

BEFORE THE ARBITRATOR

In the Matter of the Arbitration  
of a Dispute Between

GRAPHIC COMMUNICATIONS  
INTERNATIONAL UNION LOCAL 577-M

and

KCS INDUSTRIES, INC.

Case 1  
No. 51905  
A-5314

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 Mr. John Brennan, appearing on behalf of GCIU Local 577-M.

Foley & Lardner, S.C., Attorneys at Law, 777 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, by Mr. Stanley Jaskan, appearing on behalf of KCS Industries.

ARBITRATION AWARD

Local 577-M of the Graphic Communications International Union (hereinafter referred to as the Union) and KCS Industries, Inc. (hereinafter referred to as the Company) requested that the Wisconsin Employment Relations Commission designate Dan Nielsen, a member of its staff as arbitrator of a dispute over the Company's decision to layoff out of seniority on October 17, 1994 and the Company's refusal to pay a full eight hours for October 18, 1994 to employees who volunteered to leave work early on the preceding day. The undersigned was so designated. A hearing was held on January 10, 1995, in Milwaukee, Wisconsin, at which time the parties waived the requirement of an arbitration panel and agreed that the neutral arbitrator should hear the case. At the hearing, 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 January 19, 1995. The parties submitted post-hearing briefs through the undersigned on January 30, 1995, and the record was closed on March 8, 1995.

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

## I. Issue

Although there was no substantial disagreement about the matters in controversy, the parties were unable to agree on a specific framing of the issues and agreed that the arbitrator should frame the issues in his Award. The Union asserts that the issues are:

1. Did the Company violate the collective bargaining agreement by failing to pay a full eight hours for October 18 to those employees who volunteered to leave early on October 17? If so, what is the appropriate remedy?
2. Did the Company violate the collective bargaining agreement by laying off employees out of seniority from October 18 through October 28? If so, what is the appropriate remedy?

The Company frames the issues as:

1. Did the Company violate the collective bargaining agreement by laying off employees out of seniority for the period October 19 through October 28? If so, what is the appropriate remedy?
2. Did the Company violate the collective bargaining agreement by failing to provide a full eight hours of work or pay on October 18 to those eight employees sent home early on October 18 who left work early on October 17 without receiving notice that only four hours would be guaranteed for October 18? If so, what is the appropriate remedy?

There is little difference between the issues as stated. The Company's statement of the pay guarantee dispute is somewhat more precise than that of the Union, and accordingly the undersigned adopts the Company's statement of the issues.

## II. Relevant Contract Language

### **SECTION 7. EMPLOYMENT**

. . .

7.1 SENIORITY. Employees may, in order to avoid scheduled layoff, apply their bargaining unit seniority with KCS Industries, Inc. or any of its predecessors to any classification within the bargaining unit in which they are qualified to perform the work at such classification rate of pay and shall be returned to their former

classification in the same order as if they had been laid off. In all cases, "qualified" is intended to mean the ability to perform the task efficiently and effectively, without training, and with a bare minimum of familiarization. The Employer shall be the judge as to the determination of the employee's qualification. Should there be an increase in the force, the persons displaced through such cause shall be reinstated in reverse order in which they were laid off before other help may be employed.

**7.3 WORK FORCE DIRECTION AND TERMINATION.** The management of the Company shall have the right to employ help and may discharge: (1) For incompetency; (2) for neglect of duty; (3) for violation of Company rules (which must be conspicuously posted); and (4) to decrease the force, such decrease to be accomplished by laying off first the person or persons last employed in accordance with bargaining unit seniority standing, in the job classification of the department in which they are employed, either as regular employees or extra employees, as the exigencies of the matter require. (Also, see "Seniority Letter of Agreement" in the addendum section following this Agreement.)

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## **SECTION 9. JOB CLASSIFICATIONS**

9.1 For wage purposes, there shall be the following classifications, based on, but not necessarily limited to, the job skills described below:

### **CLASSIFICATION I**

Assemblers, packers, rackers, helpers and wipers.

Postal Stamp Operations of traying, quality control, examining, catching, spoilage counting and reworking.

...

## **SECTION 10. TEMPORARY TRANSFERS**

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10.4 Employees in higher wage classifications, not having work assignments in their regular department, shall be given first preference by seniority standing for jobs in other departments within their wage classification when transfers are necessary.

. . .

## **SECTION 15. REPORTING PAY AND WORKDAY MINIMUM**

15.1 All full-time employees called in or allowed to go to work after the regular commencing time shall receive not less than a full day's pay unless they have been notified the previous working day that there will be no work or less than a full day's work. In the latter case, they shall receive full wages for time worked with a minimum of one-half (1/2) day, unless the employee is tardy or takes time off on their own volition.

15.2 This clause shall not apply where factors beyond the Employer's control; such as fire, flood, explosion, earthquake or power failure make it impossible to start or continue work.

. . .

## **SENIORITY LETTER OF AGREEMENT**

It is agreed that Sections 7.3 and 10.6 shall be interpreted as stated in the following paragraphs.

There will be one seniority date for all employees, this date is the date of hire as a regular employee in the bargaining unit.

Each employee will have a "home" department. The home department is determined by the employee's clock number.

Layoffs will be by seniority in home departments. Employees laid off from their home department will be assigned to Class I positions, seniority permitting, or laid off from the plant. An employee who is assigned to a Class I position, or is laid off from the plant, may bump into a classification from which they are qualified seniority permitting.

On recall from layoff, employees will be called back by seniority in their home department as openings occur in that department or by seniority to Class I positions.

Qualified senior employees who are on layoff may bump employees who have been called back to their home department.

As openings occur, employees must return to their home department.

### III. Background

The Company produces pressure sensitive labels, signs and advertising displays, and postage stamps at its Milwaukee, Wisconsin facility. This work is organized into three departments, respectively the Graphic Arts Department, the Assembly Department and the Postage Stamp Department. The Union is the exclusive bargaining representative for approximately 300 of the Company's production employees across all three departments. Employees are frequently moved across departmental lines to meet production needs, and all employees are typically eligible to work in Class I assembly jobs, which are the simplest jobs in the operation.

Postage stamp production is performed for the U.S. Postal Service. It requires the perforation and cutting of large rolls of pre-printed and pre-glued stamps. Perforating the stamps involves the use of a specific perforating tool for each run. These tools are supplied by a company in Great Britain. In October of 1994, the Company was scheduled to run an issue of commemorative stamps. The tool for perforating this run was ordered from the Company's British supplier and was supposed to arrive by Tuesday, October 11th. A premium had been paid on the shipping costs to insure prompt delivery. Stephen Johnson, the Company's Director of Manufacturing, attempted to track the shipment down, and was told several times by the shipping broker that delivery was imminent. On Friday the 14th, he was advised that the tool was at O'Hare International airport in Chicago and would be shipped up by truck, arriving at the plant by Saturday or the start of business on Monday, at the latest.

The tool did not arrive by the start of business on Monday. The Company's production schedule called for perforation to begin by 10:00 a.m. on Monday and to be completed on Tuesday. Most of the employees scheduled for Tuesday the 18th and Wednesday the 19th in the Postal Department were to examine the perforated stamps. Johnson realized that he would be unable to provide a full eight hours of work on Tuesday if production on the run of stamps could not be begun on Monday morning, so he decided to ask for volunteers to go home early on Monday, preserving some of Monday's work for Tuesday. Sixteen employees volunteered to leave after four hours of work on Monday.

The tool arrived at noon on Monday. At 1:00 or 2:00 p.m., Johnson decided to post a notice to employees, informing them that he could only guarantee four hours of work on Tuesday, as a precaution against having to pay a full eight hours under the terms of 15.1 of the contract. That provision requires a full day's pay unless employees are given notice by the end of the

preceding work day that less than a full day's work will be available. The notice read:

Due to a limited amount of work to process tomorrow (Tuesday), only four hours of work will be guaranteed.

The APS perforating tool arrived from England at noon today, therefore we will be able to begin perforating Legends of the West which will provide more work into the department.

Thank you for your cooperation.

The notice was posted after the departure of the employees who had volunteered to go home early, and those employees did not learn of the limited hours on Tuesday until they reported for work the next morning.

After the perforating tool was received on Monday, the Company set up the job and tried to begin production. They quickly discovered that the stamps were misaligned on the rolls, and that the perforations were being made in the wrong areas. The Company later determined that the rolls had been distorted during another company's application of glue, and that the extent of the problem was such that the machines would have to be individually recalibrated for each roll.

By Tuesday morning, it was clear to Company officials that production on the stamp run would be substantially delayed. Another notice was posted before 7:00 a.m., advising employees that only four hours of work could be guaranteed for Wednesday. Early on Tuesday afternoon Johnson concluded that there was no short term solution for the distortion problem, and he gave notice of layoffs to the employees who were scheduled to work on the run. The problems were not resolved until ten days later, and the layoff was terminated on October 29th.

At the time that work was curtailed on Tuesday, October 18th, and through the entire period of the layoff, a team of employees in the Assembly Department was working on production of a neon sign advertising "Red Dog" beer. The Company had been given until the end of the month to produce 1400 signs for Miller Brewing, its largest customer. The Red Dog signs were different from those usually assembled in the department, in that the high voltage neon requires a larger transformer and more sleeves than the typical sign project. Additionally, neon tubing is fragile and requires careful handling during assembly. The assembly process requires tasks performed at seven stations:

- (1) Riveting the standoffs (posts extending out from the frame to hold the neon bulb) to the frames at specific angles shown on a blueprint;
- (2) Affixing the brackets that hold the transformer to the back of the sign by the use of four rivets;
- (3) Attaching the transformer to the bracket with four screws;

- (4) Tying three pieces of neon tubing tightly to the standoffs with twists of thin wire;
- (5) Wiring the signs by attaching wires to the electrodes, finishing the connections and placing sleeves over the exposed wires;
- (6) Inspection of the finished sign, labeling the back, touching-up the paint, and putting electrical tape on the sign to black out portions, forming the forehead and eyes of the dog on the sign;
- (7) Packing the finished sign for shipment.

Some preliminary riveting work had been done on Friday, the 14th to feed the line beginning on Monday. The balance of the twelve member team began working on the job at 7:00 a.m. on Monday, when they were shown how to perform the various tasks needed to assemble the signs. Four of the twelve employees had worked on a prior production of the Red Dog signs in September. The training for final inspection consisted of 5 minutes of being shown an example of the tape placement and what to look for in a finished sign. Training to wire the signs likewise took about 5 minutes.

Because of the time pressures to complete the sign run and the demanding nature of the customer, the Company decided not to risk losing production by having more senior employees bump into the Red Dog job when the cutbacks took place in the Postal Department on Tuesday the 18th. Instead, it allowed the junior employees to continue working on the project, which lasted through the end of the layoff.

The instant grievance was filed, protesting the failure to pay a full day's pay to employees who were not given notice of the reduced hours on Tuesday, October 18th until the that morning, and protesting the use of junior employees on the Red Dog job during the layoff. The Company denied the grievance, asserting that the lack of notice was caused by the late arrival of the perforating tool and unforeseen problems with the stamp rolls, both of which were beyond its control. As for the use of junior employees on the Red Dog assembly work, the Company pointed to the contract language restricting bumps to jobs which the employee could perform with no training and minimal familiarization. The Company noted that it had allowed junior employees to work in Assembly I type jobs during past layoffs when training was an issue. The matter was not resolved in the lower steps of the grievance procedure and was referred to arbitration.

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

#### IV. Arguments Of The Parties

##### A. The Position of the Union

The Union takes the position that the Company violated the contract and should be required to make its employees whole. There is no dispute that the eight employees who volunteered to leave early on October 17th were not given notice of reduced hours on October 18th until they reported for work that day. All other employees were given notice of the four hour guarantee for October 18th by 1:00 or 2:00 in the afternoon on the 17th. Even though it knew who was absent from the shop, the Company made no effort to contact the workers who had helped it out by leaving early. The arbitrator should reject the Company's attempt to claim an exception under 15.1 of the contract, since that provision is clearly aimed at natural disasters or other external catastrophes which suddenly and uncontrollably prevent work from being done. Here the Company had no work because of the later arrival and subsequent malfunctioning of a specialized machine tool. The Company knew that the tool was already late, and should reasonably have foreseen that it would not arrive by Monday morning. Even if the Company was surprised by the shortage of work on Tuesday, it could have at least expended the minimal effort required to call these eight workers. Since the employees did not receive the notice required under the contract, and since the late arrival of the tool and problems with using it once it arrived were not within the class of emergencies that excuse late notice of work shortages, the Company should be required to pay the eight employees for their lost wages.

Turning to the layoff question, the Union asserts that the Company had no excuse for laying off out of seniority. The testimony clearly establishes that the Red Dog job was simple work, and fell within the Class I positions into which senior employees are allowed to bump to avoid layoff. The jobs included twisting pieces of wire, placing pieces of black tape on the neon tubes, inserting screws in the assembly and putting the assembled signs in boxes. The Company assigned inexperienced employees to the work and provided them with an absolute minimum amount of training. If some level of training was required for these simple tasks, the Company should logically have chosen more skilled employees for the work in the first instance. If no real training was required, the jobs should have been filled through strict seniority once layoffs became necessary.

The Union also notes that the Company's production records show no appreciable difference in production levels for Red Dog signs over the duration of the project. If training and specialized skills were actually important factors, production should have increased as the employees became more experienced in their tasks. Thus the Company's own records belie their claims that this was skilled work. The work was simple and should have been made available to senior employees in lieu of layoff.

The Union dismisses the Company's attempts to show a past practice of laying off out of seniority, or Union acquiescence in the Company's interpretation of the contract. While the Union has dropped grievances over the Company's past violations, these were cases involving minor monetary damages, and the Union cannot be criticized for rationally allocating its limited litigation budget. This was a layoff of more than a week, and the stakes justify the expense of pursuing arbitration.

For all of the foregoing reasons, the Union asks that the grievances be sustained, and the Company be ordered to make its employees whole.

#### B. The Position of the Company

The Company takes the position that the contract was not violated in any way, and that the grievances should be denied. The employees sent home on October 17th were not given notice that there would be only four hours of work on October 18th before the end of the shift on the 17th. However, the Company is excused from paying an eight hour guarantee where

circumstances beyond its control prevent work from being started or continued. The late arrival of the perforating tool and the unanticipated distortion of the stamp rolls were factors beyond the Company's control. Granting that the Company could have tried to reach the eight employees who left early via telephone, the exception in the contract does not require that the Company be prevented from giving notice. It applies when the Company is prevented from continuing work. Since the Company could not control the delivery of the perforating tool or the degree of stretching and shrinkage in the pre-printed and pre-glued rolls of stamps, the contract expressly exempts this situation from the minimum hours guarantee, and this aspect of the grievance must therefore be denied.

As for the question of laying off out of seniority in order to protect production on the Red Dog job, the Company points to the language of Article 7.2, which prevents bumping where the job cannot be performed unless the employee can do the job "efficiently and effectively, without training, and with a bare minimum of familiarization." The contract makes the Company the sole judge of qualifications. The Red Dog job was time sensitive and unusual. The materials and assembly were different than those customarily required in the Company's sign production, and portions of the assembly process were time consuming and difficult. Even Union witnesses admitted that there was little correlation between a high voltage neon sign, such as the Red Dog job, and the usual fluorescent signs with which most employees were familiar. Given the important distinctions between the Red Dog job and past assembly projects, the Company's good faith judgment of employee qualifications should not be disturbed by the arbitrator. Thus this portion of the grievance should also be denied.

#### V. Discussion

There are two distinct aspects to this case. The first is the failure to pay the eight hour guarantee to employees who did not receive actual notice of a short workday on October 18th before the end of their normal workday on October 17th. The second is the retention of junior

employees to complete the Red Dog job while senior employees were laid-off from October 17th through October 28th. Each is addressed in turn.

A. Lack of Notice/Lack of Work

The Company admits that the employees sent home early on Monday, October 17th did not receive the required notice that less than a full day's work would be available on Tuesday. The issue is whether the guarantee of a full day's pay was applicable in this case, since Section 15.2 of the contract excuses notice and payment in certain circumstances:

This clause shall not apply where factors beyond the Employer's control; such as fire, flood, explosion, earthquake or power failure make it impossible to start or continue work.

Steve Johnson testified that the curtailment of hours on Tuesday was posted on Monday afternoon between 1 and 2 o'clock as a precaution because the perforating tool expected by 7:00 a.m. had not arrived until noon. The actual loss of work on Tuesday was occasioned by the distortion in the stamp rolls, which made perforating impossible.

The guaranteed eight hour minimum does not apply where work is made "impossible" by "factors beyond the Employer's control". The Union argues that these factors are limited to catastrophes, since all of the examples accompanying this language fall into that category. The contract as written does not support that very narrow reading of the exception. Clearly the exception is narrow, in that work must be impossible, and the cause must be one which the Company could not in any way control. Just as clearly, however, there are matters outside of the Company's control other than catastrophes that might render production impossible.

The Company correctly points out that lack of notice does not result in payment when the actual loss of work is caused by factors completely outside the Company's control. Absent the distortion in the stamp rolls, the Company would have liability for a full day's pay to the grievants. The late arrival of the tool was known to the Company when it secured the employees' agreement to leave work early on Monday, and Johnson judged that a full day's work could be preserved by having the volunteers work only four hours on Monday. The lapse of an hour between the volunteers leaving and the arrival of the tool would not have so substantially changed his managerial judgment as to constitute the type of outside intervening force envisioned by Section 15.2. The distortion of the stamp rolls, on the other hand, does constitute such an event. It was not reasonably foreseeable or preventable by the Company and cannot be attributed to any exercise of Company discretion. Since perforating could not be performed on the rolls without time-consuming changes in the original operational plan and in the equipment, and since the examining work of the grievants could not be performed before perforating, production on Tuesday became impossible. This was the actual cause of the lack of work and it falls within the exception carved out by Section 15.2. Thus this aspect of the grievance must be denied.

#### B. Layoff and Bumping

The contract and the side letter on seniority allow senior employees to bump into Class I positions if the Company judges that they have the ability to perform the work efficiently and effectively without training and with a bare minimum of familiarization. Here the Company made a blanket decision that the team working on the Red Dog signs would remain intact, in order that it might maintain production levels on the rush job. This is a rational concern for the Company, but the contract does not allow for such broad assumptions. Instead, there must be some assessment of the jobs and the available employees.

The Company has attempted to make out a case that other bargaining unit employees could not quickly and efficiently perform any of the tasks required for neon sign assembly because of their complexity. This claim appears to be more than just somewhat overstated. The assembly

was broken into seven sets of tasks. While the Company stresses the unusual aspects of working with neon tubing, only two of the tasks involve actually handling or manipulating the neon tubes -- tying the neon tubes to the frame and wiring the neon. Attaching the transformer bracket to the frame is a matter of using four screws (or rivets - Assistant Manager of Production Chris Fadrowski testified both ways). Attaching the transformer to the bracket is again a question of using four screws or rivets. Inspecting the assembled products and sticking bits of black tape on it to form the dog's face, by the uncontroverted testimony of April Ozolins and Sandra Kerr who both performed the job, required a maximum of five minutes of "training" which consisted of showing the employee what to look for in the inspection and where to put the tape. Wrapping the finished product and binding it in a carton for shipping is a task that cannot be made to even sound complicated. The Company's argument that these jobs could not be performed without training is very difficult to credit, unless one defines training as including any degree of direction or instruction from the lead worker or supervisor. That definition cannot be reconciled with the contract's acknowledgment that some minimal familiarization is allowable in the case of a bump.

Some of the tasks associated with the Red Dog signs do appear to be perceptibly more complicated than the jobs usually run through the shop. The task of riveting the standoffs requires that the posts be positioned at specific angles according to blueprints. The task of tying the neon tubing requires a familiarity with the materials, because of the tubing's fragility. Wiring the neon is different from the usual wiring operation with fluorescent signs and requires some training if an employee has not worked with neon before. The record does not refute the Company's claim that these three tasks would require more than a bare minimum of familiarization before the employee could perform them efficiently and effectively.

The language of the contract is clear that an employee must be qualified to claim work, and it establishes the Company as the judge of qualifications. The authority to determine qualifications does not, however, excuse the Company from attempting to make a reasonable determination of the question. Four of the seven tasks associated with assembling the Red Dog signs -- attaching the transformer bracket, attaching the transformer, inspection and taping, and packing the finished sign -- required a degree of orientation so minimal that it must properly be termed familiarization rather than training. On the other hand, giving the benefit of the doubt to the Company as the judge of qualifications, the testimony established that attaching the posts to the frame, tying the neon and wiring the sign could credibly be viewed as being sufficiently different from other sign production that they would require more than "a bare minimum of familiarization".

With respect to the four tasks on the Red Dog project identified above as not requiring more than a bare minimum of familiarization, the Company violated the contract by refusing to make them available for bumping by senior employees during the October 18th - 28th layoff. With respect to the remaining three tasks, the record evidence does not prove a violation. As a remedy, the Company is directed to identify the senior employees who would have been able to avoid a layoff had the Company made these four jobs available for bumping, and to make them

whole for their losses. The arbitrator will retain jurisdiction for a period of thirty days from the date of this Award for the sole purpose of clarifying the remedy if clarification is necessary.

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

### AWARD

1. The Company violated the collective bargaining agreement by laying off employees out of seniority for the period October 19 through October 28, since its blanket decision to protect the makeup of the teams working on the Red Dog was not consistent with the right of senior employees to bump into Class I jobs where they could perform the work efficiently and effectively, without training and with a bare minimum of familiarization. Four of the tasks associated with that project -- attaching the transformer brackets, attaching the transformer, final inspection / taping, and packing -- cannot credibly be described as requiring more than a bare minimum of familiarization and should have been made available for bumping.

2. The Company did not violate the collective bargaining agreement by failing to provide a full eight hours of work or pay on October 18th to those eight employees sent home early on October 18th who left work early on October 17th without receiving notice that only four hours would be guaranteed for October 18th. The actual lack of work on October 18th was due to factors beyond the Company's control which made production impossible, and thus Article 15.2 of the contract excuses payment of the minimums on that day.

3. The appropriate remedy for the layoff out of seniority is to identify the employees who could have claimed the jobs performing the four tasks on the Red Dog job requiring only a bare minimum of familiarization, and to make them whole for their losses.

The arbitrator will retain jurisdiction for a period of thirty days following the issuance of this Award for the sole purpose of clarifying the remedy.

Dated at Racine, Wisconsin this 27th day of June, 1995.

By Daniel Nielsen /s/  
Daniel Nielsen, Arbitrator