BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between TEAMSTERS "GENERAL" LOCAL 200 and TEWS COMPANY	Case #17 - 22 Nos. 50807 - 50812 A-5200 - 5205 Aggregate Hauling - Colgate Pit

Appearances:

Previant, Goldberg, Uelman, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North River Center Drive, Suite 202, Post Office Box 12993, Milwaukee, Wisconsin 53212, by Ms. Naomi E. Eisman, appearing on behalf of Teamsters "General" Local 200.

Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. Donald J. Cairns, appearing on behalf of Tews Company.

ARBITRATION AWARD

Teamsters "General" Local 200 (hereinafter referred to as the Union) and Tews Company (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate a member of its staff as arbitrator of a dispute over the Company's decision to cease in-house aggregate hauling operations at its Colgate Pit, reassign equipment and personnel and thereafter have hauling performed by a subcontractor. The undersigned was so designated. A hearing was held on August 17 and September 20, 1994 in Milwaukee, Wisconsin, at which times the parties were afforded full opportunity to present such testimony, exhibits, stipulations, other evidence and arguments as were relevant to the dispute. A stenographic record was made, and a transcript was received by the undersigned on September 28, 1994. The parties submitted post-hearing briefs and reply briefs, the last of which were exchanged through the undersigned on January 30, 1995, whereupon the record was closed.

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

I. Issue

The parties were unable to agree on a framing of the issue and agreed that the arbitrator should frame the issue in his Award. The Union asserts that the issue is:

> Whether or not the Company's removing its employees from hauling aggregate at its Colgate pit and having their work done by employees of a non-union subcontractor violates the collective bargaining agreement? If so, what is the appropriate remedy?

The Company frames the issue as:

> Did the Company violate the collective bargaining agreement when it reassigned four tractors to other locations, sold trailer equipment which it had used in aggregate operations and thereafter subcontracted such work to outside haulers? If so, what is the appropriate remedy?

The issue may be fairly stated as follows:

> Did the Company violate the collective bargaining agreement when it subcontracted aggregate hauling work at its Colgate Pit to outside haulers? If so, what is the appropriate remedy?

II. Relevant Contract Language

> ARTICLE 5. TRANSFER OF COMPANY TITLE OR INTEREST
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> 5.1 This Agreement shall be binding upon the parties hereto, their successors, administrators, executors and assignees. In the event an entire operation, or any part thereof, is sold, leased, transferred or taken away by sale, transfer, lease, assignment, receivership or bankruptcy proceeding, such operation shall continue to be subject to the terms and conditions of this Agreement for the life thereof. The Employer shall give notice of the existence of this agreement to any purchaser, transferee, lessee, assignee, etc., of the operation covered by this Agreement, or any part thereof. Such notice shall be in writing, with a copy to the Union, not later than the effective date of sale. Nothing in this Agreement shall be construed to prevent the Employer from terminating all or part of his business, following prior notice to the union.

. . .

ARTICLE 6. CHANGE IN OPERATIONS

6.1 Before the Employer introduces major changes in operations which might result in loss of employment for regular, full-time employees, the Employer shall meet and review such change with the Union, in an effort to minimize the possible economic hardship involved for all parties.

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ARTICLE 31. GRIEVANCE PROCEDURE

31.1 Should differences arise between the Employer and the Union, or between the Employer and any of its employees, either individually or collectively, as to the meaning and application of the provisions of this Agreement, an earnest effort shall be made to settle such differences at the earliest possible time by the use of the following procedure:

. . .

31.2 If arbitration is requested, such arbitration Board shall be composed of two (2) arbitrators selected by the Employer and two (2) arbitrators selected by the Union. The said four (4) shall attempt to arrive at a settlement between themselves. Where the four (4) arbitrators, by a majority vote, settle a dispute, no appeal may be taken. Such decision shall be final and binding on both parties. If the four (4) are unable to arrive at a settlement, then the parties agree to request the Wisconsin Employment Relations Commission to appoint an impartial arbitrator.

If the Employer and the Union agree, such Arbitration Board may be composed of one (1) arbitrator selected by the Employer and one (1) arbitrator selected by the Union.

31.3 The impartial arbitrator shall have the sole and exclusive power and jurisdiction to determine whether a particular grievance, dispute or complaint is arbitrable under the terms of the Agreement. The decision of the impartial arbitrator on any matter submitted to him shall be final and binding on all parties.

The impartial arbitrator shall issue his decision no later than thirty (30) days after the case has been submitted to him.

31.4 The time limits set forth in this ARTICLE (except for the time in which an arbitrator must render his award) shall be strictly enforced, and failure of either party to comply with these time limits shall constitute a default and resolve the particular grievance, dispute, or complaint in favor of the other party.

31.5 In the event the matter goes to arbitration, the losing party shall bear the full cost of the arbitrator, but not including the wages lost by witnesses. In the event the parties are unable to determine which party lost the arbitration, the arbitrator shall have authority to make such determination, including any proration which he may decide.

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ARTICLE 33. SUBCONTRACTING

33.1 The parties recognize that the Employer may hire additional trucking when his own equipment and his own employees are fully employed.

EXHIBIT A

LIST OF CLASSIFICATIONS AND APPLICABLE WAGE RATES

The following wage scale shall apply:

A. Senior Employees in Each Classification

Hourly Wage Rate Effective Classification	6/1/92	6/1/93	6/1/94	6/1/95
Cinders, sand gravel stone and gravel pit stripping: Three Axle Trucks & Semi trailers	$13.20	$13.40	$13.60	$13.85
Building Material: Three Axle Trucks & Semi Trailers	$13.25	$13.45	$13.65	$13.90
Warehouse work in Bldg. Material Yards	$13.14	$13.34	$13.54	$13.79

Ready-Mixed Concrete				
All Equipment	$13.50	$13.70	$13.90	$14.15
Bulk Cement Drivers	$12.70	$12.90	$13.10	$13.35

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III. Background

The Company manufactures and sells building products from a variety of facilities in southeastern Wisconsin. The Company's truck drivers, warehousemen and helpers at the nine facilities in Waukesha, Washington, Ozaukee and Milwaukee Counties are represented by the Union. In addition to these facilities, the Company owns four sand and gravel pits, from which it extracts aggregate. Two of the pits are located in western Racine County. A third is located at Dousman in Waukesha County, and the fourth in Colgate on the border between Waukesha and Washington Counties. Some of the aggregate dug from these pits is hauled to the Company's ready-mix plants in trucks equipped with hydraulic lifts ("wet kits") and trailers, which in combination operate as dump trucks. The remainder is sold.

The Colgate Pit, which generates approximately 1 million of the 1.4 million tons of aggregate production each year, was purchased in 1972 from Palmer Sand and Gravel. It is the only one of the four pits at which Company employees have been used to haul aggregate. When the pit was purchased, the Company also acquired six dump trucks from Palmer, and the Company assigned drivers to those trucks. Six employees were used for hauling at Colgate until the late 1970's, when the Company retired two obsolete pieces of equipment and reduced the Colgate work force to four drivers. Those four drivers hauled about 15% of Colgate's production, with the remainder hauled by subcontractors. At the other three pits, the Company has relied exclusively on the subcontractors for hauling aggregate.

In August of 1993, the Company's Chairman, Robert Tews, sent a letter to Union Business Representative Eugene Sheehan, advising him that the Company was "planning on selling its gravel hauling division based at the Colgate Pit" and proposing a meeting to minimize economic hardship on employees. Such a meeting is required by Article 6 of the contract when the Company makes a significant operational change. Sheehan wrote back a week later by certified mail, expressing skepticism about the Company's claim that it was selling the gravel hauling division, and asserting that the Company was not changing its operations, but instead was simply replacing Union workers with non-Union workers at the Colgate Pit. Sheehan informed Tews that the Union was grieving the proposed sale, and demanded information about when and to whom it proposed to sell the division, and what it planned to do with the four workers at the Colgate Pit. Two weeks later, a formal grievance was filed alleging violations of Article 3.3, 33 and 34 of the contract:

> "The attempt to eliminate the four aggregate truck at the Colgate Pit and replacing them with subcontracted truck which are outside the bargaining unit in violation of the Union agreement, Article 3.3, 3.3(B), 33 - 34." (sic)

In fact, the August letter from Tews was not accurate, since the Company had no intention of selling its gravel hauling division. Instead, the Company wished to refit its tractors for other

uses, sell the trailers and wet kits, and have its subcontractors take over the entire hauling operation at Colgate. 1/ The Company's intent was clarified in later discussions with the Union, although the Union remained unpersuaded by the Company's claimed motives.

The Company proceeded with its plans, transferring the four tractors out of Colgate and having the four affected drivers bid into other jobs. None of the four was laid off as a direct consequence of the Colgate Pit subcontract. Eleven grievances were filed concerning the decision to subcontract and the fallout from that decision. As part of the grievance procedure, all of them were heard by a Board of Arbitration, composed of two Union representatives and two industry representatives. Case #1 before the Board was described as "Company elimination of aggregate trucks from the Colgate pit, replacing them with subcontracted trucks which are outside the bargaining unit." The Board deadlocked on that case. Cases 6, 7, 8 and 9 also generally complained about the subcontracting, its effect on the employees at Colgate, and the ripple effect the elimination of the four jobs had on other, less senior bargaining unit members. Those four cases also deadlocked.

Case #5 complained that the "Company is leaving its equipment sit idle at and in its building material locations, using non-unit subcontractors and also refuses to furnish the Union with equipment information as requested." In arguing the case to the Board, Don Wetzel, who had succeeded Eugene Sheehan as the business agent assigned to service the Company's contract, argued that the Company had dump trucks used for hauling building materials that were capable of also hauling aggregate, and that these trucks and other equipment were not fully employed while subcontractors were hauling aggregate from the Colgate Pit. The Board concluded that there was no violation and dismissed Case #5.

The instant grievance was not resolved at the lower steps of the grievance procedure and was referred to neutral arbitration. At the hearing, the Union provided evidence that the Company had equipment standing idle during the winter and early spring of 1993. The Company presented evidence that the four trailers from the Colgate Pit had their wet kits removed and were refitted for use in hauling spec-mix, building materials and bulk cement. Additional information, as necessary, will be set forth below.

1/ According to Robert Tews' testimony at the hearing, the move was decided on during budget meetings in July or August, because the tractors could be used more profitably to haul bulk cement, spec-mix and building materials. The Company needed to transfer equipment because its primary subcontractor for hauling bulk cement had announced that it was going out of the business and the Company had to increase its own bulker capacity. At the same time, the Company was planning to take on a considerable capital expense via the purchase of eight new front-discharge ready-mix tractors and replacement of two existing bulkers, According to the testimony of Union Business Representative Donald Wetzel, Tews told him the decision to subcontract the aggregate hauling was based on the lower cost of having outsiders do the work.

IV. Arguments Of The Parties

A. The Union's Brief

Even though the Company initially pretended that it was going to sell the hauling operation at the Colgate Pit, and later that it was simply transferring needed equipment to other locations, it is obvious that this case involves purely a subcontracting of bargaining unit work to save money. The hauling division was not sold, and the equipment taken from Colgate (or equivalent equipment) has been idle for long periods of time. The Union takes the position that the Company has violated the collective bargaining agreement in numerous respects by its decision to subcontract. The decision has also directly impacted employees, cutting wages and exposing former Colgate-based employees to numerous layoffs. In the case of one employee, it has endangered his health because of the more strenuous work he is now required to perform.

The contract must be construed as a whole, and the transfer of work from the bargaining unit is an effort to evade not just the subcontracting language but also the job posting, work assignment and recognition provisions of the contract. Many arbitrators have acknowledged that removing work from the bargaining unit necessarily impairs the Union's role as exclusive bargaining representative, as well as the seniority rights of every employee. Here the contract specifically forbids the assignment of work to non-bargaining unit employees, and identifies the Union's exclusive jurisdiction as extending to gravel hauling. The entire fabric of the contract is designed to prevent the type of work transfer attempted in this case, and the arbitrator should be guided by the evident intent of the parties rather than by narrow readings of the contract which allow the subversion of the agreement as a whole.

The Union rejects the Company's effort to rely on the subcontracting language of the contract to justify its actions, noting that the only time that subcontractors might be used for trucking is when the Company's trucks and employees are fully employed. The Union asserts that the Company's workers and equipment were not fully employed during the time of this subcontract, since the evidence clearly showed that trucks and employees were idle. Moreover, the subcontracting language cannot be read as allowing the use of subcontractors to completely replace bargaining unit employees in an area traditionally within the Union's jurisdiction. Such an interpretation effectively eliminates the work assignment language of Article 3, and opens all of the unit's work to outsiders. The job posting language of the contract requires that open positions be posted for employees and this cannot be reconciled with a wholesale assignment of work outside of the bargaining unit. The expansive reading the Company gives the subcontracting language cannot be accepted, unless the arbitrator finds that this clause supersedes all others, and that the parties seriously considered and agreed upon a system whereby the entire bargaining unit could be whittled away, piece by piece. The Union denies that such was its intent, or that any reasonable reading of a labor contract could yield that conclusion.

The Union notes that past practice is one of the primary restrictions on the ability to subcontract, and that new practices in this area may not be unilaterally introduced by the Company. The Company's action in this case, completely removing an entire classification of work from the bargaining unit, is a radical departure from past, more modest uses of the subcontracting clause to supplement the work force. As such, it should be rejected by the arbitrator.

The subcontracting language of the contract is, the Union asserts, clear and unambiguous. As noted above, it completely bans subcontracting trucking work if Company equipment and employees are not fully employed. Despite the Company's effort to "launder" the equipment by the pretext of transferring it to other divisions, the record evidence shows substantial underuse of both equipment and employees. Thus, even if the subcontracting clause were the only restriction on management in this case, the Company's actions would be a clear violation of the collective bargaining agreement.

The Union submits that it has proved a contract violation, and that the arbitrator should order the Company to return the Colgate hauling to the bargaining unit, as well as making all affected employees whole for their losses.

B. The Company's Brief

The Company takes the position that it has fully complied with the contract, and that the grievances should be dismissed. Gravel hauling has traditionally been heavily subcontracted in the Company's operation, with non-employees hauling all of the aggregate from the Company's other three pits and 85% of the production from the Colgate Pit. Overall, 90% of the aggregate hauling or more has always been performed by workers outside of the bargaining unit. The Union has never protested these subcontracts or attempted to assert jurisdiction over the employees, work or equipment of the subcontractors. Indeed, the parties have gone in the opposite direction, eliminating in the 1983-86 contract many of the restrictions on subcontracting because they recognized the Company's practical need to rely on outside haulers. That need has not subsided.

Article 33 of the contract explicitly recognizes the Company's right to use subcontractors, and other provisions implicitly recognize that right. The Work Assignments language of Article 3 reserves to the Union "work involved in the operation of the Employer's truck equipment", indicating that equipment operated by other employers is not restricted by the contract. Moreover, Article 6 - Change in Operations contemplates that the Employer might make significant changes in its operations which will reduce employment in the bargaining unit, and requires notice to the Union and discussions aimed at minimizing any hardship. The Company gave the required notice of this operational change and offered to meet.

The Company acknowledges that the contract's primary language on this subject is Article 33. It addresses the subcontracting of hauling, and that is what happened here. The language allows

subcontracting when the Company's equipment and employees are "fully employed". This language can only mean that the particular type of equipment is being used for its customary purpose, and not, as the Union suggests, that all equipment must be in use, irrespective of its suitability for the work of the subcontractor. The Company points to the fact that it has reduced its operations at Colgate in the past when two of six trucks became obsolete and were not replaced, and that the Union made no protest to the replacement of those two drivers and pieces of equipment with outside contractors. This demonstrates that non-suitable equipment can be replaced or idled without violating the contract. The Union made exactly the same arguments to a bilateral Board of Arbitration as it made in this case regarding the meaning of "fully employed". 2/ That Board was hearing cases arising from this same closing. The Board, comprised equally of Union and management representatives, rejected the notion that all equipment, no matter its suitability, must be in use before a subcontractor may be used. This is consistent with the interpretation given to exactly the same language in the contract between the Union and one of the Company's competitors, which virtually eliminated its in-house aggregate hauling in favor of subcontractors, without protest by the Union. Given the past practice, the expert opinion of the Arbitration Board and the industry practice, the Company argues that the term "fully employed" must be given its reasonable meaning, that is "fully employed in its normal function". Since there is no evidence that any equipment normally used for aggregate hauling was idled by the cessation of the Colgate operation, there has been no contract violation, and the grievance should be denied.

In summary, the Company asserts that aggregate hauling has never been reserved to the bargaining unit, and that the decision to rely exclusively on subcontractors is a reasonable response to economic factors, and is allowed by the contract.

C. The Union's Reply Brief

The Union rejects the notion that the changes in the 1983-86 contract in any way supported the Company's attempt to transfer bargaining unit work. These changes did not weaken the contract's protections against subcontracting, but simply removed specific conditions on the type of subcontractor used. The central principle that the Company may not erode the bargaining unit was unaffected by these language changes.

The Union likewise rejects the Company's claim that the Change in Operations clause may be used to justify this subcontract. There has been absolutely no change in the Company's operations. One portion of them is simply staffed by non-Union personnel. The Company's attempt to analogize to the retirement of two trucks at Colgate in the past is easily distinguishable,

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2/ The Company also notes that other operations have been discontinued or transferred without protest by the Union. Then, as in this case, the affected employees were allowed to bid into different jobs, and the only protest regarded the bidding process, rather than the decision to transfer equipment and jobs.

since in that case no employee was required to for a job outside of Colgate. The Company's citation of other operational changes in which work was transferred are also in apposite. In those cases, work was not transferred outside of the bargaining unit and no subcontractor was brought in. The principles and the relevant contract language in this case are completely different.

D. The Company's Reply Brief

The Company denies that it ever attempted to disguise its intentions in this matter. Although the initial letter to the Union contained a typographical error in that it said the Company was selling the division instead of the equipment, the Company corrected that error promptly. The idea that the Company would sell a profitable and necessary part of its operations was absurd, and the Union should not have been misled.

The Company dismisses as inaccurate and contractually irrelevant the Union's claims of hardship on the part of the four employees formerly working at Colgate. All four have continued to be employed and there is no persuasive proof that they have suffered any loss. Moreover, all had the chance and the seniority to bid for jobs. The impact on the bargaining unit is minimal, the Company argues, since unit employees never hauled more than 10% of the Company's aggregate, and since the total impact on the 116 man bargaining unit was the transfer of four men.

The Company urges the arbitrator to discount the Union's arguments that there are implicit restrictions on its right to subcontract, through the Recognition, Seniority and assorted other clauses. The contract here does not deal with subcontracting implicitly. The parties bargained a specific clause covering subcontracting, and it is on that clause that the arbitrator must make his decision.

Finally, the Company reiterates that the full utilization of equipment and personnel which allows subcontracting must be viewed as limited to the type of equipment that would be used for the subcontracted operations. All of the exhibits introduced at the hearing show that the Company does not call bulk cement haulers unless its own personnel and suitable equipment are fully utilized but that once they are fully utilized, the Company routinely uses subcontractors. This is consistent with the Company's view of the contract language, and should control the outcome of this case.

V. Discussion

The issue in this case is whether the Company violated the contract by subcontracting the aggregate hauling from its Colgate Pit. The case is controlled by the terms of Article 33. Although the Union makes an eloquent case for a broad examination of other contract provisions to determine whether a decision to subcontract is consistent with the overall thrust of the agreement, the parties have specifically bargained over, and reached agreement on, the Company's right to subcontract for trucking under limited conditions, and that specific language must govern

over the general provisions regarding recognition, seniority and work assignment. 3/ This is not to say that those provisions are wholly irrelevant to the dispute. The process of

contract-making must be presumed to have been aimed at producing a coherent statement of agreement, and ambiguities in the article which controls the dispute should be resolved in such a manner as to avoid direct contradictions with other provisions and without rendering those provisions meaningless.

Article 33 is headed "SUBCONTRACTING" and provides that "[the] parties recognize that the Employer may hire additional trucking when his own equipment and his own employees are fully employed." While decisions on the acquisition and deployment of capital are at the heart of management's rights, the contract's subcontracting language recognizes the practical fact that the use or non-use of equipment in trucking also means the use or non-use of bargaining unit employees to perform the work to which that equipment has been dedicated. In this case, the Company exercised its right to redeploy the four tractors at the Colgate Pit, but neither replaced the equipment at the pit nor discontinued operations there. Instead, it transferred the bargaining unit's portion of the gravel hauling work to the subcontractors who were already hauling 85% of the aggregate from Colgate. The argument here boils down to what it means to have equipment "fully employed". The Union provided persuasive evidence that, even though the four Colgate employees went to other full-time positions, the Company had tractors idle during the period of this subcontract. The Company, for its part, showed that the tractors removed from the Colgate Pit had been modified in such a way as to make them unsuited to gravel hauling, at least in the sense of it being an uneconomical use of the trailers the tractors were modified to haul.

3/ In connection with this, it must be noted that the Union's claim of a broad implicit restriction on subcontracting simply cannot be reconciled with the pervasive and longstanding use of subcontractors to haul 90% of the total aggregate production and 85% of the Colgate Pit's production.

As a general proposition, the Company's argument that "full use" of equipment under the subcontracting clause applies only to equipment suitable for the work being subcontracted is sensible. The inactivity of a ready-mix truck, to use a more extreme example, would have no bearing on the appropriateness of a gravel hauling subcontract, since that truck could not be used to haul gravel. The difficulty in this case is that the tractors withdrawn from Colgate were unsuitable for gravel hauling, but only after the Company made them unsuitable by selling the wet kits and dump trailers and outfitting the tractors for other work. Thus, while the general proposition is sound, any analysis must take account of the Company's ability to intentionally create the conditions precedent to subcontracting, and the potential for using the power to modify and reassign equipment as a subterfuge to evade the terms of the labor agreement. 4/

According to Tews, the decision to remove the tractors from Colgate was made in the summer of 1993, during the budget meetings of the Company's Executive Committee. The Committee decided to purchase eight front-discharge ready-mix trucks at a cost of just over one million dollars, to accommodate the popularity of the front-discharge design among customers. The Committee also realized that it needed two new tractors to replace two existing bulk cement haulers, and two new trailers for use in hauling spec-mix, a rapidly expanding and profitable

market for the Company. In addition, the Committee identified a need for a total of four more tractors for spec-mix, but concluded that it could not afford to purchase those tractors if it wished to go forward with the purchase of the ready-mix trucks. At roughly this same time, the Company discovered that its primary outside hauler for bulk cement, Barry Trucking, was going out of the business. After a failed attempt to buy Barry's trucks, the Company bought one bulker, without a tractor, leaving it well short of its needs for bulk cement hauling.

The Company argues that the transfer of the tractors from Colgate was in response to its perceived need for tractors for the bulker it had purchased and the expansion of its spec-mix fleet. The first tractor was taken from Colgate in September, the wet kit was removed, a blower was installed and it was connected to the new bulker. The second tractor was transferred outside of Local 200's jurisdiction, to the Juneau/Watertown facility, on November 15th and the wet kit was removed. The two remaining tractors were transferred on November 19th, the wet kits removed and the tractors designated for hauling spec-mix and building materials.

The Company's proffered explanation for the transfer of the tractors from gravel hauling to other functions is rational, reasonable and non-discriminatory. Given the nature and history of the work subcontracted 5/ and the lack of layoffs flowing from the subcontract, taking the Company's

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4/ See Article 3.3(b): "The Employer agrees that he will not enter into any leasing device or subterfuge of any kind to avoid or evade the terms and conditions of this Agreement."

5/ The arbitrator wishes to stress that the analysis here is limited to the facts of this case, and

claimed reasons at face value would lead to the conclusion that there was no violation. The Union, however, disparages the claimed motives of the Company, pointing to initial untruth of Tews' letter saying that the division was being sold, and to the fact that there was a great deal of idle equipment in the months following the Colgate subcontract, despite the claim of a pressing need for the tractors in other operations.

Tews August 29th letter was clearly inaccurate, inasmuch as all of the parties concede that the Company never intended to sell its gravel hauling operation. Characterizing this as an attempt to deceive the Union, however, seems to require more suspicion than the evidence justifies. If the letter was a deception, it was very short-lived. Either the Company corrected the letter in fairly short order or the scheme was remarkably transparent, since the September 1st letter from Sheehan made clear the Union's belief that no sale was planned, and the mid-September grievance complained of the Company's intention to subcontract the work rather than making reference to a sale. Additionally, it is difficult to determine what the purpose of such a deception would have been, since it would inevitably and quickly have been revealed as a subcontract. For these reasons, I cannot interpret Tews' letter as evidence of bad faith at the initiation of this subcontract.

The complaint that equipment was idle after the subcontract, despite the Company's explanation that it needed these tractors elsewhere, is more substantial. It is, after all, an easy matter to claim some innocent motive before a transfer, and then plead that changing circumstances frustrated the original plan. Here the Company alleged that the equipment was needed elsewhere in its operations, but the Union showed that there were at least some tractors sitting at Company yards through the end of the winter. Even though the Company demonstrated that some of these tractors were wrecks or trade-ins, it is clear that all of the Company's equipment was not fully employed after the four tractors from Colgate were converted. Part of this appears to be attributable to the natural seasonal slowdown in construction during the winter months, which was particularly severe in the early months of 1994.

In weighing the record as a whole, I am not persuaded that the transfer of the tractors from Colgate was a ruse. The most significant factor in arriving at this conclusion is that the Company did not simply articulate a desire to expand its bulker and spec-mix hauling capacity, but actually went forward with substantial capital investments in purchasing the trailers necessary to accomplish this goal. Given the trade-in of three old tractors to purchase two new tractors, and the purchase of one bulker and two spec-mix trailers, the Company needed four additional tractors

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most critically the fact that the grievance involves a tangential aspect of the Company's operation in which hauling at three of the four pits had always been subcontracted, and the vast majority of the work at the fourth had always been subcontracted, without regard to the disposition and use of other Company equipment.

in the 1994 budget year to stay even. With the additional capital expenditure for eight new ready-mix trucks (and assuming that the Company does not have unlimited funds available for purchasing equipment) transferring four tractors from a less profitable operation, in which bargaining unit employees had always been a minor supplement to outside contractors, into more profitable operations which represent the primary jobs of the bargaining unit, is an action which is consistent with good faith on the Company's part. Put another way, it does not stand to reason that the Company would have made these substantial investments simply to disguise a desire to subcontract the gravel hauling from Colgate. 6/

For the reasons set forth above, I have concluded that the conversion of the four tractors from Colgate to uses other than gravel hauling was accomplished for legitimate and good faith business reasons. The conversion rendered them unsuitable for gravel hauling and, on the specific facts of this case, the conditions precedent to subcontracting under the labor agreement were satisfied. Thus there was no contract violation, and the grievance is denied.

6/ The remaining issue in attempting to determine the true motives of the Company is Wetzel's testimony that Tews admitted he was subcontracting the work because he needed the equipment in spec-mix and bulk cement hauling, but also because it was cheaper to have it done by outside contractors. Tews denies that he cited labor costs as a reason for the move. It is possible that the two men misunderstood one another. In either event, the objective evidence of the capital expenditures made by the Company at this time persuades me that the driving force behind the move was the need to use these tractors elsewhere in the operations.

On the basis of the foregoing, and the record as a whole, the undersigned makes the following

AWARD

The Company did not violate the collective bargaining agreement when it subcontracted aggregate hauling work at its Colgate Pit to outside haulers. Accordingly, the grievance is denied.

Dated at Racine, Wisconsin this 20th day of June, 1995.

By Daniel Nielsen /s/

Daniel Nielsen, Arbitrator