BEFORE THE ARBITRATION BOARD

In the Matter of the Arbitration
of a Dispute Between

WISCONSIN ELECTRIC POWER COMPANY
Milwaukee, Wisconsin

and

UNITED ASSOCIATION OF OFFICES, SALES
& TECHNICAL EMPLOYEES, LOCAL NO. 2

Grievance dated 9/30/91
regarding posting
and demotion

Case 46
No. 47809
A-4960

Appearances:

Ms. Lynne English, Company Attorney, 231 West Michigan Street, Milwaukee, WI 53201, appearing on behalf of the Company.

Mr. Richard Perry, Perry, Lerner & Quindel, S.C., Attorneys at Law, 823 North Cass Street, Milwaukee, WI 53202, appearing on behalf of Local No. 2.

ARBITRATION AWARD

The parties jointly requested that the Wisconsin Employment Relations Commission designate Marshall L. Gratz to serve as Third Arbitrator on an Arbitration Board also consisting of Company-appointee J. F. Barrett and Union-appointee Linda J. Knee, to hear and determine a dispute concerning the above-noted grievance under the grievance arbitration provisions of the parties' May 14, 1990 through March 31, 1993 collective bargaining agreement (herein Agreement).

The parties presented their evidence and arguments to the full Arbitration Board at a transcribed hearing held at the Company's office in Milwaukee, Wisconsin, on October 22, 1992. Following distribution of the transcript, the parties submitted post-hearing briefs, the last of which was received by the Third Arbitrator on March 8, 1993, marking the close of the record. The Third Arbitrator circulated his proposed award to the Arbitration Board on July 11, 1993, and certain revisions on October 6, 1993. Following lengthy Arbitration Board deliberations, including a meeting of the Arbitration Board in executive session on October 27, 1993, the following award is issued.

ISSUES

At the hearing, the parties were unable to agree on a statement of the issue, but they did agree to authorize the Arbitration Board to formulate a statement of the issues for determination in

the matter. The Union proposed that the issues be framed as:

1. Was there a vacancy on September 8, 1991, in the Customer Account Clerk position?

2. Did the Company violate the contract when it demoted an employee directly into a position which requires posting, without posting that position as set forth in the grievance?

3. If so, what should be the remedy?

At the hearing, the Union stated that, notwithstanding the relief requested on the face of the grievance, the Union was not requesting affirmative relief in this proceeding, but rather was requesting only a cease and desist order. (tr.15).

The Company proposed that the issues be framed as follows:

1. Did the Company violate the contract by not posting a notification of job vacancy for the position of Customer Account Clerk into which it demoted Jane Wojcicki?

2. If so, what should be the remedy?

The Arbitration Board finds it appropriate to formulate the issues as proposed by the Company.

PORTIONS OF THE AGREEMENT

ARTICLE V - DISCIPLINE

Section 5.1

The right to discipline, discharge or release an employee (following the completion of the probationary period provided under Section 4.1 of this Agreement) belongs to and remains with the Company but such action will be administered only for just cause. . . .

. . .

ARTICLE XI -MANAGEMENT

Section 11.1

The right to employ, lay-off, release, re-employ, promote, demote, transfer, discipline and discharge employees shall be vested in the Company, except as modified by the terms of this Agreement. The management of the property and corporate affairs are reserved by and shall be vested exclusively in the company. The Company shall have the right to determine how many employees it will employ or retain, together with the right to exercise full control and discipline in the interest of good service and the proper conduct of its business. The Union, through its representatives and in behalf of any employee or employees, shall have the right to a hearing before the accredited representatives of the Company on any difference of opinion as to the competency of any employee to fill a new position or vacancy, on lay-offs or in case of discipline or discharge.

. . .

ARTICLE XII - SENIORITY

. . .

Promotions and Transfers

Section 12.5

The Company will follow its long established practice of giving consideration to the elements of seniority in the bargaining unit, ability, and efficiency in making promotions, demotions, or filling vacancies in occupations under the jurisdiction of the Union.
. . .

Section 12.6

When a vacancy occurs, which in the judgment of the Company must be filled, or the Company creates a new position in occupations under the jurisdiction of the Union, a Notification of Job Vacancy shall be posted on all Union bulletin boards. Such Notification shall be posted and a copy mailed to the Union at least six (6) days prior to the time the position is to be regularly filled and shall state qualifications required for the position as well as other pertinent facts pertaining thereto. It is further recognized that under certain circumstances, the application of the provision will, in the opinion of the Company, be unnecessary in which event the

Company will request the Union to waive the posting requirement.

. . .

Section 12.11

> In the event a posted job is not filled, or a selection made for it, the original posted notice shall be re-posted at intervals of not more than every ninety (90) days for a period of six (6) days each until the job is filled or the job request withdrawn. Such posting periods, subsequent to the original posting, are to be regarded merely as reminders that the job is still open. If the above re-posting procedure is not carried out or if the request for applicants for the job is withdrawn, the job can only be filled by following the standard procedure of posting as a new job vacancy.

BACKGROUND

The Company is a publicly-held electric utility headquartered in Milwaukee, Wisconsin. For many years, the Union has represented a bargaining unit of Company employes, which is described in the Agreement, and which generally consists of employes working in a variety of office, sales and technical occupations.

The basic facts giving rise to the instant grievance are not materially disputed. In 1991, Jane Wojcicki was a Utility Clerk (wage level 130) in the Order and Control Group in the Consumer Relations Department. Supervision determined that she was unable to effectively carry out her job responsibilities as a Utility Clerk because of what supervision deemed to be an intolerable level of absenteeism. On September 8, 1991, supervision demoted Wojcicki to a Customer Account Clerk (wage level 105).

On September 30, 1991, the instant grievance was filed, asserting,

> The Company failed to post an announcement for a vacancy in the Customer Account Clerk occupation in the Consumer Relations Department. The Company improperly filled a vacancy by demoting an employee into the position.

In its various responses denying the grievance, the Company acknowledged that it had demoted Jane Wojcicki from the position of Utility Clerk to the position of Customer Account Clerk, without posting the Customer Account Clerk position involved. The Company took the position that because Wojcicki's placement in the Customer Account Clerk position resulted from the Company's exercise of its expressly reserved right to demote her, no "vacancy" within the

meaning of Sec. 12.6 had occurred such as would have required the Company to follow the notification and posting requirements of that Section, or if a vacancy did occur, it was not one which the Company decided must be filled because the Company was, instead, demoting Wojcicki into the position. The Company further answered that Sec. 12.5 contains the only Agreement limitations on the Company's Sec. 11.1 right to demote; that Sec. 12.5 draws a clear distinction between promotions, demotions and the filling of vacancies; that demotion is a separate process unrelated to the posting and filling of vacancies; and that Sec. 12.6 relates only to the filling of vacancies, not to the process of demotion. The Company also rejected a Union contention that the Company's right to demote without a Sec. 12.6 posting or Union waiver of posting was limited to positions (unlike the two involved here) that were linked or related to one another in such a way that progression (based on merit and/or time in position) from a lower to a higher rated position within the group occurs without a Sec. 12.6 posting. Those positions are referred to herein as "related" positions, and positions which bear no such relationship to one another are referred to herein as "unrelated" positions.

The grievance was ultimately submitted for arbitration as noted above. At the time this case was heard, another grievance (dated September 24, 1991) which was pending asserting that the Company lacked a contractually-sufficient basis to demote Jane Wojcicki even if posting was not required in the circumstances. The parties agreed that that separate claim is not at issue in this case.

POSITION OF THE UNION

The Agreement contains a general management rights clause (Sec. 11.1) providing the Company with the right to demote employees, "except as modified by the terms of this agreement," and a specific procedure relating to the filling of vacancies by means of posting of such vacancies throughout the bargaining unit (Sec. 12.6). The Agreement also limits the right of the Company to discipline, discharge or release an employe and requires that "such action will be administered only for just cause." (Sec. 5.1).

Under Sec. 12.6, the decision to fill a vacancy is vested in the Company's judgment. However, once that judgment has been exercised, that Section requires that notification be posted on all Union bulletin boards. When the Company decided on September 11, 1991 to move Jane Wojcicki into the Customer Account Clerk position, it was thereby exercising its decision-making power in favor of filling a vacancy, namely, the position that had been vacated by Arlene Kozub on August 8, 1991.

The posting requirements in Sec. 12.6 must be complied with only when there is a "vacancy" or "new position" which in the judgment of the company must be filled. There are, however, a number of bargaining unit occupations which, once entered, provide for wage progression based on time in the position and performance, without the necessity of posting the higher paying opportunities. The rationale is that these movements are occurring within the same

job family, making posting unnecessary. In the several families of related or linked occupations in which the employee is in a line of merit- and/or time-in-position-based wage progression, the Company can promote and demote without posting because the Sec. 12.6 concept of vacancy is not present when moving up the progression nor when an employee is coming down through the progression assuming there is good cause for such descent. Thus, the interpretation of the Agreement advanced by the Union in this case does not render meaningless or ineffectual the Company's expressly reserved right to demote.

However, where, as here, movement of an employe is contemplated between positions that are not both within such a family of related occuations or within a wage progression consisting of related occupations, the Company -- whether promoting or demoting an employee -- must comply with the provisions of Sec. 12.6. Just as there is no way an employe could progress or be promoted from the Customer Account Clerk job up to the Utility Clerk position without there being a Sec. 12.6 posting, neither can an employe be demoted from Utility Clerk to the unrelated Customer Account Clerk position without that vacancy being posted under Sec. 12.6.

The Sec. 11.1 Management Rights clause on which the Company relies grants it both the right to "promote [and] demote . . . except as modified by the terms of this Agreement." Since Sec. 12.6 surely prohibits the Company from promoting an employe into a higher-paying but unrelated position, it follows that Sec. 12.6 also prohibits the Company from demoting an employe to a lower-paying but unrelated position. The scope of application of Sec. 12.6 is not limited to "promotions." It also includes the broader category of "vacancies," thus accommodating situations in which employes may seek to move downward to a less stressful or less physically demanding position. In sum, where a vacancy is being filled, Sec. 12.6 applies whether an employe is being promoted or demoted under the Management Rights clause.

Interpreting the Agreement in that way does not leave the Company without available means for dealing with employes experiencing problems with the particular position they hold. Where the circumstances warrant it, the Union has been willing to waive the posting requirement if, under all the circumstances, it is in the best interest of all concerned. The record establishes that there has been a consistent, long-standing practice of the Company seeking waivers of postings as to the position into which it seeks to demote a bargaining unit employee. The Monica Putnam and Julie Tolkacz situations cited by the Company do not constitute abandonment of that longstanding practice, especially when it is noted that the Union ultimately waived posting in Putnam's case and did not grieve any aspect of Tolkacz' situation because she was terminated and did not express an interest in pursuing the matters.

The Company's practice of seeking the Union's waiver is mandated by the explicit requirement in Sec. 12.6 that whenever the Company considers posting of a vacancy to be unnecessary, it "will request the Union to waive the posting requirement." In deciding whether to waive posting in any given case, the Union has weighed the best interests of the affected employe and the interests of other qualified members of the bargaining unit who might wish to apply for the

vacancy, and the Union has often granted such waivers. If the Company believes the posting provision is burdensome when it wishes to fill vacancies in demotion situations, it should seek to change the provision at the bargaining table, not through unilateral action and arbitration.

The Company's hearing hypothetical -- of whether the Company could demote to a position that, when posted, was not applied for by any employe -- is not presented by the facts giving rise to the instant grievance, is directly governed by the language of Sec. 12.11, and is probably a situation in which a Union waiver of the further postings required by Sec. 12.11 would be easily granted.

For those reasons, the Arbitration Board should declare that the Company violated Sec. 12.6 when it filled an Customer Account Clerk by demotion without complying with the notification and posting provisions of Sec. 12.6. By way of remedy, the Company should be ordered to cease and desist from violating the Agreement in that manner.

POSITION OF THE COMPANY

The Company's expressly reserved right to demote can be reasonably reconciled with the vacancy posting language by recognizing that there is not a "vacancy" within the meaning of Sec. 12.6 when the Company has exercised its right to demote someone into a position that would otherwise require a posting. Compared with the Union's contention that the Company may only demote an individual regressively through a wage schedule if no posting was required to progress through the wage schedule, the Company's proposed interpretation gives reasonable effect to the right to demote and to the promotion language and is more consistent with bargaining history and with applicable contract interpretation standards.

Although the precursors to Secs. 12.5 and 12.6 appeared simultaneously in 1938, the practice of giving consideration to the various factors noted in Sec. 12.5 for "demotions" was even then referred to as a "long established practice" of the Company. It was onto the backdrop of that established practice that the parties added the posting and bidding procedure introduced in 1938. Those procedures were "obviously intended to provide more structure to the situations when employees were asking to be promoted or transferred." Co. Brief at 5. Thus the posting procedure was initially placed, and remains, under the heading of "Promotions and Transfers." The Management Rights clause was amended to specifically include the right to demote in 1946, well after the posting and bidding procedure was in place. Surely the parties would not have added a reference to that specific right if they mutually understood that it was effectively eviscerated by the posting language. For those reasons, the bargaining history implies that the posting procedure was intended to apply to situations of voluntary promotion or transfer (or demotion when the employe voluntarily applies for a lower-rated job), but was not intended to restrict the Company's independent right to impose an involuntary demotion where it had an otherwise contractually-sufficient basis for doing so.

The parties' past practice has basically been to "agree to disagree" about the applicability of Sec. 12.6 to demotions. The evidence shows that for the last 15 years or so, the Company has consistently maintained that it had a right to reclassify the employees into lower-rated positions when they were not satisfactorily performing at one position, without requesting the union's waiver of posting. The Union has generally responded by expressing its objections that the Company lacks the right to unilaterally demote without a waiver, but agreeing to a waiver with regard to the particular reclassification involved. The Union has similarly conducted itself in relation to the simultaneous transfer of two employes to one another's positions, even though arbitrators have recognized that in such instances there is no "vacancy." Citing, National Crane Corp., 81 ARB. Par. 8305 (Sinicropi, 1981). In 1980, the Union did not communicate its waiver of objections to the non-posting of the position to which Monica Putnam was demoted until more than two months after the demotion was implemented. The Union did not assert its position at all regarding the Company's 1988 demotion of Julie Tolkacz. All things considered, the overall nature of the past practice renders it of little help in resolving the ambiguity in the Agreement.

The Company's proposed interpretation of the Agreement is more reasonable because it gives effect to both the Company's right to demote and the posting provisions. The Union's interpretation of the vacancy posting provision would render the Company's express right to demote ineffective. The reason the Company would involuntarily demote an employee is because the employe is performing unsatisfactorily at the employe's present position and the Company has made a determination that the continuation of the employee in his or her present position would be detrimental to the Company's interests. Regressing employes on wage schedules on which progression does not involve a posting would not remove an employe from a position in which or she can no longer be tolerated. With the exception of the Right-of-Way Agent and Cadet Right of Way Agent, there were no jobs linked progressively without the need to post when the posting and right to demote language was first incorporated into the parties' agreement. For that reason, and because the parties granted the Company the right to "demote" without expressly limiting it as the Union seeks to do here, it follows that the parties intended that the Company would have the right to demote an employe in order to remove that employe from a position in which he or she could no longer be tolerated. It would be a nonsensical, unreasonable and tortured interpretation of the term "demote" to conclude that the parties intended that the Company would have a right to demote only to a lower paying position in a wage progression that does not involve posting. To a reasonable person, a demotion refers to the reclassification of an employee to a lower-rated and different occupation. Moreover, the Union's argument is circular: whether posting is required for demotion to a particular position depends on whether posting is required for movement between the positions involved. Finally, the language in Sec. 12.6 giving the Company the right to judge whether a vacancy will be filled indicates mutual understanding that the Company is to exercise a measure of discretion in determining when vacancies exist that require posting.

The Arbitration Board should therefore declare that the manner in which the Company demoted Jane Wojcicki did not violate the Agreement.

DISCUSSION

In this case the Company claims the right to unilaterally choose a bargaining unit position into which to involuntarily demote a bargaining unit employe as to whom it has an otherwise contractually-sufficient basis to demote. Without that right, the Company is deprived of a reliable and effective means of moving an employe from a job in which he or she is performing unacceptably to a lower rated and different (i.e. unrelated) position. The Company rests its claim primarily on the reservation of "the right to demote employees . . . except as modified by the terms of this Agreement" in Sec. 11.1 of the Management Rights article.

The Union's claim is that all bargaining unit employes (and the Union) are entitled to notification through a posting whenever the Company makes work available either in an existing but unfilled position or in a newly created bargaining unit position, so that interested employes can apply to have their comparative bargaining unit seniority, ability and efficiency considered by the Company for movement (upward, downward or lateral) to that newly available position. The Union rests its claim primarily on the contention that the Company's right to demote is modified by Sec. 12.6 of the Seniority article, which reads, in part, as follows,

> When a vacancy occurs, which in the judgment of the company must be filled, or the Company creates a new position in occupations under the jurisdiction of the Union, a Notification of Job Vacancy shall be posted on all Union bulletin boards. . . . It is further recognized that under certain circumstances the application of the provision will, in the opinion of the company be unnecessary in which event the Company will request the Union to waive the posting requirement.

The Union would require either posting or a Union waiver of posting before the Company can fill a position by involuntary demotion for which the Company has an otherwise contractually sufficient basis, except where the movement is between related positions, that is, positions between which advancement does not in practice involve a Sec. 12.6 posting.

The language of the Agreement does not provide specific and direct guidance as to which of the parties' competing interpretations is the more appropriate one. Thus, there is no language which specifically and directly differentiates the parties' intended treatment of voluntary vs. involuntary demotions so as to except involuntary but not voluntary demotions from the requirements of Sec. 12.6, as the Company's position as stated in its brief would do. Nor is there language which specifically and directly differentiates the parties' intended treatment of demotions between related vs. unrelated positions, so as to except demotions among related positions but not demotions among unrelated positions from Sec. 12.6, as the Union's interpretation would do. Adoption of either party's reading of the Agreement requires interpretation of the Agreement by means of established standards of contract construction, and warrants consideration of the

bargaining history evidence relied on by the Company and the past practice evidence relied on by the Union, as well.

Past Practice Regarding Demotions

As the Company has argued, the evidence regarding the parties' conduct regarding demotions to unrelated positions over the years has often reflected a longstanding agreement to disagree about whether the Company has the right to involuntarily demote an employe to an unrelated position without a Sec. 12.6 posting or waiver. That evidence does not support the Union's sweeping assertions about a longstanding past practice in which the Company has routinely asked for Union waivers of posting as regards proposed involuntary demotions to unrelated positions or that the Company has routinely stayed its demotions until such a waiver was secured. On the other hand, because the parties appear to have generally taken care not to prejudice their respective general positions while attempting to resolve particular situations in a mutually acceptable way, as the Company has aptly concluded in its brief, the past practice evidence regarding involuntary demotions is not a particularly persuasive basis on which to support either party's position.

Implications of Bargaining History

The bargaining history does not provide reliable guidance to the proper interpretation in this case, either.

The Company's right to demote was recognized in their agreement in 1938 by introduction of the precursor to Sec. 12.5. That language suggests that the Company had been exercising that right as a part of the "long established practice" referred to in that language. Also in 1938, the precursor to Sec. 12.6 was first introduced into the parties' agreement, mandating that the Company post new bargaining unit positions and any vacancies in bargaining unit positions which the Company decides to fill. The fact that the Company apparently had a practice of making demotions in accordance with the standards set forth in the precursor to Sec. 12.5 before the posting requirement was imposed does not reliably indicate whether the posting requirement was or was not intended to modify and limit that right as the Union proposes in this case.

The parties' purpose for adding an express inclusion of demotions in the Sec. 11.1 Management Rights provision in 1946 is not elucidated by the record. If anything, that addition expressly confirmed that the Company's right to demote employes -- like the other rights enumerated in the first sentence of Sec. 11.1 -- is subject to the express proviso at the end of that sentence which reads, "except as modified by the terms of this agreement." That addition could have been intended merely to affirm the right to demote as it previously had been indirectly recognized in the precursor to Sec. 12.5. That 1946 addition does not reliably indicate whether or not the parties intended that Sec. 12.6 to effectively prohibit involuntary demotions to unrelated positions. While the numbers of related jobs within which an employe's wage progression

occurred without posting appears to have grown considerably since 1938 and 1946, the record does establish that there were at least some jobs that were related to one another in that way at all times and as far back as the 1938 introduction of the precursors to Secs. 12.5 and 12.6. Accordingly, in 1938 and 1946 the Company's right to demote was not meaningless, since it permitted the Company to demote an employe to a related position without posting or waiver and to demote an employe to an unrelated position pursuant to a posting where the selected applicant voluntarily applied for the posted lower-paying position. (The language expressly authorizing Union waivers of the posting requirement appears from the record to have been added some time after the 1938 agreement.)

The significance of the parties' historical and current placement of the Sec. 12.6 posting requirement under sub-heading of "Promotions and Transfers" is undercut by the fact that Sec. 12.5 -- which makes express reference to "demotions" as well as to "promotions" and "filling vacancies" -- was introduced and has remained under that same heading. Since the scope of Sec. 12.5 was not limited by the "Promotions and Transfers" heading so as to exclude "demotions," it follows that the parties would not have intended that heading to imply any such limit on the scope of the other provisions included under it, including Sec. 12.6.

The Company has also noted that the parties listed "promotions" and "demotions" separately from "filling vacancies" in Sec. 12.5 and its precursors On that basis, the Company has asserted during the processing of the grievance, that the language of Sec. 12.6 and its precursors seems limited to a procedure intended only to deal with the last of those three separate functions. In its brief, the Company acknowledges that the bargaining history "implies that the posting procedure was intended to apply to situations of voluntary promotion or transfer (or even perhaps demotion, if the employee voluntarily applies for a lower-rated job) on the employee's part, but was not intended to restrict the Company's independent right to demote." (Company brief at 6.). Thus, the Company seems thereby to acknowledge that Sec. 12.6 applies to promotions and to demotions applied for by an employe, but not to involuntary demotions imposed by the Company. Consistent with the notion that the Agreement posting procedures apply to promotions is, for example, the testimony of a Company witness to the effect that a bargaining unit employe "was promoted by virtue of posting procedure into the Utility spot . . . ". (tr. 45, lines 14-21). Accordingly, the Company's contention that Sec. 12.6 relates to functions separate from involuntary demotions rests on the validity of the Company's proposed distinction between promotions and voluntary (bid for) demotions on the one hand and involuntary demotions on the other. The validity of that distinction, in the context of an interpretation of the Agreement as a whole, will be further discussed below.

The Company has also relied on the discretion historically afforded the Company in Sec. 12.6 and its precursors to decide whether to fill a vacancy. This fundamental right protects the Company from being required to fill existing or to create and fill new positions that the Company does not need or want. That right not to have unneeded work performed does not persuasively imply the further and different right to unilaterally choose to have work performed in a position of

the Company's choice unrelated to that from which the Company seeks to demote an employe.

Application of Contract Interpretation Principles

The Company appropriately has invoked well-recognized principles that contracts are to be interpreted, to the extent possible, as a whole, giving effect to each of its parts, giving words their conventional meaning, and in a manner that avoids harsh, nonsensical or unreasonable results. When those and other principles of contract interpretation are applied, the Arbitration Board concludes that the appropriate interpretation of the Agreement in this case is that proposed by the Union.

Section 11.1 by its nature and terms is a general provision, subject to modification by specific provisions elsewhere in the Agreement. In contrast, Sec. 12.6 is a more specific provision which, if applicable, is worthy of controlling effect as against the more general Management Rights language.

Section 12.6 appears intended to provide opportunities for employes to be notified of and to apply for new or existing positions that the Company decides to fill with someone other than the incumbent. The balance of the employes in the bargaining unit have the same interests in having such opportunities posted whether the Company seeks to do so for purposes of an involuntary demotion or for some other purpose not involving an involuntary demotion. As noted, the parties have not included an express exception to Sec. 12.6 as regards involuntary demotions. They have, however included an express exception to the scope of applicability of that section in the waiver language contained in the last sentence of the Section. Where, as here, the parties have expressly incorporated an agreed-upon exception to the scope of applicability of Sec. 12.6, established contract interpretation principles call, if possible, for avoidance of an interpretation that would entail additional exceptions that have not been similarly incorporated. That principle is known as "expressio unius est exclusio alterius" (to expressly include one is to exclude all others). The Company's proposed exclusion of involuntary demotions from the scope of applicability of Sec. 12.6 would require the Arbitration Board to engraft an exception in addition to the one the parties have agreed to include, contrary to that principle.

The Company's interpretation also calls upon the Arbitration Board to draw a distinction not expressly drawn in the Agreement between voluntary (bid for) demotions to which the Company now seems to acknowledge that the contractual posting procedure was intended to apply, and involuntary demotions as to which the Company insists the posting procedure does not apply. The Company's proposed distinction in that regard, while by no means inherently unreasonable or implausible, does not appear anywhere in the Agreement provisions to which attention has been called by the parties, nor is that distinction persuasively supported by past practice or bargaining history.

In contrast, the Union's proposed distinction -- demotions between related positions to

which Sec. 12.6 does not apply vs. demotions between unrelated positions to which Sec. 12.6 does apply -- draws firm support from the parties' undisputed practice regarding promotions from one related position to another. For, it is undisputed that advancement between related positions has not been treated as a personnel transaction to which the contractual posting provisions have applied. Union witness Charles Huggins' testimony (tr. 82-84 and 111-112) is uncontroverted on that point. It seems reasonable and logical to extend the same inapplicability of Sec. 12.6 to demotions between related positions (for which there is an otherwise contractually sufficient basis). However, because it is undisputed that promotions between unrelated positions are subject to the contractual posting procedure, a parallel treatment of demotions between unrelated positions would render them subject to Sec. 12.6, as well.

It is true that the Union's proposed interpretation effectively prohibits the Company from unilaterally demoting an employe to an unrelated position. That is unquestionably a significant modification of and limitation on the Company's Sec. 11.1 right to demote. However, contrary to the Company's contentions, such a limitation does not render the Company's right to demote either meaningless or ineffectual.

Rather, the Union's interpretation gives effect to the Company's Sec. 11.1 right to demote by permitting the Company (assuming there is a contractually sufficient basis on which to do so): to demote an employe to a related position without posting or waiver; to demote an employe to an unrelated position pursuant to a posting (where the selected applicant has voluntarily applied for the posted lower-paying position); and to demote an employe to an unrelated position pursuant to a waiver of posting where the Company requests and the Union grants same as provided in Sec. 12.6.

While a reasonable person might not associate so significant a limitation with the right "demote," standing alone, the Arbitration Board believes that such a person could well share the Arbitration Board's conclusion that such is consistent with the mutual intentions of the parties when the Agreement is read as a whole.

Finally, there is the Company's contention that the Union's interpretation is so inherently harsh and unreasonable that the parties cannot properly be deemed to have intended it. As noted, the Union's interpretation does effectively prevent the Company from moving an employe (whom the Company has an otherwise contractually sufficient basis to demote) to an unrelated position of the Company's choice absent a Sec. 12.6 posting or waiver. However, it does not thereby wholly prevent the Company from protecting itself from the employe's unacceptable performance. The Company retains its rights to impose discipline including discharge under Secs. 5.1 and 11.1 and to request a Union waiver of posting pursuant to Sec. 12.6. Moreover, the record evidence suggests that, in at least some cases, the potential for a Company exercise of its rights to discipline the under-performing employe involved can provide a meaningful impetus for the Union to agree to a Sec. 12.6 waiver. Leaving the Company in that situation is neither so harsh nor unreasonable as to preclude the possibility that that is what the parties intended the Agrerement to mean.

Conclusion and Remedy

For the reasons noted above, the Arbitration Board concludes that Sec. 12.6 required posting or waiver where, as here, the Company sought to demote a bargaining unit employe to an unrelated bargaining unit position. Accordingly, the Arbitration Board's answer to ISSUE 1, above, is in the affirmative.

The type of relief requested by the Union is deemed appropriate and has been granted.

[the text of this Award continues on the next page]

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the Arbitration Board on the ISSUES noted above that:

1. The Company did violate the contract, specifically Sec. 12.6, by not posting a notification of job vacancy for the position of Customer Account Clerk into which it demoted Jane Wojcicki.

2. By way of remedy for that violation, unless and until the Agreement is materially changed, the Company shall, in the future, cease and desist from demoting bargaining unit employes to an unrelated bargaining unit position without a Sec. 12.6 posting or waiver.

Dated at Shorewood, Wisconsin
his 28th day of February, 1994 by Marshall L. Gratz /s/
Marshall L. Gratz, Third Arbitrator

I concur. _____ _____
signature date

_____ _____
signature date

I dissent. _____ _____
signature date

[see note on next page]

[Note: This award was issued April 6, 1994. The Union Arbitrator concurred. The Company Arbitrator dissented and submitted a letter which was appended at his request to the award which noted:

The purpose of this letter is to direct additional attention to the union's acknowledgment of the company's right unilaterally to demote an employee (assuming there is a contractually sufficient basis upon which to do so) within the wage steps of an occupation or between occupations, when progression between the wage steps or between the occupations does not require posting of a job vacancy. This union acknowledgement is found at pages 21 through 27 of the transcript of the hearing and at item 5 of the union's brief starting at page 10. I request that this letter be appended to the award.

-end of note]