

BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

MONROE COUNTY (HIGHWAY DEPARTMENT)

and

MONROE COUNTY HIGHWAY EMPLOYEES,
LOCAL UNION NO. 2470, AFSCME,
AFL-CIO

Case 83
No. 41816
MA-5472

Appearances:

Mr. Daniel R. Pfeifer, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO,
on behalf of the Union.

Mr. Edward G. Staats, Personnel Director, on behalf of the County.

ARBITRATION AWARD

Pursuant to a request by Monroe County Highway Employees, Local Union No. 2470, AFSCME, AFL-CIO, hereinafter referred to as the Union and concurred in by Monroe County (Highway Department), hereinafter the County, the Wisconsin Employment Relations Commission on March 28, 1989 appointed Robert M. McCormick as an impartial arbitrator to determine a dispute existing between said parties involving the County's suspension of Grievant Hugh Zwiefel without pay on May 31, 1988. 1/ This procedure was conducted in accordance with the binding arbitration provisions of the labor agreement between the parties which was in effect at all times material herein, except that the parties waived the provision for an arbitration board, thereby allowing the undersigned to proceed as the sole arbitrator, and, further waived the requirement that an award be rendered within 10 days following hearing. The hearing was conducted on May 17, 1989 at Sparta, Wisconsin. The final post-hearing briefs were received on June 28, 1989.

At outset of hearing the parties permitted the undersigned to frame the following

1/ All dates refer to 1988, unless otherwise specified.

ISSUE

Did the County suspend the Grievant, Hugh Zwiefel, without pay for 3-1/2 days, for just cause within the meaning of Article 3, Section 1-D of the Agreement, for his conduct of May 26, 1988? If not, what is the appropriate remedy?

PERTINENT CONTRACT LANGUAGE

Article 1 - RECOGNITION

. . .

Section 2. The Union agrees that neither it nor any of its members will engage in any Union activity on the Employer's time, except as agreed to in other parts of this Agreement. The Union, its officers or members, shall not intimidate or coerce employees into joining the Union. Similarly, management will not engage in any coercion or intimidation of employees either to encourage or discourage Union membership.

. . .

Article 3 - MANAGEMENT RIGHTS

Section 1. The County possesses the sole right to operate county government and all management rights repose in it, subject only to the provisions of this Contract and applicable law. These rights include, but are not limited to the following:

- A. To direct all operations of the County;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, train, promote, transfer, schedule and assign employees to positions within the County;
- D. To suspend, discharge and take other disciplinary action against employees for just cause;

. . .

The County's exercise of the foregoing functions shall be limited only by the express provisions of this Contract. If the County

exceeds this limitation, the matter shall be processed under the grievance procedure.

Article 4 - GRIEVANCE AND ARBITRATION PROCEDURE

Section 1. Definition of a Grievance: A grievance shall mean a dispute concerning the interpretation or application of this Agreement.

. . .

Section 5. Steps in the Procedure:

. . .

Step 2: The arbitration board shall consist of three (3) members, one member to be chosen by the County Personnel Committee, one member to be chosen by the Union, and the third member shall be chosen by the first two members and the third member shall be the Chairman of the Board. In the event the first two members are unable to agree on the third member, the third member shall be appointed by the Wisconsin Employment Relations Commission (WERC). The arbitration board shall make their findings known in writing simultaneously to the County Clerk and the Union, within ten (10) days after their final meeting, and their decision shall be final and binding on both parties. The cost of the arbitration board shall be borne equally between the Union and the County. Each party shall pay the member they chose and both parties shall pay onehalf (1/2) the cost of the third member. Disputes or differences regarding bargainable issues are expressly not subject to arbitration of any kind, notwithstanding any provisions herein contained. The arbitrator shall have no right to amend, nullify, modify, ignore, or add to the provisions of the Agreement. His/her authority shall be limited to the extent that he/she should only consider and decide the particular issue or issues presented to him/her in writing by the Employer or the Union, and his/her interpretation of this meaning or application of the language of the Agreement.

. . .

Article 12 - JOB POSTING

Section 1. All new or vacated positions shall be posted at each bulletin board for seven (7) days on a sheet of paper stating the job that is to be filled, on what day it is to be filled and the rate of pay. Interested employees shall sign their names to this notice. Seniority and qualifications shall be considered in the selection of the applicant for the new or vacated position. The Highway Commissioner and the Union representative shall attempt to mutually agree on the nominee for the position. A copy of all job postings, including the signatures of applicants, shall be submitted to the Union.

Section 2. Any employee failing for any reason to qualify for any job or new position through the job posting procedure may return to his/her former job.

Section 3. The successful applicant shall be allowed sixty (60) days to qualify for the position. Interim appointments may be made by the Highway Commissioner until such time as a regular appointment is made. The successful applicant, if moving into a higher pay rate, shall be paid the higher pay rate, retroactive to his/her first day in said position, after the sixty (60) day qualification time.

. . .

Article 20 - GENERAL PROVISIONS

. . .

Section 2. General, but reasonable regulations may be posted by the administration and failure to adhere to these regulations shall be cause for discharge.

. . .

Section 5. The County shall not discipline or discharge an employee except for just cause. Any employee discharged and later through proper hearing is found innocent of the charges, said employee shall return to his/her former job with the County paying said employee all wages and benefits he/she would have earned had he/she been working, less any compensation received from Unemployment Compensation or other sources during the period of discharge.

. . .

Article 26 - NONDISCRIMINATION

Section 1. Monroe County and Local Union #2740 are committed to the principles of equal employment opportunities and practices for all persons regardless of sex, race, age, national origin, creed, ancestry, handicap, arrest and conviction records, marital status, sexual preference and political affiliation, except where those factors constitute a bonafide occupational qualification. Monroe County and said Union will act in a nondiscriminatory manner in all matters regarding personnel, which shall include, but is not limited to the following: hiring, promotion, demotion, disciplining, wage and fringe benefit policies, training, working conditions, and all other benefits of employment.

. . . 2/

BACKGROUND

On May 5, the Highway Commissioner, George Baker posted two vacant Equipment Operator I positions in the department. Six employees originally signed the posting, but for reasons not material herein, only three employees were considered for the award of the vacancies as "successful applicants," namely, Hugh Zwiefel, Joe Ekern and Bill Brueggen. The record evidence is uncontroverted that the Commissioner awarded one of the positions to Zwiefel on May 16th. The second position - Baker awarded to Bill Brueggen, an employe with less seniority than Ekern.

The Union, through its President and local representative, Zwiefel, filed grievance #26 on May 23rd, averring therein in material part:

Mr. Baker stated that he feels Joe (Ekern) is not qualified and said he was giving the position to a lesser seniority person --

2/ Sections of the "Personnel Policy Manual" (County Exhibit 7) which the County avers to be relevant, have not been reproduced as they represent an exparte contention (County's) that they constitute refinements to the contractual Posting and Discipline provisions without any supporting evidence that the parties incorporated such provisions by virtue of clear language in the labor agreement itself (Joint Exhibit #1), and therefore are not deemed material herein.

We the Union feel that Joe should have his sixty day probation period to prove whether he is qualified or not. This has been the practice in the past.

The Union membership held a meeting sometime between May 23 and May 26, after learning that the Highway Committee and Baker would conduct a test on pieces of equipment as a prelude to the award of the two vacancies to the two most qualified applicants. The Union body voted that it was not necessary to take the test under the labor agreement.

On May 26 three members of the Highway Committee, Baker and the three "applicants" assembled at a rural site, where the County had three pieces of heavy equipment at-the-ready for operation, namely, a grader, a bull-dozer and a back-hoe.

The Chairman of the Committee, Henry Laufenberg, explained to the employes that all were present to conduct a test on the equipment and for the "applicants" to operate the equipment. Zwiefel presented Laufenberg with a written grievance #27, a Union grievance signed by Zwiefel, advising the County that the employes present would only take the test under protest and further averring therein:

In Article 12 under Job Posting it does not say employees have to be test (sic) to see who is more qualified, this is not a past practice and should not be done.

The person with the most seniority should be allowed their sixty days to qualify just like they have in the past.

Zwiefel also raised the question of grievance #26 with Laufenberg, contending the Ekern was more senior and should get the position.

Baker directed all three employes to run the three pieces of equipment. Brueggen and Ekern did so, but under protest and Zwiefel, though first agreeing to perform on the machines, under protest, subsequently refused to operate the grader after a heated verbal exchange of words with Baker.

The record evidence discloses that the Grievant asked Baker what he wanted Zwiefel to do with the grader, "windrow or what?" The record preponderates that Baker replied to the effect, "Get your ass in that fucking grader." The record further indicates that both supervisors and employes commonly used barracks-style expletives in their verbal exchange on the job sites. Zwiefel first delayed and then advised Baker that he would not operate the grader, and by Zwiefel's testimony he advised Baker, as a ruse, that he did not know how to start that grader, in order that he (Zwiefel) could bring the exchange with Baker to a conclusion.

Subsequently in the serial order of the others proceeding to operate the dozer and the back-hoe, Grievant refused to operate the other two machines when directed by Baker. Grievant advised Baker that he had operated the back-hoe all of the previous summer and so no testing was needed.

Commissioner Baker directed Grievant to return to the shop and on May 27th caused the following hand-delivered written reprimand to be delivered to Zwiefel which reads:

Hugh:

In regards to your open refusal to demonstrate your ability to operate three pieces of equipment: Grader, Dozer and Backhoe on Thursday, May 26, 1988, Also your disrespectful attitude towards myself and the Highway Committee on same date, I am suspending you without pay for a period of 3 1/2 days, beginning May 31, 1988 through Friday forenoon, June 3, 1988. I will allow the 1/2 day floating holiday on Friday, June 3, 1988 as per your request.

You should be well aware that I consider this matter a form of insubordination and I will take further disciplinary action if there are any incidents of this nature in the future.

Portions of the testimony of Baker and the two Highway Commissioners Laufenberg and Richard Campfield concerning the exchanges at the testing site and their elaborations as to what constituted Zwiefel's "disrespectful attitude towards Baker and the Committee" shall be dealt with in Discussion to follow. The record evidence further indicates that the Highway Committee members present on May 26 at the testing site, were not aware that Baker had awarded one Operator position to Zwiefel on May 16.

The record evidence reveals that Baker did not explicitly advise the Grievant at the testing site that Zwiefel's continued refusal to operate the equipment could lead to his being disciplined. However, the record is uncontroverted that after Grievant refused to comply with Baker's directives, Baker did tell Zwiefel (in substance) "the matter would not end here!". The County suspended Grievant for 3-1/2 work days and with the Memorial Day holiday pay deprivation, Grievant lost 4-1/2 days' pay.

After the demonstration test on May 26, the Highway Committee later formally acted on that day to appoint Joe Ekern to Equipment Operator. The Committee's formal minutes for May 26 reflect its action, ". . . to give Zwiefel and Ekern the position of equipment operator for a trial period of 60 days."

On May 26, the Committee also rejected the Union's grievance #27, challenging the

County's right to test applicants to prove they can operate the equipment. Its minutes reflect in part:

The Committee feels this was a way to decide who should get the position. In the future in every position, an individual could be required to be tested in the operation of said equipment if requested by the Highway Committee.

There is no other evidence in the record that the County previously ever required demonstration tests by applicants save Baker's vague reference - to testing five years ago.

Ekern's grievance #26 was resolved by the Highway Committee action, and the aforesaid grievance #27, was never further processed to the next step by the Union.

One June 1, Baker sent Zwiefel a letter which reads in part:

- . . . (1) One position of Equipment Operator I was awarded to Hugh Zwiefel by myself verbally effective May 16, 1988.
- (2) The other position of Equipment Operator I, after carefully observing the directed demonstration of skill and abilities to operate the grader, dozer and backhoe on May 26 will be awarded to Joe Ekern effective June 5, 1988. . . .

The Union filed grievance #28 on June 16, citing that Article 3, and inferentially any other just cause Article had been violated by giving the 31/2 day suspension to Zwiefel. On June 27, Baker sent Zwiefel a letter relating to his grievance #28, after an abortive effort by Zwiefel and Baker to settle the grievance, which reads as follows:

SUBJECT: Grievance #28

Hugh:

My answer to grievance number #28 dealing with your suspension:

As you recall, we discussed this grievance at a Highway Committee meeting and also on June 11, 1988 at my home.

I tried to settle this matter in an amicable manner, but I guess, not to your satisfaction.

So, at this time, I stand on my original suspension of 3-1/2 days without pay for your refusal to demonstrate your ability to run certain pieces of equipment as per job classification of Equipment I.

Hugh, I profoundly hope that you give this matter more consideration. This continually testing of management on their operation of the dept. is not in the best interests of the dept. or all concerned.

There is conflict in the testimony of Baker vis a vis Zwiefel with respect to whether Grievant ever received any previous reprimand or discipline. Baker in responding to the arbitrator's question, said that there were reprimands in 1987 for a verbal fight and also for complaining about an easy job. Grievant testified, on direct examination of Mr. Pfeifer, that he had not received any previous discipline notice. However, the record discloses that the County did not offer any written evidence of any recorded prior discipline of the Grievant.

There is a more serious conflict in the evidence surrounding the Union's claim that Baker's action against the Grievant was based upon anti-union animus. Zwiefel and Pfeifer testified at the instant hearing that at the Highway Committee appeal hearing on or near June 24, Baker stated that he had gotten along fine with Zwiefel until he became Union President. County witnesses Laufenberg and Staats testified that each could not recall such a statement. The record discloses that under cross-examination, Baker first denied making such a statement and then later testified that he could not recall making such a statement. These aforementioned conflicts, as well as the possibility of underlying discrimination because of Grievant's active Union status, shall be dealt with in Discussion to follow.

POSITIONS OF THE PARTIES

The County argues that Zwiefel's grievance does not state the wrong doing attributable to County representatives. It further avers that though the initial award of the vacancy to a junior employe (grievance #26) and the Union's challenge to the County's right to testing of applicants before its award of the position (grievance #27) were a part of the background leading to the events of May 26, the issues of those grievances are not comingled with Grievant's acts of insubordination.

The County avers that the Union decided not to press the testing grievances and that Ekern's grievance was resolved after the Committee awarded the second position to him after the demonstration test of May 26.

The County asserts that this dispute is a single controversy over whether the Grievant, who just happens to be the Union President, can flagrantly refuse to follow his supervisor's instructions

to operate a piece of equipment in a demonstration test.

The County urges that the Grievant's own testimony indicates that Zwiefel and the others agreed to operate the pieces of equipment under protest, and that Grievant then outright refused to do so, ostensibly because he was irritated at the Commissioner's expletive used in Baker's directive; and further refused because he (Zwiefel) thought the testing was unnecessary.

The County cites the fundamental law of the shop, "that an employe works (i.e. follows the order of supervision) and grieves later". The arbitral authority consistently applies this axiom unless an employe would be placed in harms' way, i.e., exposed to some safety hazard, if he were to follow such orders.

The County urges that Baker was fair to the Grievant. There was no reprisal in rescinding his (Baker's) initial award of one vacancy to Zwiefel. The County argues that it was Grievant's protracted argument with supervision, the outright refusal to perform and the heated verbal exchange with the Department head in front of the Highway Committee, which constituted the disrespectful attitude to the Committee and the insubordination that triggered a just cause suspension.

The County urges that the Arbitrator sustain the County Highway Committee's discipline meted out to Zwiefel, as one for just cause within the meaning of the labor agreement and deny the grievance.

The Union urges that the commissioner's and Committee's action in suspending Grievant for his refusal to take a test which was unnecessary, was a discriminatory reprisal against Zwiefel for his active grievance-processing as Union President. It reflected the "anti-union animus" of Baker directed at the grievant and confirmed by the Committee.

The Union points to the testimony of Zwiefel, which should be credited, that Baker stated at a Highway Committee appeals hearing that "he (Baker) had gotten along fine with Zwiefel until he became Union President." The Union further points to the testimony of County witnesses Laufenberg, Baker and Staats, who were all present at said meeting, who all testified that they could not recall such a statement. The Union believes the clincher to cause crediting of Zwiefel's version is the fact that none of the aforementioned County witnesses ever denied that the statement was made by Baker.

Further corroboration of Baker's disdain for Zwiefel's union representative status was Baker's testimony that the Grievant filed the Ekern grievance partly because Ekern was Zwiefel's friend. In contrast, Zwiefel testified that he knew Bruegger longer than Ekern, and that as Union President, he would have filed a grievance for any senior employe who didn't receive the posted position.

The Union also points to the testimony of Ekern regarding Baker's statement at the testing site on May 26. Ekern testified that Baker informed him that if he did not like his job, he could find another one. Ekern testified that he told Baker that he liked his job, and that Baker should find another job.

The Union would also rely upon the testimony of Laufenberg, indicating Committee approval of Baker's "anti-union animus" and disciplinary reprisal of Zwiefel, when Laufenberg testified that, "he believed that there was no difference between an individual acting for himself or acting on behalf of the Union -- in either case an employe must follow the orders of the Commissioner, no matter what they may be."

The Union argues that the Grievant's actions in filing the testing grievance on May 26 were done in his capacity as Union President, and that any arguments that ensued are protected activities under Wis. Stats., Sec. 111.70.

The Union avers that the discipline cannot be supported as one for just cause under the labor agreement when one examines Baker's total conduct and the testimony of Highway Committee members present at the testing site. Crucial to this chain of events, the Union points to Baker's testimony and written exhibits, that Baker in fact, had awarded one operator position to Zwiefel on May 16. The record evidence shows that the Committee members were not aware of that fact on May 26, the date the demonstration test was set up by the Committee.

The Union argues that at the time of the incident on May 26, Baker did not inform Zwiefel that he would be subject to discipline if he (Zwiefel) did not operate the equipment. The Union further avers that Baker's act of suspension was not based on a due process investigation, with no discussion of the total events by the Highway Committee before it rubber-stamped the Commissioner's rendered discipline.

The Union requests that the arbitrator find the suspension to be one without just cause within the meaning of the labor agreement; that in the alternative, the arbitrator find that the discipline executed by Baker and the Committee was based upon the County's "anti-union animus" as a reprisal against Zwiefel for carrying out his representative role as Union President. The union requests that the grievance be sustained, and that the arbitrator direct that the County purge Grievant's personnel file of the recorded discipline and order make-whole monies of 4 1/2 days of pay, improperly withheld by the County.

DISCUSSION

At outset the undersigned would deal with some novel theories raised by the County in its brief going to the certain alleged deficiencies in the substance of Zwiefel's grievance (Grievance #28), and also with respect to the County's view of the subservient quality of a labor agreement vis-a-vis the County's Personnel Policy Manual.

As to the former, the undersigned concludes that the labor agreement does not require any burdensome pleading obligation on the part of a grievant in setting forth the alleged wrongdoing committed by the County. Zwiefel averred in grievance #28, under the pre-printed heading "what did management do wrong or Section of contract which was violated, if any", - that "Article 3 and other Articles that may be applicable.". There is no undue surprise to the County or obfuscation of grievant's real claim. The County is a signatory to a labor agreement which contains a just cause standard in Article 3, Management Rights Section 1-D., against which one would measure the County's disciplinary actions or suspensions. In addition, Article 20, General Provisions, Section 5 contains the same applicable just cause standard to measure against the discipline administered. The Arbitrator rejects the County's contention that the grievant has not sufficiently spelled out the "alleged wrongdoing".

As to the second argument raised in the County's brief, the undersigned can find no evidence that County Exhibit #7, County Personnel Policy Manual is to be examined by the Arbitrator as a co-determining set of standards, alongside the labor agreement, against which to evaluate the propriety of Zwiefel's conduct. The labor agreement governs the level of benefits and the rights and duties of the employer and its employees through the written accord with the employe's exclusive bargaining representative, the Union. The undersigned concludes that the existing labor agreement contains no provision indicating the parties' intent to incorporate any, or all, of the provisions of the Policy Manual. It is not sufficient for an employer to draft Personnel Policy provisions, and provide therein, that said Policies govern alongside the labor agreement so long as no Policy provision conflicts with the labor agreement. The undersigned rejects the County's argument in that regard.

Just Cause and the Claimed Limitation of the Arbitrator's Authority

The County argues that arbitral authority stands for the proposition that an arbitrator cannot substitute his judgment for that of the employer in ascertaining whether the discipline effectuated constitutes one for just cause. Such concept is far from being a "verity" in arbitral law. Only where the parties have so limited the possible latitude of an arbitrator by express contract language, i.e., "the arbitrator being limited to find only whether the g'rievant's conduct did or did not occur", would such a proposition hold water.

The instant labor agreement contains an unfettered just cause standard. The boilerplate type limits on the arbitrator's authority contained in Article 4, Section 5, Step 2 and in Step 2 of the Addendum, Memorandum of Agreement attachment do not limit the arbitrator's applying his sense and construction of a just cause standard to the conduct in evidence. Therefore, the undersigned rejects the County's argument in that regard, and concludes that consistent with the "Trilogy" and existing Section 301 and municipal arbitral law the parties have bargained for the arbitrator's potential construction of the just cause standard as he/she applies the standard to the County's and grievant's conduct in evidence.

Claimed Union-Animus and Alleged County Discriminatory Discipline

The labor agreement itself provides in the recognition clause, Article I, Section 2 that:

. . . management will not engage in any coercion or intimidation of employees either to encourage or discourage Union membership."

A further examination of the labor agreement reveals the presence of Article 26 Nondiscrimination wherein a material portion of said proviso reads:

. . . Monroe County and said Union will act in a nondiscriminatory manner in all matters regarding personnel, which shall include, but is not limited to the following: . . . disciplining . . . "

The undersigned would construe the two contract provisions within the four corners of the labor agreement and conclude that the parties have adopted the statutory standard of Section 111.70 as their own contractual standard to measure County and Union conduct as to whether it is in fact discriminatory in a manner that either discourages or encourages union membership.

An examination of Baker's conduct, the testimony of the Highway Committee persons and the chain of events surrounding Zwiefel's conduct in carrying out his representation function certainly raises a suspicion of discriminatory motives on the part of Baker.

The record evidence indicates that Baker awarded one of the Equipment Operator I positions to grievant on May 16, ten days before the demonstration test scheduled by the Committee. Under cross-examination by Union counsel, Baker was asked why Zwiefel was tested? Baker's answer, "maybe he was not qualified." (emphasis supplied) Thereafter Baker, in answer to the undersigned's questions gave some confusing answers. With regard to my question, "you awarded the job to Zwiefel on May 16 - Baker's reply was - "yes." Then to my question - "Was he the successful applicant?" (the contractual term of Article 12) - Baker answered - "no."

The arbitrator seeking more clarification asked "what if Ekern had not filed a grievance, who would have been awarded the position? - Baker's answer Brueggen - Question by Arb - "Brueggen and Zwiefel?" - Baker's answer, "yes." Laufenberg, under cross-examination by Union Counsel, testified that Zwiefel did not argue with the Committee. Union Counsel in trying to ascertain the Committee's meaning of the usage in its minutes (County Exhibit 14) - asked Laufenberg, Q. "It says disrespectful to me and the Committee"? Laufenberg answered, "his argument with the Commissioner was before the Committee." Thereafter, the chain of employer conduct takes the undersigned to the conflict in testimony between the County witnesses and that of Pfeifer and Zwiefel as to just what Baker stated to the attendees at the Highway Committee

appeals hearing.

Contrary to the Union version set forth in its brief, the undersigned recorded Baker as replying "no", an outright denial as to whether he (Baker) ever stated that, "He always got along with Zwiefel until he (Zwiefel) became Union President." My notes further indicate that, when pressed by Union Counsel, Baker answered, "I do not recall making that statement." The record further indicates that Laufenberg answered Pfeifer's sane questions by testifying, "I never heard that statement." The record further discloses that Staats, Personnel Director, who was also present at said appeal hearing, called as an adverse witness by Pfeifer, testified that, "I do not recall hearing the statement", in answer to the above question posed by Union Counsel.

Both Pfeifer and Zwiefel testified that Baker did state at the appeal hearing to the attendees present, "That he (Baker) got along fine with Zwiefel until he became Union President."

However, the record is devoid of any other County conduct, either attributed to Baker or to the Committee, of any claimed acts of union animus or discriminatory conduct directed at Zwiefel by any County representative. In contrast, Zwiefel was awarded the job of Operator I, so there is no discriminatory rescinding of Baker's award of the position that the Union could point to. In addition the record evidence is susceptible to a plausible inference that Baker and the Committee disciplined the grievant solely for his refusal to perform the test-operation of the three pieces of equipment as directed by Baker.

The undersigned is suspicious of the Highway Committee representatives expressed chagrin, by their testimony, that Zwiefel was disrespectful to the Committee. It may very well be that like some elected officials, they attribute too much prestige and the indicies of sovereignty to their Highway Committee positions, when evaluating whether a union representative and employe is being "disrespectful", while vigorously carrying out his representative duties of grievance processing. However, mere suspicion raised in the mind of the arbitrator by some chain of supportive evidence that the Commissioner engaged in discriminatory conduct violative of the labor agreement, is not a satisfactory preponderance of the evidence. The undersigned concludes that the Union has failed to muster sufficient proof that the County and its agents have disciplined Zwiefel because of his union activity or grievance processing within the meaning of Article 1, Section 2 and Article 26 of the labor agreement.

Does The Suspension Constitute One For Just Cause?

The undersigned's reaction to the chain of evidence set forth under the "Alleged County Discrimination" heading, and my findings as to that testimony, applies herein, when evaluating whether the County has met the Just Cause standard.

The County, in its Exhibit 14, reflecting the Highway Committeets action and Baker's letter of May 27 (Jt. Exhibit 2) recites that Zwiefel showed "disrespectful attitude to the Highway

Committee and to Baker." This County conclusion is not supported by the record evidence. Zwiefel's exchange of words with Baker and Laufenberg must be viewed in the total context of how the testing device was established by the County, the Union membership action on testing as well as Zwiefel's presentation of grievance #27 to Laufenberg, which challenged the County's right to test as a substitute for the contractually established trial period for applicants under Article 12.

The record evidence is uncontroverted that Baker awarded an operator position to Zwiefel on May 16. The record evidence further indicates that the Highway Committee was not aware of said fact when it viewed the exchanges between Baker and the grievant on May 26.

Canfield, a committee person, testified in answer to my question, "that the verbal exchanges between Zwiefel and Baker were embarrassing, to the point three committee members walked away." Laufenberg in answer to my questions and that of Union Counsel, testified that Zwiefel's mere arguing with Baker before the Committee members was disrespectful. Laufenberg thought the very exchange was improper. The undersigned concludes that the Committee members perhaps should dwell on Harry Truman's verity, rather than being overly concerned over mine run confrontation - to wit, "if you are in the kitchen, you should take the heat."

Labor relations between County Highway committees and unions is not just some "gazebo and picket fences." Some confrontation goes with the territory. The undersigned concludes that Zwiefel's verbal protestations to Baker and the Committee were part and parcel of his legitimate role of carrying out his union representation function. If there were any evidence of abusive words, only Baker utilized good old enlisted-man's expletives.

Next we examine Zwiefel's refusal to perform the demonstration tests on the three pieces of equipment as directed by Baker. However, the undersigned shall view said refusal in the context that the evidence clearly preponderates for the proposition that Baker had awarded the job to Zwiefel on May 16. The County in its brief creates "out-of-hole-cloth" that this was a transitory award of position. It suggests that Baker's action was only an initial award to an applicant, which could be later altered by the Committee through testing. The labor agreement does not support such a fiction. In addition the County Highway Committee persons were not aware of Baker's award of position of May 16, when the Committee assembled on May 26.

The County certainly is on target when it paraphrases the universal rule of the shop - "work now, follow supervisors instructions and grieve later." (emphasis supplied) Grievant and the other two employes agreed to test operate the machinery under protest. Zwiefel entered upon the Grader ostensibly to carry out that commitment and operate the grader. He balked after hearing Baker state in a good Sergeant's style "get your ass on that fucking grader and run it."

The undersigned agrees that, in blue collar highway departments, the job relationships and supervisory-employee exchanges do not always reflect "goody two-shoes country." Such language,

Zwiefel conceded at hearing, was common to the shop.

The undersigned views grievant's refusal as a technical insubordination. The record evidence supports a plausible inference that grievant had a good faith doubt that a test of his abilities was not necessary, since Baker had already awarded him the position.

However the arbitrator's analysis of whether the County engaged in a just cause discipline may properly include my application of one of the indicies of the just cause standard, "Does the punishment fit the degree of culpability found in the grievant's conduct?" I believe a 4 1/2-day suspension does not satisfy that test of just cause. It was inordinately severe in view of the conduct of said county representatives.

Given what Baker did on May 16 with his prior award of the job before testing, the Ccmmitee's lack of knowledge that the vacancy had been so awarded and the fact that grievant was simultaneously carrying out his representativestatus to protest testing, leads this arbitrator to conclude that the County should have given, under a reasonable-man-objective test, only a 2-day suspension without pay for Zwiefel's technical insubordination in refusing to perform the demonstration tests of equipment on May 26th. My modification of County discipline is within the prescription of Article 20, Section 5, since that "all or nothing at all" sanction applies only to discharges.

For the foregoing findings and conclusions recited above the arbitrator makes and renders the following

AWARD

That Monroe County did not make a just cause suspension without pay for 3 1/2 days (plus a deprivation of one paid eight hour holiday) for zwiefel's conduct of May 26, 1988, within the meaning of Article 3, 1-D of the labor agreement. The arbitrator further directs that the County modify its discipline effectuated on or near May 27, 1988 by reducing the suspension of Zwiefel to two days' without pay and make whole the grievant, by paying Zwiefel 2 1/2 days pay at his applicable contractual rate; and the undersigned further directs the County to record in the grievant's personnel file the Arbitrator's modified disciplinary layoff without pay to the just cause suspension found to be proper by the arbitrator in this award, namely a two (2) day disciplinary layoff without pay.

Dated at Madison, Wisconsin this 3rd day of July, 1990.

By Robert M. McCormick /s/
Robert M. McCormick, -Arbitrator