IN ARBITRATION PROCEEDINGS PURSUANT TO TITLE 9

OF CURRENT COLLECTIVE BARGAINING AGREEMENT

ENTERED INTO BY AND BETWEEN THE PARTIES

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In the Matter of the Arbitration between INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1245, affiliated with American Federation of Labor-Congress of Industrial Organizations, Complainant, and PACIFIC GAS AND ELECTRIC COMPANY, Respondent. Involving grievance of Joan Bynum	ARBITRATION CASE NO. 16

AWARD AND DECISION

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Arbitration Board:

ROBERT LITTLER
Chairman

L. L. MITCHELL
NORMAN AMUNDSON
Members Designated by the Union

V. J. THOMPSON
W. L. MURRAY
Members Designated by the Company

San Francisco, California
July 12, 1961

AWARD

This Award is made pursuant to submission and arbitration by virtue of the terms of Sections 9.4 and 9.11 of the collective bargaining agreement between the parties. A copy of this Agreement was by stipulation admitted in the Record of these proceedings as Joint Exhibit No. 1.

The Employer party to these proceedings (sometimes called the "Company") is Pacific Gas and Electric Company. The Union party to these proceedings is Local Union No. 1245 of International Brotherhood of Electrical Workers, Affiliated with American Federation of Labor-Congress of Industrial Organizations.

The Submission Agreement of February 15, 1961 under which this Arbitration takes place provides, in part, as follows:

> "1. Company and Union, pursuant to the provisions of Section 9.4 of said Agreement, have selected Robert Littler, Esq., as a fifth member of an Arbitration Board. He shall be Chairman of the Board as provided in such Section. Mr. Littler has been selected to arbitrate only the issue in the above referred to grievance.
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> "2. The sole and specific issue which is involved in the grievance and which is to be submitted to arbitration and on which the Chairman shall render his decision is stated on the attachment hereto. Review Committee Case No. 228 will constitute and will be referred to as Arbitration Case No. 16.
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> "3. Company and Union members of the Arbitration Board will advise and consult with the

Chairman and will set with him as a Board in hearing the grievance. Company and Union may at any time make substitutions in the representatives each originally named to serve on the Board. Company and Union may waive the attendance of either or both of their respective members at meetings of the Board and at the hearing to be held before the Board.

"4. The Chairman shall have the right and obligation to render a separately written decision in Arbitration Case No. 16 which will be final and binding on the Company and the Union and neither party will seek an appeal therefrom except, however, that if the Chairman's decision goes beyond the scope of the issue submitted to arbitration, or is not responsive to such issue, or if it in any way changes, or adds to, or reforms the Agreement of July 1, 1953, as amended, it shall have no force or effect and shall not be binding on either party."

The sole and specific issue mentioned above, as set forth in the attachment referred to, is specified as follows:

"Did the Company have adequate reason to bypass Joan Bynum in its selection of an employee to fill a Clerk A vacancy in the Richmond Office."

In the interest of completeness, the copy of the Submission Agreement dated February 15, 1961 and the attachments thereto, which were submitted to the Chairman before the commencement of the hearings in these proceedings, will now be incorporated in the Record and marked Chairman's Exhibit No. 1; and it is so ordered.

The duly appointed Union members of the Arbitration Board are L. L. Mitchell and Norman Amundson. The initial duly appointed Company members of the Arbitration Board were R. J. Tilson and Ira Chinn. Pursuant to the Submission

Agreement and on June 8, 1961 the Company duly appointed V. J. Thompson to replace R. J. Tilson and W. L. Murray to replace Ira Chinn as Company members of the Arbitration Board.

All conditions precedent to submission and arbitration have been performed or waived by the parties. Hearings were held. Members of the Board sat with the Chairman in hearing the grievance. Oral and documentary evidence was introduced. Briefs were filed. The issue was thereupon submitted. All evidence and arguments submitted have been considered. Company and Union members of the Arbitration Board did consult with the Chairman.

Accordingly, this Arbitration Board makes the following

AWARD:

The Company did have adequate reason to by-pass Joan Bynum in its selection of an employee to fill a Clerk A vacancy in the Richmond Office.

Executed and delivered this 12th day of Dec., 1961.

As Chairman

We dissent:

L. L. Mitchell

Norman Saunders

We concur:

W. J. Thompson

R. J. Tilson

DECISION OF THE CHAIRMAN

This Decision and Opinion is filed separately from the accompanying Award to comply with the request and instructions of the Parties in the Submission Agreement described in the Award.

Sometime during the first six months of 1959 a vacancy occurred in a job in the Richmond Office of the Company which is described as "Clerk A." The job duties of this position are important. This Clerk supervises two field collectors, two regular clerks, and two part-time clerks. He determines whether a bond or other security shall be required of new customers of the Company. He decides whether service shall be shut off as to a customer who is in default on his bill, or whether an extension of time to pay shall be granted and, if so, under what terms. He adjusts and makes decisions with respect to complaints of customers that their bills are too high because of some error in the meter, in reading the meter, or from some other cause. There are other duties. These are the ones with which we are primarily concerned.

In the exercise of these functions he is controlled by policy rules of the Company. Even so, these rules allow him considerable latitude in making decisions in individual cases. The rules are not before us.

Some of these duties are performed in the Richmond

office; some are performed "in the field." In general, this Clerk A is in charge of credit matters. It is not an executive job; but it is more than the usual clerk's job; and it is a responsible one, particularly with respect to credit practices, as well as customer and public relations of the Company. While there is nothing in the Record on the subject, I can easily take judicial notice of the fact that the Richmond office serves a large industrial and residential area.

The Company presented evidence to the effect that because of the sensitive position of this Clerk A in dealing with customers on occasions of tension, and even of antagonism, and because a large segment of the customers in this area are more than somewhat raucous--I use the word in all delicacy--Clerk A is regularly subjected to abuse from many of the customers. The Union does not contend otherwise. This fact became part of an issue. I shall discuss it later.

The ground rules under which promotions and transfers are to be made by the Company are set forth in Title 18 of the collective bargaining Agreement. The general principles are set forth in Section 18.1, which reads, in relevant part, as follows:

> "Under this Title a regular employee will be considered for promotion or transfer on the basis of his Company seniority, classification seniority, and qualifications . . . The parties recognize that <u>experience and training in the duties of a job</u> which is vacant are important elements to be considered in determining an employee's qualifications therefor . . ."

The underlineation is mine. I emphasize these words here because their interpretation became a factor in this case.

Section 18.8 describes in detail how Company and classification seniority shall be applied in different factual situations. The details need not concern us except in one respect. To this I shall return later.

Section 18.13 of the Contract provides:

> "Notwithstanding anything contained in this Title, Company need not give consideration to any employee who is not qualified by experience, knowledge, skill, efficiency, adaptability and physical ability to perform the duties of a job which is vacant."

Section 18.14 of the Contract provides:

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

It is clear from the Record that all the decisions in this matter were made for the Company by the District Commercial Manager in Richmond. This is undisputed. He personally made the investigations leading up to the decisions. The decisions were his and his alone.

As I said at the outset, this Clerk A job in Richmond became vacant in the early part of 1959. The previous

occupant of the job had become ill. It is neither clear nor important as to the exact date it was considered that the former occupant would not return and that the job was vacant. The District Commercial Manager testified that he discussed the appointment to this position with five employees who appeared to be in line of promotion to it. All refused the appointment. One declined because he did not think he had sufficient experience for the job. One declined because he did not want to face the frustrations of the job. So the District Commercial Manager testified. At least one previous occupant of the position had asked to be relieved because of the frustrations of the job.

Then the District Commercial Manager considered Mr. Clarence Mullikin. He finally assigned Mr. Mullikin to the job temporarily on or about June 28, 1959. He appointed Mr. Mullikin to the job permanently, effective on or about August 21, 1959. In the course of making this decision--although the exact dates were a little unclear in the recollections of the witnesses--he investigated Mr. Mullikin. The District Commercial Manager had known Mr. Mullikin personally and knew something of his work. He studied Mr. Mullikin's personnel file. He questioned Mr. Mullikin's superior. He interviewed Mr. Mullikin to the extent of about an hour.

In compliance with the provisions of the collective bargaining Agreement, the Company posted notice of the appointment of Mr. Mullikin on August 17, 1959. Thus, the opening

and the appointment came to the attention of Mrs. Joan Bynum, who is the grievant in this case. She called the Personnel Department of the Company to inquire why she had not been considered.

Now, the Contract provides that such an appointment as this does not become effective until five days after such posting. Meanwhile, any employee "may request the Company to reconsider its selection" (Section 18.12). Mrs. Bynum made timely request.

Section 18.7 of the Agreement provides for automatic consideration for appointment within defined lines of progression up to the job vacancy which is within "the same promotion and transfer unit and does not involve a change in headquarters." Mr. Mullikin was automatically considered. Mrs. Bynum was in the same unit but not in the same headquarters. Under Section 18.4 of the Contract, for an employee to be considered who works at another headquarters, such employee must have on file a "transfer application."

As a result of Mrs. Bynum's phone call to the Personnel Department, it was discovered that Mrs. Bynum had submitted a timely transfer application, but in a reorganization of the files it had been mislaid. The Personnel Department immediately called this to the attention of the District Commercial Manager, forwarded to him her personnel file, and made an appointment for the District Commercial Manager to interview Mrs. Bynum. The interview took place. Again, it lasted about an hour. There

is some unimportant uncertainty as to exactly when this took place, but it was probably on August 18, 1959. The District Commercial Manager decided not to change his original decision and Mr. Mullikin's permanent appointment became effective as of August 21, 1959. Mrs. Bynum filed a grievance. The issue was not settled in the earlier stages of the grievance procedure. Thus, the matter comes before us.

Mrs. Bynum had seniority with the Company of about nine years; Mr. Mullikin of about four years. Both are excellent employees. Both are highly regarded by their supervisors. Both had been recommended by their supervisors for promotion. Both were well liked by their fellow employees. The Company seeks to sustain the decision of the District Commercial Manager on the ground that he was justified in promoting Mr. Mullikin out of order of seniority because of superior experience and training in the duties of Clerk A, Richmond (Section 18.1) and because of superior ability and personal qualifications (Section 18.14). There is no dispute but that these arguments are relevant. It is clear that the job of Clerk A, Richmond does involve contact with the public, some technical knowledge or skill in addition to clerical skill, and the employee must exercise supervisory duties as defined in Section 18.14 above quoted.

Before attempting to resolve the various issues submitted, it is important to decide just what are the functions and powers of this Board, and particularly of this Chairman. This became obvious at the hearing; and the Chairman

specifically requested that the parties discuss this question in their briefs (Tr. pp. 233, 234). They did. Counsel for each side cited a number of Arbitration Awards in which various arbitrators have expressed their opinions on this subject. Unfortunately, these opinions do not furnish much guidance in this case. They show that arbitrators vary greatly in their notions as to their own duties in similar cases; but they also show that so much depends on the facts of the individual cases, and particularly upon the provisions of the contracts under which the cases arose, that there appears to be no line of acknowledged precedents to serve as a guide.

Of course, the basic question is whether the Chairman must decide the question himself as to who should be appointed, or whether he has the more limited function of simply passing upon what the Company has done. Counsel for the Union argues that "The function of the Arbitration Board is to <u>decide for itself</u> whether the evidence adduced by the Company constitutes a 'clear showing of superiority' in favor of the junior employee." (Underlineation in the Brief.) What the Union requests this Board to do is by its own order to require that Mrs. Bynum be appointed to the position of Clerk A, Richmond, and to award her back pay. As I see it, we could not ourselves make the appointment without substituting our own judgment for that of the Company.

The Company argues for a restricted function of the

Chairman. Counsel urges that the "Company's decision, if reasonable, must be sustained unless it was capricious, arbitrary or discriminatory"; or at most, that the decision of the Company should be sustained if it is supported by evidence.

After a careful study of the question I cannot escape the conclusion that what the parties have contracted for is the judgment of the Company, not that of the Chairman of this Arbitration Board. This is repeated again and again in Title 18 of the Agreement: "the Company shall observe" (Sec. 18.1); "the Company may fill it in its discretion" (Sec. 18.6); "the Company . . . shall give preferential consideration" (Sec. 18.8); "the Company shall consider" (Sec. 18.8(a)); "Company shall consider" (Sec. 18.8(b)); "Company shall consider" (Sec. 18.8(c)); "Company shall consider" (Sec. 18.8(d)); "Company shall consider" (Sec. 18.8(e)); "Company shall give preferential consideration" (Sec. 18.11); "any employee may request the Company to reconsider" (Sec. 18.12); "Company need not give consideration" (Sec. 18.13); and "Company shall consider . . . but Company may nevertheless make appointments" (Sec. 18.14).

The exact phrasing of the issue submitted in this case explicitly confirms this: "Did the Company have adequate reason to by-pass Joan Bynum . . . ."

The only specific provision in the collective bargaining Agreement touching upon the subject is in the general

Title 9 on "Grievance Procedure." Here, it is provided that the decision of the majority of the Arbitration Board shall be final and binding "provided that such decision does not in any way add to, disregard, or modify any of the provisions of this Agreement" (Sec. 9.11). This is not all. The agreement of the parties in submitting this case to arbitration expressly repeats and emphasizes that ". . . if the Chairman's decision goes beyond the scope of the issue submitted to arbitration, or is not responsive to such issue, or if it any way changes, or adds to, or reforms the Agreement of July 1, 1953, as amended, it shall have no force or effect and shall not be binding on either party." I can call to mind no other instance in which the Chairman, or Arbitrator, has been so thoroughly admonished not to get off the reservation.

From this, I conclude that this Board has no authority to make the Award requested by the Union. To attempt to do so might negate this whole arbitration proceeding. The most we can do is pass upon what the Company has done; and we should investigate and pass upon that.

The first question for decision is whether Mrs. Bynum was properly considered for this position. This is what the Contract required; to this, at least, she was entitled. There is no question but that she was not initially considered. Her transfer application had been mislaid. The Union does not argue that there was any fault in this error. As soon as it

was called to the attention of the Company, the officials immediately set about to repair the mistake.

As I pointed out above, the District Commercial Manager examined the personnel file of Mrs. Bynum. He discussed her experience and qualifications with one of her superiors. Then he interviewed Mrs. Bynum. The interview lasted about an hour. Both the District Commercial Manager and Mrs. Bynum testified that she was given every opportunity to state her qualifications and why she thought she was entitled to the job.

The Union makes several points in support of the argument that Mrs. Bynum was not given what counsel chooses to call "due process 'consideration'." These I now rephrase somewhat in order to save time and space.

1. At the outset of the interview, the District Commercial Manager observed that he thought a man could handle this Clerk A job better than a woman. Of course, this must have had a chilling effect on Mrs. Bynum. At the very outset she was confronted with a conclusion--not final, as appears from the Record, but tentative--that she could not possibly overcome. She was a woman. I shall later discuss this conclusion in connection with the substantive issues of the case. The point is valid as a criticism of the conduct of the interview; for the Company should not only consider the employee fairly, but should also appear to have considered the employee fairly.

2. The District Commercial Manager "made no significant effort to obtain information about Mrs. Bynum apart from the

'interview'." The chief point here is that the District Commercial Manager did not talk to the immediate supervisor of Mrs. Bynum. The District Commercial Manager tried to; but the immediate supervisor was on vacation. He did talk to the supervisor just above her immediate supervisor, and apparently at some length. The testimony is that the total number of employees in the office where Mrs. Bynum worked is thirty. It seems improbable that her immediate supervisor's supervisor did not know what was going on. From the Record nothing appears to indicate that a talk with her immediate supervisor would have produced any information about her not otherwise brought to the attention of the District Commercial Manager.

3. During the interview the District Commercial Manager did not much interrogate Mrs. Bynum concerning her qualifications and experience. He let her talk. Different people handle interviews differently; different arbitrators handle arbitrations differently. The testimony is unanimous that she was given every opportunity to state her cause. From observing Mrs. Bynum on the witness stand, I judge that she is capable of stating her point of view in a manner forceful, objective, and also friendly. She testified that the District Commercial Manager listened.

4. Immediately at the conclusion of the interview the District Commercial Manager told Mrs. Bynum that she did not have the job. While Mrs. Bynum might have felt better about the whole matter had the District Commercial Manager reflected on the problem before making and announcing his decision, who can

say that since he had not changed his mind he should not say so candidly and at once?

5. The District Commercial Manager "did not file a report concerning his interview . . . or concerning his reasons for selecting Mullikin, until October 13--about two months after the selection was made and after the grievance had been filed." Counsel cites an Award by Mr. Arthur M. Ross in the course of which he discusses the significance of such a Company memorandum. His views were expressed in an earlier Award in an arbitration between the same parties but not under the same contract. The contract with which we are concerned covers clerical employees. The contract with which Mr. Ross was concerned was described as the "Physical" Contract and it appears to cover "Operation, Maintenance, and Construction Employees" of the Company (Joint Exhibit No. 2, p. 102). The Award is described as Arbitration No. 8. The provisions governing promotions and transfers in the "Physical" Contract are different from those in the contract involved in these proceedings; but this difference is not important in this context. What Mr. Ross said was:

> " . . . elaborate procedures and extensive documentation are not necessary at that /the selection/ stage. If the candidates' ability and qualifications are properly evaluated, then the substance of the evaluation can be formalized and documented later, should it develop that a grievance must be investigated. But building the case from scratch after the grievance has been filed

> is another matter altogether. In that event the material must necessarily be discounted to some extent, having been developed for the sole purpose of winning an argument."

The language of Mr. Ross must be read in light of his decision that in the case he was deciding there was no proper "consideration" at all; and what he seems to be telling us is that in his view the date of the memorandum goes to the weight of the evidence. I agree.

6. The Company did not offer Mrs. Bynum the opportunity to try her hand at the Clerk A job. In this instance I do not think that such a trial was indicated. My reasons for this will be clear later on.

Did the District Commercial Manager "consider" Mrs. Bynum as he was required to do? He testified again and again that he did. The testimony of the District Commercial Manager occupies about one-third of the transcript in this case. He was examined and cross-examined in meticulous detail as to every phase of these events. There is nothing in the Record to suggest that he was in any way biased against her. He knew her personally. From his testimony and from his demeanor on the witness stand it appears that he liked her and knew that she was a good employee.

The Union has quoted Arthur M. Ross as to what is "consideration" in a similar situation. This is from the Award above described. Recognizing that there should be some continuity in these arbitral matters and also that Mr. Ross is

a wise and experienced arbitrator, I have measured what was done in this case by the criteria laid down by Mr. Ross in what is described as Arbitration No. 8 under the Physical Contract. Mr. Ross said:

> "What should the Company have done? What 'consideration' does Section 205.14 require? It is not necessary to devise an elaborate system and build a voluminous record. Procedures can be reasonable and expeditious, but every bidder must be assured that his ability and personal qualifications are really taken into account. The decision-making group should be familiar with the requirements of the job to be filled. The candidates should be identified. Their experience, merits and demerits should be examined. If some are obviously less qualified than others, the former can be set aside after a preliminary appraisal while the latter are considered more intensively. If a junior bidder is selected, the Company should be prepared to state why his ability and personal qualifications are considered demonstrably superior. The Company should satisfy itself on this point when the decision is made, without waiting for a grievance to be filed."

In the case decided by Mr. Ross the decision was made by a group of foremen; and the procedure of selection was different. Adapting the language of Mr. Ross to the instant case we find the following:

1. The decision-making individual ". . . should be familiar with the requirements of the job to be filled." He was.

2. "The candidates should be identified." They were.

3. "Their experience, merits and demerits should be

examined." They were.

4. If a junior employee is selected " . . . the Company should be prepared to state why his ability and personal qualifications are considered demonstrably superior." The Company was and did.

5. "The Company should satisfy itself on this point when the decision is made, without waiting for a grievance to be filed." The Company did.

In view of the testimony of the District Commercial Manager, to hold that he did not "consider" Mrs. Bynum would be to hold that he committed perjury in these proceedings. The Union does not suggest this. Of course, all of this goes to his state of mind at the time; and arbitrators are not possessed of powers either of clairvoyance or mental telepathy. From all the objective evidence available, I hold that the District Commercial Manager did "reconsider" his selection when Mrs. Bynum requested it (Sec. 18.12) and then did "consider" her (Sec. 18.7, 18.8, and 18.14 of the Contract). And his conclusion was to let the appointment of Mr. Mullikin stand.

There is involved in this resolution of the problem the question of (1) seniority versus (2) experience, training, ability, and personal qualifications. The problem of weighing these sometimes conflicting factors is one which has vexed many arbitrators, and many, many more employers and unions. No arbitrator has yet suggested any algebraic formula the solution of which will answer the question. The collective

bargaining agreement between the parties contains no guidance as to the relative weight to be given these factors. I do not see how it could.

A similar problem was considered not only by the Ross Award above referred to, but also by another Ross Award which I shall later discuss, and by an Award of Mr. Arthur Miller. This, also, was between the same parties but it also involved the Physical, not the Clerical, Contract. In Mr. Miller's Award he was primarily concerned with the then contention of the Company that once having made the determination that "qualifications" outweighed seniority, that determination was final. He ruled against the Company; but in that case the Company did not attempt to produce evidence to sustain its conclusion. While, therefore, his views on the balance of these factors are not controlling, nevertheless, because Mr. Miller also is a wise and experienced arbitrator, they should not be disregarded. (Arbitration Case No. 6 under the Physical Contract.)

It would seem from reading the collective bargaining Agreement as a whole, and from examining the opinions of my predecessors in connection with somewhat similar provisions of a parallel contract between the parties, that in making such an appointment the Company should look first to the seniority of the candidates and then, if necessary, to the general factor of qualifications. How much superiority will outweigh

how much seniority?

Various standards have been prescribed by various arbitrators. Among these are: "demonstrably . . . superior" (Miller, supra); "clear showing of superiority" (Ross Award, supra); "head and shoulders above" (31 LA 673). There are others. The trouble is that these standards do not measure anything. When held up to the facts, these criteria waver or crumble.

Counsel for the Company argues that what the arbitrator must decide is "whether there is evidence to support the decision of the Company"; and that if there is any such evidence, ". . . the arbitrator has no recourse but to sustain the decision of the Company."

What the Company commends to the Chairman is that his position should be substantially that of an appellate court in reviewing the judgment or verdict in a lower court. However, on probing this standard I find that it likewise is unsatisfactory. In California, alone, the appellate courts seem to have applied many different standards in reviewing records on appeal.

> "They have said, for instance, that a verdict will not be disturbed if it is supported by some evidence, by any evidence, by slight evidence, by substantial evidence, by clear and substantial evidence, by any reasonable amount of evidence, by any evidence of substantial character which supports the judgment as applied to the peculiar

> facts of the case, or by evidence that is not patently or inherently improbable and unbelievable." (4 Cal. Jur. 2d 485-6)

However these appellate court standards may be stated, they are too restrictive, as well as too uncertain. I consider it useless to add any legal precept of my own. For these purposes I consider my job to be something more than a review of what has gone before, as an appellate court might do, and something less than substituting my own judgment for that of the Company. So I abandon theory and turn to facts.

What is the margin of difference between Mr. Mullikin and Mrs. Bynum in the light of the quoted provisions of the collective bargaining agreement?

1. I cannot find that Mrs. Bynum was disqualified for the position so as to be disregarded in considering appointment to the job.

2. The District Commercial Manager has said that this was a job for a man. I have pointed out that Clerk A, Richmond is frequently in a situation of tension between the Company and its customers. He is sometimes in a situation of antagonism. It is said that this may be critical in connection with those parts of the work away from the office and "in the field." I know of no method whereby to weigh these factors. Whether a woman should be subjected to the trials, and sometimes indignities, and perhaps even hazards, of this position is a matter of personal judgment. While I do not entirely agree with the

judgment of the District Commercial Manager, I cannot say he was wrong. I can understand that an executive might not wish to subject his women subordinates to these conditions. However, there are other and more important factors which have influenced me in reaching my conclusion.

3. The Union argues that the experience of Mrs. Bynum prior to her employment by the Company and other than her employment by the Company is superior to that of Mr. Mullikin's. To a degree, this is true. Before coming with the Company Mr. Mullikin had briefly occupied what appear to be routine clerical jobs and had served a hitch in the Navy. Mrs. Bynum had had five years of experience with another large employer in bookkeeping or accounting work during which she had supervised four employees. She had taken nine months' training in a business college, although it is not clear what bearing this might have had in preparing her for the work of Clerk A. She had had further experience as a record clerk. During her employment with the Company she has held several positions in the Union, which would indicate that her fellow workers had confidence in her ability and diplomacy. However, the pre-employment history of the two is rather remote in point of time--nine years in the case of Mrs. Bynum, four years in the case of Mr. Mullikin. Since the Company had more than ample opportunity to observe the two during their work for the Company, it is not unreasonable for the District Commercial

Manager to consider that experience primarily.

4. So far as experience with the Company was related to preparation for the work of Clerk A, Richmond, that of Mr. Mullikin's is undoubtedly and markedly superior. During nearly all of her history of employment with the Company Mrs. Bynum had been a telephone operator. This is important, because often the first voice that greets a caller leaves a lasting impression; and Mrs. Bynum is good at it. However, this work is only incidentally related to what a Clerk A would do; and the experience of Mrs. Bynum within the job factors which make up the work of Clerk A was limited. It did not exceed six months. In addition, she apparently spent some periods part-time assisting others in work aside from PBX work; but this is hard to measure. On the other hand, it appears that nearly all of Mr. Mullikin's four years with the Company has been in connection with a variety of assignments which involved work either within the duties of Clerk A, or work which Clerk A supervises. To go into detail would seem to serve no useful purpose, and would unnecessarily extend this Decision, which is already overlong. It is sufficient to say that this experience provided Mr. Mullikin with a superiority in training for the job Clerk A, and also furnished the Company with evidence from which the District Commercial Manager could--and apparently did--draw conclusions as to his other qualifications for the job.

5. There are in the Record formal ratings of both Mrs. Bynum and Mr. Mullikin. These are on identical forms quite similar to those used by many employers to rate their employees. These are part of the personnel files of each (Union Exhibits 2 and 3) which are indicated as confidential, although the rating forms themselves disclose that the ratings were currently discussed with each employee. These ratings were sufficiently near in point of time to the appointment to be relevant, and sufficiently remote to be valid as a current record. Mrs. Bynum was rated as "above average"; Mr. Mullikin was rated as "very superior." The descriptive phrases are mine, not those of the raters. They are based on my inference as to what the raters meant. There are also in Mr. Mullikin's file three letters from supervisors who had observed Mr. Mullikin's work. In these I find these phrases applied to him: "alert and capable", "fast and accurate", "exceptionally cooperative in performing any duty assigned to him", "exceptional ability", "learns new procedures very quickly", that he can devise "a better way of doing the job", "with this speed his accuracy was considerably above normal", etc. Counsel for the Union properly points out that all three letters were dated within a three-weeks' period early in 1959, and one was based on observations made three years before. It is curious that three supervisors should be so coincidentally moved to record their high opinions of Mr. Mullikin; but they were

recorded before this job Clerk A became vacant. Moreover, there was independent evidence that these judgments were valid. The District Commercial Manager so testified, based on his personal knowledge and investigation.

I am aware of the old aphorism in personnel work to the effect that to judge the comparative ratings of employees you must first rate the raters. Some supervisors are always enthusiastic about their subordinates; some less so. However, there is nothing before us to indicate that the judgments of the several supervisors were other than objective. Even discounting the conclusions with respect to Mr. Mullikin, the evidence would indicate that he had proved himself, indeed, to be a "very superior" employee as to most of the duties to be performed by Clerk A.

I should not forebear from recording that in Mrs. Bynum's file there are also commendatory remarks and recommendations. She, too, is suggested for promotion by her supervisors. I find it difficult to phrase the distinction between the two files before me; but there is a difference.

6. Last, and perhaps most important, I reiterate that this job of Clerk A, Richmond, is a most sensitive one from the point of view of the Company. The Clerk meets the customers of the Company and acts for the Company on occasions when there is most likely to be disagreement, tension, and even antagonism. In this capacity the Clerk A is the Pacific Gas

and Electric Company. What he does well the Company does well; what he does badly the Company does badly. Accordingly, it was most important to consider what I shall loosely call the personality, stability, judgment, and diplomacy of candidates for the position. The District Commercial Manager chose Mr. Mullikin. I cannot say he was wrong.

In another arbitration between the same parties, but again interpreting the Physical rather than the Clerical Contract, Arbitrator Ross expressed his views on this subject, though the case he was then deciding involved an appointment to a position far less sensitive than that of Clerk A, Richmond. Mr. Ross said:

> "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 . . . are difficult to demonstrate in a judicial proceeding . . . Psychological characteristics are more subtle and therefore less susceptible to iron-clad proof. Nonetheless they may play a crucial part in a promotion decision." (23 L.A. 556, 558)

I agree.

Certain other questions have been presented and discussed

concerning which I refrain from expressing an opinion.

a) The Union brief suggests that " . . . the employer may easily by-pass the seniority system by making certain (whether in good faith or bad) that junior employees obtain such experience." This may be so; but there is nothing in this record to suggest such an inference.

b) As a corollary to this argument, the Union suggests, as I understand it, that a senior employee not unqualified for the job should be given a trial or "break in" period. For the reasons I have given, I do not think the Company was required to do so in this case; what might be the duties of the Company under other facts, I say not.

c) Which side has the burden of proof? In this discussion there was no distinction between who has the burden of going forward with the proof and who has the ultimate burden of proof. As this case developed these procedural points seemed unimportant. So I express no opinion.

d) The Union argues that in selecting a junior employee over a senior employee the Company must not only be fair, it must also be right; however, at the same time, the Union urges that the Company should not be entitled to rely on facts that develop or arguments that are developed after the appointment was made--such as actual performance on the job. If there is any incompatibility here, it is not necessary now to resolve

it. I have tried to decide this case as of the date of the appointment and disregarding any evidence as to the performance of Mr. Mullikin during the time he was on the job.

Dated at San Francisco, California this 17th day of July, 1961.

Respectfully submitted,

Robert Littler
as Chairman