BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

LANGLADE COUNTY HIGHWAY DEPARTMENT EMPLOYEES, LOCAL 36, AFSCME, AFL-CIO

and

LANGLADE COUNTY

Case 90
No. 58113
MA-10847

Appearances:

Mr. David A. Campshure, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1566 Lynwood Lane, Green Bay, Wisconsin 54311-6051, appearing on behalf of Langlade County Highway Department Employees, Local 36, AFSCME, AFL-CIO.

Ruder, Ware & Michler, A Limited Liability S.C. by **Attorney Jeffrey T. Jones**, 500 Third Street, Suite 600, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of Langlade County.

ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, Langlade County Highway Department Employees, Local 36, AFSCME, AFL-CIO (hereinafter referred to as the Union) and Langlade County (hereinafter referred to as the Employer or the County) requested that the Wisconsin Employment Relations Commission designate a member of its staff to serve as arbitrator of a dispute concerning the County's decision not to post a Range 3 Heavy Truck Operator position. The undersigned was so designated. A hearing was held on January 24, 2000, in Antigo, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant to the dispute. The parties submitted post-hearing briefs, which were directly exchanged between the parties. On March 27, 2000, the parties advised the Arbitrator that they were waiving the submission of reply briefs, whereupon the record was closed.

Now, having considered the testimony, exhibits, other evidence, contract language, arguments of the parties and the record as a whole, the undersigned makes the following Award.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

ISSUE

The issues before the arbitrator are:

1. Did the County violate the parties' collective bargaining agreement when it failed to post the position of Range 3 Heavy Truck Operator?

2. If so, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

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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:

A. To direct all operations of the County;

B. To establish reasonable work rules and schedules of work, in accordance with the terms of the Agreement;

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

D. To suspend, demote, discharge, and take other disciplinary action against employees for just cause;

E. To relieve employees from their duties because of lack of work or for other legitimate reasons, in accordance with the terms of this Agreement;

F. To maintain efficiency of County government operations entrusted to it;

G. To comply with state or federal law;

H. To introduce new or improved methods or facilities;

I. To change existing methods or facilities;

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

L. To take whatever reasonable action is necessary to carry out the functions of the County in situations of emergency;

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.

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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 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 the job shall continue only for a reasonable time after the end of the five *(5)* days 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 vacant 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.

The Employer shall post the name of the applicant who receives the posted position and he/she shall also provide the secretary of the Union with a copy of said posted notice.

In the event the 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 in writing that the position is being abolished.

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ARTICLE 7 - GRIEVANCE PROCEDURE

A. Definition: Any difference or misunderstanding which may arise between the Employer and the employee, or the Employer and the Union shall be handled as follows:

B. Time Limitations: If it is impossible to comply with the time limits specified in the procedure because of work schedules, illness, vacations, etc., these limits may be extended by mutual consent in writing.

C. Settlement of a Grievance: Any grievance shall be considered settled at the completion of any step in the procedure, if all parties concerned are mutually satisfied and do not appeal to the next step within the time limits provided.

D. Step 1: The Union Committee and/or the Union Representative shall present a written grievance to the Commissioner within fifteen (15) days from the date of the occurrence giving rise to the grievance. In the event of a grievance, the employee shall perform his/her assigned work task and grieve his/her complaint later.

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F. Arbitration:

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3. Arbitration Procedures: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable time to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the County and the Union, which shall be final and binding on both parties. The arbitrator shall [*] modify, add or delete from the expressed terms of the Agreement.

*[*Note: The Union represents that the word "not" was inadvertently omitted from the last sentence of this provision in the drafting process.]*

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ARTICLE 13 - HOURS OF WORK AND CLASSIFICATIONS

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E. 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 classified rate.

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APPENDIX A
WAGES AND CLASSIFICATIONS
Langlade County Highway Department
January 1, 2000

Range 1	
Mechanic	$14.44
Welder	
Sign Man	
Parts Man	
Gas Man	
Bulldozer Operator	
Scraper Operator	
Loader Operator	
Paver Operator	
Backhoe Operator	
Screed Operator	
Grader Operator	
Range 2	
State Patrolman	$14.33
Crusher Operator	
Hot Mix Operator	
Range 3	
Roller Man	$14.19
Heavy Truck Operator	
Wayside Man	
Range 4	
Night Watchman	$13.99
Small Truck Operator	

Range 5

Common Laborer	$13.30

BACKGROUND

The Employer provides general governmental services to the people of Langlade County in north central Wisconsin. Among these services is the maintenance of public roads, through the Langlade County Highway Department. The Union is the exclusive bargaining representative for the Department's non-exempt employes.

The Department has numerous employe classifications, including Heavy Truck Operator. Prior to Bob Hoyt's retirement in December of 1998, there were nine Heavy Truck Operators in the Department. When Hoyt retired, Union President Romy Fleischman asked Highway Commissioner Todd Every if the County planned to replace Hoyt, since there were other employes who wished to post for the job. Every told him the ninth position was not needed, and that Hoyt's job would not be posted. Ultimately, Every hired a third mechanic rather than a ninth Heavy Equipment Operator.

After Every said he would not fill the job, Fleischman monitored the usage of the heavy trucks by getting the daily work schedule and noting which pieces of equipment people were assigned. The heavy trucks are used sparingly in the winter months, with only four or so being used for snow hauling. The ninth truck was not used at all in 1999 until the construction season began in June. Beginning in June, Fleischman's records showed a greater usage of the heavy trucks (HT) and usage of the ninth truck. On July 14, 1999, Fleischman filed the instant grievance, alleging that the County had failed to post Hoyt's job opening within a reasonable period of time. Every denied that the collective bargaining agreement had been breached, and denied the grievance. It was appealed to the Personnel Committee, which considered it at its August 10th meeting. The Committee sent the grievance back to the Highway Commissioner for additional information. Two weeks later, on August 24th, the Committee denied the grievance. It was referred to arbitration.

An arbitration hearing was held on January 24th. At the hearing, the County for the first time challenged the timeliness of the grievance. In addition to the facts recited above, the following evidence was taken:

Both Fleischman and Every presented statistics on the use of the heavy trucks by employes other than Heavy Truck Operators. Fleischman's statistics were drawn from daily work assignment sheets. Every's were drawn from those records, as well as time sheets and leave records. Fleischman's breakdown showed:

Days of Month	0-8HT Hauling	9 HT In Use	10 HT In Use	11 HT In Use	In Use
June	12 days	5 days	1 day	6 days	0 days
July	16 days	5 days	2 days	9 days	0 days
August	18 days	4 days	6 days	6 days	2 days
September	20 days	2 days	3 days	8 days	7 days
October	21 days	10 days	8 days	3 days	0 days
November	9 days	7 days	1 day	1 day	0 days
	96 days	33 days	21 days	33 days	9 days
	100%	34 ½%	22%	34 ½%	9%

Fleischman's records show that the ninth truck was used on 63 of the 96 days on which hauling occurred during the construction season, or 66% of the time. The County's records essentially track Fleischman's, although they are calculated differently. Every calculated the number of days on which more than eight heavy trucks were in use, and the number of man hours worked on the trucks by employes other than the eight Heavy Truck Operators. According to the County's records, between June and November, there were 68 days on which nine or more heavy trucks were in use, with 1184 man hours spent on the additional trucks, for an average of 17.4 man hours on the extra trucks on those days. From the County's records, it appears that the employes on the heavy trucks normally worked a ten hour day from Memorial Day through Labor Day, and an eight hour day after Labor Day.

Romy Fleischman testified that he waited to file a grievance until he had a chance to observe the usage of the ninth heavy truck and determine whether there was still effectively a ninth Heavy Truck Operator's job. He noted that the contract allowed the County to delay posting a job for up to six months if the equipment associated with the job was not in use, and that the ninth heavy truck was not used between Hoyt's retirement and June. He also observed that two prior arbitrators had ruled that the Union could not demand the filling of a job if the equipment was not used regularly. Thus, he waited to grieve until he was convinced that the ninth truck was being used just as it had been in the past.

Fleischman agreed that the Heavy Truck Operators did not spend all of their time driving, and that even though they held that classification, they might spend a good deal of their time doing brush cutting, flagging, snow plowing and the like. He expressed the opinion that this was no different than any other employe, and that most of them spent substantial time doing work on equipment other than that in their classifications. Fleischman estimated the following percentages for equipment operators to work on their assigned equipment:

Bulldozer Operator	60%
Scraper Operator	20%
Loader Operator	100%
Paver Operator	100% June to October

Backhoe Operator	75%
Screed Operator	100% June to October
Grader Operator	65%
State Patrolman	100%

Fleischman also noted that the Crusher Operator spent the winter months working in the shop. He observed that the positions of Wayside Man, Night Watchman and Small Truck Operator, although listed in the wage schedule, were not filled.

On cross examination, Fleischman agreed that all employes possessed CDL's, frequently crossed over between pieces of equipment in the course of a day, and would be paid at the highest applicable rate when temporarily assigned. He stated his recollection that the County had provided written notice of its intent to eliminate the third Range 1 Grader Operator job and to eliminate the Range 2 Grader Operator entirely.

Road Superintendent Eugene Rogatzki testified that there were 21 classifications, 35 employes, and 100 pieces of equipment in the Highway Department. All employes other than the common laborers have an assigned piece of equipment, but all are assigned to other equipment as needed. The County owns 11 heavy trucks, but has never had 11 drivers, and has never had a grievance over assigning employes to the 10th and 11th trucks when necessary. Rogatzki observed that the heavy trucks were the least complicated pieces of heavy equipment owned by the County, and that the Heavy Truck Operator is the largest single classification, even after the elimination of the ninth position. Rogatzki recalled that the County gave written notice when it completely eliminated the Range 2 Grader Operator classification, and expressed the opinion that complete elimination was the only circumstance under which the County was obligated to provide notice to the Union. He did not know whether the County also provided notice when it eliminated the third Range 1 Grader Operator job.

Additional facts, as necessary, are set forth below.

ARGUMENTS OF THE PARTIES

The Position of the Union

The Union takes the position that the County violated the clear language of the contract. Article VI mandates the posting of vacant positions. The County's claim that this position is not vacant because it was eliminated is factually untrue. The evidence is undisputed that the ninth heavy truck is in use on 57% of the days in a typical work year. This is no different than most of the positions in the bargaining unit where employes work on equipment other than their posted equipment for large portions of the work year. Many jobs are tied to the paving season, which runs for only half the year, and many of the heavy truck operators do not work on their assigned truck outside of the paving season. Moreover, if the County actually intended to eliminate the job, it would be required to serve written notice of that intent on the

Union. It did not do so. The County's own failure in this regard is an admission that the position still exists. Thus, there is no valid basis for declaring the ninth position vacant.

The County's actions here cannot be allowed to stand, lest the language of Article VI be rendered surplusage. If the ninth Heavy Truck Operator's job can be declared "eliminated" when the truck is still being used on 66% of the days in the construction season, all of the equipment-specific jobs in the bargaining unit can be eliminated, and the Department can be staffed entirely with common laborers. That would obviously run contrary to the intent of the parties in negotiating the specific wage rates for each job and the detailed posting provisions of the contract.

The Union notes that specific provisions, such as Article VI, must govern over general provisions, such as the Management Rights clause. Thus, even though the County has the general right to fill or not fill positions, that right is subject to the specific language in the remainder of the contract. Article VI provides, in the clearest possible terms, a limited right to temporarily fill jobs or temporarily leave them vacant. It also provides, however, that the jobs must ultimately be filled if the equipment is to be used. Here the equipment is being used, and the job vacated by Hoyt still exists.

Turning to the County's late-arising claim that the grievance is not timely, the Union notes that this is merely an effort to dispose of a meritorious grievance. The Union was verbally advised that the job was eliminated at the beginning of the winter, and Fleischman could not know whether this was true until the construction season was underway. He waited a reasonable period time, charting the use of the ninth truck, and grieved as soon as he had reliable data showing the truck was being used regularly. There was no reasonable alternative to this course of action, and the Union cannot be penalized for acting responsibly by waiting to be sure its grievance had merit.

For all of these reasons, the Union asks that the grievance be sustained, and that the County be ordered to either post the ninth position or to cease and desist from using more than eight heavy trucks.

The Position of the Employer

The County takes the position that the grievance is untimely and should be dismissed. The Union was given clear notice in December of 1998 that the ninth Heavy Truck Operator job was being eliminated, and yet waited for eight months before filing a grievance. The contract provides in the clearest possible terms that grievances must be filed within 15 days of the "occurrence giving rise to the grievance . . . ." Inasmuch as the grievance procedure is jurisdictional, the Arbitrator is wholly without authority to entertain the Union's claim. Even if the "occurrence giving rise to the grievance" is treated as being the use of the ninth truck during the 1999 construction season, Fleischman's own records show that the truck was used on June 3, 22, 23, 24, 28, 29 and 30. This usage was in plain view of Union officials. Yet the grievance was not filed until July 14th. By any measure, this grievance is untimely. Even

if it was not technically untimely, the County proceeded in reliance on the Union's failure to grieve when it temporarily assigned employes to the ninth truck, and when it decided to fill the vacant mechanic's position. Thus, the Union must be estopped from pursuing this grievance, since its inaction prompted the County to act to its detriment.

In addition to the procedural defects with the grievance, it is utterly lacking in substantive merit. It is a basic principle of labor relations that an Employer has the inherent right to determine that a vacancy either does or does not exist and, if one does exist, whether it should be filled. There is nothing to show that the County has somehow surrendered its authority to make these decisions. To the contrary, the Management Rights clause of the contract specifically recognizes the County's right to make these decisions. It reserves to the County the rights to: . . . direct all operations of the County; . . . To hire, promote, transfer, schedule and assign employees to positions within the County in accordance with the terms of this Agreement; . . .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; [and] . . . To determine the methods, means and personnel by which County operations are to be conducted. The exercise of these rights necessarily carries with it the right to decide what jobs exist and what jobs will be filled.

Arbitrator Edmond Bielarczyk ruled in 1988 that the Management Rights clause allowed the County to decide not to post a number of jobs equal to the number of pieces of equipment in a particular classification. In that case, the Union claimed that since there were five caterpillar tractors and only three Caterpillar Operators, the County was obliged to post two more Operator jobs. Arbitrator Bielarczyk rejected this claim, noting that the exercise of management rights was subject only to a test of reasonableness, and that the County could reasonably maintain fewer equipment operator jobs than pieces of equipment. He found unpersuasive the Union's argument that the fourth and fifth caterpillar tractors were sometimes in use, observing that the time involved was minimal (40 hours annually for the fourth tractor, and 20 hours for the fifth tractor) and that the inclusion of an out of class pay provision of the contract showed the parties' understanding that the County might sometimes need more employes in a classification than it had permanent jobs for.

That is precisely the case here. There is an occasional need for the ninth truck, but the need is not sufficient for a permanent position. There were only 634 hours in the ninth truck in the 1999 construction season, less than a third of an average work year. It makes no sense to post a year-round Heavy Truck Operator position when there are so few hours to be worked in the classification. Given these facts, the arbitrator must reject as untrue the Union's claim that there currently is a vacant ninth Heavy Truck Operator position. There is some work in that classification, but there is no vacant position. The mere fact that the Union wishes there was a ninth position does not overcome the County's fundamental right to make this decision.

Finally, the County rejects as misplaced the Union's claim that the lack of written notice of the elimination of the ninth Heavy Truck Operator's job somehow proves that the job still exists. The Union simply misreads the language of Article 6, which provides in part that "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 in writing that the position is being abolished." The classification of Heavy Truck Operator still exists, as is evidenced by the Wage schedule in the contract. Rogatzki persuasively testified that this language only applies when entire classifications are eliminated. Moreover, the evidence shows that the ninth truck continues to be used, and thus, the job of driving it continues to be filled on a temporary basis. If a job is filled temporarily, there can be no notice of elimination.

For all of the foregoing reasons, the County urges that the grievance be dismissed in its entirety.

DISCUSSION

Timeliness of the Grievance

The initial question is whether the instant grievance was timely filed. If not, the Arbitrator lacks jurisdiction over this dispute and has no authority to consider the merits of the Union's claim. Arbitration is merely the final step in the negotiated grievance procedure, and a grievance that has not been properly processed through that procedure is not properly before the arbitrator. Having made that observation, the Arbitrator must further observe that there is no element of untimeliness to the grievance.

The contract requires that grievances be filed within 15 calendar days of the event giving rise to the grievance. There is no question that Fleischman was told in late 1998 or early 1999 that the ninth Heavy Truck Operator position would be eliminated, and there is no dispute that he waited until mid-July to file a grievance. However, the Union reasonably explained that it had to wait until the construction season was well underway to know whether the position had, in fact, been eliminated. The ninth truck is not used outside of the construction season. The construction season begins in earnest in June. The Union has learned in prior arbitration cases that the intermittent use of a piece of equipment does not indicate the existence of a vacant position. Thus, Fleischman waited for six weeks in order to chart the use of the ninth truck and determine whether there was sufficient use to draw into question the County's claim that the position had been eliminated. The incident giving rise to this grievance is not the use of the ninth truck. It is the pattern of regularly using the ninth truck, and the Union had the right to refrain from grieving until the pattern became apparent. When a pattern becomes apparent is a subjective determination, but I cannot conclude that the Union acted unreasonably in waiting until July 14th to file this grievance. Neither can I find any basis for equitably estopping the Union's pursuit of this grievance. Aside from the mere assertion that the County acted to its detriment in reliance on the Union's failure to grieve, there is no evidence anywhere in the record that the County did anything differently than it would have done if this grievance had been filed on the first day that the ninth truck was used after Hoyt's retirement.

The Existence of a Vacancy

The threshold question on the merits is whether there was a vacancy in the ninth Heavy Truck Operator position. Certainly Hoyt had retired, so there was no ninth Heavy Truck Operator, but the existence of a vacancy implies more than the absence of a former incumbent. It implies the continuation of the position the former incumbent held. As Arbitrator Bielarczyk noted in his 1988 Award between these same parties, "the County has the specific management right . . . to determine the number and kinds of classifications necessary to perform its various services" and thus, "the right to determine whether a vacancy exists." Arbitrator Bielarczyk also observed that the County's exercise of that right must be reasonable under all of the circumstances. This is a statement of what is, in the lore of labor contract interpretation, black letter law. Absent some specific language to the contrary, a good faith determination that a position is no longer needed and will not be filled is within the province of the employer. That determination must, however, be more than mere words to the effect that there is no longer a position.

Positions under this contract, other than the common laborer, are defined by the function or equipment which the employe is primarily responsible for, but employes are routinely assigned to other equipment and relatively few of them spend all of their time working within their specialized area of responsibility. The Heavy Truck Operator does more than simply operate heavy trucks. The evidence is that the majority of the employes in that classification spend the entire non-construction season doing other tasks, and that the use of heavy trucks from early November through the end of May is limited to four or five trucks for snow hauling. Obviously the amount of usage depends on the amount of snow, but it is fair to assume that even these trucks are not in use continuously in the non-construction season. Given this, the fact that there is less than full-time usage of the ninth truck does not provide persuasive proof that there is no vacant position. This is not a case like that considered by Arbitrator Bielarczyk, where the use of the fourth and fifth Caterpillars was *de minimis* and there was never an existing position to cover those vehicles. There is less than full-time usage of almost all of the heavy equipment in the Highway Department, in some cases much less than full-time, and the parties presumably knew this when they negotiated specialized classifications tied to the equipment. 1/ In negotiating those classifications, the parties did more than simply agree to task rates for operating particular pieces of equipment -- they agreed on what constituted positions within those classifications.

1/ This distinguishes this case from those arbitration awards cited by the County, in which the various arbitrators found that the part-time performance of duties did not show the existence of a vacant job. Here, the negotiated classifications largely consist of jobs that involve part-time performance of the distinguishing work of the classification.

The more relevant question in determining whether the Employer could reasonably have exercised its right to decide that there was no vacancy is whether the amount of hauling work performed has materially changed since the retirement of Hoyt. Prior to his retirement,

the parties concede that there were nine positions, none of them devoted on a full-time basis to driving truck, and most of them only about half the year driving truck. The testimony of the Union's witnesses was that there was no difference in the use of the equipment or the amount of work from 1998 to 1999, and the County's witnesses did not really dispute this testimony. Given a bargaining unit in which the majority of the negotiated classifications involve performing many tasks other than the specialized function of the classification, and given a record which indicates that the ninth truck was operated on the pretty much the same basis after Hoyt's retirement as it was before, it is difficult to conclude that the ninth Heavy Truck Operator position was actually eliminated. The work continues to be performed on a regular and substantial basis during the construction season. 2/ If there were nine positions before Hoyt retired, no change in the workload or the use of the equipment, and the equipment is used on two-thirds of the days on which hauling is performed, it cannot be said that the position no longer exists. Accordingly, I conclude that there is a vacancy in the ninth Heavy Truck Operator position.

2/ In the alternative, the County could show that there has been a gradual decrease over time in the amount of work to be performed in the ninth Heavy Truck Operator position, and that Hoyt's retirement was the logical occasion to respond to the decrease. However, that is not the evidence in this record.

Must a Vacancy Be Filled?

The mere fact that a position exists and is vacant does not, by itself, lead to the conclusion that it must be posted. Management has the basic right to determine the level of services that will be provided to the public, including the right to do without the performance of certain duties. If it makes that decision, it does not violate the contract and the Union cannot compel it to post the job. Here, however, the County has not decided to do without the operation of the ninth Heavy Truck. It has instead assigned those duties to employes in other classifications on an as-needed basis, paying out of classification pay where appropriate. The question, then, is whether this violates the labor agreement.

Article 6, Section C, of the contract addresses the filling of vacancies. That provision states, *inter alia*:

> 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 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 the job shall continue only for a reasonable time after the end of the five *(5)* days posting or the settlement of a grievance, if one should arise.
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> . . .
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> In the event the 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 in writing that the position is being abolished.

This language, particularly the first paragraph, is unusually strong as to the need to either fill a vacant position or leave the equipment assigned to that position idle except in emergencies. 3/ Moreover, the Article specifically requires that if a "vacated position is no longer needed" and will not filled "either temporarily or permanently" written notice of that must be provided to the Union. Rogatzki testified that he believes this language only applies to the elimination of an entire classification, but that is not what the language says. More to the point, the clear implication of this language is that if a vacated position is still needed, it will be filled, and the procedure for filling positions is that specified in the preceding paragraphs of Article 6. As discussed above, in practice the ninth Heavy Truck Operator position continues to exist and has been filled, albeit through the use of Article 13's out of class pay provision rather than the posting provision.

3/ This, of course, presupposes the existence of a vacant position. In a case such as the Heavy Truck Operator, where there are nine positions, if the amount of work available changed materially so that nine positions were no longer justified, the ninth truck could still be used on an intermittent or occasional basis, in the same way that the tenth and eleventh trucks are currently used. As noted by Arbitrator Bielarczyk, the existence of an out of class pay provision presumes that equipment may be used by persons other than those regularly assigned to it.

While the County may choose not to use the ninth truck on a regular basis, and may thereby abolish the position, that is not the choice it has made. It has continued to use the truck as before without posting the position vacated by Hoyt. As the evidence demonstrates that the position continues to exist, and the duties of that position continue to be regularly performed, I conclude that the County violated the provisions of Article 6, Section C, by failing to post the job for bid by other bargaining unit members. The Union believes that the senior internal applicants for this job would be employes in higher paid classifications. Given this, and since the appropriate task rate has already been paid for this work, there is no need

for a make whole remedy. The appropriate remedy is to either post the job or to genuinely abolish the position by giving written notice to the Union and thereafter refrain from using the ninth truck on a regular and substantial basis.

On the basis of the foregoing, and the record as a whole, I have made the following

AWARD

1. The County violated the parties' collective bargaining agreement when it failed to post the position of Range 3 Heavy Truck Operator;

2. The appropriate remedy is to either (a) post the job or (b) genuinely abolish the position by giving written notice to the Union and thereafter refrain from using the ninth truck on a regular and substantial basis.

Dated at Racine, Wisconsin, this 30th day of June, 2000.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

DJ/ans
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