BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CITY OF ANTIGO	Case 69 No. 48910 MA-7757
and	
ANTIGO CITY EMPLOYEES UNION, LOCAL 1192, AFSCME, AFL-CIO	

Appearances:

Mr. Jeffrey Jones, Ruder, Ware & Michler, S.C., on behalf of the City.

Mr. Philip Salamone, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, on behalf of Local 1192.

ARBITRATION AWARD

According to the terms of the 1992-94 collective bargaining agreement between the City of Antigo (hereafter City) and Antigo City Employees Union, Local 1192, AFSCME, AFL-CIO (hereafter Union), the parties requested that the Wisconsin Employment Relations Commission designate a member of its staff to hear and resolve a grievance regarding the correct pay rate for grievant David Lee Falk under Articles 24B and 9 of the effective labor agreement. The undersigned was designated arbitrator. Hearing was held at Antigo, Wisconsin on June 21, 1993. No stenographic transcript of the proceedings was made. The parties submitted their initial briefs to the undersigned. The parties reserved the right to file reply briefs and those and other documents were received by September 22, 1993.

ISSUES:

The parties stipulated to the substantive issues herein as follows:

> Did the City violate the terms of the collective bargaining agreement by paying the Grievant the Apprentice Operator's wage rate, less the applicable new hire/probationary wage deduction set forth in Article 24(B), following his transfer to an Apprentice Operator position in the Water Department on September 28, 1992?

If so, what is the appropriate remedy?

In accordance with generally accepted arbitral principles and procedures, the undersigned shall first deal with the procedural issues as they were stated by the City, before deciding the substantive issues. The Union's objections to consideration of the City's timeliness issue are, therefore, formally overruled.

RELEVANT CONTRACT PROVISIONS:

ARTICLE 4 - GRIEVANCE PROCEDURE

A) Definition of a Grievance: Disputes concerning the interpretation or application of a specific provision of this Agreement 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.

. . .

D) Grievance Procedure: Reference to days in this Agreement shall be interpreted to mean working days and shall exclude weekends and holidays. Only one subject matter shall be covered in any grievance. A written grievance shall contain a clear and concise statement of the grievance, the signature of the Grievant or his representative if the Grievant is unavailable, the issue involved, the relief sought, the date the incident or violation of the contract took place, and the section of the Agreement which has been alleged to have been violated.

Step 1: The Employee or the Union representative shall present a written grievance to the immediate supervisor within (10) days form the date 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. The immediate supervisor will investigate the grievance and submit his/her decision to the employee and

his/her representative in writing, within ten (10) days after receiving the written grievance.

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ARTICLE 9 - JOB TRANSFER

Any employee who is temporarily transferred to a job(s) with a higher rated classification for four (4) or more hours in any day shall be paid the higher rate for all hours worked in said classification. If an employee is temporarily transferred to a job(s) with a lower rate of pay, he/she shall receive the rate of his/her regular classification. This does not apply to part-time laborers. Nothing in this Agreement shall, however, require the City to fill a position either temporarily or permanently, or to pay any employee at a higher rate if the employee is not assigned to perform the range of duties required at the higher classification.

. . .

ARTICLE 24 - MISCELLANEOUS PROVISIONS

. . .

B) New Employees: Newly hired employees shall be paid two dollars per hour less than the hourly rate for their position for the first six months of employment, one dollar and fifty cents per hour less from six to twelve months; one dollar per hour less from twelve to eighteen months; fifty cents per hour less from eighteen to twenty-four months; and the full hourly rate for their positions after twenty-four months of employment. However, the City may pay newly hired employees at a higher rate as determined by the Finance and Personnel Committee.

. . .

BACKGROUND:

The parties have had a collective bargaining relationship for

many years. The 1986-87 agreement contained the following language in Article 24 - Miscellaneous Provisions:

> C) New Employees: All newly hired employees hired after January 1, 1986, will start at $5.50 per hour and receive a fifty cent (50) per hour increase every six (6) months thereafter until they are being paid at a rate equal to the present Class 6 Range for the Street Department.

It is undisputed that this provision was proposed for inclusion in the labor agreement by the Union; that the Union proposed this language so that new hires would not receive the same wage at the time of hire as employes with greater seniority; and that this provision first appeared in the 1986-87 agreement. This provision was amended again in the 1988-89 agreement. It is clear on this record that the Union also proposed this change in Article 24(C) as follows:

> C) New Employees: All newly hired employees hired after January 1, 1988, will start at $5.50 per hour or at a higher rate as determined by the Finance and Personnel Committee, and receive a fifty cent (.50) per hour increase every six (6) months thereafter until they are being paid at a rate equal to the present Class 4 Range for the Street Department.

Notably, Article 9 has appeared in the parties' labor contracts, as quoted above in the Relevant Contract Provisions section of this Award, since at least 1988.

In approximately 1989, Wisconsin Council 40 Staff Representative Steve Hartmann was assigned to represent Local 1192. During the negotiations which led to the 1990-91 labor agreement, the Union proposed to amend Article 24(C), as it had appeared in the 1988-89 agreement, to read as it does in Article 24(B) in the effective agreement. It is undisputed that the parties did not discuss whether new Article 24(B) or Article 9 would control situations such as that in issue in this case; that Article 9 as it relates to this case was never mentioned or discussed by the parties during negotiations for the 1990-91 contract; that the Union proposed the change in Article 24 in order to settle a grievance that had previously been filed and that that (then-pending) grievance had nothing to do with the issues raised in the instant case.

In negotiations for the 1992-94 agreement, the parties did

not discuss or change Articles 9 or Article 24(B). Representative Hartmann stated that it had been his understanding that Articles 9 and 24(B) were unrelated and that whenever any employe was temporarily transferred, that that employe should receive the higher Article 9 pay rate if the employe was performing the range of duties of the higher classification. Hartmann also stated that it was not the Union's intent, by changing Article 24(B) in the 1990-91 contract, to change the meaning or application of Article 9.

FACTS:

David Lee Falk, the Grievant, began working for the City as a General Laborer in the Water Department on June 10, 1991. 1/ On that day, another individual, Ron Messer, also began working for the City as a General Laborer in the Water Department. It is undisputed that an arrangement was made (letter dated June 6,

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1/ The parties stipulated to the following facts at the hearing:

> The Grievant, David Falk, was hired by the City of Antigo on June 10, 1991 as a General Laborer. Following employment, he was assigned to work as an Apprentice Operator within the Water Department and paid the applicable Apprentice Operator wage rate less the probationary deduction set forth in Article 24(B) of the 1990-91 Labor Agreement then existing between the parties for a one year period. Subsequently, the Grievant was assigned to work outside of the Water Department as a General Laborer and paid the applicable General Laborer's wage rate less the probationary deduction set forth in Article 24(B).
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> On September 28, 1992, a Licensed Operator, Jim Mathis, was ill and unable to report to work. The Grievant was assigned to work as an Apprentice Operator within the Water Department to "cover" for Mr. Mathis. The Grievant was paid the applicable Apprentice Operator wage rate less the probationary deduction set froth in Article 24(B) while so assigned until May of 1993.

Based upon the undisputed record evidence, the Article 24(B) deduction should more accurately have been labeled the "new hire," not the "probationary" deduction, as the contract contains a 6 month probationary period. In addition, the undisputed testimonial and documentary evidence herein fleshes out the arrangement that was made regarding the Grievant's first year of employment and clarifies the time periods he actually worked as Apprentice Operator and the reasons therefor.

1991) between the City and these employes, apparently with Union acquiescence, that one man would work for one year inside at the Water Department as an Apprentice Operator, initially at a rate $2.00 less than the Apprentice Operator rate (then $9.50 per hour), or $7.50 per hour, pursuant to Article 24(B); that the employe's pay rate would be controlled by Article 24(B); and that the other man would work for the first year outside as a General Laborer at the Water Department, initially at a rate $2.00 less than the contract rate for the job (then $9.38 per hour) or $7.38 per hour, again pursuant to Article 24(B). 2/ The employes and Water Superintendent Vern Berger also agreed that these employes would then trade positions for the second year of their employment and that at the end of the second year, Water Department Superintendent Berger and Public Works Superintendent VanderLeest would decide which of these employes would be permanently assigned to work inside as an Apprentice Operator and which employe would then be permanently assigned to the General Laborer job. It is also uncontested that in order to work as a Licensed Operator in the Water Department, the State of Wisconsin requires that the employe have one year of work experience working an outside (General Laborer) job at the Water Department. Prior to and at the time of the instant hearing, the Grievant was not a State licensed operator.

Ron Messer worked for the first nine months of his employment as an outside General Laborer on the day shift while the Grievant worked inside on the night shift (4:00 p.m. to midnight) in the Apprentice Operator position. Neither employe filed a grievance regarding their pay rate. Both Messer and the Grievant were paid biweekly, the hourly rates described above with appropriate deductions made for their new hire status, according to Article 24(B).

Three months prior to the end of the first year of employment, Messer had an accident and was off work. During this three month period of time, the Grievant continued to work inside on night shift as an Apprentice Operator. The Grievant admitted that he was paid the Apprentice Operator rate less the "new hire" deduction during this three month period and that he did not then file a grievance regarding his pay rate.

The Grievant was then reassigned to work outside on the day shift as a General Laborer and worked there for one week. However, on or about September 28, 1992, due to the illness of senior Apprentice Operator Jim Mathis, the Grievant was assigned to cover for Mathis on the swing shift. 3/ Apparently, the City continued to pay the Grievant at the General Laborer rate less the

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2/ See the parties' stipulation at note 1/ above which controls pay rates.

3/ The swing shift at the Water Plant runs seven days on, two off and eight days on, and four off, with an 8:00 a.m. to 4:00 p.m. shift except for night shifts on third Mondays and Wednesdays and third Thursdays through Sundays (alternating).

applicable "new hire" deduction, but it later corrected its error and paid the Grievant the Apprentice Operator rate less the "new hire" deduction. The Grievant did not file a grievance at this time but stated that he spoke to a Union representative (Chuck) regarding the matter.

The Grievant thereafter filed the instant grievance on or about January 14, 1993. In the grievance, Falk complained about being "transferred inside to fill Jim's (Mathis) position" and he sought "back pay for the wage differential from the time I took over Jim's position until the time that Jim returns." The grievance cited Article 9 as being violated. During the processing of the grievance, the City consistently responded substantively to the grievance and in its written answers, dated January 29 and February 25, 1993, the City failed to raise any objections to the timeliness of the filing of the grievance. The City first raised its timeliness objection at the instant hearing.

The Union proffered evidence of an alleged past practice regarding Article 9 pay which the City resisted. The Grievant stated that in mid-February 1992, he received the Tandem Truck Driver (TTD) wage rate for fifteen work days while he was being trained at the City Street Department to take the State examination for a Commercial Driver's License (CDL). 4/ In addition, employes Robert Piskula and Kevin Brandt (who had both been employed by the City, initially in the Water Department, since 1989) stated that during their first two years of employment with the City, they were, at times, assigned to work as Tandem Truck Drivers and they were paid the higher TTD rate of pay, not their Article 24(B) "new hire" rate. Piskula had also been assigned to work on the sewer crew at times during his first two years of employment and during these periods, Piskula stated he received the sewer crew rate, not his lower "new hire" rate.

The City offered the testimony of Public Works Superintendent VanderLeest and former City Bookkeeper Chet Carrigan, the City's Bookkeeper from 1979 to October, 1989. These witnesses stated that the higher wage payments made to Falk, Brandt and Piskula were made by mistake and were due, in part, to employe turnover in the City's payroll office. VanderLeest also explained that Falk was never transferred to the Streets Department for his CDL training; that the City had erred in paying Falk the TTD wage rate during his CDL training; that the "new hire" deduction should have been applied during Falk's first two years of employment; and that no grievances had ever been filed regarding the new hire rate prior to the instant case.

Carrigan explained that the City did not attempt to recoup the overpayments made to Falk, Brandt and Piskula because the City felt it had made the errors and that it should take responsibility for them. VanderLeest stated that City Department Heads (like

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4/ At the time of hire, City officials told Falk that he would be required to obtain a CDL during his six month probationary period.

Water Superintendent Berger and the head of the Streets Department) are responsible for submitting payroll information to the City Bookkeeper. Carrigan admitted that these overpayment errors had been made in the Streets and Water Departments in 1988-89 (while he was Bookkeeper) and in 1990-91 (after he had transferred to a different City job). Carrigan stated that he believed that these errors had been made across the board in the Streets Department; that Carrigan had been unaware of these errors until VanderLeest brought them to his attention at an unknown time; and that the City never notified employes, such as Piskula, Falk and Brandt, that they had been paid in error and why this was done, nor has the City ever published or explained its policy regarding wage payments to new hires who are transferred to higher paid jobs. Finally, none of the witnesses who testified were aware of any new hire who had not been paid the higher wage rate for a job he/she had been transferred into during the first two years of their employment.

POSITIONS OF THE PARTIES:

Union:

The Union asserted that the Employer waited too long to object to the timeliness of the filing of the instant grievance. The Union noted that the Grievant was a relatively new employe when he first inquired of the Union regarding his proper pay rate and that the case was a complex one requiring contract interpretation as well as knowledge and application of past practice. The Union urged that the City had failed to meet its affirmative burden of proving that the grievance was untimely filed and that doubts regarding such issues should be resolved against forfeiture. In addition, the Union contended, the contract violation in this case constituted a continuing violation which should not be subject to ordinary concepts of timeliness. In any event, the Union argued that the timing of the filing of the grievance should have no affect on this case except, at most, in terms of the appropriate remedy.

Regarding the merits of the case, the Union argued initially that the language of Article 9 is clear and unambiguous such that the Grievant, who was temporarily transferred to a higher paid classification (beginning on September 28, 1992, and ending in May, 1993) should have been paid the higher pay rate during the time he was transferred. The Union noted that Article 9 uses the term "any employe" when describing those eligible for higher pay upon transfer. The Union observed that Article 9 pre-dated the disputed language of Article 24(B) and that the parties never discussed changing the meaning of Article 9, or its prior interpretation or applicability when they changed Article 24(B). The Union urged that its evidence regarding past practice supports its reading of Article 9.

In the alternative, the Union asserted that if the disputed contract language is found ambiguous, the interpretation the Union has urged is supported by its evidence of a consistent past practice to pay new employes transferred under Article 9 the

higher rate of pay of the job into which they were transferred. The Union contended that the City's claim at the hearing that these three payments were made in error was incredible. The Union pointed out that if this had been the case, the City should have so informed the Union and the employes and/or it should have attempted to recoup any over-payments. The City failed to take any of these actions, the Union noted. Finally, the City failed to produce evidence to contradict that proffered by the Union regarding past practice. The probable infrequency of such issues would tend to support a conclusion that the three occurrences here should constitute a past practice, the knowledge of which the City could fairly be charged to have possessed.

City

The City urged that the grievance should be summarily dismissed because it was filed too late, citing many cases on that point. The City also argued that because the issue of timeliness relates to the arbitrator's jurisdiction, it can be raised at any time during the grievance procedure. The City observed that Article 4(D) Step 1, clearly specifies that grievances must be filed within ten days from the date of the event or occurrence giving rise to the grievance. The City observed that following his September 28, 1992 transfer to the Water Department Apprentice Operator position, the Grievant received at least six paychecks, (beginning on October 15th), each showing he was being paid the Apprentice Operator rate less the probationary reduction otherwise applicable to him. Yet the Grievant did not file the grievance until January 14, 1993.

The City noted that Article 4 of the contract prohibits the Arbitrator from modifying, adding to or deleting from the express terms of the labor agreement; and that Article 4 states that grievances not properly appealed within the time limits or on which the parties have failed to mutually agree in writing to extend time limits, must be considered settled. The City also claimed that the Grievant should have complained about the manner in which he was paid at the time of his hire and that by failing to do so the Grievant/Union led the City to believe it had properly paid the Grievant when he was hired in June, 1992 and thereafter.

In the alternative, and assuming arguendo that the grievance is found arbitrable, the City contended that the clear and unambiguous language of Article 24(B) requires a ruling in its favor. In this regard, the City pointed out that Article 24(B) states that "newly hired employes shall be paid" a lesser hourly rate "for their position(s)" than employes employed in excess of two years. The City asserted that under this language, all newly hired employes must be paid the lesser hourly rates described in Article 24(B), no matter what "their position".

The City urged that the language of Article 24(B) is clear, but that even if it were found ambiguous, if the undersigned interpreted Article 9 as the Union wished, this would result in a piecemeal, discordant approach, contrary to generally accepted principles of contract construction. Therefore, the City argued,

the labor agreement should be read as a whole and so that, if possible, all provisions are harmonized and given full force and effect and none are isolated or rendered meaningless.

In addition, the City argued that the more specific language of Article 24(B) which details newly hired employes' pay, should control over the more general language of Article 9 which does not mention newly hired employes at all. In these circumstances, the County argued, Article 24(B) should control Article 9. The City also argued that accepting the Union's Article 9 arguments here would render Article 24(B) meaningless.

The City contended that the collective bargaining history supports its reading of Articles 9 and 24(B). The City noted that the undisputed evidence showed that the Union proposed both the currently effective language of Article 24(B) as well as the language which preceded it; that the Union's reasoning for its proposals on Article 24 was to pay newly hired employes at less than the hourly rates of those employes who had been employed for some time; and that the Union never advised the City's bargaining team that it expected the language of Article 9 to supersede that of Article 24(B). Given that the Union's intent in proposing Article 24(B) and its predecessor was to assure that newly hired employes would not make the same or higher pay than tenured employes for a two year period, the City asserted that adoption of the Union's interpretation of Article 9 would negate the parties' underlying intent and the purpose of Article 24(B) and constitute an "absurd" result.

Reply Briefs

In its reply brief the Union submitted a 1988 grievance arbitration decision which it asserted supports its arguments regarding an Article 9 past practice and which, it claimed, refute the City's arguments regarding the need to harmonize Articles 9 and 24(B). On September 22, 1993, as the Union had no objection thereto, the City submitted a letter response to the Union's arguments relating to this 1988 award. The undersigned then closed the record in this case.

Union's Reply Brief

The Union asserted that a 1988 grievance arbitration award by WERC Arbitrator Raleigh Jones was controlling here. There, the Arbitrator held that the City had refused to pay a tenured employe at the Landfill, Crew Leader pay for the time that the regular Crew Leader was on vacation, in violation of a past practice the Arbitrator found to be clear, longstanding and mutually agreed upon but which practice he found was also contrary to the language of Article 9. The City then appealed the Award through the Courts but the Award was ultimately affirmed.

The Union argued that in the instant case, the Grievant was clearly assigned to the higher paid position and he performed the full range of duties of the position during the time he was transferred. Thus, the Union urged, given the facts of the

instant case, it should be easier to rule in favor of the Union than it was for Arbitrator Jones in the 1988 case. In addition, the Union asserted that the City's having paid three new employes when they were temporarily assigned higher paid positions undercuts the City's arguments and demonstrates that the City's claim that it paid by mistake is absurd.

The Union contended that the evidence of the parties' bargaining history showed that the subject at hand was never discussed or considered by the parties; that it was not the Union's duty to inform the City what if any affect the change in Article 24(B) would have on Article 9; and that because Article 9 uses the phrase "any employe", the Union had a right to assume that those moved up to higher rated jobs would continue to be paid the higher rate. The Union argued that the Union's interpretation of the contract does not require reading Article 9 in "total isolation," as the City claimed.

The Union urged rejection of the City's timeliness objections. The Union argued against forfeiture and that the violation of the contract was a continuing one. Thus, the Union urged a ruling on the merits in its favor.

City's Reply Brief

The City asserted that the contract does not list mitigating factors as a basis for tolling the 10 working day time period for filing a grievance. The City urged that as of the filing of the grievance, both the grievant and Ron Messer had both worked for the City for over one year and had accepted (without complaint) wages for their work pursuant to Article 24(B). Thus, the City should have been able to rely on their silence as acceptance of the new employe wage reduction scheme.

The City contended that the Union's interpretation of Article 9 is flawed. The City noted that although the language of Article 9 appears to be clear, as the Union asserted, the language of Article 24(B) is also clear. The Union's arguments, the City urged, disregard the conflict between the two Articles when they are read together. The City argued, therefore, that its method of harmonizing Articles 9 and 24(B) should be applied.

The City urged that the Union's arguments regarding the existence of a past practice cannot succeed due to the "zipper clause" contained in Article 24(D). The City observed that there is no "maintenance of standards" clause in the parties' labor agreement, and that therefore Article 24(D) should control to destroy the alleged past practice described by the Union. In addition, the City asserted that the element of mutuality (including offer and acceptance) is missing between the parties so that no practice was ever created here as the Union claimed.

The City asserted by implication that even if the City had exercised its discretion and chosen a convenient method or present way of paying new employes in accord with the Union's assertions, in this case, such an act would not constitute a past practice.

In this regard, the City noted that the record is devoid of any evidence that the parties discussed or considered how Article 24(B) would operate in conjunction with Article 9. The City observed that the evidence offered by the Union that three prior instances had occurred, merely supported the City's assertions that these three employes were paid the higher rate by mistake.

Finally, the City argued that the arrangement whereby Messer and the Grievant were paid pursuant to Article 24(B) for a one-year period, itself, constituted a past practice contrary to that urged by the Union. In addition, the City asserted that because the Union proposed the change in the language of Article 24(B), that that Article should be construed against the Union and that the Union had an affirmative duty to explain the impact, if any, of its proposed new language on the remainder of the labor agreement. The Union did not do this and it should suffer the consequences, the City urged.

The City's September 22, 1993 letter

The City noted that in the case which led to the Jones Award, Article 24(B) was not involved and the past practice asserted by the Union in that case concerned only the practices which had occurred at the Landfill. Thus, the City asserted that both the issues and the facts of the prior case were different from those present in the instant case. Based on the above, the City urged the undersigned to disregard the Union's arguments regarding this prior arbitration case and the award thereon.

DISCUSSION:

The City presented extensive arguments urging the Arbitrator to dismiss this grievance because it was untimely filed. On this point, I note that the grievance was filed on January 14, 1993. On January 29 and February 25, 1993 City representatives VanderLeest and Rogers (respectively) responded to the merits of the grievance and denied it on its merits. In the circumstances of this case, I agree with the Union that this grievance concerns a continuing violation of the labor agreement. In this regard, I note that for each day on and after September 28, 1992, that the grievant was assigned away from his agreed-upon position, he could have filed a grievance, and each day's work out of his agreed-upon position would have tolled the filing period described in Article 4, Section D, Step 1. Thus, a grievance such as this can be filed at
any time during the period of essentially daily contract violations, and, as the Union correctly pointed out, only the appropriate remedy should be affected by the filing date of the grievance.

Regarding the merits of this case, several facts are undisputed. During prior contract negotiations between the parties, neither side mentioned, discussed or agreed upon the intended affect (if any) of the change the Union proposed in Article 24(B) upon the existing language of Article 9.

Furthermore, it is undisputed that Article 9 existed in the contract before the parties agreed to Article 24(B) and its predecessor. There is similarly no question that in originally proposing and later proposing to amend Article 24(B), the Union specifically intended to maintain a two year dichotomy between the pay rates for newly hired employes and the pay rates of tenured employes. In addition, the record facts demonstrate that from 1988 through 1991, Street Department employes such as employes Pickula, Brandt and Falk were paid higher pay rates while they were temporarily transferred to other jobs, despite their new employe status. Significantly, no witness could recall any previous instance where a new employe who was transferred to a higher paid job during the new hire status period was paid the lower new employe rate.

In this context, the greater weight of the record evidence favors an award sustaining the grievance and granting Falk backpay equal to the difference between what he received and the rate for a tenured apprentice operator for the period beginning ten work days prior to his filing of the grievance on January 14, 1993. This conclusion is buttressed by the language of Article 24(B) which refers to newly hired employes receiving reduced wages "for their positions" (emphasis supplied). On this point, I note that pursuant to the agreement between the City and the Union, Messer and Falk's work positions during their second year of employment were to be switched, so that it was agreed that Falk's position was to be as a General Laborer working outside at the Water Department. When the City transferred Falk out of his agreed-upon position to cover for tenured employe Mathis as an inside apprentice operator at the Water Department, the City violated Article 24(B) as well as the side agreement regarding Messer and Falk.

I disagree with the City's arguments regarding the issue of bargaining history. Here, it is clear that no bargaining between the parties occurred regarding the specific issue before me. Hence, no meeting of the minds was reached which could be helpful in resolving this dispute. In addition, I find, contrary to the City's arguments, that Article 24(B) is not more specific than Article 9. Rather, the language of these Articles shows that neither is general in nature and that both are equally specific.

I find unpersuasive the City's argument that to read Articles 24(B) and 9 as the Union has done renders Article 24(B) meaningless. Clearly by this Award, Article 24(B) will continue to have full effect unless and until the City chooses to transfer a newly hired employe during his/her first two years of employment to a position different from that he/she is hired into. This position is further supported by the language of Article 9 which applies to "any employee," excluding only "part-time laborers."

The evidence of past practice submitted by the parties in this case supports the Union's arguments in this case, not the City's. In this regard, although the transfer instances involving Piskula and Brandt were short-term in nature, it is clear that the City paid these newly hired employes at the higher rate of the

positions to which they were transferred. 5/ In these circumstances and given the City's failure to establish a policy thereon and its failure to attempt to recoup moneys allegedly paid in error, the City must be held responsible for these higher wage payments made (without known exception) between 1988 and 1991. 6/

Finally, I find that the prior arbitration award submitted by the Union concerning a short-term transfer at the Landfill is irrelevant to this case. Specifically, I find that that prior case concerned only tenured employes, not newly hired employes, and that it concerned the Landfill, not the Water Department; that Article 24(B) (and/or its predecessor) was not involved; and that the evidence of past practice submitted in that case by the Union was specific to activities at the Landfill only.

Based upon the relevant evidence and argument I issue the following

AWARD

The City violated the terms of the collective bargaining agreement by paying the Grievant the apprentice operator's wage rate, less the applicable new hire/probationary wage deduction set forth in Article 24(B), following his transfer to an apprentice operator position in the Water Department on September 28, 1992.

The City shall, as soon as possible, pay Falk the difference between the pay he received and the rate for a tenured apprentice operator, for the period beginning ten work days prior to January 14, 1993 until May, 1993. 7/ This backpay shall also include all applicable fringe benefits on the amount paid.

5/ I find the temporary transfer of Falk for truck driver training inapposite to this case. In regard to the transfers of Piskula and Brandt during their new hire period, I find it incredible that higher wage payments to these employes could have been made in error. Such an assertion is contrary to basic principles of agency which must operate to bind the employer to actions taken in the regular and ordinary course of its business by employes authorized to take such actions.

6/ The City argued that by accepting Article 24(B) pay for the first year of their employment, Falk and Messer established a past practice in support of the City's approach. This argument misses the mark. There is no dispute that Falk and Messer were subject to Article 24(B) during the first years of their employment. However, upon its transfer of Falk to cover for tenured employe Mathis, the City triggered the application of Article 9.

7/ I shall retain jurisdiction regarding the remedy only in this case, should the parties fail to reach agreement on the amount of backpay due to Grievant Falk within 60 days of the issuance of this Award.

Dated at Madison, Wisconsin this 15th day of November, 1993.

By Sharon A. Gallagher /s/