BEFORE THE ARBITRATOR

In the Matter of Two Disputes Between	Case 82 No. 48655 MA-7672
WAUPACA COUNTY (HIGHWAY DEPARTMENT)	and
and	Case 83
WAUPACA COUNTY HIGHWAY DEPARTMENT LOCAL 1756, AFSCME, AFL-CIO	No. 48656 MA-7673

Appearances:
Mr. Sam Froiland, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1756.
Mr. James R. Macy, Esq., Godfrey & Kahn, S.C., on behalf of the County.

ARBITRATION AWARD

According to the terms of the 1991-93 collective bargaining agreement between Waupaca County (hereafter County) and Waupaca County Highway Department Local 1756, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission appoint a member of its staff to serve as impartial arbitrator of two disputes between them regarding (Part I) the Union's request that the County post and fill "positions" for one bulldozer operator, one end loader operator and one truck driver and regarding (Part II) the County's failure to fill a truck driver "position" after having posted same. The undersigned was designated arbitrator. Hearing was held on March 12, 1993. A stenographic transcript of the proceedings was made and received by the undersigned on April 9, 1993. The parties filed their initial briefs by April 27, 1993 which were thereafter exchanged by the undersigned. The parties reserved the right to file reply briefs fourteen days after their receipt of the opposing party's initial brief. Those reply briefs were received and exchanged by the undersigned by May 13, 1993.

ISSUES:

The parties were unable to stipulate to the issues before me in these two cases. However, they agreed that the undersigned could frame the issues in the first part of these cases. The Union suggested the following issues:

> Did the County violate the collective bargaining agreement by failing to post and fill the positions of bulldozer operator, end loader operator and truck driver pursuant to Article 8 Job Posting and Seniority?
>
> If so, what is the appropriate remedy?

The County suggested the following issues for determination in the first part hereof:

> Did the County violate Section 8.03 of the collective bargaining agreement by not posting equipment in the absence of vacancies?
>
> If so, what is the appropriate remedy?

Based upon the relevant evidence and argument herein I find that the Union's

above-proposed issues shall be determined.

In regard to the second portion of these cases, the Union suggested the following issues statement:

> Did the County violate the collective bargaining agreement by posting and then failing to fill truck number 1167 pursuant to Article 8 Job Posting and Seniority?
>
> If so, what is the appropriate remedy?

The County's proposed issues in Part II were as follows:

> Did the County violate Article 8 of the collective bargaining agreement by reserving its right to determine positions in classifications by removing a posting in 1991?
>
> If so, what is the appropriate remedy?

The parties agreed that the undersigned could frame the issues regarding the second part of these cases. Based upon the relevant evidence and argument, I find that the Union's above-proposed issues shall be determined herein.

RELEVANT CONTRACT PROVISIONS

Article II-Management Rights

2.01 The Waupaca County Board of Supervisors, through its duly elected Highway Commissioner, possesses the sole right to operate the Highway Department and all management rights repose in it, except as otherwise specifically provided in this Agreement and applicable law. These rights include, but are not limited to the following:

A) To direct all operations of the Highway Department;
B) To establish reasonable work rules and schedules of work;
C) To hire, promote, transfer, schedule and assign employees within the Highway Department;

D) To suspend, demote, transfer, discharge and take other disciplinary action against employees for just cause;
E) To layoff employees because of lack of work or other legitimate reason;
F) To maintain the efficiency of the Highway Department operations;
G) To take reasonable action, if necessary, to comply with State or Federal law;
H) To introduce new or improved methods or facilities or to change existing methods or facilities;
I) To determine the kinds and amounts of services to be performed as pertains to the Highway Department operations and the number and kinds of classifications to perform such services;

J) To contract out for goods and services, provided however, that no employee shall be on layoff or laid off or suffer a reduction of hours of work as a result of such subcontracting;

K) To take whatever action is necessary to carry out the functions of the Highway Department in situations of emergency.

. . .

8.01 Job Posting: A vacancy shall be defined as a job opening not previously existing in the Table of Organization or a job created by the termination of employment, promotion or transfer of existing personnel, when the need for job continues to exist in the Table of Organization.

. . .

8.03 All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least (10) calendar days, and shall state the prerequisites and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. Employees securing a posting will be assigned vacated equipment if maintained in service by the County.

It is understood by the parties that the employee who has signed the posting for available equipment within the respective job classification shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

. . .

8.06 The Employer may make a immediate temporary assignment to fill any vacancy until the vacancy has been filled pursuant to the procedure herein outlined.

. . .

Article XIII-Job Classification & Wage Schedule

. . .

13.03 The number of employees to be assigned to any job classification and the job classification needed to operate the Waupaca County Highway Department shall be determined by the Employer and shall constitute the Table of Organization.

. . .

BACKGROUND

The 1988-89 collective bargaining agreement contained the following language in Article VIII - Job Posting & Seniority:

> 8.03 All vacancies shall be posted on the bulletin board. Such notice shall be posted for at least ten (10) calendar days, and shall state the prerequisites, (Equipment number) and wage rate for the job. Such prerequisites shall be consistent with the requirements of the job classification. It is understood by the parties that the employee who has signed the posting with an equipment number shall be considered the primary operator; however, the County may reassign such equipment to other worksites to meet specific workload needs.

The remainder of Article VIII appeared then as it does now in the 1991-93 agreement.

By its letter dated December 6, 1989 (prior to the expiration of the 1988-89 contract) the County notified the Union that it wished to evaporate certain allegedly permissive language contained in that contract after it expired. Among the Sections to be evaporated was a portion of Section 8.03. The County proposed to delete the parenthetical reference to equipment number as well as all of the last sentence of that section. The County maintained its position that these portions of Section 8.03 were permissive throughout negotiations and filed a petition for declaratory ruling prior to the close of the Interest Arbitration case involving a successor agreement to the 1988-89 contract.

A hearing on the County's declaratory ruling petition relating specifically to Section 8.03 was held before Examiner Peter Davis on May 17, 1991. A one hundred page transcript of those proceedings was taken. At the close of the proceedings the parties agreed to change Section 8.03 to read as it does in the effective labor agreement. In addition, the parties discussed a then-pending grievance regarding a truck driver position and whether the revised language of Section 8.03 would apply to that position (Transcript, page 96):

> Mr. Macy:
> (County's counsel)
>
> . . .
>
> As I understand it, there is a current posting that has come down. We have to still evaluate whether there's a need for this position. We have to make that initial determination. But we will apply the new language after this threshold determination.
>
> (Off-the-record discussion)
>
> (Peter Davis) EXAMINER: Back on the record. I will take (sic) another attempt at stating the settlement agreement which has gone through a little refinement. The parties agree, as I understand it, that the Exhibit A language, the new 8.03 language, will become Contract language that binds them on any jobs that have been posted as of today which I understand is one truck driver job, and all future jobs--excuse me, all future

postings. . . .

The County had posted a truck driver position in the Spring of 1991 (prior to filing the DR) and it listed truck number 1167 on that posting. At that time, County mechanic Kevin Krieser and another County worker, Mark Rosenau signed the posting for the truck driver opening. Sometime after this posting was made, the County took the posting down and filed its DR petition. No grievance was filed regarding this action by the County and it is undisputed on this record that after the DR proceeding was completed, the County decided not to create an additional truck driver position (as described in the above-quoted statement by Mr. Macy). No grievance was filed by the Union regarding this County decision.

On June 27, 1991, the Union filed two grievances: one requesting that the County post the "vacancy for open Cruz-Air;" the other requesting that the County post the "vacancy for open 93-T bulldozer." 1/ On September 28, 1992 the Union filed the instant grievance relating to truck number 1167 which stated in relevant part as follows:

> Statement of Grievance: . . . In the Spring of 1991 Waupaca County posted a job posting for #1167 truck driver. . . . After truck #1167 was posted Waupaca County said truck 1167 was to be used only as a spare truck. The Union contends since that time, Waupaca County has been using that truck more than a spare.
>
> . . .
>
> The Union demands that Waupaca County honor that posting for #1167 truck according to Article VIII, Section 8.04 of the current contract.

The other three grievances involved in the instant case were also filed on September 28, 1992. These grievances involved truck number 1178, bulldozer 93-T and Endloader 131-T. Each grievance asserted that the County had maintained these pieces of equipment "in use" without assigning an operator to them and each demanded that the County post job postings for these "vacancies." The County denied all four regarding all four grievances the grievances and they proceeded to arbitration herein.

It is undisputed that the County used trucks 1167, 1178 and endloader 131-T and bulldozer 93-T during the period January 1, 1991 through April, 1992. The Union submitted various (and sometimes conflicting) calculations regarding the number of hours each piece of equipment was used during this period of time. 2/ It is clear on this record that the equipment referred to herein was used for significant periods of time and that other like pieces of equipment (which are currently assigned by the County to a primary operator) were used for similar periods of time in 1991 and 1992. 3/

1/ The Union ultimately dropped both of these grievances because the County posted and filled one Cruz-Aire position. The 93T Bulldozer "position" complained of in June, 1991 appears to be the same as that complained of in the instant case.

2/ The County objected to the receipt of this evidence, arguing that it is irrelevant.

3/ Union Steward Roger Hansen calculated that for the period from January 1, 1991 through April 24, 1992, the following pieces of equipment were used

It is also undisputed that in the past, although the Union has proposed that employes in lower classifications receive higher classification pay while working with equipment normally assigned to employes in higher classifications, the County has traditionally resisted placing such a proposal in the contract. Rather, the County has continued its undisputed past practice of paying employes the wage rate of the Class they successfully posted into even when they are assigned to perform work that is normally assigned to someone in a higher or lower classification.

As of the date of the instant hearing, the County maintained approximately 141 pieces of Highway Department equipment and it employed approximately 75 bargaining unit Highway Department employes.

Union bargaining committee member Jerry Olson stated that in his view if a piece of equipment is used for one hour it should be posted by the County. Union steward Roger Hansen stated that in his view, a vacancy is created when one employe leaves a former position to take a new position, so that the employe's former job should be deemed open and it should then be posted. No evidence was submitted to show that either hours of use or employe promotions have automatically created vacancies. Rather, Personnel Director Langman's testimony stands unrefuted that at no time relevant here, has the Union contested the County's right to decide when a position becomes vacant or open.

POSITIONS OF THE PARTIES

Union

The Union asserted that during calendar 1991 through April 25, 1992, the County regularly used Truck #1167, Bulldozer #93-T, Endloader #131-T and Truck #1178. From April 25, 1992 through the end of 1992 the Union asserted that the County operated the following equipment as follows:

#1167	--	345 Hours
#93-T	--	402.5 Hours
#131-T	--	461 Hours
#1178	--	358 Hours

The Union contended that the above equipment was not assigned to employes by the County during 1991 and 1992 despite the fact that other similar pieces of equipment had been used for similar periods of time and those pieces of

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for the hours listed:

Truck 1167 - 449.5 hours
Truck 1178 - 493 hours
131-T Endloader - 1113 hours
93-T Bulldozer - 257 hours

Hansen's calculations were based upon his perusal of County records and I find that Hansen's calculations are accurate. Evidence that appears to conflict with that given by Hansen, as stated above, has been disregarded. Krieser's observations of the use of truck 1167 lack the accuracy of Hansen's calculations. In addition, I do not find the evidence gleaned from the County's fuel records to be particularly useful except to show that the equipment in dispute here was often in use as frequently as other similar pieces of equipment to which primary operators had been assigned.

equipment had been assigned. Therefore, the Union asserted, the County had an obligation to post and fill four jobs covering the above-listed pieces of equipment.

The Union noted that although Section 8.06 allows the County to temporarily assign employes holding jobs in one classification to a different classification, it does not allow the County to circumvent the obligation to post and fill vacancies. The Union contended that the County's failure to fill the four disputed vacancies undermines the negotiated classification system and that the vacancies regarding the four pieces of equipment were real, not temporary. The Union further observed that the extensive out-of-classification transfers of lower paid employes, as the County had done, has eroded employe pay rates as guaranteed in Schedule A because the assigned employes cannot make the higher rates normally paid to employes assigned to and regularly operating this equipment.

In regard to the County's arguments relating to its having filed a Declaratory Ruling in 1990, the Union asserted that it is not seeking to force the County to post equipment pursuant to the labor agreement but rather it is seeking to require the County to post the true vacancies (in dispute here) which have existed for the past two years. The Union observed that even after the settlement of the D.R., the labor agreement continued to contain language requiring the County to post vacant positions.

Finally, the Union asserted that the County's laches argument was specious. It noted that the County had failed to raise this argument prior to the instant hearing. The Union observed that it had explained its withdrawal of the Cruz-Aire grievance and its withdrawal of the grievance relating to bulldozer 93-T at the hearing. Therefore, given the overwhelming proof that the disputed positions in fact existed, the Union urged rejection of the County's laches defense.

The Union therefore sought an award ordering the County to post two Class III truck driver positions, one Class IV endloader position and one Class V bulldozer position.

COUNTY

The County argued that it has historically maintained substantially more trucks and equipment than it has had employment positions, so that there have traditionally been more pieces of equipment than employes in the department. The County further observed that it has always reserved to itself, the management right to create, post and fill employment positions it deems necessary (Articles 2 and 13). To protect and preserve that right, the County brought a declaratory ruling petition in 1990 wherein it sought the removal of the Section 8.03 contract reference to available equipment which could be interpreted as requiring the County to create or maintain positions equal to the number of pieces of equipment then in use. That case settled with the removal from Section 8.03 of references to posting pieces of equipment and the insertion of a reference that employes, after their selection for a position, would be given assignments as primary (but not exclusive) operators of equipment then in use within their classifications. This change, in the County's view, made the language a clear and unambiguous reservation of the County's rights to create and fill positions.

The County further argued that a grievance then pending regarding the Union's request that the County post and fill a truck driver position for truck number 1167 (the same one involved herein) was held in abeyance following the settlement of the D.R. The County later decided not to create and fill a truck driver position and this grievance was withdrawn. The County noted that is has

not created and filled any truck driver positions since the D.R. settlement.

Although one employe left the position of Bulk Plant Oil Operator, the County filled that position from within and the County thereafter also filled a Cruz-Aire Operator position vacated by the previous promotion to Bulk Plant Oil Operator. No other openings were thereafter created or filled and the County and Union agreed upon labor contracts covering the years 1990 and 1991-93. The County therefore urged that no truck driver opening has been created and that the grievance regarding truck 1178 is also untimely because it involves the same facts underlying a grievance filed and dropped more than two years ago.

The County contended that even assuming arguendo that the language of Section 8.03 is unclear, the bargaining history and the settlement of the D.R. support the County's interpretation and application of the contract. Were the arbitrator to rule in favor of the Union in the instant cases, the County urged, the recently changed language of Section 8.03 would be rendered meaningless. In addition, such a ruling would grant to the Union what it was unable to gain in negotiations and what it relinquished in settling the D.R. - the notion that usage of equipment should determine the number of employment positions.

Finally, the County argued that no new positions have been created which did not previously exist in the contract's Table of Organization and no job openings have been created by the promotion, termination or transfer of existing personnel which the County has found a need to fill (pursuant to Section 8.01). Thus, the County urged that as a practical matter, these grievances must be denied. Furthermore, the County noted, a ruling in favor of the Union in these cases would result in the need to give higher pay to those working out of their classifications, an advantage which the County has traditionally resisted granting through negotiations. In these circumstances, the County sought an award denying and dismissing the grievances.

REPLY BRIEFS

Both parties timely filed reply briefs which were received and thereafter exchanged by the Undersigned, per the parties' agreement at hearing.

Union

The Union urged that the County's laches argument should be disregarded. The Union explained that it withdrew two prior grievances based on terms favorable to the Union: the County posted and filled one job in one grievance and in the other grievance, the County decided no vacancy existed. The Union asserted that the County should not be allowed to destroy the job classification structure and the Schedule A pay rates of employes by forcing employes to work out of their classifications on a regular basis and that if the labor agreement is construed as a whole rather than piecemeal as the County has done, such a result will not occur. The Union contended that it has merely sought in these cases to have the County post new jobs or positions once they have been created. The Union argued that the creation of these jobs was demonstrated by the uncontested evidence of vehicle usage submitted by the Union at hearing.

County

The County objected to the Union's reference to and reliance upon Section 8.06. The County noted that the Union's first reference to this Section occurred at the instant hearing. Thus, the County urged that, in fairness, the Union's arguments regarding Section 8.06 should be disregarded.

Furthermore, the County contended that the Union distorted the facts surrounding the practice of employes working out of classification. In this regard, the County noted that the Union failed to acknowledge that employes who are assigned to work in lower paid classifications have traditionally been paid their normal/higher rate of pay. The County contended that the pay rate problems about which the Union has complained should properly be the subject of collective bargaining.

Finally, the County strongly disagreed with the Union's assertions that the County has "eviscerated" the bargaining unit. Rather, the County asserted that it has filled two positions it found necessary even though only one employe left County employment. In these circumstances, the County urged that the grievances be denied and dismissed in their entirety.

DISCUSSION:

These cases essentially involve determining what circumstances must exist before an employment position is deemed to be open or vacant. 4/ Absent express limiting language in the labor agreement, the generally accepted view is that the employer retains the right to make these decisions in its discretion. In the instant case, I can find no contract language or evidence of any practice which would tend to support the Union's claims that equipment usage or the fact that an employe has posted into a different position, leaving a piece of equipment "vacant," establish openings or vacancies that must be posted.

Rather, it is clear that the County has specifically reserved the right to decide when and if vacancies have occurred in several areas of the labor contract. For example, in Article II, Section 2.01(I), the County has retained the right to "determine the kinds and amounts of services to be performed . . . and the number and kinds of classifications to perform such services." In addition, in Article XIII Section 13.03, the County expressly reserved its right to determine the "number of employees to be assigned to any job classification and the job classification (sic) needed to operate" the County Highway Department.

Furthermore, the change in Section 8.03, brought on by the County's 1990 declaratory ruling petition, clearly supports the County's arguments in these cases. The parties' settlement of the declaratory ruling case by the

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4/ The County argued at the hearing and also in its briefs that the grievance regarding truck 1167 should be denied and dismissed because the Union has been guilty of laches--that it sat on its rights without complaint from 1991 until September 28, 1992. On this point, I note that the reference to a truck driver position in the declaratory ruling proceeding did not specifically refer to truck 1167; that the County proffered no documents or testimony that the Union had dropped a grievance with prejudice regarding truck 1167 or that the Union knew or should have known that a violation of the contract had occurred in 1991 when the County posted a position referring to truck 1167 and later removed that posting.

In these circumstances and given the County's tardiness in raising its laches defense, I find that the grievance regarding truck 1167 which is before me is not barred by laches and that the Union pursued the contract violation it believed had occurred in a timely fashion after collecting the data on the County's use of that truck over time. I will therefore determine the merits of all four grievances in this award.

elimination of the parenthetical reference to equipment numbers on postings, the parties' agreement to delete language in the last sentence of that Section that referred to employes signing postings containing equipment numbers and the parties' agreement to add language stating that employes who have secured a posting would then be assigned to vacated equipment if it is maintained by the County, demonstrate that the parties wished the County to have the freedom to assign employes to work without being required to also assign the equipment each employe had been primarily assigned to operate to the particular job. Thus, the transcript of the declaratory ruling case fails to support the Union's arguments herein that the parties intended that job vacancies should be tied to equipment availability or usage. (DR Transcript, pp. 46-48; 82-87).

The Union has argued that its wage rates and bargaining unit are being destroyed by the County's refusal to post "true" openings. The Union overstates its case. A ruling in favor of the Union in this case would wrest from the County its clearly preserved Section 13.03 right to actively determine the "number of employees" and the "job classification needed to operate" the Highway Department. In this regard, I note that the record clearly shows that the County withdrew the truck 1167 posting because it decided that it did not need another truck driver position and that the County did not post any other truck driver, bulldozer or endloader openings during 1991 and 1992. Thus, no openings were found by the County. 5/

If the determination whether a vacancy exists must be based upon equipment usage or an operator's vacating equipment, as the Union has argued, the County would lose the right to decide and determine the number of employes it needs. If operators vacating equipment is determinative of the number of job positions, the County could never employ fewer employes than it had in 1991. Indeed, the County would likely be forced to hire more employes if equipment usage is determinative of job positions, as the Union argued: if there are now 69 County trucks, then depending on truck usage, more than 15 truck drivers would have to be employed to operate these trucks. It is also wholly unsupported by the facts of these cases and by the language of the effective labor agreement and the bargaining history surrounding it.

Therefore I issue the following

AWARD

The County did not violate the collective bargaining agreement by failing to post and fill the positions of bulldozer operator, end loader and truck

5/ I do not find Section 8.06 relevant to the instant grievances and therefore, I have not considered the Union's arguments thereon. In this regard, I note that Section 8.06 applies solely "temporary assignments" into vacancies, found necessary by the County, during the period prior to the County's permanently filling the vacancy found. There was no evidence offered on this record to show that any vacancies that had been found necessary by the County had been thereafter temporarily filled pursuant to Section 8.06.

driver.

The County did not violate the collective bargaining agreement by posting and then failing to fill truck number 1167 pursuant to Article 8.

These grievances are therefore denied and dismissed in their entirety.

Dated at Madison, Wisconsin this 24th day of June, 1993.

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Arbitrator