

In the Matter of an Arbitration

between

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1245,

Complainant,

and

PACIFIC GAS AND ELECTRIC COMPANY,

Respondent.

RE: Arbitration Case No. 156.
Grievance of Mc
involving Section 19
Displacement Rights.

Opinion & Decision

of

Board of Arbitration

San Francisco, California

BOARD OF ARBITRATION

Union Board Members:

Roger Stalcup
Dorothy Fortier

Company Board Members:

Storme Smithers
Rick Doering

Neutral Chair:

Barbara Chvany

APPEARANCES

On Behalf of the Union:

Thomas M. Dalzell
Staff Attorney
IBEW LOCAL 1245
P.O. Box 4790
Walnut Creek, CA 94596

On Behalf of the Company:

Kenneth Yang, Esq.
PACIFIC GAS & ELECTRIC COMPANY
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San Francisco, CA 94106

INTRODUCTION

This dispute arises under the Labor Agreement between the above-captioned Parties (Jt. Ex. 1). Pursuant to the Agreement, a Board of Arbitration was constituted and an arbitration hearing was conducted on May 18, 1988 in San Francisco, California. At the hearing, the Parties had a full opportunity to examine and cross-examine witnesses, and to present relevant exhibits. A verbatim transcript of the proceedings was taken (cited herein as Tr. ____). The Parties stipulated that the prior steps of the grievance procedure have been followed or waived and the matter is properly in arbitration (Tr. 3). Post-hearing briefs were submitted by the Parties.

Originally, three grievances had been consolidated for arbitration on this hearing date. At the hearing, it was determined that only the grievance of Mc would be placed before the Board in this proceeding (Tr. 5-6).

ISSUE

Was the Company's restriction of Grievant Mc 's displacement rights under Section 19.6 of the Parties' Labor Agreement because of her failure to pass the Clerical Test Battery proper; if not, what is the remedy? (Tr. 2)

REMEDY REQUESTED

The Union requests that the Grievant be afforded unrestricted displacement rights pursuant to Title 19, and that she be made whole for any losses suffered as a result of the restriction of her displacement rights based upon her failure to pass the Clerical Test Battery (Tr. 2; Un. Bf. 9).

The Company seeks denial of the grievance in its entirety (Co. Bf. 18).

PERTINENT AGREEMENT PROVISIONS

TITLE 18. JOB BIDDING, PROMOTION
AND TRANSFER

* * *

18.11 BYPASS FOR LACK OF QUALIFICATIONS

(a) 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. Additionally, the bid of an employee to a classification having a higher maximum wage rate will be rejected if the employee has been under active counselling for poor work performance during the previous 12 months. Active counselling for the purpose of this Section is considered to be: (1) Two or more separate

instances in which the employee received disciplinary layoff without pay for poor work performance or (2) demotion for cause.

(b) Company may give tests to assist in determining an employee's qualifications. By written agreement, Company and Union may adopt testing programs for determining employees' qualifications for promotion. An employee's failure to pass such tests in accordance with a Company and Union-approved program shall result in the rejection of his bid without further consideration. (Entire Section amended 1-1-84)

* * *

**TITLE 19. DEMOTION AND LAYOFF
PROCEDURE**

* * *

19.6 BUMPING EMPLOYEE IN BEGINNER'S JOB

(a) If Company cannot effect a demotion or displacement of an employee in accordance with Section 19.3 and, if in addition, such employee cannot for any reason effect an election in accordance with Sections 19.4 or 19.5, he may elect to displace that employee in the Division, in a beginning classification who has the least Service provided he meets the qualifications of a transfer.

(b) If the Company cannot effect a demotion or displacement of an employee in Subsection (a) hereof, if he has been employed three years or more, may elect to displace that employee in the Company in a beginning classification, who has the least Service, provided he meets the qualifications of a transfer.

(Jt. Ex. 1)

BACKGROUND

Events Giving Rise to Grievance:

The Grievant, Mc , was hired by the Company on August 27, 1980. On January 21, 1987, she was informed that her position as a Data Entry Operator in the Company's Computer Operations Department, Data Recording Section, was being eliminated due to lack of work (Jt. Ex. 2; Co. Ex. 2).¹ As a Data Entry Operator, the Grievant's duties were to keypunch information on paper records to a computer file (*ibid.*). Prior to assuming that job, the Grievant had taken a keypunch skills test, which measures an individual's manual dexterity, familiarity with the keyboard and ability to keypunch accurately and quickly (Co. Ex. 1, pp. 8-9).²

Title 19 of the Labor Agreement sets forth the Grievant's rights upon the elimination of her position. Under Section 19.6, the Grievant had the opportunity to transfer (or "bump") into a Utility Clerk position provided she met the necessary qualifications (Jt. Ex. 1, 2; Tr. 30-31).

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In addition to the Grievant's position, 22 other Data Entry Operator positions were eliminated in January, 1987 (Jt. Ex. 2).

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It is a different test, designed to measure different skills, knowledge and abilities, than the Clerical Test Battery described below (Co. Ex. 1, p. 9).

In this case, the Grievant was restricted by the Company in the exercise of her Section 19.6 displacement rights when she was not allowed to transfer into a Utility Clerk position because of her failure to attain a 180-point passing score on the Clerical Test Battery (CTB).³ It is this restriction of the Grievant's displacement rights which forms the basis of the grievance in this case. It is undisputed that the Grievant passed another test, Reprographics, and she transferred into a Reprographics Operator B position effective February 4, 1987.

There is no claim that the Grievant was denied a full opportunity under the Labor Agreement to pass the CTB or its predecessor. Rather, the dispute herein involves the application of a 180-point score to the Grievant as the standard for determining her opportunity to move into a Utility Clerk position under Section 19.6.

The CTB:

Without negotiation with Local 1245, the Company initially implemented the CTB in Fall 1985 as a pre-employment test for screening job applicants for clerical classifications (Co. Ex. 1; pp. 5-7). The test had been developed in a nation-wide study involving 46 electric utility companies (Co. Ex. 1; pp. 4-5). The

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The Grievant scored 164.25 on the CTB (Jt. Ex. 2). Of the other 20 Data Entry Operators whose positions were eliminated, 16 passed the CTB (or a prior test administered by the Company) and thereafter bumped into Utility Clerk positions (Jt. Ex. 2).

CTB is a pencil and paper test battery with four components: arithmetic, using tables, language skills, and classifying (Co. Ex. 1, p. 4). It was developed specifically to test knowledge, skill and ability for clerical job duties (Co. Ex. 1, p. 5).

The data recommended a passing score of 220 for the CTB, but, upon review of the study data and the Company's particular experience involving job applicants, the Company determined to apply a score of 180 points for pre-employment (Co. Ex. 1, pp. 6-7; Tr. 13-14).⁴ Applying that standard, there has been approximately a 40% pass rate by applicants since the test's implementation (Tr. 19).

Following the implementation of the CTB for pre-employment screening, the Company held discussions with Local 1245 regarding the utilization of the CTB for bid and transfer screening (Co. Ex. 1, pp. 7-8; Tr. 23). The Parties resolved the subject in Letter Agreement 85-142-PGE dated April 22, 1986 which provides, in part, as follows:

Pursuant to Subsection 18.11(b) of the Clerical Agreement, Company proposes to require that all employees, seeking to bid or transfer to the clerical line of progression, take and pass the respective pre-employment Aptitude Test Battery before being awarded a position in the clerical line of progression.

The tests will be scored in accordance with procedures described in the attached EEI Clerical and Meter Reading Testing Program Administration Manual (September, 1985). The cut-off scores for the tests are as follows:

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The majority of companies apply a standard of 178 points (Tr. 14).

Clerical - 180 points in aggregate

* * *

Previous satisfactory performance in a clerical position, other than Data Entry Operator, Reprographics Operator, or Meter Reader will satisfy the requirement for passing the Clerical Test Battery entry examination. ...

* * *

(Co. Ex. 3; see, also, Co. Ex. 1, pp. 9-10)

Past Application of CTB Test Standards:

-- Bid and Transfer --

Since the CTB was implemented for bid and transfer purposes in July, 1986 pursuant to Letter Agreement 85-142-PGE, above, there have been no occasions in which the Company has lowered the negotiated 180 score for employees seeking bids or transfers to jobs within the clerical line of progression (Co. Ex. 1, p. 18; Tr. 19).

-- Arbitration Case No. 128 --

In May 1986, the Arbitration Award in Case No. 128 involving these Parties was issued. The Award addresses the use of agency employees to perform clerical bargaining unit work. The Arbitration Board found that the Company violated the Agreement and awarded, as a partial remedy, the conversion of certain agency employees to bargaining unit employees (Co. Ex. 4; Co. Ex. 1, pp. 10-11). The Parties reached agreement on implementation procedures for that Award in Letter Agreement 86-77-PGE dated June 25, 1986 (Co. Ex. 5; Co. Ex. 1, pp. 10-11). As part of the

conversion process, agency employees were required to meet the "customary pre-employment entrance criterion" of the Company, including the CTB (Co. Ex. 5; Co. Ex. 1, p. 11).

Approximately 100 agency employees were involved in this conversation, and 78 of them took the CTB (Tr. 20).⁵ A majority of the affected agency employees scored less than 180 points (Co. Ex. 1, p. 11; Tr. 20). If the 180 score were retained, a large number of agency employees would not be able to convert to PG&E employment (Co. Ex. 1, p. 12). Because of the circumstances, the Company investigated lowering the passing score for agency employees who had good performance reviews during their PG&E assignments and met other pre-employment criteria (Co. Ex. 1, pp. 13-14; Tr. 21-22). After some analysis, the Company lowered the passing score for such employees to 159 points, which permitted an additional 15 agency employees to convert (Co. Ex. 1, pp. 13-14; Tr. 27). One agency employee with a score of 148 was also permitted to convert, in light of good past performance and service as a lead clerk (Tr. 24-25, 27).

The decision by the Company to accept a lower score in this situation was made after consideration and review of the particular circumstances involved (Tr. 24-26). A significant consideration was the fact that performance reviews of these agency employees were based upon the type of work they would continue to perform upon conversion to PG&E employees (Co. Ex. 1,

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The remainder took a previous test battery (ibid.).

p. 14). The fact that the conversions were being effectuated by order of an arbitration Award was also considered. In addition, the situation involved a large number of agency employees who, if not converted, would have to be replaced causing expense and lost efficiency. Under the totality of the circumstances, the Company determined that it would be appropriate to lower the passing standard (Co. Ex. 1, p. 15; Tr. 24-26).

In reaching this decision, the Company did not consult or notify Local 1245, and the Union did not agree to modify the CTB passing standard for employees affected by the Award in Arbitration Case No. 128 (Tr. 22-23, 32-33).

-- Union's Response --

In September, 1986 when the Local Union first became aware that the Company had unilaterally modified the passing score on the CTB related to implementation of the Award in Arbitration Case No. 128, Local 1245 advised the Company, as follows:

... passing the CTB as a prerequisite to bid/transfer/demotion was no longer appropriate for any current employee or for any agency employee seeking to convert to PG&E employee under the settlement of Arbitration Case No. 128.

(Co. Ex. 8)

Local 1245 later modified its position in a letter of January 7, 1987, in which it indicated that the Union believed "a score of 148 should be the minimum cutoff score for qualification for all purposes under the Agreement "transfer/bid/demotion" (ibid).

-- Arbitration Case No. 142 --

The decision in Arbitration Case No. 142 was issued in December, 1986 (Co. Ex. 6). That Award ordered a similar remedy to the Award in Arbitration Case No. 128 (Jt. Ex. 2; Co. Ex. 6). In a Letter Agreement dated June 3, 1987, the Parties agreed upon the method for implementing the decision in Case No. 142: affected employees were to meet the Company's customary pre-employment criteria, including the CTB, and a passing score of 159 was to apply if the agency employee had satisfactory job performance (Co. Ex. 7).

-- Other Waivers --

With regard to pre-employment testing, the Company has waived the 180 passing score on the CTB under certain circumstances. This occurred on approximately 8 occasions prior to the conversions involved in Arbitration Case No. 128, and again on approximately 8 occasions after those conversions (Tr. 23, 30). Not all requests were granted; only approximately 50% of the requests resulted in a waiver (Tr. 16, 29).

Circumstances in which such waivers occurred have involved temporary summer employment, situations in which the Company had an arrangement with a local educational institution or an out-reach program, part-time intermittent jobs, particularly where there was difficulty in filling them, and in certain locations where the Company had difficulty obtaining qualified applicants (Tr. 17-19, 28-30). Waivers also occurred where good job

performance had been demonstrated in the same position in the past (Tr. 18).

In these waiver situations, the employees involved scored over 160 on the CTB, with the exception of one individual who had a score of 112 (Tr. 16, 28-29). The latter waiver occurred upon the insistence of the supervisor of the candidate, who had performed an outstanding job for over a year in the particular department, which had a serious need for her services (Tr. 16-17).

POSITIONS OF THE PARTIES

The Union:

The determination herein as to whether the Company improperly restricted the Grievant's displacement rights under Section 19.6 must be made in light of the provisions governing the rejection of transfers set forth in Section 18.11. In this case, the Grievant was deemed unqualified for a transfer to a Utility Clerk position for the sole reason that she failed to pass the CTB. Her job performance, past employment history, outside training and education were not considered; nor did the Company conclude that she fell within either of the categories set forth in Section 18.11(a) (i.e., that she did not possess the "knowledge, skill, efficiency, adaptability and physical ability required for the job," or that she was "under active counselling for poor work performance during the previous 12 months").

On January 7, 1987, Local 1245 repudiated the score of 180 for passing the Clerical Test Battery, the Union contends. Therefore, it may not be concluded that the score of 180 was the agreed-upon testing program at the time of the events giving rise to this grievance. The question remains as to usefulness of a CTB score of 180 in assisting the Company in determining an employee's qualifications, as permitted by Section 18.11(b). The Union has a twofold response.

First, the Union contends that the Company did not employ the Grievant's score to assist in determining her qualifications but, rather, relied upon her score as the sole basis for its decision. Second, the Company has impeached the validity of 180 as a passing score by the waivers it has applied under Arbitration Case No. 128 and elsewhere. Its actions have indicated that other factors are more reliable than the CTB test score to predict an employee's success.

As a result of the Company's unilateral bending of the CTB passing score, there are members of the clerical bargaining unit converted from agency employee status who received partial waivers, an opportunity never afforded incumbent employees who seek to transfer. The Union maintains that this application of the CTB constitutes unequal treatment of employees and should not be ratified. Finally, the Union concludes that the Company's restriction of the Grievant's displacement rights was not justified under either prong of Section 18.11(a); and, its sole reli-

ance on her CTB score was similarly improper under either testing scheme set forth in Section 18.11(b).

The Company:

According to the Company, the Union bears the burden of establishing that the Employer's action in this case breached the Parties' Agreement. Essentially, the Union must show the Company was without contractual authority to require the Grievant to pass the CTB before affording her full displacement rights to clerical positions. For the reason set forth below, the Company asserts that the Union has failed to meet that burden.

First, the Company contends that under Title 19.6 of the Labor Agreement, the Grievant may displace into a beginning clerical position "provided [s]he meets the qualifications of a transfer" (Jt. Ex. 1, pp. 81-82). One of the transfer qualifications is the CTB testing requirement set forth in the Letter Agreement 85-142-PGE (Jt. Ex. 2; Co. Ex. 3). In that Letter Agreement, the Parties stipulate that a successful clerical transferee must take the CTB and receive a score of 180 or above. It is undisputed that the Grievant's test score herein was short of the negotiated cutoff and, therefore, the Company properly restricted her displacement rights.

Second, well-established arbitral principles dictate that past practice cannot amend explicit contractual provisions. Notwithstanding the clear language of the Labor and Letter Agreements, the Union argues the Company cannot rightfully apply the negotiated 180-point cutoff score, apparently because the Parties

have somehow amended their understanding through past practice. This argument has no merit, the Employer argues.

In this case, the Union is seeking to use an alleged practice to alter the Parties' unambiguous contractual commitments, a use of past practice which many arbitrators have flatly rejected. Generally, past practice is relied upon by arbitrators only to interpret vague or inconsistent contract language. Where the contract is clear and unequivocal, such extrinsic evidence is not relied upon, citing Elkouri & Elkouri, How Arbitration Works, 4th Ed. 1985, p. 437; Bureau of Engraving, Inc., 80 L.A. 623 (Reynolds, 1983); AMAX Coal Co., 77 L.A. 1058 (Witney, 1981). The foregoing authority upholds the principle that explicit contract language must prevail over a practice that is inconsistent or in conflict with its terms. The Company contends that the Union is seeking to rewrite the clear and explicit CTB displacement requirements in the Parties' Labor and Letter Agreements.

The Company recognizes that, in some unusual circumstances, arbitrators have carved exceptions to the principles discussed above, based upon "very strong proof" of past practice serving to modify existing contractual terms. However, this result has occurred only when the proven past practice amounted to a manifestation of agreement by the parties to amend their written contract, see, e.g., Louisiana-Pacific Corp., 79 L.A. 658 (Eaton, 1982). Such a past practice or mutual manifestation of intent has not been established in this case, according to the Company.

There is no evidence to support a finding that the Parties have mutually agreed to deviate from the negotiated 180-point cutoff score for incumbent employees. The limited circumstances in which the CTB standard has been lowered for pre-employment purposes are distinguishable. For example, the lowering of the cutoff score involved in Arbitration Case No. 128 occurred for agency employees who had good performance reviews for the same type of work they would continue to perform after their conversion to PG&E employees. In this matter, it is undisputed that the Grievant had never performed the clerical work which she would be assigned if her displacement rights had not been restricted. Therefore, she may not avail herself of that limited modification to the pre-employment testing standard.

DISCUSSION

Application of Agreement Language:

In Section 18.11(a), the "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" (Jt. Ex. 1). Under Section 18.11(b), the Labor Agreement recognizes that the "Company may give tests to assist in determining an employee's qualifications ... An employee's failure to pass such tests in accordance with a Company and Union-approved program shall result in the rejection of his bid without

further consideration" (ibid.).⁶ The Parties have stipulated that the same requirements governing transfer apply in this displacement/bumping situation (Tr. 30-31).

In Letter Agreement 85-142-PGE dated April 22, 1986, the Parties agreed that employees seeking to bid or transfer to the clerical line of progression would be required to take and pass the CTB with a score of 180 points or above (Co. Ex. 3). This Letter Agreement constitutes "a Company and Union-approved program" pursuant to Subsection 18.11(b) of the Clerical Agreement (Jt. Ex. 1; Co. Ex. 3). Accordingly, an employee's failure to meet that standard "shall result in the rejection of his bid without further consideration," as provided in Section 18.11(b).

It is undisputed that the Grievant failed to achieve a passing score on the CTB and, as a result, was restricted from exercising her displacement rights under Section 19.6 to bump into a Utility Clerk position. Therefore, under the Labor Agreement and Letter Agreement 85-142-PGE, the Company acted within its proper authority in restricting the Grievant's displacement rights under Section 19.6.

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In Section 18.11(a), there are additional considerations in the event an employee seeks to bid to a classification with a higher maximum wage rate. It was not established that the transfer at issue here involved a transfer to a classification with a higher maximum wage rate, or that it was necessary to address these additional considerations in light of the Grievant's failure to pass the CTB.

Approved Testing Program:

Local 1245 contends that there was no Union-approved testing program in existence at the time this grievance arose, because the Union had repudiated Letter Agreement 85-142-PGE after the Company had waived the 180-point passing score for agency employees affected by Arbitration Case No. 128. This contention must fail for the following reasons.

When parties reach mutual agreement on a subject, neither one can unilaterally reject that agreement. If a breach occurs, the remedy is to seek enforcement of the agreement through the grievance procedure of the collective bargaining agreement, not to repudiate the agreement in its entirety. In this case, the Parties reached agreement upon a testing program for bids and transfers, and for the agency employees involved in Arbitration Case No. 128. If the Union considered it a breach when the Company partially waived the passing score for agency employees, the Union's remedy was to enforce the agreed-upon standard by resort to the grievance procedure, not to repudiate the mutually-approved testing programs entirely. Just as the Company would be prohibited from unilaterally applying a higher score in light of such agreed-upon standards, the Union may not unilaterally void the standards set by the applicable Letter Agreements.

The Board of Arbitration does not have an issue before it as to whether the applicable Letter Agreement between the Parties was violated in the circumstances involved in Arbitration Case No.

128. The issue before the Board in the instant matter concerns the application of the CTB standard to the Grievant in a bid/transfer situation. The application here has been in accordance with the pertinent Letter Agreement. If the Union seeks to change the mutually agreed-upon testing standards for employees seeking to bid or transfer to the clerical line of progression, the appropriate method to accomplish such change is by direct negotiations with the Company, not through arbitration.

The Parties have adopted Letter Agreement 85-142-PGE setting forth the approved requirements pursuant to Subsection 18.11(b) for employees in the Grievant's situation. The Board of Arbitration has the authority to enforce and implement the agreements between the Parties, not to modify or amend them.

Other Contentions:

The Union contends that the Company should be barred from restricting the Grievant's displacement rights under Section 19.6 in this situation. First, it contends that the Company's sole reliance upon the CTB test score to restrict those rights constitutes a violation of Section 18.11. Second, the Union contends that the Company's application of the 180-point score constitutes disparate treatment of the Grievant as compared to others who were permitted to pass the CTB with a lower score.

The Union's assertion of a violation of Section 18.11 in these circumstances must be rejected for the reasons discussed above. That Section sets forth the right of the Company to reject an employee's bid "without further consideration" in the event of

a failure to pass a test administered in accordance with a Company and Union-approved program (Jt. Ex. 1). The Company's right to reject the Grievant based upon her failure to pass the CTB test by the agreed-upon standard is clearly recognized in the Labor Agreement and the pertinent Letter Agreement (Jt. Ex. 1; Co. Ex. 3).

The Union's second contention involves the allegation of unequal treatment. Improper disparate treatment occurs when employees under substantially similar circumstances are treated unequally without justification. If there are reasonable, legitimate and good faith reasons for treating employees differently, distinctions in treatment may be warranted.

With regard to the waivers cited by the Union to support its claim of disparate treatment, it is significant to note that all involve pre-employment screening as opposed to application of the CTB standard in the bid or transfer situation. Most importantly, the substantial majority of the cited waivers involved circumstances in which the employees at issue had performed the same job duties they would continue to perform in the future. The existence of such a track record is a reasonable and legitimate distinguishing factor.⁷ In fact, the Parties, themselves, have

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The Board herein does not intend to reach or decide any issue of an alleged violation of Letter Agreement 86-77-PGE involving the implementation of the Award in Arbitration Case No. 128. That issue is not before the Board for determination in the instant proceeding.

recognized the legitimacy of such a consideration in the bid and transfer situation. In Letter Agreement 85-142-PGE, they expressly recognize that "previous satisfactory performance in a clerical position ... will satisfy the requirement for passing the Clerical Test Battery entry examination" (Co. Ex. 3). Presumably, the Grievant would have been afforded consideration under this clause if she had had prior satisfactory performance in a qualifying position. She did not.

In summary, the record establishes the Grievant was treated in the same manner that similarly situated employees have been treated in the past regarding bid or transfer, and in a manner which comports with the Parties' Labor and Letter Agreements governing that subject. Under the circumstances, the Company's application of the 180-point passing score was proper.

Accordingly, the following Decision is rendered:

DECISION

The Company's restriction of Grievant Mc 's displacement rights under Section 19.6 of the Parties' Labor Agreement because of her failure to pass the Clerical Test Battery was proper. The grievance is denied.

Roger Statcup
Union Board Member

11/14/88
Date

~~Concur~~/Dissent

Donothy Fortier
Union Board Member

11-15-88
Date

~~Concur~~/Dissent

Rich R. Dolny
Company Board Member

11/7/88
Date

Concur/~~Dissent~~

Home Smithers
Company Board Member

11/7/88
Date

Concur/~~Dissent~~

Burlana Chavany
Neutral Board Member

11-3-88
Date

Concur ~~Dissent~~