOES HAVE DIFFICULTY AT TIMES OF CRISES.

KEEPING IN MIND THE DIFFICULTY OF PROVING PERSONALITY TRAITS IN JUDICIAL PROCEEDINGS WE BELIEVE THE COMPANY HAS SHOWN THAT THE AGGRIEVED IS IN FACT NERVOUS AND EXCITABLE IN EMERGENCIES. IN VIEW OF THE JOB DUTIES AND RESPONSIBILITIES OF TURBINE TENDER JOB WE FEEL THE COMPANY ACTED REASONABLY.

WE HAVE CAREFULLY STUDIED THE EVIDENCE SUPPLIED BY COMPANY AND UNION RELATING TO THE TEMPERAMENT OF THE BIDDER AND CONCLUDED THAT:

DECISION:

COMPANY DID HAVE GROUNDS FOR INVOKING 205.11 TO REJECT THE BID OF M FOR THE JOB OF TURBINE TENDER.

In the Matter of Arbitration

between

Pacific Gas and Electric Company

and

International Brotherhood of Electrical Workers, AFL Local Union 1245

August 27, 1954

A Collective Bargaining Agreement of September 1, 1952 between Pacific Gas and Electric Company and International Brotherhood of Electrical Workers, Local Union 1245, provides in Title 102 for the submission of certain unresolved grievances to an Arbitration Board for final and binding determination. Pursuant to this Title an Arbitration Board was constituted to decide a controversy designated as "Arbitration Case No. 4." The Board consists of Ronald T. Weakley (replacing Raymond F. Michael) and Elmer B. Bushby, appointed by the Union; R. J. Tilson and H. H. Jackson, appointed by the Company; and Arthur M. Ross, Impartial Chairman. Hearings were held at San Francisco on June 16 and 22, 1954. Post-hearing briefs from both parties have been received and considered. In addition Board Members Weakley, Tilson and Ross visited the Company's Station "C" at Oakland to observe the job duties of the station crew.

The jurisdiction of the Board in this case is established and limited by the parties' Submission Agreement, which reads as follows:

ARBITRATION CASE NO. 4

Issue

The sole issue for determination in the above numbered case is:

> Did the Company have grounds for invoking Section 205.11 of the agreement of September 1, 1952 to reject the bid of [redacted] for the job of turbine tender?

Mr. [redacted] became an employee of the Company on April 13, 1943, hiring in as a Trainee at Station C. His employment record shows numerous transfers and promotions, the most recent of which was his assignment as Emergency Relief - Turbine Tender and High Pressure Fireman on January 1, 1952. (Previously he had served temporarily in this capacity for about a month, and had been assigned to the turbine deck on six occasions). In the Emergency Relief position he worked as Turbine Tender for eight days in February 1952, about three weeks in April, and a few days in May. The last date on which he was assigned to the turbine deck unaccompanied by another employee was May 31, 1952.

Meanwhile, during the Spring of 1952, it had become evident that a regular position of Turbine Tender would soon become available because of the imminent retirement of a supervisor at the station. Although [redacted] was "in line" for this vacancy by virtue of his seniority and his place in the line of progression, Management decided that he was not qualified for the position. At the request of their superiors, six supervisors filed reports on

on April 7, 1952. The gist of these reports was that M was conscientious, energetic and hard-working, but unduly nervous, excitable and erratic in emergencies; and that it would be unwise to promote him. Certain of the reports discussed his suitability for promotion to Water Tender as well as Turbine Tender.

The Turbine Tender vacancy was formally posted on July 1, 1952. bid for the job but a junior employee was selected. Since then other junior employees have been promoted to Turbine Tender. M 's grievance, protesting the rejection of his bid, has been negotiated through the grievance procedure in accordance with Title 102 and serves as the basis for the present arbitration. At one step in the procedure an investigation was made by an "East Bay Investigating Committee" consisting of the Company's Personnel Supervisor and the Union's Business Representative for the East Bay Division. Their joint report and separate recommendations have been admitted as evidence. Testimony at the hearing, however, indicated that the report was inaccurate in certain particulars; and it should be deemed corrected in those respects.

I. <u>What Must be Shown to Justify Disqualification under Title 205.11 of the Agreement</u>?

The parties are in basic disagreement over the question of what kind of showing must be made at the arbitration stage in order to support a decision to reject the bid of a senior employee. The Union holds that the Arbitration Board must "determine whether there exists factual evidence

sufficiently specific and substantial to persuade it that M is nervous and excitable to a degree which precludes him from properly performing the job of Turbine Tender. If the Board does not find the evidence of a sufficient, specific and substantial character to so convince it, it must find in M 's favor." (Union Brief, pp. 9-10). The Company, on the other hand, argues that its decision should not be disturbed unless it be shown that the supervisors acted arbitrarily or in a discriminatory fashion; and that the Union has the burden of making such a showing. (Company Brief, pp. 34-35). The Company contends that the supervisory reports of April 1952 (which characterize M in general terms as nervous and excitable) are sufficient to show that there were reasonable grounds for rejecting his bid; and further, that "standing alone, without investigation or consideration of any facts upon which they were founded, these reports, though they state opinions rather than facts, constitute competent and reliable evidence of Mr. 's temperament." (Company Brief, p. 13).

Our conclusions with respect to the problem of evidence and proof are as follows:

1. Much depends upon the wording of the Agreement provisions in the particular case. Many collective agreements, for example, provide that the senior bidder shall be promoted only when ability and capacity are relatively equal. The Agreement here at hand, however, does not establish a standard of comparative ability. Title 205 clearly indicates

that senior employees will receive preference unless disqualified under 205.11, which reads,

> "Notwithstanding anything contained in this title, Company may reject the bid of any employee who does not possess the knowledge, skill, efficiency, adaptability and physical ability required for the job on which the bid is made."

Thus the senior employee has a prima facie claim on the promotion. If the claim is rejected under 205.11, the party rejecting it should undertake to show that the employee was disqualified for lack of knowledge, skill, efficiency, etc. To hold otherwise would place on the opposing party the difficult burden of proving a negative: that the employee was not disqualified for any reason.

2. The Agreement does not limit promotion grievances to claims of arbitrary or discriminatory action. Title 205.1, it is true, provides that "any alleged arbitrary or discriminatory disregard of this [promotion] policy shall be subject to review under the grievance procedure." However the parties also incorporated Title 205.16, which reads,

> "Any employee aggrieved by Company's application and interpretation of the seniority and job bidding policies established herein may thereon invoke the grievance procedure of this agreement."

It is a familiar principle of construction that distinctive meaning should be assigned to language wherever possible. When the parties adopted Title 205.16 they presumably intended more than to reiterate the quoted sentence in

Title 205.1. Therefore a claim that a promotion decision was clearly erroneous is reviewable in the grievance procedure even if there be no allegation of arbitrary or discriminatory action.

3. The wording of the Submission Agreement is likewise significant. The stated issue is whether the Company had grounds for invoking Section 205.11. This makes it incumbent on the Company to come forward and present the grounds for its action. Certainly the party which affirms a proposition has the obligation of demonstrating it.

4. There are published arbitration awards in promotion cases holding that supervisory judgments should be upheld unless the Union can show that they were arbitrary, discriminatory or grossly in error. (See, for example, Merrill-Stevens Dry Dock and Repair Company, 6 LA 841; Lionel Corporation, 7 LA 121; Durham Hosiery Mills, 12 LA 311). However, there are more numerous awards holding that management must justify its decisions with factual evidence. (A few of these awards are Chase Copper and Brass Company, 11 LA 709; Columbia Steel Company, 13 LA 366; Illinois Bell Telephone Company, 14 LA 1021; Public Service Electric and Gas Company, 12 LA 317; Ford Motor Company, 2 LA 374). It is hazardous to generalize from these published cases because of differences in the language of the collective bargaining contracts and submission agreements.

5. Having concluded that the Company must show the grounds for disqualification, we may turn now to the character of the showing required. Considerable weight should be given to bona fide conclusions of supervisors when supported by factual evidence. In the first place, a supervisor is responsible for the efficient performance of his unit and has a legitimate concern that employees be properly assigned to achieve this objective. In the second place, he has a deeper and more intimate acquaintance with the men under his charge than an arbitrator is able to acquire in a brief hearing.

It should also be recognized that personality traits such as nervousness and excitability are difficult to demonstrate in a judicial proceeding. If a man were disqualified for lack of knowledge, the deficiencies in his training and experience could be readily pointed out. Psychological characteristics are more subtle and therefore less susceptible to iron-clad proof. Nonetheless they may play a crucial part in a promotion decision. When all is said and done, however, one man's conclusions as to another man's personality are necessarily based on facts and occurrences. Such facts and occurrences should be brought out as evidence even though they are unusually difficult to elucidate.

6. The supervisors' reports of April 1952, characterizing M 's personality in general terms, were accepted as exhibits over the Union's protest. However,

the Arbitration Board requested that some of the supervisors be brought in to testify as to the factual basis for their conclusions. The Company acceded to this request, but argues in its Brief that the reports were sufficient.

The Company cites several California cases in which witnesses were permitted to testify that an individual was nervous or excited. (Holland v. Zentner, 36 P. 930; People v. Wong Loung, 114 P. 829; People v. Manoogian, 75 P. 177). In these cases the witnesses were permitted to testify as to the individual's demeanor and behavior on a particular occasion -- e.g. at the time of arrest. They did not undertake to describe his personality in general. For this reason the cited cases are not strictly in point. Under the "intimate acquaintance" rule, however, a supervisor is certainly competent to testify on the general mental condition of an employee who has worked under his charge for a considerable period of time. The supervisors' reports were clearly admissible and were properly admitted.

But their sufficiency is another matter altogether from their admissibility. The ultimate fact to be proved by the Company, in order to sustain the conclusion that Malcomson was properly disqualified, is that he is excessively nervous and excitable for the position of Turbine Tender. Without questioning the sincerity of the supervisors' reports, in the context of this case they amount to reaffirmations by agents of the Company of the ultimate fact to be proved. They cannot take the place of evidence concerning

the specific occurrences which led the supervisors to their conclusions. While the Company was justified in relying on the supervisors' reports (in fact there was no practical alternative), it does not follow that an Arbitration Board should be restricted to them.

Thus, while considerable weight is given to supervisory judgments which are backed by substantial evidence and appear reasonable, it is equally true that in grievance negotiation and arbitration, all the available facts should be put on the table in order to ascertain whether there <u>was</u> substantial basis and the judgments <u>were</u> reasonable.

II. <u>Evidence as a Disqualification</u>

We have carefully studied the evidence supplied by the Company and the Union relating to M 's temperament. On the basis of this appraisal we conclude that the Company did have sufficient grounds for rejecting M 's bid.

The Union emphasizes that M has been employed at Station "C" since 1943 and that his suitability was never questioned on the ground of nervousness or excitability prior to 1952. These characteristics, however, might be relatively unimportant in some assignments but crucial in others. The responsibilities of the Turbine Tender are higher than those of many other classifications. He works in isolation, physically removed from supervisors and other employees. The possible damage from erratic conduct is much greater than in the case of the Fireman. There is a

considerable "stand-by" element in the job; so that steadiness and dependability are at a premium when emergency develops. Moreover, personality changes often occur in an individual over the course of time.

The Union also stresses the testimony of Dr. John Alden, a practicing psychiatrist who examined Mr. M at the Union's request. What Dr. Alden found is that M is free from paranoid, manic-depressive or other psychotic tendencies. We certainly accept this finding. But it does not follow that M is free from nervousness or excitability sufficient to disqualify him for this particular assignment.

On this score Company witnesses described a large number of specific occurrences of the type which led to their judgment concerning him. Considerable detail was furnished concerning M 's actions and reactions during these occurrences. Space does not permit a detailed account of each incident. It is true, as the Union points out, that none of them can be classified as major. M has not been responsible for damage to equipment or injury to other personnel. He has not neglected his duties and, except in one case, has not wilfully disregarded the instructions of his supervisors.

It can fairly be concluded from the testimony, however, that M does tend to lose perspective when things go wrong. He does have difficulty in distinguishing between a minor difficulty and a major crisis. He does

become excited and somewhat distraught when unusual incidents occur. He is apt to lose track of details and relationships which he really knows. What is more serious, when encountering difficulties he tends to reject assistance from higher-rated employees and members of supervision. There is clearly a defensive element in this attitude: M appears to believe that his skill and judgment are being questioned, and becomes angry when the supervisor and the Water Tender proffer help in accordance with their duties. On more than one occasion he has thrown down his gloves and walked away under these circumstances. With respect to one operating procedure, he believes that an explicit shop rule should be disregarded on the ground that another procedure is faster and equally safe. Better judgment, of course, would persuade him to accede to the rule even if he deemed it unnecessary. But here again, an undue sensitivity concerning his "know-how" in the operation of boilers seems to be involved.

Keeping in mind the difficulty of proving personality traits in a judicial proceeding, we believe the Company has shown that M is in fact unduly nervous and excitable in moments of emergency. In view of the job duties and requirements of the Turbine Tender classification, we conclude that the Company acted reasonably in rejecting his bid. For this reason the issue submitted to us will be answered in the affirmative.

DECISION

The Company did have grounds for invoking Section 205.11 of the agreement of September 1, 1952 to reject the bid of M for the job of Turbine Tender.

September 8, 1954

The following members of the Arbitration Board concur in the above decision:

Elmer B. Bushby
Appointed by the Union

H. H. Jackson
Appointed by the Company

R. J. Wilson
Appointed by the Company

Ronald T. Weakley
Appointed by the Union

Arthur M. Ross
Impartial Chairman