

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

**CALUMET COUNTY EMPLOYEES UNION,
LOCAL 1362, AFSCME, AFL-CIO, and affiliated with the
WISCONSIN COUNCIL OF COUNTY AND MUNICIPAL EMPLOYEES**

and

CALUMET COUNTY, WISCONSIN

Case 138
No. 66652
MA-13591

Appearances:

Samuel Gieryn, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 187 Maple Drive, Plymouth, Wisconsin 53073, for Calumet County Employees Union, Local 1362, AFSCME, AFL-CIO, and affiliated with the Wisconsin Council of County and Municipal Employees, which is referred to below as the Union.

Pamela Captain, Corporation Counsel, with **Patrick Glynn**, Human Resources Director, Calumet County, 206 Court Street, Chilton, Wisconsin 53014, for Calumet County, Wisconsin, referred to below as the Employer or as the County.

ARBITRATION AWARD

The Union and the County are parties to a collective bargaining agreement, which was in effect at all times relevant to this proceeding and which provides for final and binding arbitration of certain disputes. The Union requested, and the County agreed, that the Wisconsin Employment Relations Commission appoint an arbitrator from a panel contained in the parties' labor agreement to resolve a grievance filed on behalf of Charles Benbo, who is referred to below as the Grievant. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing was scheduled for April 4, 2007, in Chilton, Wisconsin. Prior to the opening of the hearing on that date, the parties engaged in extensive settlement discussions that ultimately proved unsuccessful. Hearing was rescheduled to August 22. Hearing was held in Chilton, but was not completed. The parties agreed to continue the hearing on September 25, but prior to that date, the County requested that the hearing be rescheduled due to the unavailability of a witness. The Union objected and the parties addressed the objection via e-mail, ultimately agreeing to reschedule the hearing for November 1.

Hearing was completed on November 1, in Chilton, Wisconsin. No transcript was made of either day of hearing. At the close of hearing, the parties agreed to file briefs sequentially, starting and ending with the Union, and the record was held open to permit the Union to submit an approved copy of Highway Committee meeting minutes from a meeting on September 13, 2006. I verified with the parties that if the sequential briefing schedule resulted in one party raising an issue the other could not address, then I would not close the record without affording further opportunity for argument. The Union filed its initial brief via e-mail on December 3, and noted that it had “not received a reply” to a November 26 request “regarding the approval of the minutes of the Employer’s Highway Committee on September 13, 2006.” The County filed its reply to the Union’s brief via e-mail on January 3, 2008. The County raised an issue regarding the Union’s request for an extension of the deadline to file its reply brief. I granted the extension and the Union filed its reply brief via e-mail on January 27.

In a February 4, 2008 e-mail, the County objected to argument in the Union’s reply brief regarding Section 7.01 of the labor agreement and regarding a remedial issue, including a case citation. The County asserted, “it is too late to bring them up at this point as the issues are waived.” The Union filed a response to the County in an e-mail dated February 6. I responded in an e-mail to the parties dated February 12, which states:

I write to bring closure to the record. I do not typically review a record (evidence and briefs) until the record is closed. This typically comes with the filing of the final brief. A quick review of my notes and those portions of your briefs highlighted by these e-mails raises a few loose ends that require some comment.

First, my notes indicate a stipulation to the following issues:

Did the County violate Section 4.06 of the 2004-2006 collective bargaining agreement when it determined that the grievant was not able to demonstrate the ability to carry out the newly assigned duties and responsibilities of Backhoe Operator, and was returned to his former position of Mechanic?

If so, what is the appropriate remedy?

Each brief includes part of this statement of the issues, but each varies from my notes. I believe my notes accurately state a stipulation and will treat them as stipulated unless you advise me not to.

Second, there was some discussion at hearing regarding the status of Union Exhibit 1 and more specifically, whether the notes had been authenticated. My notes indicate the record was kept open to permit an authenticated copy of the notes to be submitted. The Union notes a problem on this point in its 12/3/07 e-mail. I do not know if either of you addressed this point in your briefs, but I will treat my copy of Union Exhibit 1 as received into evidence unless you advise me not to.

This leaves the attached e-mails to pose the final point to be addressed. I note again that I have not reviewed the briefs in detail and hope to address this issue without the detailed review that becomes necessary with the close of the record. I note that each of the initial briefs sets forth Section 7.01, and I take from this that both of you think that provision is, in some sense, in play. Assuming the stipulated issue set forth above is accurately stated, any argument on Section 7.01 must be subordinated to its impact on Section 4.06. I do not think the Union's entry of argument on Section 7.01 can be considered the type of argument that must be stricken and will not strike it. At the close of hearing, however, I offered each of you the assurance that I would not close the record if either of you felt surprised by an unanticipated argument. If the County feels that this leaves a new area of inquiry open, then I will afford the County the right to enter argument restricted to that line of argument (i.e. Section 7.01) prompting the surprise.

The County also raises a concern with potential remedial issues. If the stipulation of issues noted above is accurate, then the remedial issue is broad. From my view, a dispute regarding remedy is better addressed apart from issues on the merits. Where I sense disagreement on remedy, it has been my practice to state the remedy in broad terms and retain jurisdiction over the matter to address any specific disputes. I think that course is advisable here. Rather than inviting further argument on potential remedial issues, I think it is preferable to bring the matter on the merits to a close. If it is necessary to address remedy, I will do so only in the broadest terms and will retain jurisdiction to sort out any specific problems. If there is no issue of remedy (i.e. I deny the grievance), then there will be no need for argument on the point.

Please let me know your view on the points raised above. If the County wishes to enter further argument on Section 7.01, please advise me when you anticipate submitting it.

The County waived the filing of further argument in an e-mail dated February 13.

ISSUES

As noted in my February 12 e-mail, the parties stipulated the following issues:

Did the County violate Section 4.06 of the 2004-2006 collective bargaining agreement when it determined that the Grievant was not able to demonstrate the ability to carry out the newly assigned duties and responsibilities of Backhoe Operator, and was returned to his former position of Mechanic?

If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE IV – SENIORITY

...

4.06 Promotion/Demotion – Promotion is the movement of an employee from one class to another class having a greater pay range maximum. When an employee is promoted to a position in a higher class, he shall serve a two (2) month trial period. If during this period the employee demonstrates ability to carry out the newly assigned duties and responsibilities, upon completion, his pay shall be increased to the rate provided at the same step of the new position. . . .

ARTICLE VI – GRIEVANCE PROCEDURE

...

6.06 Arbitration –

...

E. Authority of the Arbitrator – The arbitrator shall not have the power to add to, subtract from, or alter the agreement. . . .

ARTICLE VII – MANAGEMENT RIGHTS RESERVED

7.01 Unless otherwise herein provided, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty because of lack of work or other legitimate reason is vested exclusively in the Employer. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter. . . .

2005 WAGE SCHEDULE

...

	Start	3 mo.	6 mo.	9 mo.	12 mo.	36 mo.	60 mo.	120 mo.
Shop Foreman	\$18.81	\$18.89	\$19.06	\$19.14	\$19.30	\$19.48	\$19.73	\$19.88
Mechanic	\$17.37	\$17.46	\$17.63	\$17.72	\$17.88	\$18.06	\$18.31	\$18.45
Miscellaneous Equipment & Maintenance Operator 2/	\$17.37	\$17.46	\$17.63	\$17.72	\$17.88	\$18.06	\$18.31	\$18.45

...

- 2/ Effective March 1, 2005, the classifications of Backhoe Operator, Large Motor Grader Operator, Loader Operator, Center Striping Machine Operator, and Welder shall be removed from the collective bargaining agreement and re-titled as Miscellaneous Equipment & Maintenance Operator. . . .

2006 WAGE SCHEDULE

...

	Start	3 mo.	6 mo.	9 mo.	12 mo.	36 mo.	60 mo.	120 mo.
Shop Foreman	\$19.34	\$19.42	\$19.59	\$19.67	\$19.84	\$20.02	\$20.27	\$20.43
Mechanic	\$17.87	\$17.96	\$18.13	\$18.22	\$18.39	\$18.57	\$18.83	\$18.97
Miscellaneous Equipment & Maintenance Operator	\$17.87	\$17.96	\$18.13	\$18.22	\$18.39	\$18.57	\$18.83	\$18.97

BACKGROUND

The County posted a "100% POSITION" of Backhoe Operator in a posting dated February 3, 2006 (references to dates are to 2006, unless otherwise noted). Attached to the posting was a Job Description, which states:

...

Essential Duties and Responsibilities *include the following. Other duties may be assigned.*

Performs snow and ice clearance by plowing and by applying chlorides and salt.

Operates a backhoe for, but not limited to: ditching, concrete repair, drainage, and loading materials.

Performs highway maintenance tasks and construction and repair work including, but not limited to: operating asphalt equipment and chip spreader, hauling materials by truck, grading shoulders, filling cracks, signing, sweeping, mowing, breaking up concrete, patching holes and dips, center line painting, erecting and dismantling snow fence, painting and maintaining guard rails; clearing roadways and right-of-ways of brush, vegetation, trash and dead animals; clearing drainage ditches and culverts of debris and sediments; and bridge repair.

Performs duties associated with traffic problems, which include erecting signs, barricades or other traffic control devices and flagging.

Performs some mechanical work and routine maintenance and minor equipment repair on equipment and vehicles involved in the performance of the above duties.

Performs maintenance and custodial duties in and around the shops and offices.

Subject to call at all times for winter snow and ice removal, and summer emergencies.

Maintains records and reports as required.

It is unlikely an employee will perform all the duties listed on a regular basis, nor is the list exhaustive in the sense it covers all the duties that an employee may be required to perform. These examples are merely indicative, not restrictive.

Supervisory Responsibilities

This job has no supervisory responsibilities, but may be required to provide occasional instruction/direction to co-workers while operating the backhoe.

Qualifications *To perform this job successfully, an individual must be able to perform each essential duty satisfactorily. The requirements listed below are representative of the knowledge, skill, and/or ability required . . .*

The Grievant signed for the position in a "Letter of Intent" dated February 6.

The County hired the Grievant as a Mechanic on September 13, 2005. He received a six-month evaluation on March 7 for his performance in the Mechanic position. The "Probationary Evaluation Form" includes a section headed, "Characteristics" which states the following eleven categories: Attitude; Dependability; Ability To Learn; Cooperation; Performance; Job Knowledge; Quality; and Overall Evaluation. Eight of these categories are broken into subcategories which an evaluator must complete by checking a box from the following column entries: Very Good; Good; Satisfactory; Needs Improvement; and Poor. The other three categories seek a narrative response from the evaluator or employee. Michael Ottery, the County's Highway Commissioner, completed the evaluation form, rating the Grievant "Satisfactory" in each subcategory. Ottery noted the following under the category headed "List areas of improvement to concentrate on:"

To protect the integrity of the chain of command, and who is responsible for giving directions at the department Charles needs to follow instructions from

Superintendents not other employees. Whether or not another employee suggests/tells you to do something or not, ask and reaffirm with Superintendent as to protect yourself from being misguided. Snow/Ice control salting issue 2-17-06 radio transmission.

The Grievant had no experience in backhoe operation prior to his employment with the County. During the interview process preceding his County employment, he told his interviewers that he had always wanted to operate heavy equipment.

The Grievant was the sole County employee to sign the posting. Sometime after the posting period expired, Ottery mentioned to the Grievant that the County was considering offering him the Backhoe Operator position in spite of his lack of experience. Ottery then discussed the matter with the Grievant and a Union Steward, voicing a concern regarding the Grievant's ability, as an inexperienced operator, to direct a work crew. After these conversations, Ottery discussed the matter further within County management. Within roughly two weeks of the initial conversations, Ottery informed the Grievant that the County had decided to offer him a trial period. Neither Ottery, the Grievant, nor his Union Steward mentioned training during these conversations.

In a letter to the Grievant dated March 13, Patrick Glynn, the County's Human Resource Director, stated:

This letter is to confirm our offer to you of the full-time position of Backhoe Operator with the Calumet County Highway Department. The transfer from your previous position of Mechanic to your new position is effective Monday, April 17, 2006.

Your salary and benefits will remain the same, will transfer with you, and be immediately available to you in your new position.

You will be required to serve a two (2) month trial period. This period will be used to observe your ability to carry out the newly assigned duties and responsibilities.

If the terms and conditions of employment as outlined in this letter are satisfactory, please sign and date the certification portion of this letter and return the enclosed copy to me as soon as possible. If you have any questions regarding your employment, please feel free to contact me at any time. . . .

The Grievant signed the form on March 14 and was transferred from the Mechanic position to the Backhoe Operator position. Prior to his first assignment on the backhoe, Ottery reviewed the Job Description with the Grievant and informed him that during the trial period "he would need to do what he had to do in the Backhoe position." The County was aware at the time the Grievant started his trial period that he had no prior backhoe experience.

The Grievant's first job with the backhoe took place on April 25. His last job on the backhoe took place on August 28. During that period, the Grievant worked with the backhoe on part or all of thirty-six work days. On thirteen of those days, Al Wingers accompanied the Grievant, performing all or part of the backhoe work to permit the Grievant to watch him and to use him as a resource for the Grievant's own operating efforts.

In a letter to the Union dated May 23, Glynn stated:

I am requesting a three (3) month extension of trial period for Charles Benbo, Backhoe Operator. An affirmative response from the union would result in Charles' trial period being extended through the end of the workday on September 17, 2006. A negative response from the union would result in (his) being moved back to his previous position of Mechanic in the Highway Department for failure to successfully meet the requirements of his trial period. However, as you can derive from this request, it is our desire to keep Charles in this position provided he can demonstrate the required skills in the timeframe noted above.

It is my understanding that this decision would not affect Charles' progression in pay levels or accrued benefits, nor does it obligate the union or the Employer in any similar situations in the future. . . .

Prior to this request, the Grievant had worked on seven separate jobs, each of which was performed on the County's Cat Backhoe. They totaled thirty-eight hours of operation. Wingers accompanied him on five of the jobs. The Union agreed to the requested extension.

On June 5, Ottery and David Emmer, a County Highway Superintendent, gave the Grievant a "2 month check" on a County "Promotion Employee Evaluation Form." That form is structured essentially the same as the "Probationary Employee Evaluation Form" described above, but does not contain a "Rate safety (use of equipment, safety procedures)" subcategory under the "Quality" category; places certain subcategories under different categories; and adds a subcategory under "Cooperation" that states, "Does the employee promote harmony and enthusiasm?" Ottery and Emmer checked the following subcategories "Poor": "Is the work done accurately and neatly?"; "Has the employee accomplished the required work on or ahead of schedule?"; "Does the employee learn quickly and retain what has been taught?"; "Is the employee doing quality work at a reasonable rate?"; "Are production standards being attained?"; "Has the employee shown an overall knowledge of the required duties?"; "Has the employee carried out the responsibilities of the position?"; "Rate correctiveness"; "Rate completeness"; and "Rate accuracy". They rated the "Overall Evaluation" category at "Poor." They completed the narrative categories thus:

Having mechanical experience helps when he is out on projects. I.E. he was able to fix two pieces of equipment, once a truck and once the backhoe he was operating, minimizing the down times.

Charles lacks experience in operating an excavator. Because he doesn't know what to do it is hard for him to direct any other employees of what to do next on a project. It's the belief of management that he has never had the opportunity to install culverts, provide ditching along roadways, or operate an excavator of the size the department owns.

Charles needs experience operating the excavator and needs to perform ditching & culvert installation projects. The possibility of providing excavator training would be helpful. Work with surrounding county's on road building projects could enhance ability to operate the excavator.

The subcategories not rated "Poor" were rated "Satisfactory."

After this evaluation, the County replaced its Cat Backhoe with a track-based Volvo Backhoe. The Volvo reversed the boom control operations. The Grievant was first assigned to accustom himself to the Volvo in the shop's backyard. Roughly a month later, he was assigned to take the new backhoe to a quarry and run it as much as he could to familiarize himself with its operation. Between this evaluation and the evaluation at which the County informed the Grievant he was being returned to the Mechanic position, the Grievant operated the backhoe for one-hundred fifty-one and one-half hours. Wingers accompanied him on eight of the work days involved.

Ottery, Emmer and Michael Mischnick, a County Highway Superintendent, issued the Grievant a County "Promotion Employee Evaluation Form" dated September 1. Each of the subcategories rated "Poor" remained at that rating and two others, rated "Satisfactory" in the earlier Promotion Employee Evaluation Form, sank to "Poor." Those two subcategories were: "Does the employee promote harmony and enthusiasm?"; and "Does the employee ask questions and apply the training given?". They completed the narrative portions of the form thus:

Having mechanical experience helps when he is out on projects.

Amount of time it takes to accomplish projects. Because of inexperience has a tendency to damage things. Does not show the ambition needed to be in a productive situation with the backhoe.

The final narrative entry is a response to the category, "How can you, as Department Head, guide this employee to develop into a good Calumet County employee?" The narrative states,

By offering training and opportunities to learn how to operate the various equipment at the department. Giving good direction and honest feedback.

Ottery informed the Grievant during this evaluation that he would be moved back to the Mechanic position. This reflected a consensus decision by Ottery, Emmer and Mischnick.

The balance of the **BACKGROUND** is best set forth as an overview of witness testimony. The witnesses were sequestered.

Charles Benbo

The Grievant had no experience in highway or road maintenance experience prior to being employed by the County. Ottery generally described his duties at the start of the trial period, but did not inform him of any evaluation criteria or any specific standards he would have to meet to pass the trial period. For his first jobs, he did little backhoe operation and primarily watched Wingers. He was directed to experiment with the backhoe in the yard area, moving snow piles. As he grew more comfortable with the backhoe, he took over more of its operation from Wingers. While superintendents provided him with assignments during the period preceding his first formal evaluation, he received little, if any, feedback except from Wingers, who informed him that he “was catching on real fast.” The superintendents never gave him specific time limits for a given job. Mischnick did attempt to have him learn to use the bucket to remove gravel from a road surface, but that is a very delicate operation and he had to use a shovel to do it.

His work on the High Cliff Marina job typified his experience. He had to remove four culverts that fed into a single culvert; cut the road above them and then replace them with new culverts and an end pan. He never received detailed instruction, but was informed there were no power lines in the area. While digging, he unearthed a “high voltage” warning marker. He and another employee hand dug until they discovered two major power lines. He discovered two major power lines while digging. Mischnick complimented him, but there was little discussion of the job.

His first evaluation was the first real input he received from his supervisors. He was not surprised that they had concerns. There was no discussion of specific incidents, but he understood that the County was going to ask the Union to extend his trial period. He did not ask any questions on how to improve, but took the County’s request for an extension to indicate that it believed he had potential. He did not ask questions during the evaluation, but did discuss with Ottery the possibility of getting outside training sometime after the evaluation, including offering to take time off if the County would fund the training. Ottery thought it was a good idea, but later informed him that the County would not fund such training.

No supervisor ever specifically informed him that his work was unsatisfactory. With the exception of his yard and quarry work, the only training he received was on-the-job by trial and error. He was given two and one-half days to work at the quarry. Emmers and Mischnick offered occasional suggestions, but no more. Emmers once mentioned that he had improved “110%.” He did run over a mailbox on one job and cracked some cement in a parking lot on the Sprangers Ditching job. He did not learn of the parking lot damages until after-the-fact. He damaged a few culverts while removing them, but no one complained to him. In one case, the culvert was usable even after the damages and in another, the damaged portion was removed, permitting the balance to be salvaged.

The second formal evaluation proceeded in the same fashion as the first. Ottery read the form. When the Grievant asked what he had damaged, Ottery responded that he had a long list if the Grievant really wanted to hear it. Prior to the second evaluation he had no idea he was going too slowly or was in danger of being returned to the Mechanic position.

He did not believe the County held a grudge against him or moved him back to Mechanic in bad faith. He was never advised that the New Holstein project had a time limit and was only given a time frame to complete a job on two of the projects he worked on during his trial period.

Alan Wingers

Wingers has worked in the Highway Department for nearly thirty-five years. Wingers served as a backup to the backhoe operator who preceded the Grievant. He put in one culvert for the Grievant and then watched and instructed the Grievant. He felt the Grievant did well prior to the first evaluation. Wingers was assigned to complete a job for the Grievant when the Grievant lodged a wrecking ball in a concrete culvert and could not remove it. Wingers did so, and could not understand why the County was so concerned with drainage issues since the concrete and rebar would have impeded water flow even without the wrecking ball. Past that and one job the Grievant left for a doctor's appointment, Wingers was aware of no job in which other employees had to complete the Grievant's work.

The Grievant performed well given his lack of experience and the stress the County subjected him to. Wingers could not understand why the County assigned a new dump truck to a job on which the Grievant was training. Culverts are made of thinner gauge material than in the past and are easy to damage. Prior backhoe operators had damaged property and flipped the backhoe without being disciplined. The Grievant's performance was good enough to keep him as a Backhoe Operator. Wingers, liked the Grievant, learned heavy equipment operation on-the-job.

Derrick Burkhalter

Burkhalter has worked for the County for roughly two years, and worked as part of the crew on most jobs the Grievant performed during his trial period. The parking lot concrete at the Sprangers' job was in poor condition prior to the Grievant's putting the backhoe's wings on it. Burkhalter informed Mischnick of its poor condition prior to the excavation work.

The Grievant was slow as a backhoe operator, but this reflected his limited experience. He was shocked when the Grievant was moved back to Mechanic. Since that move, Burkhalter has been assigned to operate the backhoe. The County did not train him.

Patrick Glynn

Glynn did not support Ottery's desire to give the Grievant a trial period. In Glynn's view, the Grievant was not qualified and he could see no "upside" to the trial period from the County's perspective. Ottery weighed Glynn's thoughts over a weekend, but returned with the conviction that it was important to afford the opportunity for movement from within the County's workforce. The hiring and the evaluation of the Grievant was a matter for Highway Department supervision. Glynn discussed the extension of the trial period with the Union, and informed the Union the only alternative was to return the Grievant to the Mechanic position.

Terry Ecker

Ecker has worked for the County for almost sixteen years, and he currently works as a Grader Operator. He worked his way through various pieces of County equipment. In each case, experienced employees would instruct him how to operate the equipment and then assist him as he took over the equipment's operation. Ecker has some experience with the backhoe and has observed at least five employees operate the backhoe for the County. At least one of those employees was not a safe operator. The Grievant did not receive sufficient training given his lack of experience and was exposed to complicated projects before he was ready. Ecker received a week of outside training prior to being assigned to significant duties on the County's paver. The Grievant had no greater tendency to damage property than other County employees had.

Michael Ottery

Ottery has been involved in highway work since 1979. He has served the County for roughly twelve years, including eight as Commissioner. Ottery gave a report to the Highway Committee at its September 13 meeting. Minutes from that meeting summarize a portion of his report thus:

Vehicle repairs have been a challenge for the shop staff due to the fact that the Department is one employee short at the mechanics position. At the June 19th meeting Commissioner Ottery informed the Committee that the employee who posted for the Backhoe Operators Position had agreed to an extension of the two month familiarization period. After evaluating the employees progress operating the backhoe management staff has come to the conclusion that the employee is better suited for the position of Mechanic which he was originally hired for and was returned to that shop position effective September 5th.

Ottery noted that the "challenge" referred to in the minutes reflected seasonal work, the vacancy created by the Grievant's trial period and a leave of absence by another shop employee in June. Holding the Grievant's Mechanic position open was prudent given the nature of his trial period. The County did not fill the Backhoe Operator position after the Grievant's return to work, preferring to await a final determination of the grievance. The seasonal decline of backhoe work in the Fall made this decision possible, as did the fact that five out of the

Department's fifteen employees could operate the backhoe when necessary. Leaving the position open restricted the County's ability to realize revenue through sub-contracting its use to other municipalities.

Ottery spoke with a number of Department personnel and Glynn before deciding to offer the Grievant a trial period. Ottery viewed the trial period as an opportunity for the Grievant to prove himself while experiencing a sampling of the full range of County backhoe operations. He did not assign and did not expect the Grievant to use each piece of equipment within the classification he posted to. Ottery explained his expectations to the Grievant prior to the trial period. He did not put them in writing, preferring to use a review of the Job Description as the means to communicate the requirements of the position. Ottery did not communicate pass/fail criteria to the Grievant because there were none, but did notify the Grievant that he would be evaluated.

Ottery and Emmer handled the first evaluation. He had observed the Grievant on a "drive-by" basis on three jobs. He relied on his Superintendents for direct observations. The Grievant received some basic training in equipment operation. That training is afforded all equipment operators and was not specific to the backhoe. The first evaluation reflected the Grievant's lack of experience and the need for more "seat time" to properly evaluate him. This prompted the extension of the trial period. At the end of the extension period, however, Ottery and the Superintendents reached a consensus that the Grievant had not demonstrated competence as a Backhoe Operator. Ottery reviewed the evaluation form with the Grievant, noting that he could go into greater detail if he had to, but preferred not to unless the Grievant so requested.

Mike Mischnick

Mischnick has no hands-on experience in backhoe operation, but has worked with heavy equipment operation in a variety of positions for over ten years. He was not aware that the Grievant had no experience operating a backhoe prior to Ottery's decision to award him a trial period. Ottery told him at the start of the trial period to "make it work."

The Grievant completed all of the projects assigned him with one exception. Mischnick assigned the Grievant his jobs and coordinated the work of each project. He adapted the jobs, the personnel and the equipment to the Grievant's lack of experience. In the Grievant's early assignments, such as a culvert replacement on County J, Mischnick permitted the work to expand to a full day even though it would normally take little more than one-half of one day. He did not formally evaluate jobs with the Grievant at the end of the day. Prior to the first evaluation, Mischnick concluded that the Grievant was a "sincere individual" regarding his effort but that it was "pretty evident" that he lacked the experience to handle the backhoe. Mischnick could not attend the first evaluation, but communicated his concerns to Ottery. Specifically, Mischnick alerted Ottery that he felt the Grievant lacked the communication skills to direct a crew and looked to the crew to tell him what to do.

The extension of the trial period did not address the deficiencies Mischnick had observed prior to the first evaluation. The Grievant's final project involved extensive filling and rough grading a surface for the installation of two sets of guard rails in the Town of New Holstein. Mischnick assumed the entire job would take three days, but at the end of three days, only one guard rail had been installed. The County had to contract out the work for the second guard rail. This reflected a pattern Mischnick had observed, where the work would progress competently while Mischnick was on-site, but after he left, the work pace would slow down. In Mischnick's view, the Grievant never showed the ability to competently handle the backhoe during the trial period. His performance had improved, but never rose to the minimum required of a competent operator.

Mischnick communicated the type of work needed and an appropriate time for completion on many, if not all, of the jobs he assigned the Grievant. Early in the trial period, the Grievant left a wrecking ball stuck in a culvert. Mischnick observed the problem and told the Grievant to have the ball out before the next day because weather reports had warned of the possibility of flash flooding that evening. When Mischnick reported to the site the next day, the wrecking ball was where it was when Mischnick directed the Grievant to remove it. Mischnick had to assign Wingers to get the wrecking ball out. Mischnick was particularly disappointed when the Grievant used only two to three hours of his eight hour days in the quarry to experiment with the new backhoe. Mischnick did not give the Grievant written or formal feedback during the trial period. He gave him specific instructions every morning before the start of any project. Mischnick was available for any questions from the Grievant on virtually every project, but the Grievant asked few questions.

The Grievant never seemed to become comfortable with the backhoe, and Mischnick felt most of his projects took unduly long to complete. The Grievant completed his work, but left sites in a condition requiring too much handwork or other finish work to complete.

David Emmer

Emmer has no hands-on experience in backhoe operation. He has served as a Superintendent for the County for eight and one-half years. He had eight years of road maintenance experience prior to becoming a County Highway Superintendent.

The Grievant had not, as of the first evaluation, shown "leadership." Emmer did not assign the Grievant to jobs, but did oversee his work on a number of them. He observed no fewer than three culvert replacements, and felt the Grievant consistently left too much material behind, which demanded finish work by hand. His ditching work was erratic. While he could perform well while being observed, when left alone, drainage lines would vary from straight and jobs would take too long to complete. The Grievant showed some improvement over his trial period, but not enough to demonstrate competence in the position. Emmer occasionally offered the Grievant guidance during jobs, but did not formally or systematically review the Grievant's performance with him. Emmer never specifically advised the Grievant that his performance was inadequate. He did advise him on a number of occasions to "relax" and to

work “on your own time table . . . at your own speed.” The Grievant never asked Emmer a question, even though Emmer was on-site for each of the jobs he oversaw.

Further facts will be set forth in the DISCUSSION section below.

THE PARTIES' POSITIONS

The Union's Initial Brief

After a review of the evidence, the Union notes that by signing the posting, the Grievant requested a lateral transfer. Section 4.06 addresses promotions and there is thus a gap in the contract regarding the Grievant's situation. Because “(b)oth parties acted at all times as if (Section 4.06) applied to the situation” it follows that Section 4.06 governs the grievance. Whether or not Section 4.06 is specifically applicable, it would be unreasonable for the County to “now change the terms” under which it offered the position to the Grievant and extended his trial period.

The County's failure to make the Grievant a Backhoe Operator has “no reasonable basis.” Despite a known lack of experience, the Grievant “completed a large number of projects with few significant problems.” The burden of showing the Grievant “failed to demonstrate the ability” to be a backhoe operator is the County's. The evidence shows no specific complaints against the Grievant from supervisors and his completion of the tasks given him establishes a presumption of satisfactory performance that the County must rebut. Examination of the evidence, including the Grievant's two formal evaluations, establishes that the County cannot meet its burden beyond the unsubstantiated opinions of its supervisors. That the evaluation forms note the Grievant is better suited for the Mechanic position is irrelevant and misleading in the absence of a demonstrable basis in fact for those opinions.

The evidence, particularly the September 13, 2006 Highway Committee minutes show no more than the County's “ulterior motive” for finding the Grievant lacked the ability to become a Backhoe Operator. Those minutes demonstrate the pressing need for Mechanic work. The County met this need by returning the Grievant to the shop, while using the absence of backhoe work to keep allow backhoe duties to be performed on an ad hoc basis, without filling any vacant position. The County's “financial convenience” cannot serve as a reasonable basis to deny the Backhoe Operator position to the Grievant.

Specific examination of County claims underscores that its supervisors' opinions of the Grievant's backhoe work lack a reasonable basis. The Grievant's alleged lack of speed cannot be squared with the absence of supervisory complaints or of supervisory guidance regarding time limits. Under arbitral precedent such as BAYFIELD COUNTY (HIGHWAY DEPARTMENT), MA-6406, DEC. NO. 4236 (Shaw, 9/1), an employee must be given basic instruction on what is expected of him. The alleged inability to supervise the crew is unsubstantiated and impossible to understand given the Grievant's prior evaluation. The asserted “tendency to damage things” is without substantial proof beyond the “destruction of a mailbox’ which is “not uncommon.”

The County's assertion of various damages regarding culvert work ignores testimony from Union witnesses and fails to show "a pattern of failure to follow directions."

The evidence proves the Grievant "was not accorded a fair trial period." Fairness demands basic instruction and clear communication of expectations from supervisors, particularly given the Grievant's known lack of experience. By awarding the Grievant the position, "the County in effect, lowered the qualifications, and the expectations for the position." The evidence establishes that the County's conduct did not give the Grievant a "fair trial period" but simply turned him loose "to sink or swim." Neither of his supervisors was a competent Backhoe Operator, and the County provided the Grievant no "outside training." The complete absence of daily supervisory feedback confirms that the Grievant was left alone. Their failure to alert him to any deficiencies in his performance precludes finding he received a fair trial. Their "acceptance of his work without complaint" indicates "the work was satisfactory." Arbitral precedent confirms that the County's failure to communicate with the Grievant cannot be held against him. The formal evaluations are conclusory and fail to establish a fair assessment of his performance.

Viewing the record as a whole, the Union concludes that the "Grievant should be granted a new trial period" at the "very least". The evidence, however, warrants "(a) stronger remedy", which is that "he be awarded the position, and be made whole in every respect." If a new trial period is ordered, the County must be directed to "afford him a fair chance to demonstrate the ability to perform the duties of the position of backhoe operator."

The County's Reply

The evidence establishes the wisdom of the old adage, "*No good deed goes unpunished.*"

Section 6.06, A demands that the grievance be given a contractual basis. The Union's entire case rests on Section 4.06, but the Grievant is not due a trial period under that section because "it was a lateral transfer rather than a promotion." As the Union admits, this falls within a contractual gap. Thus, the trial period and its extension were each "an informal side agreement." Since this puts the trial period outside of the agreement, the grievance lacks a basis under Section 4.06. Since the parties agree that the Grievant had no prior experience, it necessarily follows that he was not qualified to receive a Section 4.06 trial period. The parties' express definition of promotion in Section 4.06 precludes fitting the Grievant's situation into it under standard rules of contract interpretation. MA-6406 confirms this. Other arbitral precedent confirms that the parties specifically agreed to treat the Grievant outside the purview of the agreement.

In the event that "the Arbitrator" concludes "further analysis is required", the Grievant "did not demonstrate the requisite skills and ability." The Position Description as well as the testimony of supervisory personnel establishes that some direction of a work crew can be expected of the Grievant. The Grievant acknowledged that he "was aware of the County's

reservations and expectations.” The first formal evaluation negates any possibility that the Grievant can claim he did not understand what was expected of him. His evaluation as a Mechanic within days of his receipt of a trial period as a Backhoe Operator establishes that he cannot make any plausible claim that he did not understand the process.

There is no ulterior motive for the County’s actions. That the County had an opening in the shop reflects no more than its prudence in waiting to see if he would pass his trial period. The Union uses the Highway Committee minutes to establish a conspiracy that does not exist. The Committee did no more than consider then pending workload. The County did not save money by not having a Backhoe Operator. In fact, it may have given up “hiring out to other municipalities”. County failure to fill the vacant position reflects no more than prudence in awaiting an arbitrator’s decision. In any event, it is a poor conspiracy that ends with the County plotting to deny the Grievant a position that it was never obligated to give him in the first place.

Even though he was not contractually entitled to a trial period, “the Grievant still received a fair trial period.” The County is not required and has never provided extensive “on the job training.” The offer of the position afforded the Grievant a trial period, not a training period. Arbitral precedent confirms that the County cannot be required to train an employee who has been afforded a trial period. Here, “the grievant was given significant training opportunities above and beyond that which had been provided to others to become acclimated with the equipment and processes involved with this position.” The County did afford the Grievant training, did allow him to observe other employees perform the work he was expected to perform and did allow the Grievant “to shadow other County employees during this trial period.” The Grievant did request outside training, but the County has not given such training to any other employee and is not required to do so in any event. That County supervisors highlighted his lack of experience in their evaluations of his work reflects nothing more than fact.

The Union misconstrues precedent regarding the amount of instruction an employee can expect in a trial period, and fails to recognize that the Grievant received regular input from his supervisors. Beyond this, the Union fails to recognize that the Grievant did not seek the communication it now complains he needed. A fair review of the evidence establishes that the County gave him a fair trial and even extended the trial period because of “a desire for the grievant to succeed in the position.” MA-6406 has no bearing on this grievance, for the employer in that case terminated a trial period after only five days. Here, the County gave the Grievant five months.

The Union fails to recognize that the Grievant was permitted considerable time to work by himself to learn the position. The evidence affords ample evidence of damage to property and of failure to learn the job in a reasonable time frame. Ultimately the burden of proof is on the Union to “prove that management’s decision was improper, unreasonable, arbitrary, capricious, discriminatory, or made in bad faith.” Ample arbitral precedent supports the County’s position. The Grievant acknowledged he saw no “malice on the part of

management.” A review of the testimony of County supervisors confirms that the County acted in good faith toward the Grievant. The allegation that the Grievant was pushed out to “sink or swim” has no evidentiary basis.

Union assertion that the Grievant’s supervisors “are unqualified to judge the grievant’s performance is nothing short of ridiculous.” That none of them are Backhoe Operators has no bearing on their ability “to supervise and assess those that do perform” the function. Beyond this, the remedies requested by the Union “are not only contradictory, but are also inconsistent with the collective bargaining agreement.” There is no contractual basis to justify granting the Grievant the position of Backhoe Operator on a permanent basis. There is no basis in fact to grant him a new trial period. The issue posed is not whether he “could someday be an effective and efficient equipment operator”, rather it is whether he was “an operator at the end of his extended trial period.”

Although the Grievant progressed during the trial period, he never became competent as a Backhoe Operator and “is not yet ready to perform” in that capacity. It follows that the grievance must be dismissed.

The Union’s Reply

The record affords no basis to believe the County extended itself to provide the Grievant a trial period. The posting produced no signers other than the Grievant. The County’s offer of an initial trial period and its extension demonstrates only that it imposed unreasonable expectations on him then failed to fairly communicate them or to afford him reasonable assistance to meet them. That his supervisors noted they had concerns with his performance falls far short of establishing what they actually expected of him. That his supervisors were less than clear on what the scope of his assigned duties was cannot be held against the Grievant. That a supervisor told him to “(e)xpect to be a leader out there” is “too vague” to define what supervision he was expected to provide. There is no evidence that any supervisor, during either evaluation period, actually informed him how to supervise or that he had failed to do so. In any event, the testimony of his supervisors cannot be reconciled to the formal evaluation he received as a Mechanic. The absence of negative feedback between the first and second evaluations demonstrates no more than that the “expectations may have been initially too high.” Contrary to the County’s arguments, the Grievant was blind-sided by the two adverse evaluations.

The Employer’s conduct demands that they be estopped from asserting that Section 4.06 does not apply to the Grievant. The Union and the Grievant relied on the Employer’s conduct. The assertion that the County acted outside the labor agreement to offer the Grievant a trial period ignores that it behaved consistently with Section 4.06. Not estopping the County is unreasonable and unjust. If the County moved the trial period outside of the labor agreement, its decision to act consistent with Section 4.06 is inexplicable. In any event, the application of Article 4 to the grievance is the only reasonable means of addressing this dispute. Beyond this, accepting the County’s view allows it to mislead the Union and the

Grievant to their detriment regarding challenging County actions to create and to extend the trial period. Employer analysis of relevant arbitral precedent is selective and unpersuasive.

The County never notified the Grievant that any more was expected of him than to perform the duties assigned him. County failure to specifically advise him of what was expected of him cannot be held against him. The trial period was not fair because the County had unreasonable expectations of an inexperienced employee and it expected him to improve his performance rapidly “despite a lack of instruction and feedback on their part.” The lack of tangible support for supervisory testimony concerning the Grievant’s performance coupled with the lack of supervisory experience with backhoe operation precludes deferring to the supervisors’ opinions. Assertions that the County trained the Grievant are overstated. The County decision to make him a Backhoe Operator demonstrates that it lowered the appropriate level of expectations and obligated themselves to fairly instruct him; to fairly observe his response to instruction; and to evaluate whether he responded “as well as could have been expected.” The evidence will not support the County on any of these points. Ultimately, the review of the reasonableness of the County’s conduct is for the arbitrator, but the review must consider the “amount of training and direction received” by the Grievant to be relevant in determining whether “the Employer’s expectations as to speed, accuracy, or directing the crews, were reasonable.”

The Union is under no duty to prove “that the Employer had an ulterior motive” for returning him to the Mechanic position. It is sufficient to show that “a plausible ulterior motive existed”; that the motive was to avoid the hire of a new employee; and that the motive “may have influenced the Employer’s decision.” It is not fatal to the grievance that the Employer could have declined the initial trial period or its extension. Had they so acted, the Union still could have grieved, and the fact remains that the County got the benefit of the Grievant’s labor “through the busy summer period”. Beyond this, the Union has no duty to prove specific County bad faith. Rather, it needs only to prove that the Grievant “demonstrated the ability to perform” as a Backhoe Operator under Section 4.06 or that the County decision to return him to Mechanic was “unjustified, pursuant to Section 7.01.” The use of “justified” under that section is ambiguous but points less toward a review of employer bad faith than of reasonableness or fairness. No standard of review can establish that the Grievant failed to properly perform the duties assigned him. Thus, the County’s decision to move him back to the Mechanic position cannot withstand scrutiny.

Even if the County is correct that the opinion of supervisors without direct backhoe experience is worthy of deference, the fact remains that these supervisors never clearly communicated their concerns or complaints to the Grievant. He was, as a result, blind-sided.

Sections 4.06 and 7.01 afford ample authority for an arbitrator to award the remedy requested by the Union. Even in the absence of specific contract language, “the Arbitrator has wide discretion, which is unlimited by the collective bargaining agreement, to fashion a remedy for the Employer’s violation of the contract which provides a just result.” Judicial precedent confirms this. In any event, the breadth of Section 7.01 warrants breadth for the

creation of an appropriate remedy. The remedy requested in the initial brief is warranted in fact and under the labor agreement.

DISCUSSION

The background to the stipulation of the issue is indicative of the record's development. The review of the record stated above does not do justice to how closely disputed the grievance is. Section 4.06 is the focus of the stipulated issue, but that statement prefaces a dispute between the parties regarding whether Section 4.06 can be applied to the grievance, and if so, whether Section 7.01 should play any role.

The County is correct that Section 4.06 is arguably inapplicable to the grievance. Section 4.06 defines "promotion" as employee movement "from one class to another class having a greater pay range maximum." Footnote 2/ from the 2005 Wage Schedule establishes that the Grievant's move from Mechanic to Miscellaneous Equipment & Maintenance Operator is a move in classification. However, the 2005 and 2006 wage schedules confirm that the move is not to a class "having a greater pay range maximum" since each classification shares the same maximum.

The Union's analysis of the record is, however, more persuasive than the County's regarding the applicability of Section 4.06. The arguable inapplicability of the section does not move the grievance outside of the labor agreement. The grievance poses facts dissimilar to MARATHON COUNTY, MA-9315, DEC. NO. 5361 (Crowley, 10/96). In that case, the parties reached "a separate agreement apart from the contract" to enable a unit employee "to get a chance to be awarded the job outside the terms of the contract" (DEC. NO. 5361 AT 15) prior to offering the job to outside applicants, where the unit employee was not a qualified applicant under governing labor agreement provisions. The absence of any express agreement in this case creates uncertainty regarding the standards governing the grievance.

The uncertainty does not create a contractual vacuum. Section 4.06 refers to promotion and demotion. The Grievant and Ottery each testified that the Grievant's move from the Mechanic class to the Miscellaneous Equipment & Maintenance Operator class was desirable. Each had their own view on why, but the testimony underscores that from either a Union or a County perspective treating the transfer as a promotion does not necessarily conflict with the normal meaning of the term. More to the point, the silence of Section 4.06 does not, standing alone, dictate that it cannot be applied to a lateral transfer. Rather, the agreement is ambiguous on that point. As the County asserts, this ambiguity can be addressed by standards of contract interpretation, such as "*expressio unius est exclusio alterius*", and as the Union asserts, it can also be addressed by recourse to other agreement provisions, such as Section 7.01, see *Labor and Employment Arbitration* (Bornstein, Gosline and Greenbaum, Second Edition) at Section 9.02, and Elkouri & Elkouri, *How Arbitration Works*, (BNA, Fifth Edition) at Chapter 9.

In my view, contract ambiguity is best addressed through evidence of bargaining history or past practice, since each focuses on the conduct of the bargaining parties, whose intent is the source and the goal of contract interpretation. Here neither guide is available, since the Grievant's experience is unique. However, the guides serve as background in the sense that the evidence demonstrates conduct by the parties over time which manifests agreement. More specifically, Section 4.06 guided the parties' conduct throughout the Grievant's experience as a backhoe operator. Glynn's March 13 letter refers to a "transfer", but the third paragraph of the letter takes language directly from Section 4.06. Even though the witnesses were sequestered, all of the witnesses who referred to the Grievant's experience with backhoe operation between March and September, referred to a "trial period." That Union and County affiliated witnesses shared the reference indicates understanding, and the "trial period" reference is traceable to Section 4.06. Documentation of the trial period confirms this. The County uses separate forms for the evaluation of a probationary or a promoted employee. It used the "Promotion Employee Evaluation Form" for the Grievant. The June 5 evaluation is noted as a "2 month check", again tying into Section 4.06. The September 1 evaluation includes a handwritten strike-out of the form's "2 month check" entry, and adds the reference, "3 month extension on trial period." Thus, the parties' conduct manifests agreement to administer the Grievant's trial period under Section 4.06. Glynn's May 23 letter underscores this point. Its second paragraph acknowledges contractual coverage of pay and benefits, and makes the trial period's extension non-precedential. Nothing in that letter can be read to move the trial period outside of the labor agreement, and its non-precedential reference underscores that the parties' use of a Section 4.06 trial period with the Grievant was an experiment.

Regarding the issue on the merits of the grievance, this conclusion makes it unnecessary to separately address the application of Section 7.01. The Union's argument that Section 7.01 applies if Section 4.06 does not is preferable to the County's assertion that the inapplicability of Section 4.06 makes Section 7.01 inoperative. Section 7.01 governs "the right to . . . transfer". There is no reason to doubt that had the County chosen to discipline the Grievant while on his trial period, Section 7.01 would have been applicable under its "proper cause" reference. The County's view would read the analogous reference regarding the authority to transfer out of existence. This underscores the applicability of Section 7.01. More significantly, there is no persuasive reason to oppose the operation of Section 4.06 to the operation of Section 7.01. As a general matter, agreement provisions should all be given meaning and should be reconciled where possible, see *Labor and Employment Arbitration* at Section 9.02(2)(d) and Elkouri & Elkouri, *How Arbitration* at 492-495. There is no reason to infer conflict between Sections 4.06 and 7.01 as they apply to the grievance. Rather, determination of the propriety of the County's implementation of the Grievant's trial period under Section 4.06 should be viewed as consistent with a determination whether or not it was "justified" under Section 7.01.

It adds nothing to the interpretation of the contract to determine whether the County's implementation of the trial period should be assessed under a standard characterized as "arbitrary", "capricious", "reasonable" or some combination of the terms. To meet contractual muster, the County's conclusion that the Grievant did not pass the trial period must

be “proven not to be justified” under Section 7.01. This demands a review of the purpose of the trial period and its implementation under Section 4.06. The parties argue in passing regarding who carries the burden of proof on this point, but such considerations are relevant only in a case posing doubt on an ultimate issue, which thus demands resolving the doubt against one party or the other. This record does not pose such doubt on an ultimate issue.

The length and breadth of the parties’ arguments should not obscure that the fundamental dispute between them is whether the “trial period” reference of Section 4.06 should be read to state “training period” requirements. On that fundamental point, the County’s arguments are more persuasive than the Union’s.

Section 4.06 does not state training requirements. Rather, it demands that “during this period” the employee must demonstrate the “ability to carry out the newly assigned duties and responsibilities”. This reference is ambiguous, but points toward the demonstration of existing skills rather than to their development through training. The two-month length of the trial period underscores this. The section is silent on what happens if an employee does not demonstrate the required ability. However, neither party reads the language to authorize discipline or discipline-like consequences. Rather, the County returned the Grievant to his former position.

Against this background, the County’s reading of the requirements of Section 4.06 is preferable to the Union’s. The force of the Union’s arguments turns on whether training requirements should be implied into Section 4.06. The answer to this is inevitably fact-driven, but the evidence will not support the implication of the rigorous training requirements the Union argues. The Union argues that by offering a trial period to an employee known to have no experience as a backhoe operator, the County lowered governing expectations. The difficulty with this view is that there is no agreement language to support it. Beyond this, the evidence does not show any agreement between the Union and the County to “lower the bar.” Rather, the parties discussed Ottery’s reservations and agreed to give the Grievant the opportunity to prove his skill to permit the position to be filled from within. As a matter of contract, this means that implying the training requirements the Union seeks appears to be the creation of an agreement not reached in bargaining.

Viewed on the facts, the force of the Union’s position is that the County could have done more to enhance the Grievant’s chance of success. The issue in arbitration, however, is less of a policy choice than the determination whether the contract compels the actions the Union seeks. On this point, the force of the Union’s position breaks down.

The evidence does not establish that the Grievant failed to receive a fair chance to succeed. Nothing in witness testimony indicates any other employee received the benefit of lowered expectations. Testimony pointing to operators who made mistakes without being disciplined ignores that the Grievant was not disciplined and did not have his conditions of employment adversely affected. Those who testified regarding their training indicated they, like the Grievant, received on-the-job training from more experienced operators, with one

exception involving Ecker, who received some extended training from an outside vendor on a newly purchased piece of equipment. More to the point, the evidence falls short of establishing that the County failed to give the Grievant a fair opportunity to establish his qualification to operate the backhoe. The force of the Union's concern with the limited and general nature of the feedback from County supervisors to the Grievant must be acknowledged. This cannot obscure that Mischnick's testimony that he instructed the Grievant on each project stands rebutted. Beyond this, Union focus on the quality of supervisory input obscures the absence of questions from the Grievant. It also obscures the objective basis to supervisory concerns. Mischnick's concern that the Grievant spent little of his time in the quarry actually experimenting with the backhoe stands rebutted. Wingers' ability to free a wrecking ball from a culvert ignores that the Grievant was assigned the duty the day prior and that he did not inform anyone of his failure to remove it prior to leaving the job site. The assertion that Mischnick knew the condition of the concrete at the Spranger's site can be acknowledged, but affords no defense to the Grievant who left the site unaware of any damages. His unawareness of the damages cannot be held against Mischnick. Review of the work site is Mischnick's duty, but the control of the work site, including the observation of its condition before and after the excavation is, in the first instance, the Grievant's. Supervisory concern with the quality of the Grievant's communication with work crews has support in the Grievant's testimony, which provided little detail except as prodded by his advocate.

Nor will the evidence support the assertion that factors other than work performance determined the Grievant's trial period. County conduct is inconsistent with the inference that it set the Grievant on a "sink or swim" course, with little desire for "swim" given its need for mechanics. The County's offer of a trial period and the offer of an extension are not reconcilable to a conclusion that it had an interest in his failure. The Grievant's testimony confirms this. That the County chose not to expose him to the operation of other equipment within the classification is similarly difficult to square with the assertion that it sought something other than his success as a Backhoe Operator. The absence of supervisory feedback or the absence of specific improvement directives is difficult to square with the assertion that the County had an interest other than his success. The lack of input is more reconcilable with the County's assertion that it offered the Grievant the chance to prove himself than it is with the assertion that it acted to assure it would not lose a Mechanic. County conduct throughout the trial period is consistent with its view that it offered the Grievant a period to prove himself rather than a period to be trained. The context in which the Grievant received the offer of a trial period underscores this. That he was the only employee to sign the posting cannot obscure that he signed the posting during his probation period as a Mechanic. The County was under no evident obligation to afford him the trial period and its conduct manifests nothing beyond its stated intent of affording the unit the opportunity for internal movement.

The Union's arguments have persuasive force regarding the effectiveness of the trial period as a training vehicle. However, the arguments regarding the quality of the County's training efforts seek more than the labor agreement anticipates. Section 4.06 anticipates a trial period of two months and does not provide specific training requirements. Nor is it evident that implying the more rigorous requirements the Union seeks works a desirable result. The

trial period implemented by the parties was an experiment. There is no evidence to indicate either party anticipated adverse employment consequences to the Grievant if he failed the trial period or voluntarily chose to return to the Mechanic position. It is not clear that imposing rigorous training requirements would enhance the likelihood of experiments like this one. Imposing such rigorous requirements could have the unintended result of closing off opportunities for internal promotion.

In any event, the evidence establishes that the Grievant received a fair opportunity to “carry out the newly assigned duties and responsibilities” of a Backhoe Operator, but did not demonstrate sufficient skill in those duties to warrant permanent placement in the classification of Miscellaneous Equipment & Maintenance Operator as of September 5. The County’s return of the Grievant to the Mechanic classification did not violate the labor agreement.

The Award entered below denies the grievance. This should not obscure that Union concerns with the training provided the Grievant have force. The denial of the grievance reflects only that the agreement does not afford me the authority to compel more elaborate training than that the County afforded the Grievant between March and September. This does not mean the Grievant could not become a backhoe operator; could not be trained as a backhoe operator; or could not continue to perform that function as the parties deem appropriate. However, such results must come through bargaining rather than litigation. The Award leaves neither the Grievant nor the County in a worse position than when the experiment with the Grievant started. The experiment was a worthwhile effort, but reflected at its inception and with the issuance of this Award an agreed-upon experiment without any guarantee that the Grievant would be permanently placed as a Backhoe Operator.

AWARD

The County did not violate Section 4.06 of the 2004-2006 collective bargaining agreement when it determined that the grievant was not able to demonstrate the ability to carry out the newly assigned duties and responsibilities of Backhoe Operator, and was returned to his former position of Mechanic.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 2nd day of April, 2008.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc

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