BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between

**DOOR COUNTY HIGHWAY EMPLOYEES,
LOCAL #1658, AFSCME, AFL-CIO**

and

**DOOR COUNTY**

Case 134
No. 61733
MA-12048

(Posting for Truck #013)

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**Appearances:**

**Mr. Grant Thomas**, Door County Corporation Counsel, P.O. Box 670, Sturgeon Bay, Wisconsin 54307-3067, appearing on behalf of Door County.

Wisconsin Council 40, AFSCME, 14002 County Road C, Valders, WI 54220, by **Mr. Neil Rainford**, Staff Representative, appearing on behalf of Local 1658.

## ARBITRATION AWARD

Pursuant to the provisions of the collective bargaining agreement between the parties, AFSCME Local 1658 (hereinafter referred to as the Union) and Door County (hereinafter referred to as the Employer or the County) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator to hear and decide a dispute over whether an Oshkosh Truck should be posted for a year-round driver opening, or could instead be posted for a winter-only driver position. The undersigned was so designated. A hearing was held on April 1, 2003, in Sturgeon Bay, 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 waived the requirement of an arbitration panel, and agreed to submit the matter to the sole arbitrator. The parties engaged in a serial exchange of briefs, the last of which was received on June 18, 2003, 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.

## ISSUE

The parties were unable to agree on a statement of the issue and stipulated that the Arbitrator should frame the issue in his Award. The Union views the issue as being:

> Did the Employer violate the collective bargaining agreement when it failed to post Truck #013 full-time (year-round)? If so, what is the appropriate remedy?

The County would frame the issue as:

> Did the Employer violate the collective bargaining agreement in the way in which it utilized Truck #013? If so, what is the appropriate remedy?

There is not much substantive dispute between the two statements. The Union's claim is that there was a vacancy created by the addition of Truck #013, which should have been posted pursuant to Article 7. I do not understand the Union to argue that the specific tasks the truck was used for violated the contract. Instead, it is the overall usage of the vehicle and whether the amount of use proves that a vacancy existed. Thus, I believe the narrower statement of issue proposed by the Union encompasses the dispute. The issue may be fairly stated as:

> Did the Employer violate the collective bargaining agreement when it failed to post Truck #013 full-time (year-round)? If so, what is the appropriate remedy?

## RELEVANT CONTRACT LANGUAGE

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### ARTICLE 1 – MANAGEMENT RIGHTS RESERVED

A. Lawful Authority: Nothing in this Agreement shall be construed as divesting the Employer of any of its vested management rights or as delegating to others the authority conferred by the law on the Employer, or in any way abridging or reducing such authority.

. . .

## ARTICLE 7 – SENIORITY

A. Definition of Seniority: It shall be the policy of the department to recognize the seniority principle. Seniority time shall consist of the total calendar time elapsed sine the date of original employment with the Employer, no time prior to a discharge for cause or a quit shall be included. Seniority shall not be diminished by temporary layoffs or leaves of absence or contingencies beyond the control of the parties to this Agreement.

. . .

D. Job Posting: If the County decides to employ additional employees, either in vacancies or in a new positions [sic] subject to the provisions of this Agreement, former employees who have been laid off shall be entitled to be re-employed in such vacancies, provided, that such employees have the necessary qualifications under the particular job classification.

. . .

E. Training Period: The applicant with the longest service record shall be given the first opportunity to qualify for the vacancy. Said applicant shall demonstrate his or her ability to perform the job during a training period of forty-five (45) days, and if he or she is deemed qualified by the Employer, he or she shall be permanently assigned to fill the vacancy. Should such employee not qualify or should he or she, himself or herself desire to return to his or her former position, he or she shall be reassigned to his or her former position without loss of seniority.

. . .

## ARTICLE 21 – SPECIAL PROVISIONS

. . .

Employees working in a higher classification shall be paid at a higher classification if they work in that classification for eight (8) hours or longer.

. . .

## BACKGROUND

The Employer provides general governmental services to the people of Door County, including the operation of a Highway Department. The Union is the exclusive bargaining representative for, among others, the non-exempt employees of the Highway Department.

This grievance concerns the County's September, 2001, purchase of a new piece of equipment, Truck #013, an Oshkosh Truck suitable for snow removal in the winter and hauling in the summer. Because the truck was suitable for year-round usage, the Union asked the County to post an opening for a full-time, year-round Class II Truck Driver. The County replied that the truck would not be used enough in the summer to warrant a full-time truck driver job, and instead proposed to post it as a seasonal Truck Driver job, for the winter only (November 15 to April 15). The Union agreed to the posting, subject to evaluating the truck's actual usage in the summer.

During the Winter season of 2001-2002, Truck #013 was used for 190.5 hours, representing 22% of the work hours during that period. From April 16th through June 16th, the truck was used as a backup truck, and was in service for 30% of the available work hours. Although this was substantially less than the trucks assigned to full-time drivers, based on the fact that the summer usage appeared to be higher than the usage during the period in which the truck was posted for a Driver, the Union filed the instant grievance, demanding that Truck #013 be posted for a full-time Truck Driver opening. The County denied the grievance, and the matter was referred to arbitration.

Additional facts, as necessary, are set forth below.

## ARGUMENTS OF THE PARTIES

### The Initial Argument of the Union

The Union argues that a vacancy in a full-time truck driver's position was created when Truck #013 was placed in service, and that the County was obliged to post that vacancy. Under the contract, the existence of a vacancy is an objective event, and is not subject to the discretion of the County. The language of Article 7 is clear and mandatory: "Whenever any vacancy occurs due to retirement, quit, new position, or for whatever reasons, the job vacancy shall be posted." In this case, the County itself stated that the usage of the new truck during the winter season would warrant a full-time seasonal driver, but that the usage in the summer would be less than that. Instead, the usage in the summer was appreciable greater than it was during the winter – 30% of possible hours in the summer vs. 22% in the winter. Objectively, there can be no justification for posting this truck strictly as a seasonal winter position when it is used more often in the summer than it is in the winter.

The County's explanation that Truck #013 does not warrant a summer posting because it is not used much in the summer is misleading. Certainly, the truck was used on a limited basis in the summer, but it was used on an even more limited basis during the winter, when it was posted. Moreover, other posted equipment is used on an even more limited basis than Truck #013. There are five tractor/dozers in the Department, and three Tractor/Dozer Operator positions. All five of the Tractor/Dozers were used less than Truck #013 between

April 16 and June 16, 2002. Indeed, all five of them combined logged fewer hours than Truck #013 during that time frame. Thus, the fact that a piece of equipment is not constantly used, or is even used sparingly, does not mean that it is not posted.

The Union argues that the refusal to post Truck #013 violates the posting provisions, but it also runs contrary to the broader seniority principles embodied in the contract. The entire thrust of the seniority and posting provisions is that employees will be given an opportunity to advance based on length of service. Unilaterally exempting a desirable piece of equipment from posting defeats these rights, and constitutes an evasion of the promises made in the contract.

The County cannot have it both ways. It can refuse to post Truck #013 in the summer, but only if it refrains from regularly using it during that time. If the County insists on making regular use of the truck in the summer, it is obligated to post it as a year-round vacancy. Accordingly, the grievance should be granted.

**The Responsive Argument of the Employer**

The County argues that the Union bears the burden of proving a contract violations, and that it has utterly failed to meet that burden. The central question here is the County's right to decide whether a vacancy exists. If no vacancy exists, there is no occasion for a posting. That decision is a basic management right, and management has reasonably exercised that right. The truck at issue in this case is operated substantially less than any other truck during the summer months. It is also operated less often than other trucks during the winter, when it is posted. However, the nature of snow clearance operations is such that the County must be prepared for the worst case scenario, and thus may be overstaffed for snow clearance. Work outside the winter is more predictable, and the County need not overstaff truck driver positions during that period. Thus, the determination that there was no vacancy in the non-winter months was well within the discretion of management.

The Union's argument that the occasional use of Truck #013 in the non-winter months proves that a vacancy exists is misplaced. At the most, the use of the truck in the summer is specifically addressed in the contract, where the parties provide that employees working in a higher classification will receive the higher rate of pay for that work. If the Union believes that non-winter use of the truck constitutes work within the truck driver classification, its remedy is to seek out of class pay. It cannot transform occasional use of the truck into a full-time vacancy. The County notes that there has been no discharge, no quit, no retirement, and no new position or classification created. The creation of a vacancy is not an automatic result of purchasing replacement equipment, where there is no corresponding change in the complement of the bargaining unit. As there is no vacancy to be filled, there can be no violation of the collective bargaining agreement. Accordingly, the grievance must be denied.

**The Reply of the Union**

The Union asserts that the County's reliance on the "out of class" pay provisions shows a basic misunderstanding of the two provisions. Employees are cross-trained and routinely fill-in for absent co-workers. The out of class pay provision addresses those instances. It is not a shield to protect the County from its obligation to post vacancies created by the County's own decisions about equipment usage.

The County's argument that it has acted reasonably and for sound business reasons is likewise based on a misunderstanding of the contract. The posting provision of the contract does not contain an exception for good faith decisions or attempts at efficiency. As argued before, the standard is an objective one, and the County's motive is irrelevant. However, even if motive were relevant, it is at least as likely that the County refused to post the job because it wished to avoid paying the higher Class II Truck Driver wage to a Class I Utility Worker, and to avoid the restrictions the contract imposes on the reassignment of Truck Drivers. The County's desire to save money and retain flexibility are both understandable, but they are contrary to the negotiated agreement.

## DISCUSSION

The question in this case is whether the acquisition of the Truck #013 and the amount of use the truck was thereafter put to provide objective evidence that a vacancy was created for a full-time, year round Class II Truck Driver. In that respect, I agree with the Union that the contract contemplates an objective standard for the existence of a vacancy, and disagree to some extent with the County's position that a vacancy must be formally declared. The language of Article 7 is comprehensive: "Whenever any vacancy occurs due to retirement, quit, new position, or for whatever reasons, the job vacancy shall be posted." If the County responds to a new piece of equipment by regularly assigning personnel to operate it, on the same basis and to the same extent as comparable pieces of equipment, it would be fair to say that a *de facto* vacancy exists in that classification. At a minimum, it shifts the burden to the Employer to explain why the regular assignment to the vehicle does not create a vacancy. All of this is consistent with the notion that Management has the right to determine whether a vacancy exists, but must exercise its rights reasonably and in good faith. Having said that, there is no persuasive evidence that the addition of Truck #013 to the County's fleet created a vacancy.

The Union's argument has two basic factual premises, and both are flawed. The first is that the fact that Truck #013 was used on a more regular basis in the two months following the winter season of 2001-2002, when it was not posted, than it was during the snow season when it was posted, means that posting is appropriate for the non-winter season. That does not follow. The County's explanation that the uncertainties of the snow removal season require it to staff trucks as if they were going to be needed, while it can plan for vehicle usage in the non-winter months, is completely reasonable. If the County knew that a particular winter would be mild, it might well make a different decision about posting snow routes for the entire season. The County cannot know that. The County can know what projects it will undertake

in the non-snow months and can make judgments about the need for truck drivers during those months. Thus, the fact that the truck was posted for a driver in the snow season does not logically set the winter usage as the measure for what is and is not a full-time position in the non-winter months.

The Union's second factual premise is similar, and it contains a similar flaw. The Tractor/Dozer usage during the months of April, May and June was substantially less than the usage of Truck #013, yet there were three full-time positions of Tractor/Dozer Operator. The Union concludes from this that the usage of Truck #013 is within the range of vehicle usage that justifies a full-time posting in the Department. As with the comparison of snow season to non-snow season, this is an apples to oranges comparison. A truck is a general use tool. A bulldozer is a specialized tool. The fact that a bulldozer is used less than a truck is hardly surprising, particularly given the very limited two month time frame the Union uses for comparison. The more appropriate basis for comparing usage is to compare Truck #013 to other trucks. It is undisputed that Truck #013 is used as a backup, on the same basis as other backup trucks that do not have regular drivers assigned to them.

To summarize, it is possible for vacancy to be created without some formal declaration or action by the Employer, through the regular assignment of personnel to a piece of equipment customarily associated with a classification. However, the determination of whether the use of a particular piece of equipment proves the existence of a permanent vacancy, rather than just the normal ebb and flow of work, depends upon the amount and regularity of use in comparison to similar pieces of equipment used by persons in that classification. In this case, Truck #013 has been used substantially less often in the non-winter months than the trucks used by Class II Truck Drivers. As there is no evidence that the addition of Truck #013 has created a *de facto* Truck Driver vacancy in the Department, it follows that there is no contact violation. Accordingly, the grievance is denied.

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

## AWARD

The Employer did not violate the collective bargaining agreement when it failed to post Truck #013 full-time (year-round). The grievance is denied.

Dated at Racine, Wisconsin, this 9th day of September, 2003.

Daniel Nielsen /s/
Daniel Nielsen, Arbitrator

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