

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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In the Matter of the Petitions of	:	
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INTERNATIONAL UNION OF	:	
OPERATING ENGINEERS, LOCAL	:	
NO. 139, AFL-CIO	:	Case 1
	:	No. 38116 ME-2667
Involving Certain Employes of	:	Decision No. 24371-A
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TOWN OF CONOVER	:	
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Appearances:

Mr. Edward Guthman, Business Representative, 2233 Birch Street, Eau Claire, WI 54703, appearing on behalf of the Union.

Drager, O'Brien, Anderson, Burgy & Garbowicz, Attorneys at Law, Arbutus Court, P. O. Box 639, Eagle River, WI 54521, by Mr. John L. O'Brien, appearing on behalf of the Town.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONCERNING CHALLENGED BALLOT

Pursuant to a Direction of Election issued by it on March 30, 1987, the Wisconsin Employment Relations Commission (herein Commission) having conducted an election among certain employes of the above named Municipal employer; and by agreement of the parties in advance of the election, the status of the Town's Foreman position currently held by Victor Benson having been left unresolved and subject to determination in a challenged ballot proceeding; and the tally of the mail ballot vote having revealed that the challenged ballot of Victor Benson could affect the outcome of the election; and a hearing on the challenge having been conducted at Eagle River, Wisconsin on June 9, 1987 by Examiner Marshall L. Gratz, a member of the Commission's staff; and the parties having agreed to submit closing arguments orally on the record such that no written arguments were filed; and a transcript of the hearing having been received by the Commission on July 1, 1987; and the Commission having considered the record evidence and the parties' arguments and being fully advised in the premises, issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That International Union of Operating Engineers, Local No. 139, AFL-CIO, (hereinafter referred to as the Union) is a labor organization with offices at c/o Edward Guthman, Business Representative, 2233 Birch Street, Eau Claire, WI 54713.
2. That Town of Conover (hereinafter referred to as the Town) is a municipal employer with a mailing address c/o Edward Stanton, Town Chairman, 3154 West Hunter Lake Road, Conover, WI 54519.
3. That pursuant to a January 12, 1987, petition, the Commission directed an election in a bargaining unit consisting of all regular full-time and regular part-time employes of the Town of Conover Street and Road Departments, excluding supervisory, managerial and confidential employes; that by agreement of the parties' representatives, the Town's assertion that Foreman Victor Benson is a supervisor and a managerial employe was left unresolved and subject to determination in a challenged ballot proceeding; and that the tally of the mail ballot vote made the challenged ballot of Victor Benson potentially determinative of the outcome of the election; and that the Union, contrary to the Town, asserts that Benson's position is that of a municipal employe properly includable in the above-noted bargaining unit.
4. That the following employes, with the following lengths of service and straight-time hourly wage rates are ordinarily employed on the following bases by the Town as its Town crew performing road and streets maintenance:

full-time (5 8-hour days per week year-round):

Victor Benson -- 23 year employe, 18 years as foreman -- \$9.03/hour  
Norm Voss -- 9 year employe -- \$8.08/hour

part-time (3 8-hour days per week year-round):

Steve Grit -- 2.5 year employe -- \$6.25/hour  
Billy Rosner -- 2 year employe -- \$6.25/hour

that because of Voss' recent extended absence, Grit and Rosner have been working on a full-time basis.

5. That all four of the employes perform street and road maintenance work and related routine maintenance of the Town's equipment; that in addition to those duties, which take an estimated 70 percent of his time, Benson has additional duties and responsibilities including: assigning, directing, checking and correcting the work of the other employes, inspecting the Town roads and equipment; attending monthly Town Board meetings to report on and discuss the work of the Town Crew and the condition of the Town's roads and equipment and to make recommendations about and discuss the future work to be performed by the Town Crew; that Benson's position and those of the balance of the crew are described as follows in position descriptions issued by the Town Board to the employes approximately four years ago:

Foreman: Considered member of Town Management Team as participating member of Town Crew work force.  
Works directly with the Town Supervisor in charge of roads. Must be skilled in the operation and maintenance of all town equipment; Trucks, loaders, Grader and other town equipment, both large and small.  
Directs daily workload and assigns tasks to town crew. Contributes to the overall general upkeep and repair of town roads. Any other tasks as assigned by the Roads Supervisor of the Town Board.

Utility Person II: Must be skilled in the operation and maintenance of all major town equipment, especially the Grader.  
Performs the grading of all direct and gravel roads according to the accepted standards of the County and State for grading.  
When not grading, will perform all other tasks as assigned by the Roads Supervisor or Town Foreman.

Utility Person I: Must be able to perform general labor tasks and be able to operate Town trucks and loaders.  
Perform all other tasks as assigned by the Roads Supervisor or Town Foreman.

6. That Benson has no authority to hire or discharge employes and has played no role whatever in the Town's hiring of other employes or in the discharge of former Town employe T \_\_\_\_\_ H \_\_\_\_\_; that Benson did recommend that Grit and Rosner be given full-time work in Voss' absence, has verbally reprimanded employes from time to time for insufficient or improper performance of their duties and would have the authority to send employes home in exigent circumstances such as coming to work intoxicated though no such circumstances have ever arisen; that the Town Board would at least consider recommendations that Benson might offer as regards hiring or discipline matters, but Benson has not had occasion to make any such recommendation to date; that the Town does not have any formal written evaluation procedure; that, however, Benson is called upon from time to time by the Town Board to report on or to investigate and report back on specific aspects of the performance of the other employes; but that the Town Board did not consult with Benson regarding the progress or performance of Grit and Rosner during their probationary period before determining that they had successfully completed probation.

7. That Benson has the authority to direct and assign the work force; that his exercise of that authority involves the exercise of independent judgment both as to what work shall be done, by whom, and in what order; but that the amount of independent judgment exercised by Benson in that regard is limited somewhat by the

fact that there are established areas, routes and routines for snow plowing and road patching, and by the fact that some projects are selected by the Town Board and some assignments are directly communicated to the other employes by a member of the Town Board as is noted in Finding of Fact 8, below.

8. That the Town is governed by a Town Board; that the Town Board in general and the member of the Town Board in charge of streets (known as the Roads Supervisor) exercises greater authority over the other employes than does Benson; specifically, the Town Board alone makes hiring and discharge decisions; that the Town Board ultimately determines whether discipline is necessary based on reports of the facts (and perhaps recommendations) from Benson except that Benson has verbally reprimanded employes on his own authority; that the Town Board and its Roads Supervisor ultimately determine what work should be done when and what non-routine maintenance should be done on the equipment, though they look to Benson for recommendations and often rely on his judgment in those regards, especially in routine road and equipment maintenance matters; that Benson has no responsibilities concerning collection, review or approval of time cards; that Benson checks with the Roads Supervisor before approving employe time off requests which are given to Benson by the other employes; that Benson and the Roads Supervisor both have received complaints from employes from time to time concerning their working conditions and the like; that the Town Board meets monthly and Benson attends such meetings; that Benson is also in frequent but not daily communication with the Roads Supervisor by radio; and that the Roads Supervisor has the radio capability of communicating with any of the members of the Town Crew, but communications to the other employes are ordinarily made through Benson except, for example, when specific plowing work assignment changes are communicated directly to the other employes by the Roads Supervisor.

9. That, as noted in Finding of Fact 4, above, Benson's wage level is greater than that of the other employes in the Town Crew; that the Town Board Chairman and Town Clerk testified that such differential was because of Benson's greater responsibilities rather than because of his greater years of service; that Benson keeps and leaves for the Town Clerk records of his work time just the same way as to the other employes; and that Benson enjoys the same fringe benefits as the other employes and is paid a premium for overtime work on the same basis as are the other employes.

10. That Benson is a working foreman, spending the vast majority of his work time performing non-supervisory and non-managerial duties; and that Benson does not possess supervisory duties and responsibilities in sufficient combination and degree to render him a supervisor.

11. That, at times in the past, Benson has been permitted to make purchases up to a limit (most recently \$25.00) without Roads Supervisor or Town Board approval; that more recently he has been asked to obtain prior Roads Supervisor or Town Board approval for any and all expenditures of Town funds; that the Roads Supervisor and Town Board seek out and often rely upon Benson's recommendations regarding the equipment, supply and repair needs related to the work of the Town Crew; but that the Roads Supervisor and Town Board create the roads and streets budget without Benson's participation in the decision-making, and, as noted above, Benson has no independent discretion to make any expenditures without approval; that although Benson serves the Town Board as a source of information, ideas, experience and expertise, and although Benson is granted considerable latitude in deciding how and what routine maintenance projects will be performed by the Town Crew, the Town Board makes the policy decisions affecting its streets and roads operations, not Benson; that, for example, the Town Board, rather than Benson, drew up and implemented a set of work rules affecting the Town Crew; that the Town Board drew up and issued position descriptions for the Town's various classifications without participation by Benson in its decision-making in that regard; and that, therefore, Benson neither participates in a significant manner in the formulation, determination and implementation of management policy nor has effective authority to commit the Town's resources such as would render him a managerial employe.

#### CONCLUSION OF LAW

1. That the position of Foreman, currently held by Victor Benson, is neither supervisory nor managerial in nature, but rather Benson is a municipal employe within the meaning of Sec. 111.70(1)(i), Stats., and his position is properly included in the bargaining unit noted in Finding of Fact 3, above.

2. That the Town's challenge to the ballot cast by Victor Benson is without merit.

ORDER

1. That the position of Foreman shall be and hereby is included in the bargaining unit noted in Finding of Fact 3, above.

2. That the ballot of Victor Benson shall be opened and counted at a time and place to be arranged by the Commission with the parties, and a tally of the results of the election shall be prepared accordingly.

Given under our hands and seal at the City of  
Madison, Wisconsin this 6th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Danae Davis Gordon  
Danae Davis Gordon, Commissioner

TOWN OF CONOVER

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
CONCERNING CHALLENGED BALLOT

The facts are summarized in the Findings of Fact, above, and need not be reiterated here.

POSITION OF THE TOWN

The Town contends that Benson's position is supervisory and managerial, such that it should not be included in the bargaining unit and his ballot should not be counted. The Town urges that although Benson does not hire and fire, that should not control since little hiring or firing occurs in the Town and because the statutes place authority for such decisions solely with the full Town Board acting in a properly noticed meeting. The Town asserts that Benson is fully in charge of the other Town Crew employees, decides what is to be done, and is responsible to the Town Board for the performance of the other employees on the Town Crew. Only in unusual circumstances are directives issued to the other employees without going through Benson. Benson's use of substantial independent judgment in assigning work is demonstrated by the fact that he does not have daily communications with the Roads Supervisor. Benson is authorized to and in fact takes disciplinary action in the form of verbal reprimands which have been the major form of discipline used on a recurring basis with Town Crew employees. The Town further notes that Benson and only Benson meets with and reports monthly to the Town Board on the condition of the Town's roads and equipment and on the status of the Town Crew, makes recommendations on what he thinks should be done, is responsible for the equipment and its maintenance, and is considered as a part of the management team.

The Town argues that because of his supervisory and managerial responsibilities, Benson is paid substantially more than his subordinates and more than the 50 cent differential involved in Town of Mercer, Dec. No. 13185-D (WERC, 1/86). The Town further notes that the undisputed testimony of the Town Chairman and Town Clerk establishes that this differential is attributable to Benson's additional duties and responsibilities relative to the other employees, not to Benson's superior length of service.

POSITION OF THE UNION

The Union contends that Benson is a municipal employe properly included in the unit such that his ballot should be opened and counted in the election. It argues that Benson is a working foreman and that the Town Board or its Roads Supervisor have retained and exercised most of the significant supervisory responsibilities with respect to the Town Crew. The Union calls particular attention to the facts that Benson spends most of his time doing work similar to that of the rest of the Town Crew, does not approve or review timecards, frequently works on one of two crews so as to be unable to directly supervise the work of the other crew, and is occasionally bypassed by radio communications directly from the Roads Supervisor to the other employees. The Union argues that Benson's pay differential is more likely explained by Benson's comparatively long service rather than by supervisory responsibilities, and it notes that Benson is paid for overtime rather than paid a fixed salary regardless of hours worked.

Finally, the Union notes that Benson is not permitted to expend any Town funds without approval, such that he is not a managerial employe.

DISCUSSION

Claimed Managerial Status of Foreman

The Commission has consistently held that a managerial employe is one who participates in the formulation, determination, and implementation of policy to a significant degree or who possesses effective authority to commit the Employer's

resources either by exercising the authority to establish an original budget or to allocate funds for differing program purposes from such an original budget. 1/

We find that Benson does not meet either of the above-noted tests of managerial status. While he is characterized as a member of the management team and while he alone among the Town Crew meets monthly with the Town Board and reports on, makes recommendations about and discusses a variety of issues relating to the condition of the Town's roads and equipment and the work and status of the Town Crew, it appears clear that the Town's management policy decisions are made and implemented by the Town Board itself rather than by Benson. Thus, when work rules and position descriptions for the Department were developed, the Town Board decided upon and implemented those measures without Benson's involvement. With regard to commitments of the Town's resources, while the Town Board has the benefit of Benson's views of the needs for equipment and supplies, it is the Roads Supervisor and full Town Board that create and approve the original budget affecting parks and streets maintenance. Furthermore, while Benson has considerable latitude in deciding how and what routine maintenance projects shall be done and while he is no doubt influential in determinations as to what other projects are undertaken and when, ultimate decisionmaking authority in those regards rests with the Town Board. Regarding expenditures from the budget, Benson has been asked to obtain Roads Supervisor or Town Board approval of all expenditures of any amount, such that even his prior \$25.00 spending authority is no longer in effect.

Hence, while Benson performs an important role in road and equipment maintenance and in keeping the Town Board informed about road conditions and the needs of the Town Crew and in carrying out the decisions of the Town Board and Roads Supervisor, in our view he cannot appropriately be characterized as a managerial employe within the meaning of MERA.

#### Claimed Supervisory Status of Foreman

The WERC considers the following factors in determining if a position is supervisory in nature:

1. The authority to effectively recommend the hiring, promotion, transfer, discipline or discharge of employes;
2. The authority to direct and assign the work force;
3. The number of employes supervised, and the number of other persons exercising greater, similar or lesser authority over the same employes;
4. The level of pay, including an evaluation of whether the supervisor is paid for his skills or for his supervision of employes;
5. Whether the supervisor is primarily supervising an activity or is primarily supervising employes;
6. Whether the supervisor is a working supervisor or whether he spends a substantial majority of his time supervising employes; and
7. The amount of independent judgment exercised in the supervision of employes. 2/

The issue in each case is whether supervisory authority is possessed in sufficient combination and degree to warrant the conclusion that the position is supervisory.

In the Findings of Fact we have outlined the principal facts of record bearing on the foregoing criteria. While some of the criteria favor a conclusion that Benson's position is supervisory, on balance we are persuaded that he does not possess supervisory authority in sufficient combination and degree to warrant supervisory status.

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1/ E.g., Kenosha County (Sheriff's Department), Dec. No. 21909 (WERC, 8/84); Village of Whitefish Bay (Police Department), Dec. No. 16928 (WERC, 3/79).

2/ City of Rice Lake, Dec. No. 20791 (WERC, 6/83); City of Jefferson (Water and Electric Department), Dec. No. 20511 (WERC, 4/83).

Specifically, we find that Benson has significant work direction and assignment responsibilities that involve an amount of independent judgment. While there are established routes and routines, and while the employes are sufficiently experienced so that they can be relied upon to work independently on their assigned projects or routes, Benson does determine who will work on what assignment and with which other employes and who will operate which equipment. Although the Roads Supervisor occasionally makes direct contact and assignments to the other employes by radio, the norm is for all communications to be through Benson.

While Benson possesses and exercises the authority to verbally correct and reprimand employes who fail to perform their work properly, his exercise of that authority has generally involved a threat that if the employe involved does not shape up he will have to inform the Town Board of the facts for the Town Board to decide what if any disciplinary action is to be taken. The Town Board has retained and exercised the right to hire and fire without involving Benson in instances in which they exercised each of those functions.

While Benson did effectively recommend converting the part-time employes to full time during Voss' absence and has done other scheduling of the part-time employes' work, the Roads Supervisor or Town Board have retained direct control over the majority of employment relations transactions affecting employes. For example, while Benson receives time off requests, he checks with the Roads Supervisor before granting or denying them. Similarly, Benson has no role regarding timekeeping other than answering Town Clerk or Town Board members' questions regarding the facts about any non-routine situation. And, while Benson is one possible recipient of employe complaints or concerns, the Roads Supervisor or others on the Town Board have also received such complaints in the past.

While Benson is paid 95 cents more than his highest paid subordinate, it appears to us that he is being compensated for the full range of duties and responsibilities in excess of those of the other employes, many of which though different than the work performed by the subordinates are not supervisory or managerial in nature. Thus, Benson inspects the Town's roads, makes some judgments about what work should be done next, reports to the Town Board on the condition of the Town's roads, maintains or sees to the maintenance of the Department's equipment and reports to the Town Board about that, and is one of the recipients of inquiries, suggestions or complaints from the public or from the Town Board regarding the condition of the Town's roads. Those are important functions and responsibilities worthy of differential compensation relative to employes whose jobs do not include them, but they are not supervisory or managerial in nature under the Commission's criteria. It further appears that those responsibilities contribute more to his pay differential than does his supervisory duties of work direction and assignment and verbal reprimand as regards two or three subordinates.

The fact that the vast majority of Benson's time is spent on nonsupervisory duties, coupled with the small number of subordinates, the supervisory authority exercised by the Roads Supervisor and the Town Board, and the availability of consultation with the Roads Supervisor on how to handle non-routine matters lead us to conclude that Benson is a working foreman and one more responsible for supervising the Town's roads and streets activities than for supervising the Town Crew employes.

## CONCLUSION

For all of the foregoing reasons, we have concluded that Benson's position is not that of a managerial employe or of a supervisor within the meaning of MERA and that it belongs in the bargaining unit described in Finding of Fact 3. We have accordingly rejected the Town's challenge of Benson's ballot and have ordered that

arrangements be made for opening and counting his ballot a prelude to our certification of the results of the election.

Dated at Madison, Wisconsin this 6th day of July, 1987.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stephen Schoenfeld  
Stephen Schoenfeld, Chairman

Herman Torosian  
Herman Torosian, Commissioner

Danae Davis Gordon  
Danae Davis Gordon, Commissioner