BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

ANTIGO CITY EMPLOYEES UNION,
LOCAL 1192, AFSCME, AFL-CIO

and

THE CITY OF ANTIGO

Case 48
No. 49042
MA-7806

Appearances:

Wisconsin Council 40, AFSCME, AFL-CIO, 7111 Wall Street, Schofield, WI 54476 by Mr. Phil Salamone, Staff Representative appearing on behalf of the Local Union.

Ruder, Michler and Ware, S.C., Post Office Box 8050, Wausau, WI 54402-8050 by Mr. Jeffrey Jones, Attorney at Law, appearing on behalf of the Employer.

## ARBITRATION AWARD

The City of Antigo (hereinafter referred to as the City) and Local 1192, AFSCME, AFL-CIO (hereinafter referred to as the Union) requested that the Wisconsin Employment Relations Commission designate an arbitrator on its staff to hear and decide a dispute concerning the City's decision to use a laborer at the landfill in a position previously held by a pre-hauler operator. The undersigned was so designated. A hearing was held on January 13, 1994 in Antigo, Wisconsin, at which time the parties were afforded full opportunity to present such testimony, exhibits, other evidence and arguments as were relevant. The parties submitted briefs and reply briefs which were exchanged through the undersigned on April 5, 1994.

On May 6th, the undersigned wrote to the parties, noting that a central argument in the City's reply brief was the inaccuracy of a factual assertion in the Union's brief, that the open job was initially posted as a Pre-Hauler, and was only posted as a General Laborer after no current City employee signed the posting:

> Gentlemen:
>
> I am currently writing the Antigo Award. A substantial problem exists. Mr. Jones relies heavily in his reply brief on the factual inaccuracy of Mr. Salamone's claim that the Pre-Hauler position was initially posted and was only converted to a General Laborer posting when no City employee signed the original posting. I agree that this may be a very important point. My notes of the hearing clearly indicate that Daniel Kamps testified to this sequence of events at the beginning of

> the Union's case. While Mr. Jones has a transcript of the hearing and insists that this testimony is not in the record, I am puzzled by the fact that Mr. Salamone's notes and mine are apparently consistent on this point.
>
> I ruled at the hearing that my recollection, aided by my notes, would serve as the official record and that I did not feel the need of a transcript. However, in fairness to the City I cannot leave this point unresolved. Accordingly, I would ask that Mr. Jones ship me the transcript as soon as possible so that I may review that version of the testimony.
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> . . .

On May 16th, counsel for the City responded by sending the transcript, together with a letter arguing that, while Kamps did testify as the Union claimed, his testimony was in error, and that reasonable inferences from other portions of the record supported the City's position that the job was never posted as a Pre-Hauler. The Union wrote on May 17th, asserting that if the City wanted to dispute Kamps' testimony, it should have done so at the hearing or in its brief. There were no further submissions to the arbitrator.

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

ISSUE

The parties were unable to agree on the statement of the issue and stipulated that the issue should be framed by the arbitrator. The Union suggested that the issue was:

> "Did the City violate the collective bargaining agreement when it unilaterally changed the "Pre-Hauler" position to a "General Laborer" position? If so, what is the appropriate remedy?"

The City proposed that the issue be stated as:

> "Whether the City violated the Collective Bargaining Agreement by not assigning an employee to a Pre-Hauler position at the City's landfill? If so, what is the appropriate remedy?"

The issue may be fairly stated as:

> Did the City violate the collective bargaining agreement when it assigned an employee in the classification of General Laborer to perform available work at the landfill rather than filling the vacant Pre-Hauler position? If so, what is the appropriate remedy?"

RELEVANT CONTRACT LANGUAGE

ARTICLE 3 - MANAGEMENT RIGHTS

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

A) To direct all operations of the City;
B) To establish reasonable work rules and schedules of work in accordance with the terms of this Agreement;
C) To hire, promote, transfer, schedule and assign employees to positions with the City in accordance with the terms of this Agreement;
D) To suspend, demote, discharge and take other disciplinary action against employees for just cause;
E) To relieve employees from their duties because of lack of work or any other legitimate reason, in accordance with the terms of this Agreement;
F) To maintain efficiency of City Government operations;
G) To comply with state or federal law;
H) To introduce new or improved methods or facilities;
I) To change existing methods or facilities;
J) To determine the kinds and amounts of services to be performed as pertains to City Government operations and the number and kinds of classifications to perform such services;
K) To determine the methods, means and personnel by which City operations are to be conducted;

. . .

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:

. . .

E) Arbitration

. . .

3. Arbitration Hearing: The arbitrator selected or appointed shall meet with the parties at a mutually agreeable time to review the evidence and hear testimony relating to the grievance. Upon completion of this review and hearing, the arbitrator shall render a written decision to both the City and the Union which shall be final and binding on both parties. The arbitrator shall not modify, add to or delete from the expressed terms of the Agreement.

. . .

ARTICLE 8 - JOB POSTING

A) Posting Procedure: Notices of vacancies or new positions shall be posted at all major places of employment for a period of five (5) working days. The City shall inform the Union in writing within forty-five (45) days of its intent to fill or not fill the position. The notice shall contain the job title and wages to be paid.

. . .

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.

. . .

BACKGROUND FACTS

The City is a municipal employer, providing general governmental services to the people of Antigo in north central Wisconsin. The Union is the exclusive bargaining representative for the City's employees in the Street, Park, Cemetery, Water and Sewerage Departments. Among the services provided is the operation of a landfill. Prior to September of 1993, the landfill was

staffed by a Crew Leader 1/, a Recycle/Scale Operator 2/, and a Pre-Hauler. The Pre-Hauler was responsible for baling garbage, and then loading, transporting and burying the bales. 3/

In 1993, the Pre-Hauler position became vacant due to the death of the incumbent. An employee named Kleo Landowski posted into the job. When the Crew Leader retired later in the year, Landowski posted into that job. The City posted the resulting vacancy in the Pre-Hauler job, but no City employee signed the posting. 4/ On September 27th, Chet Carrigan, the City's Street Commissioner sent a memo to Union President Dan Kamps:

> Currently the Pre-Hauler position at the landfill is vacant, as a result of Kleo Landowski posting for the Landfill Crew Position vacated by the retirement of Roy Perrot. Due to the changing scope of the landfill operations, the Pre-Hauler position will be filled as a General Laborer through either job posting or hiring.
>
> Providing the job would be signed for by someone that meets the five year criteria, they would be paid at the Class III rate. We feel that this position spends more time on recycling than actual operation of the Pre-Hauler. The volume of garbage has been greatly reduced since the initiation of the City recycle (sic) program.
>
> This action has been discussed with, (sic) City Administrator/Gary Rogers and Acting Director of Public Works/Pat Vander Leest. They both concur with the action.

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1/ The Crew Leader job description list qualifications as "Must be able to supervise people, must be able to do maintenance work and operations. Operation of: Baler & Conveyor, Loader, Bale Truck, Scale, Balefill, Recycling Effort. Maintenance of: Baler & Conveyor, Loader, Bale Truck, Scale, Balefill, Grounds, Records (Maintenance & Books). Crew Leader of: Balefill Personnel, Part-Time Help; And any other duties as assigned.

2/ The Scaleman, Class V job description list qualifications as: Must be able to receive people, must be able to do maintenance work and operations. Must be bondable. Operation of: Scale, Cash Register, some Bookkeeping. Backup Operation and Maintenance of: Baler & Conveyor, Loader, Bale Truck, Balefill, Recycling Effort, Grounds, Records (Maintenance & Books).

3/ The job description for the Class 3 - Pre-Hauler is "Operate Pre-Hauler, baler & conveyor and loader. Do maintenance work on the above equipment and other maintenance work which may be required.

4/ The initial posting of this vacancy as a Pre-Hauler is disputed by the City, but as discussed below the record evidence is conclusive on this point.

The instant grievance was filed on September 30th, contending that management had violated the contract, contending that the Pre-Hauler position had historically existed at the landfill and the functions continued to be performed. Thus, the grievance contended, the assignment of a General Laborer to do this work constituted a unilateral reduction in the negotiated wage rate.

Carrigan denied the grievance on October 1st:

> Article 9, of the contract clearly states that, nothing in this agreement shall, however, require the City to fill a position either temporarily or permanently. The City therefore, is not going to fill the Pre-Hauler position on a permanent basis. Rather the City will exercise the right to create a new position in accordance with Article 8, paragraph B). This was done on September 27, 1993 and posted accordingly.
>
> It was clearly stated in my letter dated 9-27-93 that the changes in the garbage deposited at the landfill since the City recycle efforts has drastically changed (sic). The bulk of work at the landfill is centered around recycling, therefore, I do not feel a full time Pre-Hauler position is warranted, but rather a general laborer position.

The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

At the hearing in this matter, the City's witnesses testified that the introduction of a recycling campaign in 1990 had reduced the number of bales of garbage at the landfill from 18 to 20 per day to about 6 to 10 bales per day by 1992. Carrigan estimated that the actual time spent by the Pre-Hauler each day working with bales of garbage has dropped to an average of two to three hours each day, with the rest of the time spent on clean-up of the area and sorting recyclables. Carrigan also said that the City had previously eliminated jobs such as Tandem Truck Driver, Sweeper Operator, No. 2 Sewer Man and Sewer Construction Leadman, filling the jobs only on a temporary, as-needed basis. He conceded on cross examination, however, that none of the functions of these eliminated jobs continued to be performed on a daily basis, as are the duties of the Pre-Hauler.

Union President Dan Kamps, a General Laborer in the Streets Department, testified that he had worked as a temporary replacement on the Pre-Hauler position. He conceded that the recycling program had decreased the amount of baled garbage and that the Pre-Hauler job did not primarily consist of working with garbage bales. He noted, however, that the position was originally posted as a Pre-Hauler vacancy, and was only converted to a General Laborer job when no current City employee posted for the job.

Kamps was one of the grievants in a 1988 grievance over the assignment of laborers to run equipment at the landfill. The grievance was settled along with several others, and the settlement

was confirmed in a letter from then-Union Staff Representative Steve Hartmann to the mayor:

> Dear Mayor Junior:
>
> This letter is to provide confirmation of the mutually agreed upon settlements to the following grievances:
>
> 1 & 3/88: When employees are assigned to work at the landfill, they shall receive their regular rate of pay as long as they are only required to do recycling and run the baler. If any employees from a lower pay grade are required to run the pre-hauler, the loader, or work the scales, they shall be paid for the day at the grade III rate.
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> . . .

Carrigan, for his part, testified that the grievance settlement pre-dated his tenure as Streets Commissioner and that he had never seen it before the day of the arbitration hearing.

Additional facts, as necessary, will be set forth below.

## POSITION OF THE PARTIES

### The Union's Brief

The Union takes the position that the City is attempting to subvert the negotiated pay rates. The City initially posted the Pre-Hauler vacancy. It only decided to change it to a General Laborer position when no City employee signed the posting. This is significant because the contract would have provided that a General Laborer receive the same rate of pay as the Pre-Hauler, unless it was a new hire. Newly hired General Laborers can be brought in at a lower pay grade than more experienced General Laborers, and take five years to reach the regular rate. The City realized after the initial posting that it could go outside of the workforce and use a cheaper new hire for this job, but only if it was classified as a General Laborer position rather than a Pre-Hauler. That, the Union contends, is the sole reason for the decision to "eliminate" the Pre-Hauler position. This desire to reduce pay rates is consistent with past attempts by the City to avoid paying proper rates, and these attempts have been soundly rebuffed by arbitrators and the courts.

The City's position is, the Union asserts, absurd. The functions of the Pre-Hauler continue to be performed every day at the same level as they had when the job was posted. The number of jobs at the landfill remains at three. The same work is being performed now as has been in the past, although the proportion of recycling work to baling work has increased somewhat. There has always been some overlap of work between the three positions, and the core responsibilities of the Pre-Hauler have not substantially changed. Given that there has been no change in circumstances, simply allowing the City to proclaim that a higher paying

classification is now open to new hires would allow it to fill every vacancy with a low paid General Laborer. That is not a result that could have been intended when the parties met and negotiated their wage classifications.

The City's reliance on the portions of the contract allowing it to decide not to fill jobs is inapplicable, the Union argues, because it does seek to fill this job. It merely wishes to pay less than the negotiated rate. This is not permissible under the terms of the contract, and the grievance challenging this attempt should be sustained.

The City's Brief

The City takes the position that the grievance is without merit, given the clear arbitral law and contract language supporting its right to determine whether vacancies exist and whether they should be filled. The mere fact that the Pre-Hauler's position has no incumbent does not compel the City to post the job. The contract clearly, specifically and repeatedly reserves to management the right to decide whether vacancies will be filled. Witnesses for both the City and the Union testified that management has decided not to fill jobs on numerous occasions in the past, including the jobs of Tandem Truck Driver, Street Sweeper and Sewer Machine Operator.

The evidence is absolutely clear that there is no longer a need for a Pre-Hauler at the landfill. The Pre-Hauler's duties have been dramatically curtailed by the success of the City's recycling program. Pre-Hauling activities constitute only 37% of the work hours for this position on average, and the work can easily be performed by the Crew Leader and a General Laborer. The City notes that the contract gives it the right to temporarily transfer workers into other jobs, subject only to the limitation that, if they work more than four hours a day at the functions of the higher rated jobs, they receive the higher rate.

The City points to a body of arbitral law that grants to employers the reasonable discretion to determine whether a vacancy exists, even where the duties of the allegedly vacant job are being performed by other employees. Where the job is substantially less than full-time and/or has been divided among other workers on an irregular basis, arbitrators have held that the job need not be posted as a full-time position. That is the case here, and the result should be the same. For all of these reasons, the City urges that the grievance be denied.

The Union's Reply Brief

The Union agrees that the City is not required to fill any vacancy if it does not wish to do so. However, in this case the City filled the job for years and posted it when the incumbent moved up to Crew Leader. It then decided to claim that it was not filling the Pre-Hauler job, while attempting to assign the duties to a General Laborer who will perform exactly the same functions as the Pre-Hauler. The primary duties may have gradually diminished as recycling was introduced, but they continue to be performed each and every day. The contract and the 1988 settlement agreement call for General Laborers to receive Pre-Hauler pay for performing Pre-Hauler work. The City is engaging in a bad faith subterfuge to avoid paying the negotiated rate of this job. Arbitrators have regularly seen through such ruses and have rejected employer attempts to avoid their obligations by renaming a job without substantially changing its duties.

The City's Reply Brief

The City asserts that the Union has mischaracterized the evidence in a number of respects, anchoring much of its argument to the untrue assertion that the City initially posted the Pre-Hauler job and then changed it to a General Laborer. It has also sought to have the arbitrator create rights where none exist. The arbitrator's jurisdiction is limited to interpreting the express terms of the contract. There is no provision of the contract that prevents the City from not filling the Pre-Hauler position. In similar cases, arbitrators have recognized that the employer's right to determine the size and composition of the work force includes the right to determine how many workers are needed in a given classification, if any. Here the City has determined that no fulltime Pre-Hauler is needed. The existence of procedures in the contract for notifying the Union when a job will not be filled, and for the temporary assignment of employees to other classifications, prove that the parties contemplated that jobs need not be filled on a fulltime basis but that the work of those jobs could still be performed.

The Union's claim that the City might abuse its authority to decide the composition of the work force to phase out all higher paid classifications is simply a smokescreen. There is ample factual support for the City's action, in that the amount of Pre-Hauler duties performed over the past two years has dramatically declined. Moreover, the contract protects the Union from such erosion of the unit by requiring that the higher rate be paid whenever an employee performs higher rated work for four or more hours per day. While the Union argues that the City has shown bad faith by posting this position as a Pre-Hauler and then changing the posting to attract an applicant at a lower pay rate from the outside, the evidence is clear that City officials decided to convert the position to a General Laborer when the vacancy first occurred, and that it was never posted as a Pre-Hauler.

The City submits that the 1988 settlement agreement limiting the use of General Laborers at the landfill is irrelevant to this dispute. Since the Union did not specifically raise this argument in its primary brief, it should be considered waived. In any event, the settlement agreement dealt with the work that could be performed when there was a temporary

assignment of General Laborers at the landfill. The issue in this case is the permanent assignment of a General Laborer to the landfill. Moreover, the settlement agreement is a separate document, outside of the contract and if there has been a violation of that agreement in the Union's view, the proper remedy is to bring a complaint of prohibited practices. Such a dispute lies outside of the arbitrator's jurisdiction. For all of these reasons, the City asks that the grievance be denied.

## DISCUSSION

### The Factual Dispute Over The Initial Posting

At the hearing in this case, a dispute arose between the parties over the City's desire to use a court reporter and have the Union share in the cost of the reporter and the transcript. The Union took the position that it did not wish to have a court reporter present. The arbitrator took the matter under advisement, and ruled at the end of the hearing that, while the City had the right to use a transcript for its own purposes in preparing a brief, in the absence of mutual agreement to have the transcript be the official record of the hearing the arbitrator's recollection, aided by his notes, would constitute the official record of the hearing.

The City's reply brief took issue with the assertion in the Union's brief that the City initially posted this vacancy as a Pre-Hauler job, and then changed it to a General Laborer after no one signed the posting. The Union relied on this as evidence of the City's bad faith, since a new General Laborer could be paid at a lower rate than anyone hired as a Pre-Hauler. The City's reply brief placed considerable stress on the absence of any evidence supporting the Union's version of the facts surrounding the posting. On reviewing the reply briefs, the undersigned wrote to the parties, noting that his recollection of the testimony agreed with the Union's statement of the evidence and asking the City for a copy of the transcript to ensure that this recollection, and the notes that confirmed it, were not somehow in error.

The transcript confirmed the arbitrator's recollection and notes. Union President Daniel Kamps testified as the first witness at the hearing, and stated on direct examination that the job was initially posted as a Pre-Hauler, and that the posting was subsequently changed. The City, in a letter accompanying the transcript, asked the arbitrator to consider that the Union's opening statement challenged the City's decision to fill the vacancy with a General Laborer, without making mention of any double-posting, and that Carrigan testified to a change in the duties which led to the decision to eliminate the Pre-Hauler position. By inference, the City argues, Kamps' testimony should be discounted as erroneous.

Kamps' testimony about the double-posting was not challenged on cross examination, nor was it contradicted by the City's witness, Chet Carrigan. Carrigan did not give testimony on the procedures used to post this grievance. It is not completely impossible to draw an inference from his testimony that the City had determined early on that this posting should be for a General Laborer, and that the City would not therefore have posted it as a Pre-Hauler. The whole point of the Union's argument is that the double-posting was inconsistent with the

City's claim that the distinct duties Pre-Hauler job had been gradually eroded, and that the true reason for changing it to a General Laborer was to pay a lower rate. This is not a subtle or obscure inference from the testimony. On the contrary, Kamps' testimony about the double-posting rather clearly invited this argument. The City's representatives, including Carrigan, were present while Kamps was on the stand, and I cannot simply assume that they missed this portion of the testimony. Given the clear and direct testimony that the job was posted twice, the evident significance of this point, and the lack of any rebuttal, I find that the only reasonable conclusion from the record is that the City initially posted the job as a Pre-Hauler and subsequently changed it to a General Laborer when no employee signed the first posting.

The Merits of the Grievance

The job of Pre-Hauler was, from the record evidence, essentially unchanged from the point at which it was posted and filled by Kleo Landowski in early 1993, and the point later in the year when Landowski vacated the position. The overall operation of the landfill remains unchanged, with the same tasks being performed by the same number of employees. The sole difference is that the City wishes to use a General Laborer in place of a Pre-Hauler. The Union challenges this state of affairs as being a unilateral change in the negotiated wage for these duties.

The City's argument follows two primary lines. On a contractual level, the City argues that it has the right to determine that vacancies will not be filled, and that this right has been recognized in past instances when other positions were eliminated. On a factual level, the City asserts that the job of Pre-Hauler has gradually faded away because the volume at the landfill has declined as the City's recycling program has succeeded.

On the first point, there is no question but that the City has no obligation to fill vacant jobs. The contract has several clear references to a decision not to fill a vacancy. Article 8 specifies a time limit for notifying the Union of "its intent to fill or not fill the position." Article 9 states that nothing in the contract "shall … require the City to fill a position either temporarily or permanently…" Furthermore, the management rights clause in Article 3 reserves to the City the rights to "assign employees", to "determine the kinds and amounts of services to be performed as pertains to City Government operations and the number and kinds of classifications to perform such services", and to "determine the methods, means and personnel by which City operations are to be conducted." The fact that the City must pay a negotiated rate for the services provided by a bargaining unit position does not foreclose a decision to do without those services.

The City here, of course, has not decided to do without the services of the Pre-Hauler. It has decided to have those duties performed by someone with a different title and rate of pay. The City is essentially asserting the right to determine that the duties of the Pre-Hauler have diminished to the point where the amount of distinct work performed does not justify a separate classification. It cites several arbitration awards in favor of this position, and points to the past elimination of jobs within this bargaining unit.

The arbitration awards cited in the City's brief stand for the proposition that a job need not be posted in a given classification even though the grieving employee performs a significant amount of work which would be peculiar to that classification. In those cases, however, the Union was seeking to force an employer to create new classifications to accommodate the duties that had been assigned to employees in another classification. This is a far cry from this case, and in some ways is the exact opposite of what the Union is complaining about here. In those cases, the Union sought to have the arbitrator add to the contract a classification never negotiated between the parties. In this case, the Union's objection is that the City is subtracting from the contract a negotiated wage rate for Pre-Hauler duties.

The City cites two unpublished cases in its reply brief. In School District of Nekoosa, Arbitrator Bielarczyk determined that a custodian's job did not have to be posted on the retirement of the incumbent, since the District had the right to determine the size and composition of the work force. There is no argument over this point of law. As noted above, the right of the employer to do without a job is not the question in this case. It is instead the question of whether an employer may reallocate the duties to another, lower rated position.

In Langlade County, another arbitrator ruled that the County had not violated the contract by refusing to post two vacant caterpillar positions (out of a total of five positions before the two vacancies occurred) even though the duties of those jobs were occasionally being performed by employees outside of the classification, and those employees were being paid according to a contract provision governing out-of-classification pay. The arbitrator rejected the Union's theory that the out-of-classification pay provision only operated when the incumbents were temporarily absent. Although the complete award was not provided, I would note my general agreement with the cited portions of the Award. In particular, the Union's apparent argument regarding out-of-classification pay is clearly an untenable interpretation of most such provisions. Furthermore, the fact that the need for the particular skills or tasks of a discrete classification may occasionally exceed the available personnel would not generally require that a permanent job should be posted in that classification. Most employers would prefer to understaff a more expensive classification and occasionally pay a task rate or out of classification pay than to overstaff the job and have a highly paid employee sit idle on most days. Collective bargaining agreements usually do not require that employers staff at the level of maximum demand.

This last point is the one that the City wishes to rely upon in this case. There is a difference, however, between the reduced staffing in the Langlade County case and the attempted elimination of the Pre-Hauler position. From the excerpt of the decision, it appears that the work assigned to other classifications in Langlade County was occasional and was not a daily duty assigned to a particular employee. Likewise, the prior job eliminations in Antigo itself did not involve the transfer of duties to other employees for performance on a daily basis. Instead, the jobs are performed on an occasional basis by employees whose primary duties lie

outside the eliminated classifications. With the Pre-Hauler, the job as performed by Landowski's predecessor was not materially different than the job performed by Landowski when he posted in as a Pre-Hauler in early 1993. Neither was there a material difference in the job after Landowski transferred out in the summer of 1993. On a daily basis, the crew at the landfill performs precisely the same work now as it did in the preceding year.

The tension in this case results from the gradual diminution in the demand for landfill space, and the Union's belief that the City is simply trying to avoid paying the negotiated rate. There is a point at which external factors may cause a substantial enough change in the duties of a job to justify the elimination of the job and the assignment of its residual duties to other classifications. There is no precise formula for when the change is so substantial that the classification itself should be changed, and it is often the case that a vacancy provides the employer with an occasion to reevaluate the need for a job. Considerable deference is accorded to the determination of an employer so long as it is clear that the change is indeed substantial and the decision is made in good faith. 5/

The change here was an approximately 50% reduction in the number of bales handled by the Pre-Hauler as the City's recycling program took hold in 1990, 1991 and 1992. Whether this reduction was substantial enough to justify the elimination of the Pre-Hauler as a separate classification is a difficult judgment. The Pre-Hauler spent approximately 75% of his time operating the pre-hauler, loader, conveyor and loader at the peak of the landfill's operation. with the remainder of his time spent on other duties. Viewed in one way, 63% of the job remains unchanged from the pre-recycling days. On the other hand, only 37% of the work remains uniquely that of the Pre-Hauler position.

The parties negotiated a new labor agreement which continued the Pre-Hauler classification in 1992, signing the contract in November of that year. Given that the change in job content was completed in 1992, the continuation of the classification would suggest that the parties did not view the change as being substantial enough to warrant attention in negotiations. The problem with this theory, of course, is that there is no evidence in the record of what the timing of those negotiations was and what the primary issues before the parties might have been. Further, there was an incumbent Pre-Hauler at that time, and in practical terms a demotion is a more difficult and contentious step to take than a changeover when the job is vacant. However, the job was twice vacant after the new contract was signed and after the job content had changed to the level of 37% Pre-Hauler duties. In early 1993 and again in the Fall, the City posted the Pre-Hauler job. It was only after the job went unclaimed in the Fall of 1993 that it was reposted as a General Laborer.

As noted above, the deference to the employer's judgment in close cases is predicated

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5/ See the comments of Arbitrator Block in American Cement Corp., 48 LA 72 (1967), cited in Elkouri, How Arbitration Works, 4th Ed. (BNA, 1985) at page 496, as well as the cases cited at footnote 193 on that page.

in large part on good faith. The sequence in this case, of agreeing to a new contract with no change in the classification, posting it twice within a year of the contract's signing, and changing the job classification only when it appeared that a savings could be made on the hourly rate by hiring a new employee into the lower starting pay for General Laborer, persuades me that this decision was not made in good faith. The Union is correct when it views the change of this job from a Pre-Hauler to General Laborer as the seizing of an opportunity rather than a neutral judgment that the job content merited a change.

The City is entitled to great deference in deciding which jobs it will have performed and how services will be delivered. Deference is not the same as blind acceptance, and the exercise of management's rights must be consistent with the promises the City has made in other portions of the contract. In determining that the Pre-Hauler still exists as a distinct classification, I am deferring to the judgment of the City in its first two postings of the job in 1993, when it confirmed that the Pre-Hauler was an active and necessary classification. There was absolutely no change in circumstances between these postings and the abrupt decision to abolish the classification, other than the opportunity to pay a rate below that which had been negotiated for the job. For these reasons, I have concluded that the City acted in bad faith, and that the refusal to post the Pre-Hauler position while still having the essential duties of the job performed is a unilateral change in the negotiated pay rate for the job.

Remedy

The Union asks as a remedy that the City be directed to cease and desist from unilaterally changing classifications, and that all affected employees be made whole. There is only one classification affected by this Award, and that is the Pre-Hauler job at the landfill. In determining that the City violated the contract by converting the job into a General Laborer, I have relied upon the record as it exists. The broad cease and desist order requested would ignore the case by case nature of these decisions, and the legitimate right of management to make modifications where changes in the job warrant and the decision is made in good faith. An order restoring the Pre-Hauler position is a sufficient prospective remedial order.

As for the request that affected employees be made whole, the record shows that no unit employee signed the last posting for this job as a Pre-Hauler. The only employees negatively affected would be those that have been performing the work pending the resolution of this grievance. To the extent that those employees would be entitled to an out-of-classification payment or higher rate under the contract by virtue of performing Pre-Hauler work, they are entitled to receive such pay. 6/ If the City has permanently filled the job during the pendency of this grievance, the incumbent is entitled to the Pre-Hauler rate.

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6/ The grievance settlement introduced into evidence by the Union does not bear on the merits of this grievance, since it deals with temporary assignments of General Laborers to the landfill, and not permanent changes in staffing. Its terms would apply, however, to the calculation of a remedy if Laborers have been used to fill in at the landfill on a temporary basis.

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

## AWARD

The City violated the collective bargaining agreement when it assigned an employee in the classification of General Laborer to perform available work at the landfill rather than filling the vacant Pre-Hauler position. The appropriate remedy is to restore the Pre-Hauler position and to make whole those employees who have performed the work of the Pre-Hauler during the pendency of this grievance in accordance with the terms of the contract and/or the settlement agreement governing pay for Laborers working at the landfill, as the case may be.

Signed this 5th day of July, 1994 at Racine, Wisconsin:

By Daniel Nielsen /s/
Daniel Nielsen, Arbitrator