REVIEW CASE FILE #84 - SAN FRANCISCO DIV. GRIEVANCE #48

ARBITRATION CASE #6

DISQUALIFICATION OF SENIOR BIDDER ON PUBLIC CONTACT JOB.

OPINION AND DECISION OF ARBITRATION BOARD

DATE: JANUARY 23, 1956

ISSUE:

DID THE COMPANY VIOLATE THE AGREEMENT OF SEPTEMBER 1, 1952 WHEN IT INVOKED SECTION 205.14 THEREOF TO REJECT THE BID OF [redacted] FOR APPOINTMENT AS APPRENTICE SERVICEMAN?

UNION'S POSITION:

THE COMPANY IS OBLIGATED (1) TO POST NOTICE OF VACANCIES IN PUBLIC CONTACT, SUPERVISORY, AND TECHNICAL JOBS, (2) TO FILL THEM ON BASIS OF SENIORITY, (3) TO GIVE TIMELY WRITTEN NOTIFICATION TO UNION WHEN BID OF A SENIOR EMPLOYEE IS BY-PASSED, AND (4) TO FOLLOW THE GRIEVANCE PROCEDURE WHEN INVOKED BY THE SENIOR EMPLOYEE.

- SECTION 205.11 ESTABLISHES CRITERIA AS GENERAL QUALIFICATIONS WHICH MUST BE MET BY A BIDDER FOR ANY JOB, AND SECT. 205.14 PROVIDES "ABILITY AND PERSONAL QUALIFICATIONS" AS ADDITIONAL CRITERIA TO BE MET BY A BIDDER ON THE 3 CLASSES OF JOBS THEREIN LISTED.

COMPANY'S POSITION:

IT IS OBLIGATED TO POST NOTICE OF VACANCIES AND "CONSIDER" BIDS SUBMITTED FOR ANY OF THE 3 CLASSES OF JOBS SPECIFIED IN SECTION 205.14 BUT CONSIDERS OBLIGATION FULLY DISCHARGED IF JOB IS POSTED AND BIDS REVIEWED.

- SENIORITY IS NOT THE DETERMINING FACTOR IN MAKING APPOINTMENTS TO ANY OF THE 3 CLASSES OF JOBS AND IT MAY NOT ONLY REJECT BIDS OF UNQUALIFIED SENIOR BIDDERS BUT MAY SELECT THE EMPLOYEE IT DEEMS BEST SUITED AND HAS UNLIMITED DISCRETION IN MAKING AN APPOINTMENT TO SUCH A JOB.

- THE GRIEVANCE PROCEDURE DOES NOT ENLARGE ON ANY SUBSTANTIVE RIGHT OR GRANT ANY RIGHT WHERE NONE EXIST OTHERWISE AND THE ONLY GRIEVANCE AVAILABLE TO AN EMPLOYEE UNDER SECT. 205.14 IS (1) WHETHER THE JOB IN QUESTION IS ONE OF THE 3 MENTIONED IN SECT. 205.14, (2) WHETHER THE COMPANY CONSIDERED THE BID SUBMITTED, (3) WHETHER APPOINTMENT WAS MADE ON BASIS OF "ABILITY AND PERSONAL QUALIFICATIONS."

ANALYSIS:

THE COMPANY HAS NOT FULFILLED ITS OBLIGATION IN "CONSIDERING" THE BID OF A QUALIFIED BIDDER ENTITLED TO PREFERENCE UNDER SECT. 205.1 AND SECT. 205.7 UNLESS ITS "CONSIDERATION" OF HIS BID PRODUCES AN OFFER OF APPOINTMENT. AN APPOINTMENT MAY NOT BE GIVEN TO A JUNIOR BIDDER WITH "ABILITY AND PERSONAL QUALIFICATIONS" NO BETTER THEN OR INFERIOR TO THOSE OF THE SENIOR BIDDER.

- THE SUBSTANTIAL PROVISIONS IN THE AGREEMENT ARE SUSCEPTIBLE TO AN INTERPRETATION UNDER THE GRIEVANCE PROCEDURE.

CONCLUSIONS:

- SECT. 205.14, WITH RESPECT TO THE JOB VACANCIES SUBJECT TO ITS PROVISIONS, DOES NOT CONFER UPON THE COMPANY AN UNLIMITED DISCRETION IN MAKING APPOINTMENTS, AS DOES SECT. 205.13 WHEN THE PROVISIONS OF SAID SECTION ARE MET, NEITHER DOES THE CRITERIA ESTABLISHED IN SECTION 205.14 REPRESENT A MERE ADDENDUM TO SECTION 205.11.

- SEC. 205.15 IS SPECIFICALLY ADDRESSED TO APPOINTMENTS PERMITTED ONLY UNDER SECT. 205.14 (NOTE: THIS MEANS THE COMPANY IS NOT OBLIGATED TO NOTIFY UNION OF A BY-PASS WHEN SECT. 205.11 HAS BEEN INVOKED. WHETHER COMPANY WILL CEASE THEIR PAST PRACTICE IN THIS RESPECT IS UNCERTAIN.)

- SECT. 205.14 DOES LIMIT THE SENIORITY RIGHTS OF BIDDERS ON A PUBLIC CONTACT JOB, NOT ONLY BY AUTHORIZING THE COMPANY TO REJECT THE BID OF AN EMPLOYEE LACKING THE NECESSARY ABILITY AND PERSONAL QUALIFICATIONS, BUT AUTHORIZING IT TO ALSO APPOINT, FROM AMONG THOSE SO QUALIFIED, AN EMPLOYEE WHO DEMONSTRABLY POSSESSES "ABILITY AND PERSONAL QUALIFICATIONS" SUPERIOR TO THOSE OF ANY BIDDER WHO MAY BE SENIOR TO HIM.

- WHILE THE ULTIMATE BURDEN OF PROVING A VIOLATION OF THE AGREEMENT RESTED WITH THE UNION THE BURDEN OF GOING FORWARD WITH SUFFICIENT EVIDENCE TO SHOW THAT THE APPOINTMENT WAS MADE ON THE BASIS OF ABILITY AND PERSONAL QUALIFICATIONS FELL ON THE COMPANY.

- UPON THE LIMITED PROOF MADE THE BOARD IS UNABLE TO FIND THAT THE AGGRIEVED LACKED THE REQUISITE ABILITY AND PERSONAL QUALIFICATIONS FOR APPOINTMENT OR THAT THE EMPLOYEE AWARDED THE JOB POSSESSED THE QUALIFICATIONS IN THESE RESPECTS SUPERIOR TO THOSE OF THE AGGRIEVED.

AWARD:

WE CONCLUDE THAT THE COMPANY DID VIOLATE THE AGREEMENT OF SEPTEMBER 1, 1952 WHEN IT INVOKED SECT. 205.14 TO REJECT THE BID OF . Y FOR APPOINTMENT AS APPRENTICE SERVICEMAN AND THAT . Y / SHOULD HAVE BEEN APPOINTED TO THIS JOB. THAT IS OUR AWARD.

WE CONCUR	WE DISSENT
/s/ ARTHUR C. MILLER, CHAIRMAN	/s/ R. J. TILSON
/s/ ELMER B. BUSHBY	/s/ T. U. ADAMS
/s/ JOHN M. LAPPIN, JR.	

NOTE: THIS REPRESENTS MERELY A DIGEST OF THE AWARD. FOR FULL CONTEXT OF AWARD SEE ARBITRATION CASE #6 IN OFFICE FILE.

PACIFIC GAS AND ELECTRIC COMPANY

AND

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS
LOCAL NO. 1245

S.F. GRIEVANCE NO. 48
ARBITRATION CASE NO. 6

AWARD DATED JANUARY 23, 1956

AWARD

(On Arbitration Case No. 6)

PACIFIC GAS AND ELECTRIC COMPANY and LOCAL UNION NO. 1245 of INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, A.F.L., are in dispute over the following question arising under their current collective bargaining Agreement:

> "Did the Company violate the agreement of September 1, 1952 when it invoked Section 205.14 thereof to reject the bid of Y. for appointment as Apprentice Serviceman?"

The dispute was regularly submitted pursuant to a written Submission Agreement to a five-man Board of Arbitration duly constituted under Section 102.12 of the Collective Agreement. The parties were heard at the San Francisco offices of the Company August 23, 1955. Evidence both oral and documentary was received and the dispute argued orally. Thereafter both parties filed written briefs on September 26, 1955, whereupon the dispute was deemed finally submitted.

Upon consideration and after consultation among us we find and award as follows:

Contract Provisions Relied Upon

The question submitted calls for the interpretation and application of Section 205.14 of the current Agreement reading:

> "205.14 In making appointments to vacancies in jobs involving personal contact by the employee with the public, or technical jobs, or jobs in which the employee must exercise supervisory duties Company shall consider the bids of employees submitted as herein provided, but Company may nevertheless make appointments to such vacancies on the basis of ability and personal qualifications."

This section, however, is but one of eighteen comprising Title 205 of the Agreement, headed "Job Bidding and Promotion", which together purport to deal comprehensively and in detail with these subjects. Certain of the sections quoted below, viz., Sections 205.1, 205.11, 205.14, 205.15 and 205.16, came into the Agreement simultaneously in 1944 as a product of negotiations over a War Labor Board Order and have survived in the current Agreement without material change from the original text. Since these and other sections of the Title were cited in argument a brief resume of its provisions is relevant to the issues presented.

The general principles of the Title are stated in its first two sections. They read:

> "205.1 The following formula shall govern the interpretation of the provisions of this Title:
>
> The factors of length of service in a department, as well as in a Division and in the System, shall be given consideration in cases of promotion, transfer to a vacancy, demotion, or lay-off. When employees within a classification are qualified by knowledge, skill and efficiency, and are physically able to perform the job, the employee with the greater length of service shall receive preference in promotion or transfer to a vacancy, and protection against demotion or lay-off on the following basis: Division lines shall not constitute an arbitrary measure or limitation in the consideration of seniority, but whenever there shall be an opening in a given Division consideration will be given to the seniority of the employees within the Division before transfers to vacancies or promotions are made into such Divisions, to the end that the employees shall not be unreasonably impeded in their normal advancement within the Division. Any alleged arbitrary or discriminatory disregard of this policy shall be subject to review under the grievance procedure.

"205.2 In cases of promotion, transfer, demotion, and lay-off Company shall give consideration to an employee's Company seniority, Division or Department seniority, and classification seniority as set forth in this Title and Title 206, but no consideration shall be given under such Titles to a probationary employee."

Other sections provide that on the first day of each month the Company will post throughout its system a list of all vacancies in jobs covered by the Agreement "excluding temporary vacancies and vacancies in temporary jobs and in jobs in beginners classifications" (Section 205.4), that any employee may submit by mail a bid on any job posted as vacant within 10 days from the date of posting "(Section 205.6) and that the bids so submitted shall be given "preferential consideration" in a prescribed sequence. There are also provisions denying "preferential consideration" under specified circumstances to bidders who are in the same Division or Department and in the same classification in which the vacancy occurs (Section 205.8), for crediting as seniority in that classification all seniority acquired by a bidder in each classification which is higher in the "normal line of progression" (Section 205.9), for "preferential consideration" of veterans who left the Company's employ to enter the Armed Forces under an Act of Congress and were reemployed by it under such Act (Section 205.10) and provisions expressly authorizing the Company, in the event it does not receive a bid from a qualified bidder in response to posting a job vacancy, "in its discretion [to] make a final appointment to such job". (Section 205.13).

A general limitation upon the seniority preferences of the bidders for all classes of jobs in terms of their qualifications is contained in Section 205.11 reading:

> "205.11 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."

Two other sections were cited as casting light upon the intent with which Section 205.14 was agreed to. They read as follows:

> "205.15 When an employee is appointed to a vacancy on the basis of ability and personal qualifications in preference to an employee with greater classification seniority as provided in subdivisions (a), (b), and (c) of Section 205.7 hereof or in preference to an employee with greater Company seniority as provided in subdivisions (d), (e) and (f) of Section 205.7 hereof Company shall notify Union of its decision at least five (5) days prior to completion of the transfer or promotion."

> "205.16 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."

The Facts

The grievant, [redacted], is a 34-year old employee, who, after graduating from high school in 1941 and serving for some five years with the Army, entered the employ of the Company on September 22, 1947. His service with the Company since that date has been unbroken except for a two-year interval during which he was on military leave, having been recalled to duty by the Army.

Y worked successively as a Casual Laborer, Temporary Watchman, Temporary Helper, Temporary Gas Maker and Helper before going on military leave November 8, 1950. Upon his return November 30, 1952 he resumed employment with the Company as a Helper, but was shortly thereafter assigned to work as a Temporary Gas Maker at the Potrero plant. He continued in this position until March 29, 1953, when, through the bidding procedures of Title 205, he was promoted to Apprentice Fitter. In that job he was assigned to work under the supervision of a Fitter as part of a two-man crew doing emergency leak work, an assignment which has brought him into direct contact with the Company's customers. He was still performing this work on August 23, 1955, the date of the hearing.

On May 1, 1954 the Company posted notice of two vacancies in the classification of Apprentice Serviceman in the Gas Department of the San Francisco Division. Approximately 24 bids were received, including bids by Y for each of the vacancies. A Job Awards Committee for the San Francisco Division, composed of the Superintendents of the Gas and Electrical Departments and the Office Manager, reviewed the bids, making note, as it did so, of the seniority ranking of each bidder. Admittedly, Y ranked highest among them in this respect; but the Committee awarded the jobs to other bidders, in the case of one job, to an employee named M . Who received the other job is not shown by the proof.

On May 24, 1954 the Company gave written notice to the Union that 's bid for the job awarded M had been by-passed, and this grievance followed.

The Company produced in evidence the record of the grievance at the prior steps of the procedure, including the separate written reports and opinions of its own and the Union's members of the committees which investigated and considered the matter. From this record it appears that at the prior steps the grievance was treated by the representatives of both parties as one concerning the qualifications of Y as a bidder for the Apprentice Serviceman's job, the Company's position being that he did not possess the necessary qualifications since his disciplinary record showed that he had incurred reprimands for being late to work, for leaving the job early before his relief appeared and for making derogatory remarks in the presence of customers.

However, at the arbitration step the Company's position was that consideration of Y 's qualifications forms no part of the submission to the Board and is beyond the scope of its authority under the proper interpretation of Section 205.14 of the Agreement. Consistent with this view it elected not to produce evidence regarding Y s deficiencies presumably available to it. Thus, none of Y 's supervisors at the time of his alleged reprimands nor the written reports they admittedly made contemporaneously nor any complaints received from customers regarding his conduct were brought before us.

The upshot is that the only evidence of the alleged reprimands offered by the Company or elicited from its witnesses consists of the statements made by its member of the joint committee which investigated the grievance long after the events in question occurred. This evidence, which is all hearsay, in many instances several times removed, for obvious reasons has less probative force than testimony given subject to cross-examination by a witness having first-hand knowledge of the facts.

Y[illegible] appeared as such a witness and gave testimony in which he frankly admitted some of the alleged infractions but denied the occurrence of others. In this state of the record we are constrained to accept as substantially true Y[illegible]'s version of his disciplinary record and find that the only infractions he committed on the job throughout his six years of service with the Company which are entitled to consideration in deciding this case are these: That on March 20, 1953, when he was assigned as a Gas Maker at the Potrero plant he left the generators unattended for 15 minutes while he moved his car from one parking place to another; and (2) That on two subsequent shifts (March 21, 22 or 23, 1953) when so assigned, he left the plant some half hour early without awaiting the arrival of his relief, in one instance with knowledge that the latter would not report until the end of the shift. Y[illegible] admitted that his supervisor verbally reprimanded him for tardiness on March 20, 1953 and for leaving his work before the scheduled quitting time on the two other shifts;

but he denied that he was ever reprimanded for making derogatory remarks in the presence of a customer. It is undisputed that there is no record of his having been disciplined for any other cause.

No evidence bearing on the ability and personal qualifications of M for the job of Apprentice Serviceman was put before us other than his Employment Record card produced by the Company. It shows an employment background very similar to that of Y 's. Entering the Company's employ about a year later than Y on November 10, 1948, M worked successively as a Laborer, Fireman and Helper until going on military leave for the period January 15, 1951 until January 30, 1953. On the latter date he resumed employment with the Company as a Helper, working in that position until June 29, 1953 when he was promoted to Apprentice Fitter. A year later, on June 29, 1954, he was appointed to the Apprentice Serviceman's job as a result of the actions of the Company here drawn into question.

It is undisputed that although some assignments as Apprentice Fitter, including the one held by Y , require repeated contacts by the employee with the Company's customers, nevertheless under the Agreement this job, unlike that of Apprentice Serviceman, is not classed as one "involving personal contact by the employee with the public" within the purview of Section 205.14. However, it is also undisputed that a "normal line of progression" under Title 205 of the Agreement is from Apprentice

Fitter to Apprentice Serviceman.

The job description for Apprentice Serviceman mutually agreed to by the Company and the Union which was in effect until July 1, 1954 reads as follows:

> "Assist Servicemen and Mechanics in performing all the duties of these two classifications; and in addition, when proficient, performs by himself domestic meter changes, locks and removals, incidental chart changes, etc. The ratio of Apprentice Servicemen to Servicemen shall not exceed one to ten on a Division basis except where there are less than ten Servicemen in which case there shall not be more than one Apprentice."

The Interpretation of Section 205.14.

Parties' Contentions

While the parties disagree over the implications of the proof as to Y 's ability and personal qualifications to be appointed Apprentice Serviceman their chief differences center on the nature and scope of the Company's obligations under Section 205.14. We accordingly turn first to this general question of interpretation.

The Union's contention is that with respect to the three categories of jobs specified in Section 205.14, viz., public contact, supervisory and technical jobs, as well as all of the other jobs to which Title 205 is applicable, the Company is contractually obligated to post vacancies and fill them on the basis of seniority, to give timely, written notification to the Union when the bid of a senior employee is by-passed and to follow the grievance procedure when invoked by the senior employee

as provided in the Title. In its view the only difference between these three categories of jobs and the others insofar as Title 205 is concerned is to be found in the criteria which the Company may apply in rejecting the bid of a senior employee. Thus, according to the Union's argument, Section 205.11 establishes the criteria of "knowledge, skill, efficiency, adaptability and physical ability" as general qualifications which must be met by a bidder for any job; and the only effect of Section 205.14 is that with respect to the three classes of jobs there listed the additional criteria of "ability and personal qualifications" are proper grounds for rejecting the bid of a senior employee.

The Company, on the other hand, reads Section 205.14 as having two parts. It concedes that the first part of the section obligates it to post notices of vacancies and "consider" bids submitted for any of the three categories of jobs there specified. However, it regards this obligation as fully discharged if its representatives post the job and review the bids received. The second part of the section, the Company contends, provides an outright exception for the three categories of jobs from the procedure established in Title 205 for making seniority the determining factor in appointments. It argues that this part of the section was not intended merely to authorize the Company to reject unqualified senior bidders, but rather to permit it to select the employee it deems best suited for a public contact job

by ability and personal qualifications and that therefore the Company is clothed with unlimited discretion in making an appointment to such a job. The Company denies that the grievance procedure enlarges on any substantive right or grants such rights where none exist and contends that the only grievances available to an employee under Section 205.14 are on the questions whether or not the job comes within one of the three named classifications, whether or not the Company complied with the requirement to consider the bids for appointment to such a job, and whether or not the Company made the appointment on the basis of ability and personal qualifications. In its view Y has not brought a grievance on any of these questions and there is none other available to him.

Analysis and Conclusions

Unlike provisions regarding the same subject in a good many collective agreements, the general formula adopted in Title 205 does not qualify seniority rights in promotions by resort to comparisons of the relative merit and ability of the competing employees. Apart from stated exceptions, the Title provides that the senior bidder, according to a prescribed seniority sequence, shall be given preferential consideration unless he fails to meet the requirements for the job specified in Section 205.11. Thus, under the general seniority and job bidding policy of the Title the senior bidder has a prima facie claim to a job vacancy which the Company may reject only if it can show by factual evidence that he is not qualified for it. A prior award in a case

involving the propriety of the Company's action in rejecting the bid of a senior employee by invoking Section 205.11 arrived at these conclusions and we find no reason to disturb them.

These observations regarding the general policy and procedure of Title 205 do not, however, reach the question submitted in this case. Here the senior employee's bid was not rejected under Section 205.11, but by invoking the provisions of Section 205.14, and the dispute raises questions regarding the meaning and effect of the latter section in the context of the Title as a whole which have never been considered in any case previously arbitrated.

On its face Section 205.14 evidences a general intent to modify the Company's contractual obligations under the Title in filling vacancies in the three types of jobs there mentioned, viz., public contact, supervisory and technical jobs. According to the Company's Director of Industrial Relations these three classes of jobs were chosen for inclusion in the Section because the Company desired to retain responsibility for selecting employees to fill vacancies in them, a purpose which could not be accomplished by the application of strict seniority rules and one which required that appointments be made on the basis of the Company's judgment as to the individual abilities and personal qualifications of those desiring them.

We do not doubt that the attainment of these objectives motivated the Company when Section 205.14 was inserted in the

Title, but the language used, when viewed in the context of the Title as a whole, shows something less than an unqualified mutual acceptance of them.

The section (205.1) does not provide for an outright exception to or exclusion from the general seniority and job bidding policies of the Title in direct, simple terms, as does Section 205.2, in the case of probationary employees, and Section 205.4, in the cases of temporary vacancies and vacancies in temporary jobs and jobs in beginners classifications. Nor does Section 205.14, with respect to the job vacancies subject to its provisions, purport to confer upon the Company an unlimited discretion in making appointments, as does Section 205.13 in the contingencies specified in the latter section.

No such forthright statement of the parties' mutual agreement wholly to relieve the Company from the seniority or job bidding policies of the Title is set forth in Section 205.14. Rather, appointments to vacancies in the three classes of jobs there mentioned are first made the subject of an affirmative obligation that the Company "shall consider the bids of employees submitted as herein provided". True, this obligation is immediately qualified by an exception that the "Company may nevertheless make appointments to such vacancies", limited, however, by the requirement that the appointments be made "on the basis of ability and personal qualifications". The Company's contentions minimize the obligation and treat the exception as if no limitation upon it had

been stated. Conversely, the Union's arguments emphasize the scope of the obligation and relegate the limited exception to the role of a mere addendum to the qualifications stated in Section 205.11.

Considering first the nature and scope of the obligation we note that elsewhere in the Title the verb "consider" and its noun "consideration" clearly import something more than hypothetical deliberations over the bids submitted for job vacancies. In fact, the Company cannot be said to have fulfilled its obligation to a qualified bidder entitled to preference under the general formula stated in Section 205.1 and the specific sequence set forth in Section 205.7 unless its consideration of his bid produces an offer of appointment. Section 205.14 enjoins the Company to consider bids submitted for vacancies in the jobs there referred to "as herein provided", an obvious reference to the other provisions of the Title which would be deprived of meaning or effect were the word "consider" to be taken as having some different connotation in this section than it plainly has elsewhere in the Title. That being so, it is apparent that when the Job Awards Committee took the steps of ascertaining the seniority of each bidder for the Apprentice Serviceman's job and then examining the qualifications of the bidders in the order of their seniority preferences as established by the other provisions of the Title it did not act voluntarily in the exercise of an unlimited discretion, as the Company has suggested, but rather according to a definite procedure

made obligatory upon the Company by express language in Section 205.14 and other provisions of the Title.

Whether, in taking the further step of rejecting Y[redacted]'s bid to enable it to appoint the next most senior bidder, the Job Awards Committee also complied with the Company's obligations under the Agreement is another matter and the crux of the question submitted for decision. The Company urges that this question on its merits is beyond our authority to decide since Section 205.14 was intended to reserve to it unlimited discretion in making such appointments. We have already noted that while apt language evidencing an intent to recognize such a discretion is present in other provisions of the Title it is conspicuously absent in this one, which, by way of contrast expressly limits the Company's appointments to appointments made "on the basis of ability and personal qualifications".

Again, this limited exception to the general seniority and job bidding policies of Title 205 is one of the "terms of this Agreement" the "interpretation and application" of which, absent positive indication to the contrary, and there is none, is a proper subject for review by the grievance procedure under the general provisions regarding that procedure set forth in Title 102, notably Section 102.6, even apart from any special provisions more affirmatively revealing an intent that this should be so. But such special provisions are made in Title 205. These are Section 205.15 which requires notice to the Union 5 days

prior to completing a promotion or transfer in which the Company has disregarded seniority by selecting a junior bidder upon the basis of "ability and personal qualifications" and Section 205.16 which specifically accords any employee aggrieved by the Company's application and interpretation of the seniority and job bidding policies of Title 205 the right to invoke the grievance procedure.

We would agree that, generally speaking, grievance procedures do no more than provide a remedy for the vindication of contractual rights or obligations substantively established in other provisions of a collective agreement and that their presence sheds little light upon the intent of the parties to create or withhold such rights and obligations where the language of the substantive provisions is doubtful. But it is hardly to be inferred that the parties would take pains to write special remedies into an agreement providing for the enforcement of particular rights or obligations which they did not intend to exist under its substantive provisions and where, as here, the substantive provisions are plainly susceptible of an interpretation recognizing the rights and obligations which the special remedial provisions assume to exist, the presence of the latter allays all doubt that such an interpretation of the former is to be preferred. We find it unlikely that Section 205.15, which on its face is specifically addressed to appointments permitted only under Section 205.14, or Section 205.16 which notes no exception in the case of such appointments, would have been written

into Title 205 in the form in which they appear had the parties intended such appointments to be made in the exercise of an exclusive management function. Rather, it seems evident that these provisions were inserted in the Title for the very purpose of providing procedures by which the Union and an aggrieved employee might test whether any appointment of the Company invoking the limited exception stated in Section 205.14 was in fact made within the terms of the limitation.

At one point in its brief (p. 12) the Company appears to concur in this conclusion. There it concedes that an employee aggrieved over the application of Section 205.14 may raise the question, inter alia, "whether or not the Company made the appointment on the basis of ability and personal qualifications", a concession quite inconsistent with the view that the Company's discretion in making appointments under Section 205.14 is unlimited. Its further statement in the same connection that Y. has not brought a grievance on this question involves a misconception regarding the scope of the submission.

Quite obviously an appointment actually made upon the basis of considerations irrelevant to ability and personal qualifications or one which in fact did not give preference to a bidder possessing superior qualifications in these respects could not be said to have been made "on the basis of ability and personal qualifications" within the limits of the exception stated in Section 205.14. This would be specifically true, for

example, if an appointment preferred a junior bidder with ability and personal qualifications no better than or inferior to those of the senior bidder for a public contact job. And an appointment thus falling outside the limits of the exception could afford the Company no justification for a failure to observe the affirmative obligation imposed upon it by the section that it consider the bidders according to the sequence of their seniority as provided in the other provisions of the Title. It follows that under Section 205.14 the rejection of Y 's bid for the Apprentice Serviceman's job was proper only if the Company in fact appointed the other bidder to it on the basis of ability and personal qualifications--the only basis for appointment other than seniority sanctioned under that section--and that therefore a determination of this question of fact is squarely within the scope of the submission in this case.

It does not necessarily follow, however, that the Union is correct in contending that Section 205.14 merely adds "ability and personal qualifications" to the criteria stated in Section 205.11 as grounds upon which the Company may reject an unqualified bidder. The contention ignores the difference that Section 205.11, consistent with the general seniority and job bidding policies of the Title, authorizes the Company to "reject" the bid of an employee who does not possess the qualifications there specified, whereas Section 205.14 authorizes it to "make appointments" on the basis of certain criteria, notwithstanding the seniority status of the bidders. Our function is

to read the Agreement as it was written and give realistic effect to the choices of language made by the parties themselves. We may not lightly assume that this significant difference between the two sections is the result of faulty draftsmanship rather than an integral part of a composition of conflicting viewpoints. Moreover, this difference in terminology is reiterated in Section 205.15, the only other section of the Title in which the phrase "ability and personal qualifications" appears. We therefore conclude that Section 205.14 limits the seniority rights of bidders for a public contact job, not only by authorizing the Company to reject the bid of an employee lacking the necessary ability and personal qualifications, but by authorizing it also to appoint, from among those so qualified, an employee who demonstrably possesses ability and personal qualifications superior to those of any bidder who may be senior to him.

There is some evidence that over the past the Union may have acquiesced in the interpretation of Section 205.14 here urged by the Company, but it is equivocal. Thus, it appears that under the grievance procedure in effect until 1952 six cases involving grievances arising because of appointments made pursuant to Section 205.14 were carried to the penultimate step of the procedure which then called for decision by the Company's Personnel Manager. There is testimony that in each case the seniority of the grievant had been considered but another employee was appointed "on the basis of ability and personal qualifications",

that the Personnel Manager rendered written decisions in each case adverse to the grievant and that none of these decisions were appealed by the Union to the final step of the procedure providing for arbitration. Since none of the decisions of the Personnel Manager were put in evidence there is no convincing proof of the actual grounds upon which they were made and whether the Union's failure to appeal the cases to the arbitration step is accountable by its acquiescence in the Company's interpretation of Section 205.14, by its acquiescence in the propriety of the Personnel Manager's decision on the merits of these particular cases or by a general allergy on its part to the arbitration of any grievance is uncertain and speculative.

There is also testimony by a Company witness that in the 1952 contract renewal negotiations the Union, mindful of the Company's interpretation of Section 205.14, made a proposal to delete the section in its entirety but that the proposal was rejected by the Company and the Agreement renewed with the section included. On the other hand, a Union witness testified that according to his recollection of these negotiations, the proposal to delete Section 205.14 was coupled with proposals to incorporate its provisions in Section 205.11 and to set up a procedure for performance standards and a joint training program. Neither party produced the text of the proposals made and considering the vagaries of human recollection regarding verbal discussions so long past we are unable to conclude that

this evidence provides any clear proof that the Union at that time renewed the Agreement committed to an understanding that Section 205.14, despite the plain implications of the language embodied in it, should be construed as the Company has contended it should.

Section 205.14 does not itself specify the particular abilities and personal qualifications requisite of an employee in a public contact job. Considering the duties outlined in the job description there is no reason to question, and the Union has not questioned, the Company's assertion that they include such characteristics as tact, patience, politeness, conscientiousness and, above all, dependability. Competent evidence to impugn Y 's ability, tact, patience and politeness is wholly lacking. However, the Company contends that his admissions of prior infractions, summarized above, alone provide sufficient reason to believe that he did not have the required trustworthiness, judgment and reliability, since they show that on three occasions in March 1953 while assigned as a Gas Maker at the Potrero plant he left highly hazardous equipment in operation unattended. That this was irresponsible conduct on his part Y now readily admits. But its gravity as bearing upon his personal qualifications must be judged in the light of the reactions of the Company's supervisors at the time. Somewhat surprisingly to us they did not view these infractions as warranting any

discipline more severe than verbal reprimands; nor did they regard them as evidence of inefficiency and unreliability sufficient to provoke reconsideration of his qualifications for the Apprentice Fitter job to which he was then about to be promoted.

Apart from these infractions there is no convincing proof of undependable conduct on Y 's part during his more than six years of service with the Company. In addition, there is his affirmative testimony that for well over a year prior to the hearing he performed a job which, though not classified as involving personal contact with the public within Section 205.14, in reality involved frequent contacts of that nature and that he did so without any reprimand or material criticism communicated to him by his supervisors. Thus it appears that in the context of his entire period of service Y 's lapses in 1953 stand out in the present record as isolated exceptions in a long continued course of responsible conduct rather than as events symptomatic of an innate incapacity to practice the degree of self-discipline required for satisfactory performance of the Apprentice Serviceman's job. Moreover, in the absence of any evidence on the subject one way or the other, for all we know the past record of the successful bidder for the job may have been marred by equal or even greater indications of undependability.

We have not overlooked the fact that an Apprentice Serviceman, unlike an Apprentice Fitter, upon attaining proficiency may

be required to perform the work himself without immediate supervision. Whether any employee who has never before been called upon to do that kind of work without such supervision is capable of discharging these added responsibilities is necessarily a matter of sound prophecy in which intangible factors difficult of objective proof may legitimately influence a decision. The views of supervisors familiar with an employee's work habits and personality traits if shown to have a genuine foundation in observed facts merit considerable weight and would have received it here had testimony of that kind been produced. But the Agreement contemplates that such decisions will have some substantial factual basis and clearly requires more than speculation predicated upon two or three isolated instances of misconduct virtually condoned at the time as a ground for denying a senior bidder opportunity for promotion in a normal line for his progression.

While the ultimate burden of proving a violation of the Agreement rested with the Union the burden of going forward with sufficient evidence to show prima facie that the appointment was made in conformity with the exception stated in Section 205.14 fell properly on the Company as the party which invoked the provision and alone was fully cognizant of the basis for the action taken. Upon the limited proof made we are unable to find either that Y lacked the requisite ability and personal qualifications for appointment to the job of Apprentice Serviceman

or that the employee awarded the job possessed qualifications in these respects superior to those of Y .

AWARD

Accordingly, we conclude that the Company did violate the agreement of September 1, 1952 when it invoked Section 205.14 to reject the bid of Y for appointment as Apprentice Serviceman and that Y should have been appointed to this job. That is our award.

We Concur

Arthur C Miller

John M Lapin Jr.

Elmer B Burkhalter

We Dissent

Thomas W. Adams

R J Wilson

Dated: San Francisco, California
January 23, 1956