BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

LINCOLN COUNTY HIGHWAY EMPLOYES
LOCAL 332, AFSCME, AFL-CIO

and

LINCOLN COUNTY

Case 154
No. 54708
MA-9765

Appearances:

Mr. Phil Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, Wisconsin 54476, for the Labor Organization.

Mr. John Mulder, Representative, Lincoln County, 1110 East First Street, Merrill, Wisconsin 54452, for the Municipal Employer.

ARBITRATION AWARD

Lincoln County Highway Employers Local 332, AFSCME, AFL-CIO ("the Union") and Lincoln County ("the County") are parties to a collective bargaining agreement which provides for final and binding arbitration of disputes arising thereunder. The Union made a request, in which the County concurred, for the Wisconsin Employment Relations Commission to appoint a member of its staff to hear and decide a grievance over the interpretation and application of the terms of the agreement relating to seniority and the filling of vacancies. The Commission appointed Stuart Levitan to serve as the impartial arbitrator. Hearing in the matter was held in Merrill, Wisconsin, on March 19, 1997; it was not transcribed. The parties filed written arguments by April 2, 1997.

ISSUE:

The parties did not stipulate to a statement of the issue. I frame the issue as:

> "Did the County violate the collective bargaining agreement or binding past practice when it assigned a less senior employe to operate a hydraulic excavator in August-September, 1996? If so, what is the remedy?"

RELEVANT CONTRACTUAL LANGUAGE:

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ARTICLE III
MANAGEMENT RIGHTS

The Union recognizes that the management of the Highway Department and the direction of its working forces is vested exclusively in the County subject to the terms of this Agreement. These rights include:

A. The right to hire, suspend, demote, discipline or discharge for just cause;

B. To transfer or layoff because of lack of work or other legitimate reasons;

C. To determine the type, kind and quality of service rendered to the County;

D. To determine the location of the physical structures of any division or department thereof;

E. To plan and schedule service and work programs;

F. To determine the methods, procedures and means of providing such services;

G. To establish work rules;

H. To determine what constitutes good and efficient County service.

It is understood that management rights are not limited to those specifically mentioned above. It is also understood that the Employer's management prerogatives shall not be used for purposes of discrimination against employees. Any unreasonable exercise or application of the Management Right's by the County as set out in this Article shall be appealable by the Union or any employee through the grievance procedure.

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ARTICLE VI

SENIORITY

A. Seniority: It shall be the policy of the Employer to recognize seniority in filling vacancies, making promotions and in laying off or rehiring, provided, however, that the application of seniority shall not materially affect the efficient operation of the Lincoln County Highway Department.

B. Accrual: Seniority shall be based upon the actual length of service for which payment has been received by the employee.

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E. The County shall make every reasonable effort to assign the State Crew Leader for special projects by seniority.

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ARTICLE VIII
JOB POSTING and TRIAL PERIOD

A. Job Posting: Whenever a vacancy occurs or a new job is created, except for common labor, it shall be posted on all shop bulletin boards for a period of five (5) working days. The determination as to whether or not a vacancy exists shall be made by the Highway Commissioner. Any employee desiring to apply for such job or vacancy must submit a written application to the Highway Commissioner.

The employee with the greatest seniority making application, who can qualify, will be given the job. The Highway Commissioner shall have the right to temporarily fill the job that is posted. However, such temporary filling of the job shall continue only for a reasonable time after the end of the job posting or the settlement of a grievance if one should arise.

B. Trial Period: The employee who receives the position shall serve a ninety (90) calendar day probationary period and at the end of such period, shall be advanced to the respective classification if the employee successfully completes the probationary period. In the event the employee fails to qualify, the employee shall be returned to his former job at the end of the trial period. In the event the Employer declares an employee qualified at

any time during the trial period, the Employer may waive the remainder of the trial period and place the employee in the position.

Employees who actually perform the duties of the new position, during the ninety (90) calendar day probationary period, shall be paid the higher rate while performing said duties. At the completion of the probationary period, he shall be paid the rate on a permanent basis.

C. Employer Objection: When objections are made by the Employer regarding the qualifications of an employee to fill the position, such objections shall be submitted to the Union Committee for consideration, if requested.

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ARTICLE XXIII
MISCELLANEOUS

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C. Travel Time: Employees shall travel to and from the job site on the Employer's time in accordance with past procedure.

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OTHER RELEVANT PROVISIONS

Lincoln County Ordinances relating to the Authorization of New Positions, Replacements in Existing Positions and Policies provide as follows:

AUTHORIZATION OF NEW POSITIONS, REPLACEMENTS IN EXISTING POSITIONS AND POLICIES

4.01 **INTERPRETATION OF CHAPTER**. (1) While policies and procedures contained herein are generally applicable to all employees, some may be modified by collective bargaining agreements. If information herein conflicts with the provisions of a union contract, the terms of that contract will control.

(2) Specific policies or rules may be adopted by departments. Such policies or rules may not conflict with those contained herein without approval of the County Board.

(3) The County Board must and does reserve the right to change its employment policies, practices, and employee benefits when necessary and consistent with State and federal law to meet changing conditions or reduced funding levels. Nothing herein should be construed or interpreted by anyone as a guarantee of permanent, continuous employment with the County.

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4.05 **EXCEPTIONS.** (Am. #222-93) The provisions of this subchapter are not applicable to the Pine Crest Nursing Home.

4.06 **NEW POSITIONS.** (Am. #254-94) Before a position can be added to a County department:

(1) The department head must request approval for the position from the Administrative Coordinator, who is charged with recommending the organization and staffing necessary to insure compliance and efficiency in providing services. Such request must include the fiscal impact of the new position. The Administrative Coordinator will conduct a through review of the request.

(2) If approval is granted by the Administrative Coordinator, the request must be presented to the department's oversight committee, board or commission.

(3) If the request is approved by the department's oversight committee, board or commission, the request must be presented to the Personnel Committee.

(4) If the request is approved by the Personnel Committee, it must be presented in resolution form to the County Board. No new position may be advertised or filled until the position is authorized by the County Board.

4.07 **REPLACEMENTS IN AUTHORIZED POSITIONS.** (Am. #251-94) When a vacancy occurs which is to be filled, in a position already authorized by the County Board, the department head must first obtain approval from the department's oversight committee and the Administrative Coordinator before filling the vacancy. The Administrative Coordinator will report any replacements in authorized positions to the Personnel Committee.

4.08 **NOTICE OF VACANCY.** (1) Vacancies in represented positions must be posted as provided in the applicable

collective bargaining agreement.

(2) Vacancies in nonrepresented positions not filled by internal promotion or represented positions not filled by posting must be advertised in the official County newspaper. Additional advertising shall be placed when deemed necessary by the department head and/or oversight committee and the Personnel Director.

4.09 **PROBATIONARY PERIOD.** (1) Unless otherwise provided in a collective bargaining agreement, all newly hired full time employees shall be on probation for 12 months, as provided in Resolution No. 23-93, adopted by the County Board on July 20, 1993. Newly hired regular part-time employees shall be on probation until they have worked the number of hours equivalent to those worked by a full time employee during the

BACKGROUND

The grievant, Curtis Dykstra, is a Class 2 Operator for the Lincoln County Highway Department (LCHD). Employed by the LCHD since October 14, 1991, he is assigned to the Tomahawk garage. Prior to joining the LCHD, he operated a hydraulic excavator for a blacktop company, and is qualified to do so on behalf of the County.

From about August 5, 1996 to September 15, 1996, the LCHD leased a hydraulic excavator, or back hoe, for use on a construction project based out of the Merrill garage. Operating a backhoe is considered to be Class 3 work on a contractual scale, with 1 being the lowest grade, and 5 being the highest. Highway Superintendent Leo Leiskau first assigned Terry Berndt, a Class 4 Operator with a seniority date of December 12, 1977 and George Janssen, a Class 3 Operator with a seniority date of September 8, 1986 to do some of the work; the majority of the work was assigned to Tony Borelli, a Class 2 Operator with a seniority date of September 12, 1994 based in Merrill. For their work with the back hoe, both Borelli and Janssen were paid the Class 3 rate of $12.43; Berndt was paid his normal rate of $12.78. The normal Class 2 rate was $12.02.

Driving time between the Tomahawk and Merrill garages is approximately 45 minutes. Dykstra was never asked, and he did not offer, to report to Merrill rather than Tomahawk as his normal base of operations during the period the back hoe was in use.

On August 7, 1996, Dykstra filed a grievance as follows:

> Lincoln County Highway Department is currently using a hydraulic excavator for construction purposes. During the week of Aug. 5, 1996, an employe with less seniority was operating the excavator on

Highway.

> A temporary vacancy was established when the department began to use the excavator. In accordance with Article VI, Section A of the contract: It shall be the policy of the employer to recognize seniority in filing vacancies. It is also the policy of the LCHD to review and select an employe based upon past employment and experience and qualifications acquired for the assigned job. In this case, the commissioner and supervisor are not recognizing seniority on the set policy. Thus, article VI, section A is being violated. It should also be noted that a hydraulic excavator is equivalent to a grader/operator.
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> In filing the above mentioned vacancy, the employe operating the hydraulic excavator should be selected on seniority and the ability to run the excavator based on past experience and qualifications.

On September 3, 1996, Highway Commissioner Peter A. Kachel, P.E. replied to Dykstra as follows:

> I have reviewed your grievance regarding operating the backhoe or hydraulic excavator. The backhoe was made available to us to try. We found it useful on the County Z and FF projects. As a result, we decided to rent the backhoe for the month of August and two weeks into September.
>
> There is no position of backhoe operator, therefore, we were not filling a vacancy, thus we did not violated Article VI.
>
> The man operating the backhoe was an experienced operator and he was qualified, based on his previous experience.
>
> Your concerns regarding the operation of the backhoe are understandable and will be noted for the future.

The grievance proceeded without a resolution satisfactory to the union and, pursuant to the agreement's provisions, was advanced to arbitration.

POSITIONS OF THE PARTIES

In support of its position that the grievance should be sustained, the union asserts and avers as follows:

> That there is no doubt that the position of operating the hydraulic excavator is covered by the collective bargaining agreement is proven by the fact that it was paid in accordance with the contract, and that all of the employes who operated the equipment were represented by the union. The clear and unambiguous contract language requires the application of seniority to awarding such positions, unless they would materially affect the efficient operation of the Highway Department.
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> There is little, if any, evidence the assignment of the grievant would have made the department less efficient; given the grievant's experience, there probably would have been enhanced efficiency. The suggestion that several workers would have had to wait for the grievant to arrive from Tomahawk was undermined by his testimony that he could have assigned the grievant to the Merrill show. Efficiency was not the issue.
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> It is well established that clear and unambiguous contract language must be given effect. The arbitrator is without authority to ignore or amend such clear and unambiguous language.
>
> It is clear the temporary position was established for bargaining unit employes and paid in accordance with the agreement. It is also clear that the contract provides that the position should be filled in accordance with seniority. The grievant was the most senior and was not selected.
>
> Further, past practice helps better define and interpret any possible ambiguities in the contract language. Except for assignments of very short duration, seniority has been consistently applied in such scenarios in the past. Even if the arbitrator finds the language ambiguous, this language has been consistently defined by past practice. The unchallenged testimony of a former department supervisor, now a County Board member, establishes that there is mutual agreement as to the past practice that would have awarded the posting to the grievant. This mutuality is critical in establishing that this past practice had ripened into a binding benefit.
>
> Accordingly, the grievance should be sustained.

In support of its position that the grievance should be denied, the employer asserts and avers as follows:

> There is no contract language requiring the County to have a certain number of personnel, no language requiring the County to create a vacancy and go through a posting process when it purchases or leases a new piece of equipment. But there is language giving the County management rights and particularly giving the Highway Commissioner the authority to determine if a vacancy exists. There is also an ordinance establishing the process for such a determination; testimony established that no vacancy existed or was created during this time.
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> Past procedures establish that simply purchasing or leasing equipment does not by itself create a vacancy. The County's ownership of other pieces of equipment not listed on the wage schedule shows that the County does not create a position every time a piece of equipment is purchased, and certainly not if it is merely leased. Further, positions are not strictly tied to the piece of equipment which they operate, but they may operate other pieces of equipment as well.
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> The grievance is not about the "assignment of work to a regular job" as in Article VI, and the labor agreement is silent on how assignments are made. The Union's claim that the County should recognize seniority runs counter to the language indicating that seniority will be recognized in only four instances – filing vacancies, making promotions, laying off and rehiring. The use of seniority is further qualified by the fact that its application shall not materially affect the efficient operation of the Highway Department. There is no mention that seniority will be recognized for daily assignments except a reference to the State Crew Leader.
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> The Union's reliance on past practice is not supported by its own testimony, in that witness Swarmer testified that some foremen went strictly by seniority, some did not. The Union's own testimony that the alleged past practice was neither clear nor consistent shows there was no true past practice. Further, since the County never leased equipment prior to 1996, how can there be a past practice? There is no past practice regarding the assignment of leased equipment.
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> The County's decision to assign Borelli rather than Dykstra was also based on efficiency of operations. The back hoe was being operated

out of Merrill, while Dykstra works out of Tomahawk. Dykstra never discussed the option of driving to Merrill on his own time until the grievance was heard at the Highway Department. Further such a result would have a private arrangement circumventing a specific provision of the contract relating to travel to the job site.

There is no contractual language supporting the argument that a position was created which should have been posted. There is no past practice either. The assignment is an exercise of management rights.

The grievance should be denied.

DISCUSSION

The union makes two basic arguments in support of its grievance. First, that there is clear and unambiguous language in the collective bargaining agreement requiring the work to have been assigned to the most senior qualified applicant. Second, that there is also established and binding past practice to the same conclusion. The county counters that the contract language clearly fails to support the union, and that no binding past practice exists.

As the union correctly notes, it is well-settled that arbitrators owe fidelity to the language of the collective bargaining agreement, enforcing the contract according to its terms. But such an understanding begs the basic questions of whether the agreement at issue here contains the requisite clear and unambiguous language, and, if so, whether that language supports the union's contentions and conclusions.

The contract provides that it "shall be the policy" of the county to "recognize seniority" in "filling vacancies, making promotions and in laying off or rehiring, provided, however, that the application of seniority shall not materially affect the efficient operation" of the Lincoln County Highway Department (LCHD).

Obviously, the personnel transaction at issue constituted neither a lay-off or a rehire. Further, the union has not claimed that a promotion was made, but rather that a temporary position was established. The first inquiry, therefore, must be into whether the county's actions involving the hydraulic excavator in August-September, 1996 constituted filling a vacancy. If the answer to that question is "yes", I must then determine whether the application of seniority would have "materially affect(ed)" the "efficient operations" of the LCHD.

The union poses an intriguing logical syllogism: the work was performed by bargaining unit members, who were paid at the appropriate wage rate as set by the collective bargaining agreement; therefore, the rest of the agreement, specifically the seniority provisions of Article VI/A, must apply.

This syllogism is intriguing, but not necessarily persuasive.

The language of Article VI appears to be fairly straightforward, standard seniority language. However, in the context of other language in – and not in – the rest of the collective bargaining agreement, the phrase "recognize seniority in filling vacancies" is something short of attaining the status of "clear and unambiguous," at least as applied to the current facts.

First, I note that a further provision in the agreement, Article VIII, Section A, states that the "determination as to whether or not a vacancy exists shall be made by the Highway Commissioner." The Highway Commissioner made no such affirmative determination regarding the hydraulic excavator work in August-September, 1996.

Naturally, this aspect of the contract is itself subject to clarification and interpretation through the grievance process. However, it does stand as contractual language which helps defines the scope of Article VI.

Further, I note that the management rights clause includes several relevant grants of authority to the County. Again, while these are all fairly standard conditions, and are all of course subject to the other terms of the agreement, it is still important to note that the County has the right to determine the "type, kind and quality" of service to be rendered; the right to "plan and schedule service and work" programs; the right to "determine the methods, procedures and means of providing such services," and the right to determine what "constitutes good and efficient County service."

Finally, it is also important to note what the agreement does not include or provide – a minimum staffing clause that would set a base level for the number of positions which the County would have to maintain, either in particular classifications or on particular assignments.

The County has also cited its ordinances 4.06 and 4.07, which set forth in precise detail the steps its departments must take before adding positions or filling vacancies. There is no doubt the County did not comply with these provisions. However, while this non-compliance may shed light on the County's concept or understanding of whether a vacancy had arisen, I do not find the ordinances themselves – unilaterally adopted by the County as they were – to define the collective bargaining agreement or otherwise be binding on the union. Indeed, ordinance 4.01 explicitly states that if the ordinance is in conflict with the agreement, "the terms of that contract will control."

The lack of applicability of ordinances 4.06 and 4.07 notwithstanding, I concur with the County that the agreement does not contain clear and unambiguous language supporting the grievance. I turn, then, to examine whether there is applicable and binding past practice on this point.

Arbitral understanding and administration of the concept of past practice is generally well-settled. A party asserting a past practice bears the burden of proving not only the existence but

also the scope of any alleged practice. Ford Motor Co., 19 LA 237 (Shulman, 1952). The weight accorded a past practice depends upon the purpose for which it is introduced, the language of the agreement, the particular facts surrounding the creation and maintenance of the practice and the view of the arbitrator. City of Tacoma Housing Authority, 99 LA 265, 269 (Mayer, 1992). The significance to be attributed to a practice depends upon whether it is supported by the mutual agreement of the parties. Willamette Industries, Inc., 78 LA 1137 (Milentz, 1982).

One of the earliest, and most oft-cited, formulations of the primary precepts of past practice is Arbitrator Justin's formulation that, "(I)n the absence of a written agreement, 'past practice', to be binding on both Parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties." Celanese Corp. of America, 24 LA 168, 172 (Justin, 1954).

The Union cites as evidence of the mutual agreement of the purported past practice the fact that Ray Kloss, a former LCHD employe and supervisor who now serves on the County Board of Supervisors voted to sustain the grievance at the Highway Committee. Supervisor Kloss testified this was because, as a former supervisor, he knew the contract required the application of seniority in such circumstances, testimony the Union relies on in establishing the necessary mutuality of understanding as to past practice.

The Union understandably focuses on those aspects of Kloss' testimony which support its conclusion. However, I believe that other, equally credible and relevant aspects of Kloss' testimony weaken the Union's case appreciably. In particular, Kloss testified that, during his tenure, the County had never rented a piece of equipment for this particular reason; that he couldn't "really say if we did or did not" apply seniority in relief assignments, and that on some occasions the County leased a backhoe with an operator already supplied by the lessor. Finally, I take arbitral note of the fact that the way an elected official on the governing body of a municipal employer votes on sustaining or denying a grievance is not conclusive as to either the objective merits of the matter or whether or not a purported past practice is unequivocal, clearly enunciated, and readily ascertainable as a fixed practice accepted by both parties.

Other testimony also failed to advance the Union theory, including that of Union steward John Swarmer, who testified that in his 25 years he was unaware of equipment having been leased; that, in emergency situations, supervisors "call in whoever they can get hold of, whether they follow seniority or not," and that, on job postings, "they follow seniority most of the time."

Again, the testimony does not prove that there was not a past practice on this point; but the evidence does not prove that there was. Given the Union's burden of persuasion to establish the past practice, those two conclusions are essentially the same.

Because I find that neither the clear and unambiguous language of the collective bargaining agreement nor binding past practice establishes that the assignment of operating the leased back hoe in this instance constituted a vacancy which required filling on the basis of seniority, I need not address the question of whether the County could have yet avoided that requirement on the

"efficient operation" exemption.

Accordingly, on the basis of the collective bargaining agreement, the record evidence and the arguments of the parties, it is my

AWARD

That the grievance is denied.

Dated at Madison, Wisconsin, this 24th day of June, 1997.

By Stuart Levitan /s/
Stuart Levitan, Arbitrator