

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**LANGLADE COUNTY HIGHWAY DEPARTMENT  
EMPLOYEES, LOCAL 36, AFSCME, AFL-CIO**

and

**LANGLADE COUNTY**

Case 85  
No. 57084  
MA-10513

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Appearances:

**Mr. David Campshure**, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311, appearing on behalf of Langlade County Highway Department Employees, Local 36, AFSCME, AFL-CIO.

Ruder, Ware & Michler, S.C., by **Attorney Jeffrey T. Jones**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Langlade County.

**ARBITRATION AWARD**

On December 11, 1998, the grievant filed a request with the Wisconsin Employment Relations Commission requesting the Commission to appoint a Commissioner or a member of its staff to serve as the sole arbitrator to hear and decide a grievance pending between the parties. The matter was assigned to the undersigned who held an evidentiary hearing on March 19, 1999 at the Langlade County Courthouse in Antigo, Wisconsin. Briefs have been filed and exchanged and reply briefs have been filed and exchanged, the last of which was received on May 24, 1999, closing the record.

**ISSUE**

The Union submitted the issue as:

Did the County violate the parties' collective bargaining agreement when it used a third Grader Operator without posting the position? If so, what is the appropriate remedy?

The County submitted the issue as:

Did the County violate the terms of the collective bargaining agreement by failing to create and post a Grader Operator position. If so, what is the appropriate remedy?

I conclude that the issue is:

Whether the County violated the collective bargaining agreement when it failed to post the position of Grader Operator and if so, what is the remedy?

### **RELEVANT CONTRACT PROVISIONS**

#### Article 4 Management Rights

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

...

C. To hire, promote, transfer, schedule and assign employees to positions within the County in accordance with the terms of this Agreement.

...

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

K. To determine the methods, means and personnel by which County operations are to be conducted.

Any dispute with respect to the reasonableness of the application of said management rights with employees covered by this Agreement may be processed through the grievance and arbitration procedure herein.

...

#### Article 6 Seniority

...

C. Whenever a vacancy occurs, or a new job is created, it shall be posted on all shop bulletin boards for a period of five (5) working days. The County may delay the posting of any vacancy or new job for up to a period

of four (4) months until such position or job is deemed necessary, provided no employee performs the work or operates the equipment for such position or job unless in an emergency. An emergency should be defined as a sudden, pressing necessity, requiring immediate action. The secretary of the Union shall be provided with a copy of the posting.

...

The Employer shall have the right to temporarily fill a job that is posted. However, such temporary filling of a job shall continue only for a reasonable time after the end of the five (5) day posting or the settlement of a grievance, if one should arise.

When a position is not filled after the first posting, or the Employer does not hire a new employee to fill the position, and it remains vacated for a period of six (6) months thereafter, it shall be reposted one more time so interested employees will have another opportunity to apply if they so desire.

...

In the event an Employer determines that a vacated position is no longer needed in the table or organization and will not be filled either temporarily or permanently, the Highway Commissioner shall notify the Union in writing that the position is being abolished.

...

### Article 13 Hours of Work and Classifications

...

D. Any employee that performs work in a higher classification shall receive the rate of pay for that classification. If he/she is performing work in a lower classification, he/she shall receive no lower than his/her regular classification rate.

### **BACKGROUND AND FACTS**

The County and the Union have been signatories to a series of collective bargaining agreements, the relevant terms of which have been set out above. This dispute involves the interpretation of the agreement as it relates to the posting procedure and assignment of workers.

Langlade County Highway Department employs 43 workers which utilize heavy equipment to perform various functions. The Department has approximately 50 pieces of heavy equipment. Employees are assigned to various job classifications based upon the type of equipment they normally operate.

Approximately four employees held Range 1 Grader Operator positions and one employee held a Range 2 Grader Operator position. During the passage of time, when two of the Grader Operators were either promoted or retired, the County decided not to fill the positions and abolished the positions with notice to the Union. The County currently has two Range 1 Grader Operator positions.

Pat McCarthy is employed by the Highway Department as a Range 1 Bulldozer Operator. In 1998, for approximately 85.75 hours, he was assigned to operate a grader. This represents 4 percent of a full-time employee's normal yearly work hours. He was assigned to operate the grader on July 22, 23, 27, 28, 29 and 30, as well as August 11, 12 and 13, 1998. On these dates, three graders were operated. The operators of these graders were the two Range 1 Grader Operators and Mr. McCarthy.

Joint exhibit 4 is an arbitration award by Arbitrator Bielarczyk of the Wisconsin Employment Relations Commission. In that award the Arbitrator held that the temporary assignment of an employee to a large piece of equipment outside of the employee's job title did not constitute the filling of a position requiring the posting of that position, but was rather a temporary work assignment made within management rights.

On August 5, 1998, the Union filed a grievance in this matter, alleging that the County violated the terms of the collective bargaining agreement by not posting a Range 1 Grader Operator position.

## **POSITIONS OF THE PARTIES**

### **Position of the Union**

The Union maintains that because the County eliminated two of the Grader Operator positions it cannot assign an employee to a grader without posting the position. The Union cites Article 6, Section C, paragraph 6, which states, "In the event an Employer determines that a vacated position is no longer needed in the table of organization and will not be filled either temporarily or permanently the Highway Commissioner shall notify the Union. . . ." The Union submits that the language is clear and leaves no room for dispute.

The Union also maintains that the parties negotiated this language which states that before eliminating a position, the County must determine that the position is not needed on either

a temporary or permanent basis. The Union points out the agreement also outlines the procedure for posting a position, which states that a position not filled through posting remains vacant. The Union submits that by failing to post the third Grader position, the County ignores the language of the contract.

Relative to Arbitrator Bielarczyk's award, it is the Union's position that it does not apply to these facts. The issue in that case was whether the County was required to post and fill a fourth and fifth Caterpillar Operator position. The Union submits there is a distinct difference between this case and the case decided by Arbitrator Bielarczyk. The distinction the Union makes is that the previous award was not related to positions that had once been created and then eliminated. In the case decided by Arbitrator Bielarczyk the County was not attempting to fill a previously eliminated position on either a permanent or temporary basis. The Union argues that the Arbitrator based his decision on whether management has a right to determine whether enough work exists to warrant the creation and posting of a new position. This case, the Union argues, concerns whether the County has a right to utilize a previously eliminated position without first posting the position.

### **Position of the County**

The County submits that well-recognized arbitral law holds that in the absence of a limiting contractual provision, an employer possesses the exclusive authority to determine whether a job vacancy exists. The County further submits that even if an employer determines a vacancy exists, the Employer still retains the authority to determine whether it should be filled. The County maintains that the agreement specifically confers upon the County the contractual authority to determine when a job vacancy exists and, if one does exist, whether it will be filled.

In support of this position, the County argues that the language of Article 4, confers upon the County the authority to direct all operations, determine the kinds and amounts of services to be performed, and to determine the number and kinds of classifications and the methods, means, and personnel by which County operations are to be conducted. The County argues that further support to this position is the previous decision of Arbitrator Bielarczyk in which the Arbitrator concluded the County had the specific management right under Article 3 to determine the number and kinds of classifications necessary to perform its services, subject to a test of reasonableness. Based on this test of reasonableness, the very limited number of hours Mr. McCarthy was assigned to the grader, the County's decision not to post the job was reasonable. Finally, the County argues additional support is given to its argument based on Article 4(A), (C), and (K), which confer upon the County the contractual right to assign an employe in one job classification to work in another job classification.

Lastly, the County maintains that a vacancy does not exist because an employe is occasionally assigned to perform duties of another job classification. Based on Article 13(D),

the County argues that this contractual provision contemplates that the County will assign employees to work in other job classifications. The County states there is support for this belief based on the statements of Arbitrator Bielarczyk in the previous case. The Arbitrator noted that the provision in Article 13(D) “acknowledges that there are times when the County has a need for additional employees in a specific classification.” The County argues that if they were required to post a position each time an employee is utilized in another job classification, Article 13(D) would be made useless. In the past, the County has routinely assigned employees in one job classification to work in another job classification without grievance from the Union.

### **DISCUSSION**

There were certain management rights, subject to the other provisions in the contract, that the County possesses. Among these rights include the right to assign employees to positions with the County. This is limited by the posting provision under Article 6 of the Agreement. This provision states, in part, that “whenever a vacancy occurs, or a new job is created, it shall be posted on all shop bulletin boards for a period of five (5) working days.” This provision goes on to state that the Employer determines when a position is no longer needed and will not be filled temporarily or permanently. Article 4 provides that the exercise of management rights is subject to a test of reasonableness.

In this case, the Employer determined that two of the Grader Operator positions would not be filled, eliminated them and so notified the Union. Based on the language of Article 6, while this right is limited by the fact it must notify the Union, it is not limited in determining when a vacancy exists in a temporary or permanent position.

In addition, Article 4 authorizes the County to assign employees to positions and to determine the personnel by which County operations are to be conducted. Article 13 authorizes an employee performing work in a higher classification to receive the rate of pay for that classification. To overlook all of these provisions when determining whether the County violated the Agreement in assigning Mr. McCarthy to the grader would be an error. If the contract was read as proposed by the Union, these provisions relative to the Employer determining that a position is no longer needed and relative to out-of-classification pay, would be without purpose.

Lastly, although a prior arbitration award is not binding on future awards, it may have merit and applicability. Parties should be able to rely on past awards in determining whether their actions are appropriate. Although the Union argues that the previous award is distinct because it was regarding new positions and the case at hand is dealing with eliminated positions, the undersigned does not find the argument persuasive. It is undisputed that the County eliminated the previous two Grader Operator positions; the positions were abolished. Therefore if, as the Union contends, a vacancy existed, these positions would be new, whether previously eliminated or not. Viewed in this light, Arbitrator Bielarczyk’s award is speaking directly to this

issue. He also found that based on the management rights provision, the posting provision, and the out-of-classification pay provision the County is not required to create an additional job or vacancy which must be posted whenever the County has a temporary need to use the current workforce.

In sum I find that the assignment of work to an employe outside of the employe's classification for 86 hours, is less than the hours at issue in the previous award, is de minimus and did not constitute the filling of a position which would require the posting of a position.

The grievance is not sustained and is dismissed.

**AWARD**

The County did not violate the collective bargaining agreement when it failed to post a Grater Operator position.

Dated at Madison, Wisconsin this 27th day of August, 1999.

James R. Meier /s/

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James R. Meier, Arbitrator

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