BEFORE
JOSEPH V. SIMERI
ARBITRATOR

THE ARBITRATION	)	
	)	**FMCS Case No. 13-50542-3**
Between	)	
	)	
REPUBLIC COUNTYLINE LANDFILL,	)	
	)	
And	)	
	)	
IUOE LOCAL 150, AFL-CIO.	)	

ARBITRATION AWARD

This dispute was arbitrated on April 16, 2013 in Merrillville, Indiana. IUOE Local 150, AFL-CIO ("the Union") was represented by Steven A. Davidson, Esq. Republic Countyline Landfill ("the Company") was represented by Dennis M. Devaney, Esq. The Union and the Company presented witnesses and introduced evidence. Post-hearing briefs were submitted to the Arbitrator on June 21, 2013. This award is issued within 30 days from the submission of the post-hearing briefs.

FACTS

You and I call it garbage. The Company calls it product. The Union calls it jobs. This is so because the Company operates a landfill. It provides commercial and residential solid waste management services at a landfill in Argos, Indiana.

The Union represents all full-time and regular part-time employees employed by the Company in the operation, maintenance, repair, moving, dismantling, and assembly of all equipment and machines used incidental to the Company's landfill operations at the Argos site.

The Company and the Union's collective bargaining agreement ("the Contract") was signed on July 12, 2012. It expires May 31, 2014. The Company and the Union were parties to earlier collective bargaining agreements covering work at the landfill beginning in 1994 and continuing through December 31, 2010. After that, the Company and the Union had no collective bargaining agreement in effect until the beginning of this Contract. During that year and a half or so, the Company and Union were involved in litigation. One of the fruits of that dispute is the Contract before me, which I must interpret.

In its operation of the landfill, the Company uses different machinery. We know about the use and function of a grader, a dozer, and a compactor. Those are machines used to fill, bury and cover the waste, as it grows skyward. The Company also uses riding mowers to cut and maintain grassy areas. And then there is that piece of equipment, at issue in this arbitration, not known to most of us, called the "tipper." Tractor-trailers, what some of us call semi-trucks, bring the disposable waste to the landfill. How does the disposable waste get unloaded from

the trailer? Well, fortunately, it is not by hand, using shovels. The tipper comes to the rescue. The trailer is disconnected from the tractor cab. Then the tipper, a hydraulic device, is used to lift or tip the trailer up, allowing the waste to fall down from the trailer onto the ground. Each time a semi-truck delivers a load of waste to the landfill, a tipper must be operated to unload the waste. During the time the 2008-2010 collective bargaining agreement was in effect, the tipper was operated by bargaining-unit members. From November/December 2010 until July 2012, the effective date of the Contract, semi-truck drivers, employees of K.R. Drenth Trucking, did the tipping. They tipped their own loads.

Maintenance of the grounds at the landfill site requires mowing and landscaping. During the time the 2008-2010 Collective Bargaining Agreement was in effect, bargaining-unit members had operated, from time-to-time, some of the Company mowers.

ISSUES

This case presents these issues. First, was the Union's grievance filed timely? Next, if the Union's grievance was filed timely, did the Company violate the Contract by subcontracting the operation of the tipper to non-bargaining unit persons? If so, what is the appropriate remedy?

Next, did the Company violate the Contract by subcontracting the operation of the mowers to non-bargaining unit persons? If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

The Company and the Union are parties to a Contract. The applicable provisions of the Contract are:

ARTICLE I
RECOGNITION AND UNION SECURITY

1.01 RECOGNITION

The COMPANY recognizes the UNION as the exclusive bargaining agent for all employees, as defined below, for the purpose of collective bargaining with respect to rates of pay, hours of work and other conditions of employment. The term "employee(s)" used herein means:

All full-time and regular part-time employees employed by the COMPANY in the operation, maintenance, repair, moving, dismantling, and assembly of all equipment/machines used incidental to the COMPANY'S landfill operations at the County Line Landfill Partnership in Fulton County, Indiana, and landfill labor incidental thereto; BUT EXCLUDING all scale house employees, all office and clerical employees, guards and supervisors as defined in the National Labor Relations Act, as amended.

1.02 SCOPE

The scope of this Agreement shall be performance of work at the COMPANY'S landfill operations at the County Line Landfill Partnership in

Fulton County, Indiana, as set forth below:

The operation, maintenance, repair, moving, dismantling, and assembly of all equipment/machines, regardless of motive power, and laboring activities incidental to landfill operations. The scope of work covered by this contract shall not include work such as, but not limited to, grounds maintenance, mowing and landscaping, paper picking, the construction and erection of fences and traffic barriers, which may be assigned to non-unit persons.

1.04 SUBCONTRACTING

The COMPANY will not subcontract any bargaining unit work if doing so would cause the layoff of any bargaining unit employees. Notwithstanding the foregoing, the COMPANY may subcontract work such as janitorial service, grounds keeping, building maintenance and specialized installation work, as well as work of a type it has subcontracted out in the past. The COMPANY will not subcontract work for the purpose of avoiding its obligation to the employees or to the UNION under this Agreement. Whenever feasible, the COMPANY will contact the UNION to determine whether the UNION can recommend a UNION contractor which performs work of the type required by the COMPANY.

ARTICLE II
MANAGEMENT RIGHTS AND PREROGATIVES

2.01 MANAGEMENT RIGHTS

Except as explicitly limited by a specific provision of this Agreement, the COMPANY shall continue to have the exclusive right to take any action it deems appropriate in the management of its operations and direction of the workforce in accordance with its judgment. All inherent and common law management functions and rights which the COMPANY has not expressly modified or restricted by a specific provision of this Agreement are retained an vested exclusively in the COMPANY.

The COMPANY'S not exercising any function hereby reserved to it, or its

exercising any function in a particular way, shall not be deemed a waiver of its right to exercise such function or preclude the COMPANY from exercising the same in some other way not in conflict with the express provision of this Agreement.

ARTICLE IV
GRIEVANCE AND ARBITRATION

4.01 GRIEVANCES

The term "grievance" means a difference or dispute during the term of this Agreement between an employee and a representative of the COMPANY as to the interpretation and/or application of the express terms of this Agreement. During the term of this Agreement, whenever a grievance shall arise such dispute or difference shall be resolved in the following manner:

STEP 1 An effort shall be made to adjust the grievance by and between the steward, the employee having the grievance and the COMPANY. All grievances shall be reduced to writing and presented to the employee's immediate supervisor within seven (7) calendar days of its occurrence. All written grievances shall bear the name and signature of the aggrieve employee, list the specific nature of the grievance and state the alleged violation of the Agreement. The COMPANY shall respond to the UNION representative of its decision in writing within ten (10) calendar days of the Step 1 meeting. If the answer given by the COMPANY in Step 1 is unsatisfactory to the UNION, notification will be sent to the COMPANY, in writing within five (5) calendar days to process the matter to Step 2.

STEP 2 A meeting shall be held between the COMPANY and the UNION, within seven (7) calendar days. The meeting shall include the UNION President-Business Manager or his designee and the Site Manager or his representative to confer on the issue. Either or both parties may, with proper notice, request that witnesses by present or available during the conference. The COMPANY shall give its answer in writing to the UNION within ten (10) calendar days after the date of the Step 2 meeting.

4.02 UNION GENERAL GRIEVANCES

Union general grievances involving the overall application or interpretation of the Agreement as it applies to the bargaining unit shall be reduced to writing and proceed directly to Step 2.

4.04 UNION AUTHORITY REGARDING GRIEVANCES

With respect to the processing, disposition and/or settlement of grievances under this article or with respect to any court action initiated by the UNION on behalf of its members claiming or alleging a violation of the agreement, the UNION shall be the sole and exclusive representative of the employee or employees covered by this agreement within the context of representation provision of the national Labor Relations Act as amended. The disposition between the COMPANY and the UNION of any grievances shall constitute a final and complete settlement thereof and shall be final and binding upon the UNION, the COMPANY and employee(s) involved within the context of the grievance and arbitration process and procedure as stated herein.

4.05 ARBITRATION

If the UNION is not satisfied with the COMPANY'S Step 2 answer, the UNION may, within seven (7) calendar days after receipt of the COMPANY'S Step 2 answer, notify the COMPANY in writing of its desire to submit the grievance to arbitration. Within seven (7) calendar days after such notification, the UNION shall request the Federal Mediation and Conciliation Service (FMCS) to furnish a list of seven (7) arbitrators for the purpose of selecting an arbitrator.

The parties will confer promptly and shall take turns striking names from the FMCS list.

The last arbitrator left on the list shall be designated by the parties to decide the case. The matter shall then proceed to arbitration promptly.

4.06 ARBITRABILITY

The Arbitrator so selected shall hear all evidence he or she deems relevant and admissible and then render a decision based on the evidence and the Agreement. The Arbitrator shall be bound by the terms and provisions of the Agreement and shall have authority to consider only grievances presenting an arbitrable issue under this Agreement. The Arbitrator shall have no authority to add to, subtract from, modify, or amend any of the provisions of this Agreement. A decision of the Arbitrator on any grievance within the scope of this issue submitted shall be final and binding on the COMPANY, the UNION and the Employee or employees involved. Retroactivity for pay purposes will not exceed up to thirty (30) days prior to the filing of the grievance.

The neutral arbitrator's fee and expense shall be paid equally by the parties to the arbitration.

4.07 TIME LIMITS

Any time limit set forth above may be extended only by the mutual agreement of the parties.

ARTICLE X
HIRING AND NOTICE

10.01 COMPANY USE OF UNION REFERRAL SYSTEM

The COMPANY recognizes that the UNION'S referral offices are a valuable source for qualified applicants and that the referral offices operate in a non-discriminatory manner. Consequently, whenever the COMPANY deems it necessary to hire an employee to perform work covered by this Agreement, the COMPANY will obtain all such employees through the referral offices of the UNION in accordance with the non-discriminatory provisions governing the operating of the UNION'S referral offices set out in the current effective Addendum No. 1.

The UNION shall have forty-eight (48) hours to refer to the COMPANY a

qualified applicant for a job opening. In the event the UNION does not supply the COMPANY with a qualified applicant within the time limit specified, the COMPANY may hire any other available applicant.

ARTICLE XII
WAGES AND CLASSIFICATIONS

12.01 WAGES

The parties agree that Class I shall include Mechanics, Operators and Pumps Operators, Leach-Ate Truck, Articulated End Dump and Pump Operators (Pumps are operated by Operators when they are not on equipment); Class I shall also include Laborers and Mowers under 20 horsepower.

	6/1/12	**6/1/13**
CLASS I	$23.30	$23.70

12.02 ASSIGNMENT OF EMPLOYEES

The COMPANY shall have the right to hire employees to operate various machines subject to the hiring clause as set forth in Article X. The COMPANY shall have the right to determine the number of employees needed and qualified for any particular work, in doing so, the COMPANY shall act in good faith. In order to promote a full shift for each employee, the COMPANY has the right to transfer and reassign employees to different classifications providing that when an employee is so transferred from one classification to another, the highest rate of pay shall prevail for the entire shift.

ANALYSIS

A. Is the Grievance timely?

The Company and the Union agreed in their Contract to follow a procedure in processing grievances. No surprise here. The Contract describes

the following Steps:

1. Put the grievance in writing and present it within seven calendar days from the time the alleged violation happened. The Company must answer the Union within ten calendar days. If the Union does not agree with the Company's answer, the Union is to notify the Company within five calendar days that the Union wants to move to Step 2.

2. Step 2 is a meeting between the Company and the Union within seven calendar days. The meeting is to include the Union's president, or business manager, or designee and the Company's site manager, or the Company's representative. Within ten calendar days after this meeting, the Company is to give its answer in writing to the Union.

3. But, if the Union has a general grievance that involves the overall application or interpretation of the Contract as it applies to the bargaining unit, the Union is to also put this grievance in writing, and this kind of grievance proceeds directly to the Step 2 meeting between the Union's president or business manager and the Company's site manager.

The Company's position is that I cannot decide the merits of this grievance because the specific procedures set forth in the Contract concerning the processing of grievances was not followed. The Company sends me to the

seminal arbitration treatise, Elkouri & Elkouri, *How Arbitration Works*, 6th Ed. at 220. There, the authors write that where the contract contains clear time limits for filing and prosecuting grievances the "…failure to observe them generally will result in dismissal of the grievance if the failure is protested." *Id.* at 220. But the authors also have a treat for the other side of this argument. Reading further, at page 221, they state that where there is "…uncertainty as to whether time limits have been met, all doubts should be resolved against forfeiture of the right to process the grievance." And, reading further, at page 222, they write "if both parties have been lax as to observing time limits in the past, an arbitrator will hesitate to enforce them strictly until prior notice has been given by a party of intent to demand strict adherence to the contractual requirements." So, if I were to rely solely on Elkouri & Elkouri, I would be correct no matter which way I ruled on the timeliness issue.

Instead, I consider the purpose of the time limits in the Contract's GRIEVANCE AND ARBITRATION article. First, the Company is entitled to timely notice of an alleged violation. Next, the Company and the Union should meet with reasonable promptness to discuss the grievance in the hope of reaching an amicable resolution. Next, if they are unable to reach a satisfactory resolution, the complaining party has the right to request a final and binding

decision from an impartial decider. In this case, that would be me.

The Company says I should not decide this case because the Union did not follow the grievance procedure written in the Contract. The Company says there was no Step 2 meeting between the Company and the Union. This Step 2 meeting must be held within seven calendar days after the Union receives an unsatisfactory answer to its grievance from the Company. Present at this meeting must be the Union's president, business manager, or designee and the Company's site manager or the Company's representative.

The obvious purpose of this Step 2 meeting is to enable the higher-up Union and Company representatives to have a face-to-face discussion in an effort to settle the dispute. It is part of the underlying rationale for the entire grievance procedure, which is "let's see if we can work it out ourselves" before we turn it over to some stranger and have to live with a decision neither one of us may like.

In deciding whether I am prohibited from ruling on the merits of the grievance, I also consider the Company and the Union's history in dealing with their differences under their contracts. The Company and the Union have had a long relationship. They first exchanged vows from 1994-1997. They reaffirmed their covenant for five additional years from 1997-2002. They

continued their relationship from 2003-2007. In 2008, they once more committed to each other. But, in November 2010, a separation occurred. They remained apart until they reaffirmed their relationship on July 12, 2012. So, stormy as it might be, the Company and the Union have had a long marriage. During this Arbitration hearing, the parties stipulated that before 2010, there had been an informal grievance procedure between the Company and the Union, and that the Company and the Union had not always followed the literal language of the contract. So I begin with that stipulation, which is an agreement that the Company and the Union did not adhere to the literal language of their contracts covering the grievance and arbitration procedure, those contracts covering a period of 16 consecutive years. That being so, I find it difficult to now accept the Company's request that I require every "i" to be dotted and every "t" to be crossed.

The Union filed this grievance on September 21, 2012. This grievance alleged violations of the Contract, which occurred on September 18, 2012 and "are on-going in Argos, Fulton County, Indiana." Thus, the grievance satisfied the Contract's requirement that it be filed within seven calendar days of the alleged violation. The grievance requested a meeting with a Company's site supervisor on September 28, 2012. There was a meeting on September 28,

2012. The meeting was attended by Union representatives James Gardner and John Horn, and Company representatives Mike Beckley, the Site Supervisor, and Rod Adkinson. Mr. Adkinson is the Company's Human Resources Manager for the Great Lakes area, consisting primarily of the State of Michigan, the Northeast corner of Indiana, Fort Wayne, Indiana and the Bryan, Ohio areas. Thus, all of the individuals, both on the Company's side and the Union's side, with authority to resolve the grievance were present at the September 28, 2012 meeting. The parties dispute whether the issue of timeliness of the grievance was discussed at this meeting. In any event, it would not make any difference whether timeliness was discussed because the meeting was held within seven days from the time the grievance was filed.

The crux of the Company's objection is that there was no Step 2 meeting. By email dated October 5, 2012 sent by the Company's General Manager David Moss to the Union's Business Agent John Horn, the Company denied the grievance first because the Company said it was untimely and, additionally, because the Company said the Union failed to demonstrate a violation of the Contract. But what was the "un-timeliness" of which the Company complained? It certainly could not have been the failure to request a Step 2 meeting. The Company's response was sent on October 5, 2012. The

Union would have had until October 12, 2012 to request a Step 2 meeting. Since the Company did not explain in any way what it meant by "untimely," it is reasonable for me to conclude that the Company was claiming that the grievance itself had not been filed within seven calendar days of its occurrence. That claim is not persuasive. The operation of the tipper occurred multiple times daily. The mowing, while not a daily occurrence, and certainly not an occurrence in the winter months, does occur frequently. Thus, the alleged violations of the Contract claiming that non-bargaining-unit members were doing bargaining-unit work are continuing. Each time a non-bargaining unit person is allegedly doing bargaining-unit work is a new violation. The Company implicitly concedes this because its timeliness claim is based on the failure to have the Step 2 meeting, not the failure to file the grievance within seven days of its occurrence.

The positions of the Union and Company concerning the merits of the grievance were set in stone. Both the Company and the Union knew their positions would not change even after a formal Step 2 meeting on these issues. Mr. David Moss, the Company's General Manager, made clear the hardness of both the Company and Union's position on the issues raised by the formal grievance. He was asked about the substance of the conversation. He testified:

> He discussed the position of Local 150, being that the tipper operation is a 150 job. And I discussed that it was my distinct recollection that we were to continue status quo. And status quo is that that is not a 150 job, and that it is not defined in the contract as a 150 job. And we agreed that we were not going to probably resolve that disagreement.
> *Tr. p.39-40.*

Later, Mr. Moss, when questioned about the Company's October 5, 2012 email denying the grievance, said:

> Once we discussed it, we decided there was no need to have a meeting, and our position had not changed on either one of those issues. We had thought that we made it clear that we thought that that was status quo from our meeting with Mr. Fagan. It was good to go forward. So we responded with the October 5th e-mail to Mr. Horn on the issues.
> *Tr. p.42*

Thus, it is clear to me that the Company had already made up its mind. I will not exalt form over substance. The Company and the Union do believe arbitration is the preferred method to resolve their contractual disputes. This same grievance and arbitration procedure has been in their contracts since 1997. If I were to deny the right to arbitration under these circumstances, I would, in the words of Shakespeare's Hamlet, "…keep the word of promise to our ear, and break it to our hope." Hamlet, Act V, Scene VIII. The grievance is timely.

B. The Merits

The Company and the Union had no contract in effect from January 1, 2011 until June 1, 2012. This hiatus is what makes this case difficult. In essence, the Company says the manner in which its work was being conducted during the hiatus would be the status quo and would continue the same under the current Contract. The Union says that status quo means the way things were operating immediately before the hiatus. Thus, both the Company and the Union use the term "status quo," but ascribe to it a different meaning. I am reminded of the lyrics of a George and Ira Gershwin song titled "Let's Call The Whole Thing Off."

> Either, either neither, neither
> Let's call the whole thing off.
>
> You like potato and I like Potahto
> You like tomato and I like tomahto
> Potato, potahto, tomato, tomahto
> Let's call the whole thing off

The Contract, unfortunately, is not a model of clarity.[1] The Company and the Union's long and continuous bargaining relationship ended in 2010. At least one of the parties decided to "call the whole thing off." A reconciliation, likely forced,

1 Neither counsel for the Company, nor counsel for the Union, were involved in the drafting of the Contract. Based on the excellent quality of their presentations at the hearing and their exceptional post-hearing briefs, had they been involved in drafting the Contract, this greivance would not have arisen.

occurred in June 2012. In the renewed courtship following the 2010 break-up, the Company and the Union rather informally agreed, that unless specifically changed, the terms and conditions of their contract would be the "status quo" existing at the time of the break-up. What the Company meant by "status quo," or how it pronounced it if you will, was different than what the Union meant by or pronounced "status quo."

A renowned arbitrator once described the role of an arbitrator in this kind of a dispute as the "designated contract reader." I agree. My award must be grounded in this Contract's language. With that standard as my directional star, is the tipper operation work to be performed solely by members of the bargaining unit, and is the mowing work to be performed solely by members of the bargaining unit?

1. The operation of the tipper.

My job is not to operate the tipper, or to sit on a mowing machine. My job is to read and interpret the Contract. At least three provisions of this Contract are significant to my task. Those are ARTICLE I, Section 1.01, titled RECOGNITION; ARTICLE I, Section 1.02, titled SCOPE; and ARTICLE I, Section 1.04, titled SUBCONTRACTING. I also give weight to ARTICLE IV, Section 4.06, ARBITRABILITY, and ARTICLE XII, Section 12.01, titled

WAGES.

I begin with the Contract's RECOGNITION article, Section 1.01. There, the Company agrees the bargaining unit consists of all full-time and regular part-time employees employed by the Company "…in the operation …of all equipment/machines used incidental to the COMPANY'S landfill operations at the County Line Landfill Partnership in Fulton County, Indiana, and landfill labor incidental thereto …" This language has remained essentially unchanged since 1997, except the word "Partnership" was inserted after County Line Landfill in the 2003 contract. The RECOGNITION article defines those employees represented by the Union and entitled to the Contract's protection.

I then examine Section 1.02, which is the Contract's SCOPE article. The RECOGNITION article tells me who is to perform the work. The SCOPE article tells me the nature of the work. It is the "…operation, maintenance, repair, moving, dismantling, and assembly of all equipment/machines, regardless of motive power, and laboring activities incidental to landfill operations." However, the Contract further states that the work "…shall not include work such as, but not limited to, grounds maintenance, mowing and landscaping, paper picking, the construction and erection of fences and traffic barriers, which may be assigned to non-unit persons." So, reading those two provisions alone, I know who does the work and

what the work is which needs to be done.

But wait, there is more. The Company directs me to ARTICLE I, Section 1.04, SUBCONTRACTING. That article reads:

> The COMPANY will not subcontract any bargaining unit work if doing so would cause the layoff of any bargaining unit employees. Notwithstanding the foregoing, the COMPANY may subcontract work such as janitorial service, grounds keeping, building maintenance and specialized installation work, as well as work of a type it has subcontracted out in the past. The COMPANY will not subcontract work for the purpose of avoiding its obligation to the employees or to the UNION under this Agreement. Whenever feasible, the COMPANY will contact the UNION to determine whether the UNION can recommend a UNION contractor which performs work of the type required by the COMPANY.

This SUBCONTRACTING article has not remained unchanged since 1997. In the 2008-2010 contract, Section 1.04 contained the following first sentence: "If an employee is utilized by a subcontractor to perform work which is part of the subcontractor's work set forth in its contract with the Company, the employee shall receive the wages paid by the contractor to its employees." This sentence is not included in the Contract before me. The deletion of this sentence from the current Contract tells me at least that the Company and the Union did not simply rubber-stamp the 2010 contract. It also tells me that bargaining-unit employees and

subcontractors are no longer fungible.

The Company's basic position is that from November 2010 when there was no bargaining agreement in effect, until June 2012, the effective date of this Contract, no bargaining-unit member was operating the tipper. Therefore, says the Company, since the Company and the Union agreed that the status quo would be the order of the day under this Contract, the bargaining-unit members no longer have the right to operate the tipper. The evidence before me does not support a finding that the Company and the Union ever agreed on the meaning of the term "status quo." During the time there was no contract, some 18 months, the Company was free to do as it wished in the operation of its facility. There was no reasonable way for the Union to know how the Company was operating its facility. Status quo to the Company meant the way the Company was operating during the time there was no contract. Status quo to the Union meant the way the Company was operating while there was a contract. You say tomato, I say tomahto. There was no meeting of the minds on the meaning of status quo.

Now I again address the document that does evidence a meeting of the minds, the Contract. What does it tell me about the operation of the tipper? First, by the Contract's express words in Section 1.01, the Company recognizes the Union as the exclusive bargaining agent for all full-time and regular part-time

employees employed by the Company in the operation of all equipment/machines used incident to the Company's landfill operations at the County Line Landfill Partnership in Fulton County, Indiana. The tipper is an essential piece of equipment/machinery used by the Company in its operation of the landfill facility. Indeed, the tipper is the essential piece of machinery necessary to unload the trailers filled with waste. Then, in Section 1.02 of the Contract, the Company and the Union agree the Contract covers all work at the landfill involving the operation and maintenance of all equipment/machines incidental to landfill operations.

To defend its position, when confronted with this Contract language, the Company responds that it has the right to subcontract the work of the tipper operator. The Company says that it was subcontracting the tipping operations between 2010 and 2012 when there was no contract. This is essentially the "status quo" argument. Again, I find there was no agreement between the Company and the Union concerning the meaning of status quo.

Well, says the Company, even if that is true, the very language in the Contract gives the Company the right to subcontract. The Contract does address subcontracting. Section 1.04 states the Company will not subcontract any bargaining-unit work if doing so would cause the layoff of any bargaining-unit employees. This means, according to the Company, that it has unbridled freedom

to subcontract any bargaining-unit work as long as no bargaining-unit employees are laid off. But the SUBCONTRACTING article also states that the Company will not subcontract work for the purpose of avoiding its obligation to the employees or to the Union. I must interpret the entire SUBCONTRACTNG article and its relationship to the Contract's RECOGNITION article and the Contract's SCOPE article. What is the point of recognizing the Union as the exclusive bargaining agent for all full-time and regular part-time employees employed by the Company in the operation of all equipment/machines used incidental to the Company's landfill operations if the Company can, and at its pleasure, give this work to non-bargaining unit employees? To ask the question is to answer it. This is what the Arbitrator in *Port of Seattle*, 110 LA 753 (Skratec 1998) said:

> Subcontracting of bargaining unit work would enable management to effectively eliminate the union's ability to provide job security for its membership. If this Arbitrator were to permit the unilateral transfer of bargaining unit work to an independent contractor, she would be undermining all of the bargaining unit positions that have been recognized as being part of this unit. No job would be free from outsourcing. *Id.* At p.757

On top of that, the Contract's SCOPE article covers the performance of work at the Company's landfill operations, including the operation of and maintenance and repair of all equipment/machines incidental to landfill operations. What is the

point of the SCOPE article if the work of the tipper operation and maintenance can be eliminated from the Contract's scope of work also at the Company's whim? To ask this question too is to answer it.

Because I must interpret the entire Contract, the fact that the subcontracting of the tipper work has not resulted in the lay off of any bargaining-unit employees, is not determinative. To accept the Company's position that the SUBCONTRACTING article is the trump card is to effectively erase a portion of the Contract's RECOGNITION article, and a portion of the Contract's SCOPE article. The bargaining unit described in the Contract is the very soul of the Contract. Presently, there are five bargaining-unit employees. Trash tonnage is down at the landfill. There are fewer bargaining-unit employees now than there were in 2010. Just as the bargaining-unit employees are adversely affected in the bad times, they are entitled to share in the good times. Accepting the Company's position means the SUBCONTRACTING article is akin to Sir Lancelot's sword, having the magical power to eliminate the entire bargaining unit. The Company could, in its reading, never hire any additional bargaining-unit employees, continue to subcontract all bargaining-unit work, and as bargaining-unit employees left the workforce, never hire replacements because no one would ever have been laid off. Not so. The SUBCONTRACTING article specifically states the Company will not

subcontract work for the purpose of avoiding its obligation to the employees or to the Union. The operation of the tipper is bargaining-unit work within the scope of the Contract. It is work that bargaining-unit employees are exclusively entitled to perform. I will not sacrifice this bargaining unit at the altar of efficiency.

2. The Mowing Work.

The Company and the Union also disagree over the right of the bargaining-unit employees to do the mowing work at the landfill site. What does the Contract tell me? The RECOGNITION article, Section 1.01, says that bargaining-unit employees are those employed in the operation of all equipment/machines used incidental to the Company's landfill operations. Certainly, mowers are used incidental to the Company's landfill operations. But, ARTICLE 1.02, the SCOPE article, also, and significantly, says that the scope of the work covered by the Contract shall not include work such as, but not limited to, grounds maintenance, mowing and landscaping. The SCOPE article is the article which sets forth the work to be performed by the Contract's bargaining-unit members. The SCOPE article is effectively a limitation on the RECOGNITION article. Nevertheless, the Union contends that bargaining-unit employees had operated mowers in the past. Moreover, says the Union, the WAGES article, Section 12.01, reads:

> The parties agree that Class I shall include Mechanics, Operators and Pumps Operators, Leach-Ate Truck, Articulated End Dump and Pump Operators (Pumps are operated by Operators when they are not on equipment); Class I shall also include Laborers and Mowers under 20 horsepower.
>
> | | **6/1/12** | **6/1/13** |
> |---|---|---|
> | CLASS I | $23.30 | $23.70 |

The Union naturally asks why does the WAGE article refer to Mowers if mowing is not bargaining-unit work? The easy answer is that there is only one hourly rate under the Contract for bargaining-unit employees, no matter what work is being performed by bargaining-unit employees. Under the Contract, the fact that bargaining-unit employees may perform mowing work does not also give them the exclusive right to perform mowing. Grounds maintenance, mowing and landscaping work is specifically excluded from the Contract's scope set forth in ARTICLE 1.02. I point out the Company introduced testimony that the reference to laborers and mowers in ARTICLE 12.01 should have been deleted, but that through a drafting error, the language remained in the Contract. That evidence may make sense because the 2008 contract had two wage classes, a Class I with a higher wage rate, and a Class II, which included laborers and mowers under 20 horsepower, with a lesser wage rate. But, I do not base my decision on that evidence. I must look to the language of this Contract, signed by both the

Company and the Union, both sides having had ample opportunity to read and examine it before signing. The Contract provides for one wage class. The WAGE article does not specifically refer to a tipper operator. Yet, operation of the tipper is within the bargaining unit's scope of work. Similarly, just because the WAGE article refers to "Mowers under 20 horsepower," does not mean the operation of the mower is bargaining-unit work. ARTICLE 1.02 unambiguously states that the scope of work covered by the Contract shall not include grounds maintenance, mowing and landscaping work. Thus, I find that under the Contract, the Company may, but need not, assign mowing work to bargaining-unit employees. If those bargaining-unit employees do, from time-to-time, perform mowing work, then they are to be paid the Class I wage rate set forth in the Contract.

Based upon the Contract, the testimony of the witnesses and all of the exhibits introduced at the arbitration hearing and, considering the positions of the Company and the Union, ably advocated by their representatives, and recognizing my role as arbitrator, I make the following Findings:

FINDINGS

1. The operation of the tipper is bargaining-unit work and bargaining-unit employees have the exclusive right to perform that work.

2. Grounds maintenance, mowing, and landscaping are not bargaining-unit work and may, in the discretion of the Company, be assigned to non-bargaining-unit persons.

3. There is no evidentiary basis to find that bargaining-unit members suffered any loss of earnings resulting from the Company's assignment of the operation of the tipper to non-bargaining-unit employees.

AWARD

Therefore, I make the following award:

1. The grievance is timely.

2. The grievance is sustained in part, and denied in part.

3. The operation of the tipper is within the Union's exclusive work jurisdiction and the Company is ordered to cease and desist from contracting that work to any outside persons, including, but not limited to, Drenth Trucking Company.

4. Grounds maintenance, mowing, and landscaping are not bargaining-unit work, and the Company may assign or subcontract such work at its sole discretion.

5. The Company and the Union must pay the Arbitrator his fee and

expenses as provided in the Contract between the parties.

6. The Arbitrator retains jurisdiction over this case for implementation of the remedy.

Dated: July 18, 2013

s/Joseph V. Simeri

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Joseph V. Simeri, Arbitrator