BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LOCAL 139, INTERNATIONAL UNION OF OPERATING ENGINEERS and HEITMAN, INC.	Case 3 No. 47859 A-4962

Appearances:

Mr. Warren Kaston, Legal Counsel, appearing on behalf of the Union.
Shindell & Shindell, Attorneys, by Ms. Anne B. Shindell, appearing on behalf of the Company.

ARBITRATION AWARD

The Company and Union above are parties to a 1988-90 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve 23 separate grievances involving non-bargaining unit personnel allegedly performing bargaining unit work.

The undersigned was appointed, and the parties initially agreed to submit the arbitrability of the grievances as a threshold issue. The undersigned issued an arbitration award on January 29, 1993 finding the grievances to be arbitrable, following which a hearing was scheduled as to the merits. That hearing was held on April 7, 1993, no transcript was made, briefs were filed by both parties, and the record as to the merits was closed on September 7, 1993.

ISSUES:

The Union proposes the following:

1. Did the Employer violate the 1988-90 Wisconsin Excavators and Graders Association collective bargaining agreement by assigning bargaining unit work as defined in the contract to non-union or non-bargaining unit personnel?

2. If so, what shall be the remedy?

The Company frames the issue as follows:

> Whether the Union's 37-year acceptance of Heitman's practice resulted in a binding past practice which modified the language of the labor agreement between the parties?

RELEVANT CONTRACTUAL PROVISIONS:

Article I, Section 1.1. Recognition. The Association contractors on a multi-employer basis hereby recognize the Union as the sole and exclusive bargaining agent for all employees in the bargaining unit. The bargaining unit shall consist of all heavy equipment operators, as classified in Article VI, Jurisdiction and Classification, performing work within the scope of this Agreement.

Article I, Section 1.2. Assignment of Work. The Contractor hereby assigns all work to be performed in the categories described in Article VI, Jurisdiction and Classification, to employees in the bargaining unit.

Article I, Section 1.3. Scope of Agreement.
(a) This Agreement shall apply to all on-site construction in the following categories throughout the Counties of Milwaukee, Ozaukee, Waukesha, Washington, Racine and Kenosha of the State of Wisconsin, limited to the following: excavating, grading, landscaping, paving, landfill and snowplowing with heavy equipment.

Article I, Section 1.4. Entirety of Agreement.
This Agreement represents the entire written contract between the parties and it supersedes any previous agreements, supplements, riders or addenda, whether written or verbal. Neither the Union, the Contractor nor the Association shall have the right to add to, subtract from or change the terms of this Agreement without the mutual written consent of all parties.

Article II, Section 2.1. Definition of Workers.
"Workers" shall include only those persons employed by the Contractor coming within the jurisdiction of Local No. 139 Operating Engineers and specifically set forth in Article VI, Jurisdiction and Classification.

Article III, Union Security, Section 3.1. Union Security. All present employees of the Contractors covered by this Agreement who are members of the Union as of the date of execution of this Agreement shall,

as a condition of continued employment with said Contractors, maintain membership during the life of this Agreement by tendering the periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership. All present employees of the Contractors covered by this Agreement who are not members of the Union and all employees of the Contractors covered by this Agreement shall become members of the Union within eight (8) days following the date of this Agreement, or within eight (8) days following the commencement of such employment, whichever is later, and shall, as a condition of continued employment with said Contractor, maintain membership during the life of this Agreement by tendering periodic dues and initiation fees uniformly required by the Union as a condition of acquiring or maintaining membership; provided, however, that such membership in the Union is made available to such workmen on the same terms and conditions generally applicable to other members and that such membership is not denied or terminated for reasons other than a failure by the affected worker to tender the periodic dues and initiation fees uniformly required as a condition of acquiring or maintaining membership.

Upon written notice from the Union advising that an employee covered by this Agreement has failed to maintain membership in the union in good standing by payment or uniform initiation fees or dues as covered above, the Contractor shall discharge the employee, unless the Contractor has reasonable grounds for believing that membership was denied or terminated for reasons other than for failure of the employee to tender the periodic dues and initiation fees uniformly required by the union as a condition of acquiring or maintaining membership.

The Contractor shall not discharge or cause an employee to lose any work for failure to maintain membership or good standing under this Article except upon written notice from the Business Representative of the Union.

Article IV, Duration of Agreement, Section 4.1.

This Agreement shall be binding upon the parties, their successors and assigns, and shall continue in full force and effect from June 1, 1988 until May 31, 1990, and from year to year thereafter, unless terminated by written notice (certified mail) given by either party to the other not less than ninety (90) days prior to the expiration date. Since it is the intention of the parties to settle and determine for the term of this Agreement all matters constitute the proper subjects of collective bargaining between them, it is expressly agreed that there shall be no reopening of this Agreement for any

matter pertaining to rates of pay, wages, hours of work or other terms and conditions of employment, or otherwise, during the term of this Agreement.

. . .

Article VI, Section 6.1. Jurisdiction and Classification. The Contractor hereby agrees to assign any equipment within the jurisdiction as described below to bargaining unit employees: the operation of all hoisting and portable engines on building and construction work where operated by steam, electricity, diesel, gasoline, hydraulic or compressed air, butane, propane or other gases and nuclear or atomic power, limited to the following: trench hoes, … mounted or towed compactors, … endloaders, … bulldozers, scrapers, … and all equipment specified in Article XXVI.

. . .

Article VIII, Grievance Procedure, Section 8.3.
In the event the arbitrator finds a violation of the Agreement, he shall have the authority to award backpay to the aggrieved or persons on the referral list in addition to whatever other or further remedy may be appropriate.

. . .

Article XI, Section 11.1 Classification Assignment. The equipment shown in the classifications set forth in Article XXVI shall be operated by an Operating Engineer.

. . .

Article XI, Section 11.17 Craft or Grade Foreman.
In the event the Contractor chooses to employ or promote a bargaining unit employee to the position of foreman or grade foreman, the Contractor shall submit fringe benefit contributions in accordance with the terms of this Agreement, on behalf of such employee, while so employed.

. . .

Article XV, Referral, Section 15.1. When the Contractor needs additional employees for work within the jurisdiction of Operating Engineers Local No. 139, it shall give the Union first opportunity to dispatch such help, by informing the Union of the location, nature and

extent of the job and shall allow forty-eight (48) hours for referral of prospective employees.

. . .

Article XXVI, **<u>Classifications and Wage Rates, Section 26.1</u>**
Classifications:
1. … backhoes …

2. … tractor or truck mounted hydraulic backhoe … bulldozer (over 40 h.p.) … endloader (over 40 h.p.) … motor patrol; scraper operator … mechanic and welder …

3. … bulldozer, endloader (under 40 h.p.) … trencher (chain type having bucket 8 inch and under) …

<u>DISCUSSION:</u>

The hearing on the merits in this matter followed an unusually long and bitter series of clashes between the parties, which included two proceedings in Federal District Court, two more before the National Labor Relations Board, and a preliminary proceeding before this Arbitrator on arbitrability of 23 grievances. Some of the history involved is discussed in my January 29, 1993 Award on arbitrability:

> This matter began when, in the Fall of 1989, a business agent of the Union allegedly observed non-bargaining unit personnel operating heavy equipment for the Company, and began to file grievances. The Company has maintained throughout that it was merely pursuing a long-standing arrangement under which some of its employes were Union while others were non-Union, and that this state of affairs had been known to and accepted by the Union for decades. In their briefs in this matter, and in the accompanying exhibits, the parties range far beyond the narrow issue presented by the present phase of these proceedings; the following discussion will recount these facts only as absolutely necessary to an understanding of the arbitrability issue.
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> There is no dispute that at the initial step of the grievance procedure the grievances were filed timely within the terms of the multi-Employer collective bargaining agreement to which Heitman was a signatory at the time. The Company and Union then engaged in a series of battles which involved two NLRB cases and a proceeding in Federal District Court, before arriving in front of this Arbitrator, all concerning the same

underlying series of events.

> A full description of the parties' activities to date would be tedious and unnecessary to the present purpose. It is sufficient to summarize: the Union began filing a series of grievances about November 9, 1989, in each of which it requested payroll and other related information from the Company in order to determine whether a violation had in fact occurred. The Company initially declined to provide the requested information. The Union filed an unfair labor practice charge with the National Labor Relations Board, Region 30, and the Company and Union eventually agreed to a settlement of the charge under which the Company would supply certain information to the Union. While the initial NLRB charge was pending, the Union attempted to file for arbitration of the underlying grievances with the WERC, but the Company did not concur in the initial request. Pursuant to its usual rules, the WERC thereupon declined to docket an arbitration case, but a second NLRB charge alleging that the Company was failing to process grievances was dismissed. The Union then filed a Section 301 lawsuit in Federal District Court to compel the Company to arbitrate. The Company filed a motion to dismiss, a hearing was held, and in his July 24, 1992 Order, Federal District Judge John W. Reynolds concluded that the parties were bound by the language of the collective bargaining agreement to arbitrate the grievances, and ordered that Heitman submit to arbitration. It is clear from the face of Judge Reynolds' order that the scope of that order was limited, based on Judge Reynolds' reading of the collective bargaining agreement's broad statement that: "The arbitrator shall have the sole and exclusive jurisdiction to determine the arbitrability of such dispute as well as the merits thereof". Thus Judge Reynolds did not dispose of the procedural arguments relating to arbitrability which the Company had raised before him, finding instead that arbitration was the proper place to raise such defenses. On August 4, 1992 the Union re-filed its request for arbitration with the WERC; this time, the Company assented, with the proviso that the issue of arbitrability of the grievances would be considered first. . . .

In addition, it is worth noting that the fringe funds associated with the Union separately sued for back contributions in Federal District Court, and prevailed in that forum. One consequence is that the Union now seeks back wages, but not back fringe contributions, covering all hours worked by non-Union operators during the term of the collective bargaining agreement.

THE HEARING:

The hearing in this matter lasted almost 12 hours, and as neither party appeared anxious to

have a court reporter present, no formal record exists against which the contradictory statements of a stream of witnesses can be compared. This is significant here because, unlike most arbitration cases, in this proceeding the parties' numerous witnesses have testified in such a manner that they might have been describing entirely different universes of activity. For reasons discussed below, I find much of this testimony to be lacking in believability. The testimony given by each party's witnesses, however, is for the most part internally consistent. I will therefore begin by describing the facts in the terms used ultimately by the Union and Company.

THE UNION'S VERSION OF THE FACTS:

> This case has its genesis in 23 separate grievances filed by International Union of Operating Engineers, Local No. 139 ("Union") against Heitman, Inc. ("Employer" or "Company"). The first of these grievances was filed more than three years ago, on or about November 2, 1989, while the last two were filed on or about May 24, 1990. 1/ All 23 of the grievances involve the identical issue--the utilization by the Employer of non-union or non-bargaining unit personnel to perform bargaining unit work as defined in the 1988-1990 Wisconsin Excavators and Graders Association Master Labor Agreement ("WEGA agreement" or "WEGA contract") to which the Employer and the Union were signatory.
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> Since the filing of the first grievance, the history of this case can be characterized as one fraught with interminable delay. 2/ Subsequent to the disposition of the many procedural arbitrability challenges lodged by the Employer, a hearing addressing the substantive issues involved in this case was scheduled before Arbitrator Christopher Honeyman of the Wisconsin Employment Relations Commission ("WERC"). The hearing was held in Milwaukee, Wisconsin on April 7, 1993. Both parties participated and had

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1/ The validity of these grievances is not in dispute. At the outset of the April 7, 1993 hearing, the Employer conceded that the subject matter of the grievances was accurate and it further stipulated that it used non-union operators during the term of the 1988-1990 Wisconsin Excavators and Graders Association Master Labor Agreement. The grievances themselves can be found in the Appendix accompanying the Union's procedural arbitrability brief at Exhibit 18, Group Ex. "B."

2/ For a more thorough discussion of the procedural history of this case, please see the Union's prior brief addressing the procedural arbitrability issue.

an opportunity to make a full and complete record. At hearing, the parties also stipulated that only the merits of the respective grievances would be addressed, with any questions regarding the issue of damages decided at a later date.

II. STATEMENT OF FACTS

The Employer is a small excavating and grading contractor engaged in the construction industry. Since 1966, it had recognized the Union as the collective bargaining representative of certain of its employees. Between 1966 and 1987, the Employer, by virtue of first regular independent agreements and later an independent "me too" agreement, was bound to the terms and provisions set forth in an "Area I Master Building Agreement." In 1987, the Employer timely and properly terminated that agreement. In the interim, commencing in 1981, the Employer, by virtue of its membership in and delegation of bargaining authority to the WEGA multi-employer group, became signatory to the first of several successive WEGA agreements with the Union. The Employer and the Union were signatory to the 1988-1990 WEGA agreement (Jt. Ex. 1), the contract under which the instant grievances were filed.

Testimony at hearing revealed that until the late 1980's, the size of the Employer's equipment operations was particularly small, when compared with the area-wide industry standard. Former Union Business Representative Dick Sette, 3/ one of three or four business representatives entrusted with policing the Milwaukee portion of the District "A" area 4/

3/ Towards the end of the hearing, it was stipulated by the parties that in the interest of saving time, several former Union business representatives whose testimony would have in many ways been duplicative of and cumulative to Sette's, would forego testifying. In this vein, it was expressly agreed that the testimony of these individuals would have been the same or similar to Sette's. These former District "A" business representatives who worked primarily in the Milwaukee area, and their respective years of service in that capacity, are as follows: Bill Koch, 1965-1977; Russell Retzack, 1971-1977; Jacamino Peroceschi, 1977-1987; and Larry Reickhoff, 1977-1986.

4/ The Union for administrative purposes, splits the state of Wisconsin into four districts. District "A" or Area I (the two terms are synonymous) is comprised of Milwaukee, Kenosha, Racine,

from 1968 until 1977, characterized the Employer as a contractor which primarily took on smaller, residential jobs as opposed to larger, high profile commercial jobs. Sette stated that during his tenure as a business representative, Heitman, Inc. had just a few machines, with two Union members, Ed Bremberger and Charles Heitman, operating this equipment.

However, on cross examination of the Employer's witnesses and through the testimony of Union witnesses on direct examination, these contentions were contradicted. The Heitmans' statements at hearing and in their earlier submissions to the federal district court and the arbitrator (see Company Exs. A and B, 11/14/90 affidavits of Ken and Arnold Heitman) that the company had never signed a contract with the Union were quickly disproved. Arnold Heitman, when confronted with his own signature on at least ten different contract documents with the Union spanning the years 1966 through 1978 (union Exs. 30-36), was forced to concede that he had indeed executed a multitude of written agreements with the Union over the course of many years. Moreover, during the cross-examination of Ken Heitman, it quickly became apparent that most of the employees listed as operating heavy equipment were either hired after 1990 or had primarily performed truckdriving and/or laborer duties. Besides the presence of many close family members on this list (sons, brothers, etc.), it was noted at hearing that this list appeared to have grown by mammoth proportions over the last three years. Previously, the Employer had steadfastly maintained through the many varied phases of this case that aside from a few of the Heitman sons (Ken, Charles and Mike), only one non-union enployee, Gus Gustofferson, had ever operated equipment for the company (e.g. see Company Exs. A and B). In addition, none of the employees, save the three at issue, showed up in the audits conducted by the Union's fringe funds (Union Exs. 24 and 25) or on the payroll records and timecards previously provided by the Employer to the Union pursuant to an NLRB directive (see Union Exs. 1, 3, 5, 6, 7, 8, 9, 14, 15 and 16).

Furthermore, as noted supra, both Heitmans also testified that Union business representatives were aware that the company employed non-union operators and had consented to such an arrangement. Former business representative Sette (and by stipulation, the other four former Union officials) quickly dispelled the notion that such an arrangement had ever existed. Sette stated that there had been no "special" or "sweetheart" deal agreed to with the Employer, nor had any business representative ever

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Waukesha, Ozaukee and Washington counties.

witnessed a non-union operator running equipment, save for a few isolated instances when Arnold Heitman had "pushed dirt" with an endloader for 15-20 minutes at a time.

Likewise, both Arnold and Ken Heitman, despite testifying that Union business representatives "regularly" visited their jobsites over a thirty year period, could not recall the name of even one of these individuals. Finally, Jim Waite, a non-union operator employed by Heitman, Inc. between 1988-1990 contradicted the Heitmans' testimony that they had "always" given their employees the choice of whether or not they wanted to join the Union. Waite credibly stated that no such election was ever offered him by the Employer, and during his tenure at the company, he made six to seven dollars less per hour than the Union contract rate and received no fringe benefits of any kind.

In a related vein, Arnold Heitman testified that the last time he talked with a Union business representative was sometime during the 1970's. He later admitted on cross-examination that he did not recall any business representative ever witnessing non-union operators running equipment. The elder Heitman also stated that his son Charles and Ed Bremberger were the "main operators" for the company over many years. Finally, Arnold Heitman stated that he had dug the basement for former Union president Marsh Whalen's home many years ago, but under cross-examination, admitted that Whalen never had first hand knowledge of any alleged non-union operators working for the company in contravention of the contract.

As discussed briefly supra, Heitman, Inc. worked primarily smaller jobsites (see Company Ex. CC, proposed Fiatallis publicity article apparently never published). For many years, the company utilized a small fleet of equipment. The Company's expansion in the late 1980's apparently coincided with its utilization of non-union personnel such as Joe Schmitt, Don Wagner and Jim Waite.

Contemporaneous with these events, the Union began to add additional staff positions in 1988. With the implementation of its administrative dues program, it now had the funds to hire more business representatives, who would inter alia, greatly expand the Union's policing capacity. Previously there had been three or four business representatives responsible for the six county area that comprised District "A." Beginning in 1988, that figure quickly jumped to eight or nine. The practical effect was more effective policing of the Union's various contracts, and a greater

number of grievances began to be filed as more contract violations came to light. Among the companies which were affected by this development, in part because of its heightened visibility, was Heitman, Inc.

In the latter part of November, 1988, newly hired Union Business Representative Willard Horvath witnessed Heitman, Inc. employee Joe Schmitt operating equipment on a jobsite located on Bluemound Road in Brookfield, Wisconsin. After ascertaining that Schmitt was not a member of the Union, Horvath filed a grievance against the Company (Union Ex. 27). Ken Heitman responded by letter dated December 6, 1988, and stated that Schmitt "is not a (sic) Operating Engineer. He does any work that is available for us that day. Such as truck driver, laborer and mechanic." 5/ In response to Heitman's letter, Horvath gave the Company the benefit of the doubt and later withdrew the grievance.

When the first several of the instant grievances was filed in November of 1989, the Employer did not assert a "past practice" defense, nor did it raise the contention that the Union had acquiesced to the use of non-union operators in the past. Ken Heitman knew at that time that he had violated the contract and had been caught, and he sought to settle the grievances by "signing up" the employees to Union membership. However, he did not wish to pay any monetary damages for the past violations of the contract. During a face to face meeting between Ken

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5/ Revealingly, Ken Heitman denied that Schmitt operated equipment in his response to the November 29, 1988 grievance. He did not at this time raise any "past practice" or "Special deal" defense in response to the grievance, as apparently he was aware of the unambiguous contractual requirements regarding the performance of bargaining unit work. The Employer's ill-conceived "shoot the moon" defense had apparently not yet been formulated at this juncture.

Additionally, compare this response in December, 1988 with Employer Exhibit CC, the Fiatallis publicity article written almost two years before, but apparently never published. Ken Heitman, by letter dated January 15, 1987, approved the article's contents and consented to its publication. Page 3 of the article discusses Schmitt's operation of a 41 foot long, twin engine scraper in glowing terms. A scraper is among the most sophisticated and difficult pieces of heavy equipment to operate.

Heitman and three Union business representatives on January 18, 1990, Heitman never once raised the aforementioned affirmative defenses (see Company Group Ex. Q). In two subsequent telephone conversations between Ken Heitman and Willard Horvath on February 6, 1990 and April 3, 1990, Heitman again did not raise these defenses (see Company Group Ex. Q). Interestingly, neither did the Employer's counsel in a telephone conversation she had with Horvath on February 6, 1990 (see Company Group Ex. Q). Apparently, the "past practice" theory had yet to be formulated at this time.

Moreover, the Employer's contention at hearing that the two "zipper" clauses contained in the WEGA agreement (Sections 1.4 and 4.1) have been overridden in the past are not accurate. A closer look at Employer Exhibits S through W illustrates that the contract was not modified in any way by the execution of these documents, but merely affirmed. These stipulations arose in the context of NLRB representation hearings involving various WEGA employer. The employer's counsel in each of these cases, Ms. Shindell, had sought to exclude the forepersons of these employers from the bargaining unit. These forepersons had been longtime members of the Union, and all had a keen interest in maintaining their participation in the Union's health insurance and pension plans. Ms. Shindell, apparently insensitive to the personal plight of these individuals, sought to categorize them as supervisors pursuant to Section 2(11) of the National Labor Relations Act. The effect of such a stratagem would have been to exclude them from the unit, thus making them ineligible for continued Union membership and participation in the fringe funds.

As a compromise measure, rather than litigate their supervisory status, the stipulations were executed. The forepersons were permitted to vote in the representation election and maintain their Union membership and thus their participation in the fringe funds. These stipulations did not modify the agreement, but merely affirmed it (see Section 11.17 of the contract, mandating participation in the fringe funds for forepersons). Even assuming arguendo that the stipulations constituted a modification of the agreement, they were set forth in writing, as Section 1.4, Entirety Of Agreement, of the contract provides.

Finally, the Employer alleges that the grievances were part of a "harassment" campaign to induce the Employer to execute a Section 9(a) agreement. Again, such a contention was challenged and ultimately disproved at hearing. The Union's Section 9(a) recognition efforts did not commence until the spring of 1989, almost six months after Horvath had

filed the November, 1988 grievance in regard to Joe Schmitt. Employer Exhibits TT and UU are merely generic "Dear Contractor" correspondence, which were sent to all Union signatory employers who had not yet granted the Union Section 9(a) recognition. Heitman, Inc. was one of those contractors, hence its receipt of this correspondence. The Union did not target Heitman in any way, shape or form, and the grievances at issue are in no way related to the Union's lawful request for Section 9(a) recognition.

THE COMPANY'S VERSION OF THE FACTS:

Heitman, Inc. is a family owned and operated company. Its principal shareholders and employees today are three brothers, Ken, Mike, and Robert Heitman. Since its formation in 1951, Heitman, Inc. has employed both union and non-union employees to operate heavy equipment on its construction jobs, with the full knowledge and approval of the union. For thirty-seven years, non-union Heitman employees operated heavy equipment, always with the union's knowledge and without Heitman, Inc. ever receiving a word of protest. See, Exhibit B. 6/

The practice started with Arnold Heitman, who started the company in 1953 and operated heavy equipment until 1983. Exhibit B, para. 4 and 8. Arnold Heitman had previously been a member of Operating Engineers 139, but was kicked out of the union in approximately 1951, before he founded Heitman, Inc. Exhibit B, para. 3.

When Arnold founded the company, it was its policy that a man could join the union if he wanted or be non-union if he wanted. Exhibit B, para. 5. Heitman's non-union equipment operators over the years included: Gus Gustofferson, who worked as a full-time heavy equipment operator from 1958 to 1970 (Exhibit A, Affidavit of Ken Heitman, para. 3); Mike Heitman, who began as a part-time operator in 1960 and continues to operate heavy equipment full-time today (Exhibit A, para. 7); Robert Heitman, who began as a part-time operator in 1966 and continues to operate heavy equipment full-time today (Exhibit A, para. 8); Ken Heitman, who began operating when he was eight years old and operates today; the sons of the Heitman

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6/ Exhibit B, Affidavit of Arnold Heitman, and Exhibit A, Affidavit of Ken Heitman, were previously submitted on November 20, 1992 as attachments to Heitman's Submission on Arbitrability.

brothers; and a large number of other employees over the years, whose names were entered into the record. See also, Exhibits A and B in their entirety.

Over the years, the company grew to be one of the larger excavating and grading companies in southeastern Wisconsin. It maintained a major fleet of heavy construction equipment and hauling equipment and constructed a new headquarters and equipment maintenance facility on a public highway. It contracted to do public and commercial construction sites for local governments and major corporations, such as McDonalds's. It even prepared the site for the McDonald's restaurant located near the union hall. Its workers were openly and visibly involved in the southeastern Wisconsin construction industry. They wear company logo hats when working, company insignia clothing such as jackets, and every piece of Heitman equipment and every vehicle in its fleet bears a large Heitman logo. As one business agent testified, "they were everywhere."

For thirty-seven years, all Heitman employees operated heavy equipment in the presence of and with the full knowledge of union officials, but only two men ever choose (sic) to become members of Operating Engineers Local 139. Arnold's brother Charles was one of the men who choose (sic) to join and he remained a member until his retirement in the late 1980's. For thirty-seven years Charles and the other union operator worked side by side with the company's non-union operators, including his brother, his three nephews, and numerous other individuals.

On one occasion, a nonunion Heitman operator had an accident with a piece of heavy equipment at a job located across the street from the union hall and the union's president visited the accident and spoke with the Heitmans. He advised them that operators who were union were on strike at the time and they should be careful not to work near the union hall while the strike was in progress.

The union acquiesced in and it accepted Heitman's practice and a binding and enforceable past practice resulted. Then, in 1989, it abruptly changed its position (Exhibit B, para. 13) and the course of events culminating in this arbitration began.

UNREBUTTED FACTS:

In the discordant sea of claims reflected in the contending versions of forty years of

background as described by the parties' witnesses, a few islands of undisputed fact stand out. Among these are several documents introduced by the Company, which list jobs performed, equipment purchased and employes employed at various times. These will be reprinted substantially as received:

EQUIPMENT OPERATORS OF THE COMPANY: 7/

CHUCK CROCKER
MIKE BREMBERGER
BUTCH MAGIN (RICHARD) - UNION
DON THORKELSON
JIM BERGERMAN - FORMER UNION
ELWOOD GUSTAFSON
MICHAEL HEITMAN
KENNETH HEITMAN
ROBERT HEITMAN
CHARLES HEITMAN - UNION
EDWARD BREMBERGER - UNION
KENNETH RUTZINSKI
JOSEPH SCHMIDT
DONALD WAGNER
JAMES WAITE
ARNOLD HEITMAN
BILL JOHNSON
BRUCE MALLOW
COLIN ANDERSEN
MICHAEL HEITMAN, JR.
STEVE BELL
TIM BELL
LLOYD HEITMAN
PATRICK HEITMAN

These employes did not all work at the same time, and their percentages of time spent operating equipment rather than driving trucks or performing other work not within this Union's jurisdiction appear to have varied substantially. But the Union presented little evidence to counter the Company witnesses' extensive testimony that all of these employes performed at least a degree of equipment operation, and that only four of them were ever members of the Union.

EQUIPMENT PURCHASED BY HEITMAN: 8/

7/ Employer's Exhibit AA.

AS OF 1970 -	3 AMERICAN BACKHOES 5 HD 5 TRACTORS 4 DUMP TRUCKS 1 TRACTOR TRUCK 4 TRAILERS 3 PICK UPS D7 CAT
1973	WHITE TRACTOR AMERICAN M-25 BACKHOE HG7 (#1)
1975	AUTO CAR ROGERS TRAILER
1976	FL 10 CHEV DUMP TRUCK
1977	2 CHEV PICK UPS AMERICAN M-25 BACKHOE MILLER TILT TOP TRAILER CHEV PICK UP IHC DUMP TRUCK
1978	FORD BACKHOE CHEV PICK UP IHC DUMP TRUCK
1980	SP 42 COMPACTOR FL 14
1981	262 SCRAPER IHC DUMP TRUCK
1982	FL 16 B CHEV PICK UP MACK TRACTOR FL 14

8/ Employer's Exhibit Y.

1983	FD 5
1984	FE 28 IHC DUMP TRUCK DROIT CRUIZE AIRE
1985	CHEV PICK UP FD 31 REX SHEEPSFOOT COMPACTOR FL 20 KOEHRING 6622
1986	IHC DUMP TRUCK
1987	FORD BACKHOE CHEV PICK UP TRANSPORT TRAILER
1988	IHC DUMP TRUCK (#l) IHC DUMP TRUCK (#2) LINC BELT 4300 III CHEV PICK UP MACK TRACTOR FD 14 ROGERS TRAILER
1989	IHC DUMP TRUCK CHEV PICK UP ROGERS TRAILER MACK TRACTOR FD 5 REX COMPACTOR FL 14 GEHL SKID LOADER & TRAILER

The Company concedes that as the more elderly equipment became unserviceable, some of it was junked or sold off, so that the Company never owned all of the equipment on this list at any one time. The list is, however, supplemented by a series of photographs taken at various dates beginning in 1960, which demonstrate that at least some of this equipment is of a scale that could colloquially be called "large". Some of the photographs also show the y's equipment working in surroundings which clearly demonstrate that large-scale commercial jobs are being performed.

THE COMPANY'S COMMERCIAL JOBS 9/

Year	Job
1974	DE PAUL HOSPITAL SOUTH 13TH STREET
1987-88	MAYFAIR SHOPPING CENTER PARKING LOT
1980-81	Y.M.C.A. MENOMONEE FALLS
1982	EXCAVATION FOR 22 HOMES IN CENTRAL CITY FOR ST. MICHAELS HOSPITAL - H.U.D. PROJECT
1983	RONALD MC DONALD HOUSE
1979	H.U.D. PROJECT 60TH & GOOD HOPE
1974-80	6-7 OFFICE BUILDINGS HWY. 100 & MAYFAIR
1982-83	NEW BERLIN CITY HALL
1979-80	CARDINAL STRITCH COLLEGE
1976-84	SUMMERFEST - PABST STATE - OLD STYLE STAGE - VARIOUS PARKING AREAS
1983	WAUWATOSA ROAD WORK - 3 MILES HWY 100 - HAMPTON
1979	COVENTRY APTS. - 276 UNITS
1979	GLENDALE PUBLIC LIBRARY - REMOVE APPROX. 15,000 CU. YDS. OF CONTAMINATED SOIL FOR CITY OF GLENDALE, PORT WASHINGTON AND GREENTREE PUBLIC WORKS GARAGE
1978	VAN BUREN BUILDING
1979	H.U.D. PROJECT HAVENWOOD-SHERMAN & FLORIST
1984	ZOO DAIRY BUILDING
1987	LEXUS - BLUEMOUND ROAD
1986	ASSOCIATED BANK BUILDING - BLUEMOUND ROAD
1986	HALL CHEVROLET - BLUEMOUND ROAD
1985	STRIP MALL - BLUEMOUND & JANISEK ROAD
1986	COLOR TTLE BUILDING - BLUEMOUND
1987	CONDO PROJECT BLUEMOUND & BROOKFIELD ROAD
1980	300 UNIT APT. PROJECT 92ND & BROWN DEER ROAD

9/ Employer's Exhibit Z. A Company witness testified that the jobs are listed in the order he thought of them, so that the list is neither complete nor in chronological order. This does not adversely affect its use here.

1981 100 UNIT APT. PROJECT TUCKAWAY GOLF
COURSE
1966-84 ONE BUILDER IN GLENDALE - OVER 30 HOMES
PER
YEAR
1976-85 U. W. M. PARKING LOTS
1981 HEISER FORD & LINCOLN - 76TH & GOOD HOPE
1982 CITY SANITATION (sic) YARD - 76TH & INDUSTRIAL ROAD
1980 UPTOWN LINCOLN-MERCURY - HWY 100 & NORTH AVENUE

MC DONALD'S RESTAURANTS:

1987 N83 215515 APPLETON AVE. - MENOMONEE FALLS
1988 7451 APPLETON AVENUE
1982 6409 W. BLUEMOUND ROAD
1984 18685 W. BLUEMOUND ROAD
1976-83 8100 W. BROWN DEER ROAD
1987 420 E. CAPITOL DRIVE
1978 2700 W. CAPITOL DRIVE
1986 14335 W. CAPITOL DRIVE
1983 2715 S. CHICAGO
1977 N96 W17512 COUNTY LINE ROD. - GERMANTOWN
1976-82 5265 W. FOND DU LAC AVENUE
1981 2820 N. GRANDVIEV BLVD.
1984 9120 N. GREEN BAY ROAD
1982 7520 W. GREENFIELD AVENUE
1981 5021 W. HAMPTON AVENUE
1978 191 W. LAYTON AVENUE
1974-78 3131 N. MAYFAIR ROAD
1983 300 N. MOORELAND ROAD
1979 3680 S. MOORELAND ROAD
1978-84 2340 E. MORELAND BLVD. - WAUKESHA
1982 3131 N. MAYFAIR ROAD
1973-83 2612 W. MORGAN AVENUE
1984 2520 W. NATIONAL AVENUE
1974-78 10915 W. NATIONAL AVENUE
1981 1614 E. NORTH AVENUE
1982 920 W. NORTH AVENUE
1984 10915 W. NATIONAL AVENUE
1983 6631 W. NORTH AVENUE

1982	617 W. OKLAHOMA AVENUE
1979	5656 S. PACKARD AVENUE
1980-86	5344 N. PORT WASHINGTON ROAD
1987	7501 W. RAWSON AVENUE
1972-76	5739 W. SILVER SPRING
1980	11313 W. SILVER SPRING
1979	5191 N. TEUTONIA AVE.
1977	7170 N. TEUTONIA AVE.
1984	5739 W. SILVER SPRING
1978	1425 S. WEST AVENUE - WAUKESHA
1981	6262 S. 13TH STREET
1983	1931 S. 14TH STREET
1974-84	5354 S. 27TH STREET
1973-76	1220 N. 35TH STREET
1972-78	6574 N. 76TH STREET
	3137 S. 76TH STREET
1973-78	5040 S. 76TH STREET
1984	4550 S. 108TH STREET
1971-76	6000 S. 108TH STREET
1970-78	1575 W. WASHINGTON-THIENSVILLE
1984	6574 N. 76TH STREET
1972-76	FORMER MC DONALDS ACROSS FROM UNION HALL - APPLETON AVENUE
1976	MEURERS 8201 W. GREENFIELD
1981	GROUND ROUND RESTAURANT - 631 W. SILVER SPRING
1984	HARDEE'S - 9100 *N.* GREEN BAY ROAD
1982	HARDEE'S - 8300 W. BROWN DEER ROAD
1984	ROAD WORK - APPLETON & CAPITAL
1983	ROAD WORK - HWY 167 MEQUON (ALL SUMMER)
1975	WISCONSIN ELECTRIC SUB STATION-COUNTY LINE RD.
1982	BURGER KING I94 & HWY 50
1984	BURGER KING I94 & HWY 20
1985	WENDYS 11201 W. SILVER SPRING
1986	SPEED QUEEN BAR-B-Q 1130 W. WALNUT
1978	OLYMPIA VILLAGE
1971	STRUCEL'S 8253 W. APPLETON AVENUE (NEAR UNION HALL)
1972-79	ARBY'S ROAST BEEF 10743 W. NATIONAL AVENUE

1984	ARBY'S ROAST BEEF 10743 W. NATIONAL AVENUE
1982	ARBY'S ROAST BEEF 11231 W. SILVER SPRING
1977	ARBY RESERVE BUILDING 51ST & SILVER SPRING
1979	OLLIVA'S CAR WASH 13TH & LAYTON
1979	COUNTRY KITCHEN HWY 45 & COUNTY LINE ROAD
1984	SHOPPING CENTER 76TH & BROWN DEER ROAD CHILDRENS PALACE
1978	76 UNITS CONDO PROJECT - HWY 164
	BURGER KING RESTAURANTS:
1979	8404 W. BROWN DEER ROAD
1981	5120 W. CAPITAL DRIVE
1982	10620 W. GREENFIELD AVENUE
1983	5812 W. LISBON AVENUE
1978	10110 W. SILVER SPRING
1972	5512 S. 108TH STREET

While, as noted above, these jobs are not listed in date order, all of them are sufficiently well identified that the Union could, if it chose, have obtained evidence to rebut the Company's claim to have performed the work in question. It did not do so.

CREDIBILITY:

As noted above, each party's witnesses largely testified consistently with other witnesses from that party; indeed, a stipulation was offered and accepted at the hearing that several former Union business agents present at the hearing, but retired, would, if the hearing had continued, have testified similarly to those who did testify. In the same way, the Company's witnesses essentially testified similarly to each other as to the nearly four decades of history of the relationship between these parties. In finding much of this testimony of debatable value, I am strongly influenced by the result of a careful analysis of its meaning. I conclude, based on careful consideration of the documents presented as well as my recollection of the testimony, that each party's contentions in this very unusual case rest on a fundamental proposition, and that for separate reasons each of these propositions is of the sort which an arbitrator could accept only if "born yesterday".

The Union's Central Proposition: The Invisible Construction Company

The essence of the Union's case is that for almost four decades the Heitman Company proceeded about its business without a single grievance from the Union because no Union business agent ever saw a non-Union Operator at work. This rests in turn on the Union's claim that until

the late 1980's the Company was engaged in constructing "residential basements", to quote one of the Union's business agents, and was therefore impliedly beneath the Union's notice for purposes of enforcement of a collective bargaining agreement. Passing over the claim that some employers signatory to a collective bargaining agreement might thus be considered not worthy of enforcement attention by the Union, this view would require me to ignore all of the Company's unrebutted evidence of a steady increase in the size of its jobs, and to believe that the Company acquired its present size virtually overnight after signing the 1988 to 1990 collective bargaining agreement. It requires looking at only a few of the jobs listed above under Employer's Exhibit Z to demonstrate the fallacy that would involve. In particular, the record contains unrebutted testimony that the Coventry Apartments job, comprising 276 units, was constructed in 1979. Residential this may be -- but then, Versailles was also a residence. The New Berlin City Hall job was also the subject of testimony (not rebutted) to the effect that this 1982-83 contract had the Company's operators working at this site for an entire winter. And the efforts of the Union's witnesses to persuade this Arbitrator that the excavation work for virtually every McDonald's restaurant in the greater Milwaukee area should be considered "residential" are, to say the least, a strained interpretation of general construction terminology. In short, there is sufficient unrebutted testimony in the record that without relying on any of the disputed testimony of the Company witnesses, I find that the record adequately demonstrates that the Company's presence in large commercial projects was well established by at least the mid to late 1970's, and that the Union's explanation that it had only twelve business agents to cover the entire state is but a poor effort to avoid the conclusion that the Union knew or should have known that the Company was doing most of this work with operators who had never signed a Union card.

The Company's Central Proposition: The Half-Union Contractor

The reason why I base the conclusion above on that part of the Company's testimony and exhibits that were unrebutted is that for its own part, the Company also would have me accept a proposition that would try the patience of the most callow of finders of fact. Stripped to its essentials, this is the fond notion that American construction labor relations allowed for three types of contractor. These are Union contractors, as that term is generally known; non-Union contractors, also a part of every labor relations professional's lexicon; and a third type, represented in the United States by a single company. That type would be the half-Union contractor, a company which has a contract with a union, allows some of its employes to join the union if they choose, pays them union scale and fringe benefits according to contract if they do, but doesn't really care if they join or not. One of the Union's witnesses, a former employe of Heitman, testified without contradiction that while he was employed at Heitman in the late 1980's, he earned six to seven dollars an hour below the prevailing Union scale, and no fringes. The Company's view of this state of affairs is essentially that this was hunky-dory with everybody. This proposition would require me to believe that the Company's management had steadily built the Company up into something of a force in the excavation industry in southeastern Wisconsin while maintaining the happy innocence of a bunch of children playing in the mud. To say that this is contrary to the impression of shrewdness I received from Arnold Heitman's testimony at the

hearing, as well as from observation of the construction industry and successful companies within it generally, seems sufficient.

THE ISSUES TO BE DECIDED:

Much of the argument presented by each party centers on the question of whether or not I should admit as evidence in determining the merits the evidence of past practice the Company witnesses testified to. The Company's definition of the issues involved presumes that such evidence should be admitted, and ignores the presence of "zipper" provisions 10/ in the collective bargaining agreement. The Union's proposed version of the issues contains no countervailing drawbacks, and I accept them as fairly stating the issues to be decided.

RIGHTS AND REMEDY:

While the parties agreed to defer evidence as to how many hours of work are involved, fundamentally this case has been about remedy from the beginning. That is because the Company -- with the exception of a "deny everything" phase shortly after the grievances were filed -- has openly admitted, and even boasted of, violating the contract as written. The Company's defense, essentially, has been that the contract as written is not these parties' real contract. For purposes of the rights phase of this matter, that is an argument easily disposed of by reference to the collective bargaining agreement itself. There can be no question that all of the disputed work comes within the jurisdiction of this Union. There can also be no question of any outside agreements superseding the language of the collective bargaining agreement, because that language on its face requires "mutual written consent" to add to, subtract from or change the terms. (Section 1.4)

There are, of course, dangers in a firm application of contractual language where the facts as to the parties' actual conduct speak eloquently to the contrary. Some arbitrators have found that a "zipper" clause similar to that cited above will not waive a practice where the practice continues. 11/ But to give primacy to such evidence of continuing practice, in the face of clear contractual language to the contrary, runs the risk of legislating for the parties, and at least of giving less attention to the finality of the parties' act in reaching a contract than is customary. And I believe it is in most cases unnecessary to do so in order to do justice. The tradition of labor arbitration provides for flexibility in the construction of an appropriate remedy, at the same time that it

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10/ Specifically, Article 1, Section 1.4 and the last sentence of Article IV, Section 4.1.

11/ See School City of Hobart (Arbitrator Ellen Alexander, 1985) 86 LA 557, 563; Fruehauf Trailer Corporation (Arbitrator Edgar A. Jones) 29 LA 372, 374-375. In the latter case Arbitrator Jones held that a contract which provided that it "cancels all previous Agreements, both written and oral. . ." did not result in a "magical dissolving effect on practices. . . which span successive contract periods."

provides restrictions on an arbitrator's possible substitution of personal judgment for the parties' specific contract language in the determination of whether that contract has been violated. Here, as usual, the second question to be addressed is what remedy is appropriate. The answer, based on the evidence, is not quite as usual.

Based on that part of the evidence presented by both parties which I found to be credible, it is apparent that the Union knew or should have known that the Company was engaged in a substantial quantity of work covered by the collective bargaining agreement which could not possibly have been performed by the small number of employes who ever joined the Union. Thus the "practices . . . which span successive contractual periods" referred to by Arbitrator Jones above are fully entitled to be considered, when the question is what remedy is "appropriate" here.

Theories of "unjust enrichment" clearly apply where the result sought by the Union involves payment of substantial sums of money to employes who never filed a grievance, or even to employes who neither worked for the Company nor had any reasonable expectation of employment by a family firm that started most of its employes at the age of eight. This is distinguishable from the rights of the pension and health and welfare funds in the Federal District Court proceeding. In fact, in his October 7, 1991 decision denying the Company's motion to dismiss, Judge John W. Reynolds expressly noted that because such funds have separate standing to sue for non-payment of contributions, "the 7th Circuit and the other Courts of Appeals have (therefore) uniformly disallowed employers from interposing the following defenses in pension fund collection actions: (1) that the union orally agreed not to enforce the benefit contribution terms of the collective bargaining agreement . . . (2) that the union or its agents acquiesced in the employer's nonpayment of contributions. . . or (3) that the union does not represent the employes for whom benefits are claimed because the union did not achieve majority status". 12/

While there is evidence that the Union never represented a majority of the employes of the Company (particularly in the list of employes already noted, as well as inferentially from evidence that the Union pursued elections with a number of other recalcitrant companies but not with this one) this is not relevant to the question of appropriateness of a contractual remedy. It does, in a way, enter into this proceeding, however, because I am fully aware of the import of the fact that the Company "went non-union" at the close of the 1988-90 collective bargaining agreement to which it was obligated. In finding that because the Union knew or should have known over a period of decades that the Company was regularly engaged in substantial jobs while using non-union operators routinely, I find that the Union is not entitled to a monetary remedy until the end of the collective bargaining agreement involved. The principle is the same as that cited in Jafco, Inc., 13/ which is that the

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12/ Union's Exhibit 29, admitted during the arbitrability phase of this proceeding.

13/ 82 LA 283, 286 (Armstrong, 1984).

employer (in that case) could not stand silent during contract negotiations and later change its practice regarding premium pay. 14/ To the extent that this means that no monetary remedy will be paid, because the Company "went non-union", that is the consequence of decades of the Union's as well as the Company's conduct, as well as the consequence of the employes' apparent lack of interest in pressing for a representation election. The fact that a violation is found, however, means that if in the future the Union is able to obtain representation rights, the Company is on notice that continuation of its practices would be unacceptable assuming similar contract language. I also wish to emphasize that nothing in this decision should be read as condoning the Company's conduct.

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the Company violated the collective bargaining agreement by employing non-union operators to do bargaining unit work during the term of the 1988-90 collective bargaining agreement.

2. That no monetary remedy is appropriate during the term of the collective bargaining agreement involved, for reasons stated above.

Dated at Madison, Wisconsin this 15th day of November, 1993.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator

14/ Archdiocese of Illinois, 84 LA 185, 189-90 (Arbitrator Marvin J. Feldman, 1985) stands for the same principle.