BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
LOCAL 569, AFSCME, AFL-CIO	Case 93 No. 46683 MA-7044
and	
JUNEAU COUNTY	

Appearances:
Mr. David White, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, appearing on behalf of the Union.
Ms. Angeline D. Miller, Juneau County Corporation Counsel, appearing on behalf

ARBITRATION AWARD

The Union and the County named above are parties to a 1990-1991 collective bargaining agreement which calls for binding arbitration of certain disputes. The Union, with the concurrence of the County, requested that the Wisconsin Employment Relations Commission appoint an arbitrator to decide a dispute involving job postings. The undersigned was appointed and held a hearing in Mauston, Wisconsin, on August 13, 1992, during which time the parties were given full opportunity to present their evidence and arguments. The parties filed briefs by December 3, 1992.

ISSUES:

The Arbitrator will decide the following issues:

> Has the grievance been appealed to arbitration in a timely manner?
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> If so, did the County violate the collective bargaining agreement by not filling posted positions?

CONTRACT LANGUAGE:

ARTICLE IV - GRIEVANCE PROCEDURE

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E. Steps in Procedure:

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Step 4: If the grievance is not settled at the third step, the grievance committee may appeal the highway committee's decision to the negotiating committee within ten (10) working days of the receipt of the written decision of the highway committee. The negotiating committee shall discuss the grievance with the grievance committee by means of a hearing. The negotiating committee shall then respond within ten (10) days in writing.

F. Arbitration:

1. Time Limit: If a satisfactory settlement is not reached in Step 4, the Union must notify the

negotiating committee in writing within ten (10) working days that they intend to process the grievance to arbitration.

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ARTICLE V - SENIORITY

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Whenever a vacancy occurs or a new job is created, it shall be posted on all shop bulletin boards for a period of five (5) working days; provided, that seasonal jobs need not be posted if vacancy occurs in non-seasonal period, but in no case may the posting be delayed beyond May 1st by this provision. Each employee interested in applying for the job, except mechanics hired after the execution of the 1990-1991 Agreement, shall endorse his/her name upon such notice in the space provided. . . . The Employer shall have the right to temporarily fill the job that is posted; however, such temporary filling of the job shall continue only for a reasonable time after the end of the five (5) days posting or the settlement of the grievance if one should arise. . . .

ARTICLE VI - EMPLOYER'S RIGHTS

Subject to the provisions of this contract and applicable law, the County possesses the right to operate county government and all management rights repose in it. These rights include, but are not necessarily limited to the following:

A. To direct all operations of the County;

B. To establish reasonable work rules and schedule work;

C. To hire, promote, transfer, schedule and assign employees to positions within the county highway department;

. . .

K. To determine the kinds and amounts of services to be performed as pertains to county government operations; and the number and kinds of classifications to perform such services;

. . .

M. To determine the methods, means and personnel by which county operations are to be conducted;

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ARTICLE XIX - MISCELLANEOUS PROVISIONS

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> 8. Any employee working in a higher paid classification shall receive the higher rate of pay for all hours worked that day.
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> . . .

BACKGROUND:

On May 22, 1991, the Union filed a grievance contending that the positions of truck driver, tandem drivers and distributor operator were open and should be posted by the County. As a response to that grievance, on June 11, 1991, the County posted four positions -- one for truck driver, two for tandem drivers, and one for distributor operator. Perry Hargrove and Steve Hartje signed the posting for truck driver, and Hargrove and Gary Schwedrsky signed the postings for tandem drivers and distributor operator.

On July 19, 1991, the Union filed a grievance at Step 2 in the grievance procedure claiming that the County had not followed up on the postings for the posted positions. On July 26, 1991, Highway Commissioner Steven Steensrud denied the grievance. The Union moved the grievance up to Step 3 on July 30, 1991, and on August 20, 1991, the Chair of the County's Highway Committee, Ed Brown, notified the Union that the grievance was denied by the Highway Committee.

The grievance was advanced to Step 4, where the County Personnel/Grievance Committee reviewed it on October 2, 1991. The Chair of that committee, James Barrett, notified the Union in writing on October 15, 1991, that the grievance was denied. The Union received Barrett's letter on October 16, 1991, in its Madison office. A copy was also sent to Union President Wesley Miller. The Committee listed the following reasons for denying the grievance:

> The Committee finds that the position of "single axle truck driver" does not exist under the Collective Bargaining Agreement. The Committee finds that there is no need to fill the full-time tandem truck drivers' positions or the distributor operator's position for the following reasons:
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> > (a) There is not sufficient work for additional employees in tandem drivers' positions on a full-time basis;
> >
> > (b) The tandem trucks which are owned by the County are not new equipment and, consequently, it is not unusual to find one or more of the tandem trucks owned by the County to be non-operational. Also, one tandem truck is outfitted for winter use only. Another is inoperable. Therefore, positions cannot be reasonably assumed to exist based on the number of tandem trucks in existence;
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> > (c) Given the state of disrepair of the tandem trucks, the County Highway Department's inability to purchase new equipment based on budget constraints, and the cost effectiveness and efficiency of utilizing an outside contractor on occasion for those jobs which require heavy hauling at less expense to the

> County (and more efficiently given larger truckbed capacity), it is not reasonable for management to fill the tandem truck driver positions at this time.
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> (d) The distributor operator's position has used a minimum number of hours during the course of recent work years. To assign a full-time employee to that position at this time appears unreasonable because there is already an employee on staff who is trained in handling the distributor in a safe manner.
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> (e) The County has not used summer help or other employees to fill these positions on a permanent full-time basis.
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> (f) When Highway Department employees work out-of-class, they are paid out-of-class wages. Therefore employees did not lose wages if assigned to work out-of-class. No compensation is due the grievants.

On October 31, 1991, Miller sent a letter by regular mail to Barrett advising him that the Union was appealing the grievance to arbitration. Miller addressed the letter as "Dear Sir" and sent it to Barrett at Camp Douglas but without a street address. The WERC received the Union's request to initiate grievance arbitration on December 10, 1991.

The tandem driver positions were vacated by employees who posted into the positions of scrapers when the County bought five scrapers in 1991. The distributor operator position was open because an employee who previously posted into that position returned to his former position, and that position was open since the summer of 1990.

Steensrud was not inclined to post these positions initially. The use of tandem trucks has declined, since the County bids certain work out now, such as seal coating and hauling in chips for it. The tandems are also older trucks, and due to their age and mileage, they are not always operational. One of the tandems, #41, was used more than usual during 1991, having more than 800 hours on it. This truck is used in the winter running sand to outlying barns. The other two tandems, #29 and #32, are used less, with #29 having 315 hours on it and #32 having 446 hours on it during 1991. The only time all three would be used simultaneously is when employees are doing seal coating work in the summer.

The use of the distributor has remained about the same over the past few years, around 150 hours per year. The distributor is mainly used by the state during the winter months to fill cracks in roads.

The County has 30 single axle trucks, with nine of them assigned to state patrol sections and four assigned to County patrol sections. The other 17 are assigned as needed. These trucks are used for transportation to and from jobs, hauling blacktop, and shouldering work. Currently, the single axle drivers are Arnie Mills and Steve Hartje.

Steensrud considers high usage on a vehicle to be around 900 to 1,000 hours, with moderate usage at 400 or 500 hours, and low usage at 100 hours or less. However, Steensrud does not consider the amount of time equipment is used as a determining factor in whether or not a position is created or filled to go along with such equipment.

The County fills some jobs by working employees out of class and paying the higher rate for a full day, not just the time worked out of class. Employees may not be assigned out of class on a permanent basis. Steensrud usually assigns Hartje or Mills, the single axle drivers, to the tandems when needed. Steensrud noted that the budget for his department is lower than it was six years ago, and such budget restrictions require either cutting out material items such as gravel and blacktop or cutting pieces of equipment.

Steensrud would prefer to see an employee assigned permanently to the distributor operation, but no one has accepted the position on a full time basis. Three employees have signed a posting for that position but later turned it down. Steensrud usually assigns Tony Babcock or Gary Schwedrsky to the distribution operation when needed.

THE PARTIES' POSITIONS:

The Union asserts that the grievance was timely appealed to arbitration, and argues that unless the record clearly demonstrates that the grievance was not processed in a timely fashion, it must be found to be timely. The labor agreement calls for the Union to notify the negotiating committee within ten working days that it intends to process the grievance to arbitration. Thus, the relevant inquiry is when the Union sent a letter to the negotiating committee, not when the Union filed documents with the WERC as the County states. The contract does not require that the letter of intent to arbitrate be served on the County's attorney or any other County official. Union President Wes Miller testified that he appealed the grievance to arbitration in a letter dated October 31, 1991, which he mailed to the chair of the negotiating committee. This date is reasonably proximate to the date that the committee answered the grievance. In the absence of evidence regarding when the committee's letter was received by Miller, the Union has met the contract's requirements.

The Union argues that four vacancies occurred when the County posted four positions, and the contract prohibits the County from indefinite use of temporary assignments as has occurred here. A fundamental aspect of the deal between the parties is that employees are able to use their skill and seniority to obtain higher paid or more desirable work, while the employer is able to be the judge of the skill of employees competing for such work. If the employer is permitted to make "permanently temporary" assignments in this manner, that fundamental principle is undermined and the posting provisions of the contract mean nothing.

In determining whether vacancies existed, the Union contends that a vacancy exists when either the employer says it exists or when the use of particular equipment is such that a vacancy constructively exists. A vacancy constructively exists when a piece of equipment has historically been posted, and when it is used to a similar degree that it has been used when that position was previously posted. The Union notes that the distributor operator position was posted twice in 1990, that the use of the distributor has increased slightly from 1988 through 1991, and yet the County now finds that the position does not exist. The same is true of the tandem truck driver positions, where two were posted in 1990. While the trend in use of these trucks has decreased slightly, the use of one -- #41 -- increased in 1991. Although the Highway Department determined that two tandem positions existed in 1990, the Employer now has determined that no such positions exist. Truck #41 is well above the definition of moderate use and within 100 hours of being considered a high use vehicle. A single axle truck position was posted twice in 1990, and the County now asserts that the position does not exist despite the fact that use on a per-truck basis has increased.

Where the County continues to require that the work be done but fails to award vacancies to anyone, it was violated Article VI, the Union concludes and asks that affected employees be made whole for any losses incurred as a result of such violation.

The County argues that the time limits for the appeal to arbitration should be strictly enforced. The Union did not seek to have the time limit extended. The County Corporation Counsel did not receive the notice of the intent to arbitrate until December 10, 1991, well beyond the ten day limit. While Union President Wes Miller testified that he sent a notice of the intent to arbitrate to the chairman of the negotiating committee, James Barrett, within the ten day period, three County witnesses had no knowledge of this notice. Personnel Coordinator Nancy Krueger, negotiating committee member Ed Brown, and Highway Commissioner Steve Steensrud all work closely with the County on grievance matters, and none of them were told by Barrett that he received this notice. The Union did not call Barrett to testify and verify the receipt of this notice from Miller. The Union had ample notice that the County considered the grievance to be untimely, as the County filed motions for dismissal and summary judgment well in advance of the arbitration hearing.

As to the merits, the County asserts that it is management's right to determine whether a vacancy exists and whether to fill it, in the absence of a contract provision requiring maintaining certain numbers of employees on particular jobs. And even if a job has been posted for bidding, that is no guarantee that a vacancy exists and will be filled. The Highway Commissioner decided that there was no need to replace employees who had held the truck driver, tandem or distributor positions.

Moreover, the County contends that the truck driver position which was posted in 1991 has been filled by an employee who signed the posting. While Steensrud would like to see someone permanently assigned to the position of distributor operator, he has not been successful in getting someone to accept the job permanently. The tandem driver positions were vacated by employees who signed to be scraper operators, and the County does not intend to keep the scraper operators as permanent positions, thus necessitating the return of those employees to tandem driver positions. The County also points to the Highway Department's deficit of $371,000.00 as a justification for not filling tandem operator positions.

The County argues that while the contract language mandates that all vacancies must be posted, the language does not specifically state that all posted positions must be filled.

DISCUSSION:

The language of the grievance procedure provides that once the County's negotiating committee has responded to a grievance at Step 4, the Union "must notify the negotiating committee in writing within ten (10 working days that they intend to process the grievance to arbitration." The question here is whether Wesley Miller's letter dated October 31, 1991, satisfies that requirement and is a timely appeal to arbitration.

The labor contract does not contemplate that the Union has to make a formal appeal to arbitration to the WERC within the time specified in the grievance procedure. Thus, the Union's request to initiate arbitration received by the WERC on December 10, 1991, is not the relevant document. The Union is only required to notify the negotiating committee in writing.

Miller's letter of October 31, 1991, qualifies as notice in writing of an

appeal. Although Miller did not address it more specifically than "Dear Sir," he testified that he sent the letter to Barrett. 1/ The Union is not required to do more. It is not required to sent a notice by certified mail, it is not required to sent a notice to the Corporation Counsel, the Personnel Coordinator or any other person in the County. It is very simply required to notify the negotiating committee in writing that it intends to proceed to arbitration.

If the parties believe they need to add some more formality to the grievance process -- whether it be by sending notices via certified mail, designating more people to receive such notices, etc. -- the parties can work this out in bargaining. The Arbitrator will not impose such formalities into the collective bargaining agreement where the parties have not chosen to do so themselves.

However, the Union is further required to notify the negotiating committee within 10 working days of its intent to process the grievance to arbitration. The contract language states that the Union must do this within such a time frame. Barrett's letter dated October 15, 1991, and received by the Union on October 16, 1991, 2/ started the clock running on the 10 day limitation period. Assuming that working days are Monday through Friday, and in any event the time period would encompass two weekends, the clock started running on October 17th, the day after the Union received County's response to Step 4. A 1991 calendar shows that for the Union to meet the 10 working days requirement, it would have to notify the County by October 30, 1991. Miller's letter dated October 31st was sent a day late. 3/

It is always unfortunate to deny a grievance when one party misses a procedural item by such a narrow margin. However, there are no extenuating circumstances or explanations for the late notice of intent, or any basis on which a delay could be considered waived or excused. 4/ As noted by Elkouri

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1/ The Arbitrator has declined to consider the affidavit of Barrett submitted with the County's brief as part of the record, since the Union had no chance to cross examine Barrett during the hearing. Even if Barrett's affidavit were accepted, it would have no bearing on the case. Miller's testimony that he sent the letter to Barrett appears to be truthful; if Barrett did not receive it, Miller's testimony is not consequently untruthful. It is possible that the letter was not delivered after it was sent. Miller did not have a street address for Barrett, and there are other possible explanations.

2/ While the Union argues in its brief that there is no evidence when the County's letter was received by Miller, a date stamp of October 16, 1991 appears on Joint Exhibit #6 to verify the date the Union received the letter in its Madison office. The letter was dated October 15th, and if it were received as stamped in Madison, it is also likely that the letter was received by Miller on the same date. While date stamps and dated letters could have incorrect dates, both parties would have had to make a mistake. Therefore, the best evidence available is that the Union knew on October 16th of the County's denial of the grievance.

3/ The fact that the date on Miller's letter fell outside the contractual time limit actually enhances Miller's credibility. If the County thought that Miller was producing a fictitious letter of the notice of intent, why would he not produce a fictitious date that fell within the 10 day limitation period.

4/ See Pacific Southwest Airlines, 82-1 CCH ARB Para. 8247 (Leventhal, 1981), and Chase Bag Co., 69 LA 85 (Wolff, 1977).

and Elkouri in How Arbitration Works, (BNA, 3rd Ed.), at pages 165-166:

> Collective agreements frequently provide that parties who wish to arbitrate disputes not settled by the negotiation steps of the grievance procedure must give notice of desire and intent to arbitrate within a specified period of time. Arbitrators often have held that failure to five the required notice, unless waived by the other party or otherwise excused, renders the dispute nonarbitrable.
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> The obvious fact that many arbitrators consider a contractual provision for notice of appeal to arbitration to be far more than a mere formality and indeed to be in effect a statute of limitations, is particularly significant in view of the fact that questions of procedural arbitrability (including time limit compliance) are to be decided by the arbitrator if the federal law applies to the case.
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> Under an agreement which required written notice of intent to arbitrate, a timely oral announcement of intention was held not to be sufficient. However, a timely oral announcement of intent to arbitrate was held sufficient where the agreement did not specifically require written notice. Unless the agreement expressly requires the notice to be in some particular form or requires the use of particular terminology, substance should govern over form and a notice should be held sufficient if it clearly and unequivocally advises the other party within the time limit that the grievance is being taken to arbitration.

Arbitrator Mueller noted in Burdick Corp., 68 LA 933 (1977) that the subject has perplexed many arbitrators, who are faced with conflicting considerations, such as arbitrators cannot write provisions into the bargaining agreements, while most arbitrators are also reluctant to dismiss a grievance based on a technicality. He noted further:

> From a study of a vast number of reported arbitration cases, it appears that where the labor agreements provide time limits but afford for appeals from one step to the next by oral appeals, arbitrators have been much more lenient in finding various grounds for excusing strict compliance to time limitations.....where collective bargaining agreements specify that notices of intent to arbitrate must be in writing, the majority of cases appear to treat such provision as constituting a form of statute of limitations. Under such line of cases, it appears that the formal requirement of written notice of appeal carries with it a corresponding obligation of greater compliance because of its being likened to a statute of limitations and because such provisions provide for the formality of being in writing.

There is nothing exceptional about this case which needs to be noted. The contract clearly calls for notice in writing within 10 days. The Union did not comply with this provision. Although the error of margin is slight, there can be no consideration of this grievance on its merits.

AWARD

The grievance was not appealed to arbitration in a timely manner and is therefore denied.

Dated at Madison, Wisconsin this ____ th day of January, 1993.

By _____
Karen J. Mawhinney, Arbitrator

KJM/mm
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