

**BEFORE THE ARBITRATOR**

In the Matter of the Arbitration Between )  
Smurfit-Stone Container Corp )  
the Employer )  
and )  
PACE, Hellgate Local 8-0885 )  
the Union )

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**ARBITRATOR'S OPINION  
AND AWARD**

FMCS No. 01-01785

(Class Grievance  
Supervisors and Non-Mill  
Personnel Doing Bargaining  
Unit Work)

**Representatives:**

**For the Union:**

David Serba, Chairman, Standing Committee  
Vince Stroops, PACE Business Representative  
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11760 Snake River Road  
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**For the Employer:**

Steve Hess  
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June 12, 2001

**Jane R. Wilkinson, Esq.**  
**Labor Arbitrator**  
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## **WITNESS LIST**

### **For the Union:**

Mike Johnson, Union Officer, Steward

Jim Bradford, Shop Steward and Paper Department Standing Committee Member

### **For the Employer:**

Doug McLean, Superintendent on #3 Paper Machine

Don Nagy, Group Leader (Machine Tender, #3 Paper Machine)

## **EXHIBIT LIST**

Joint Exhibit No. 1 - Collective Bargaining Agreement

Joint Exhibit No. 1-A - Supplemental Agreement

Joint Exhibit No. 2 - Step III Answer to Grievance #00-50

Union Exhibit No. 1- Documents concerning Monte Hegel grievance, #94-57 dated 4/17/95

Union Exhibit No. 2 - Documents concerning Bill O'Neill grievance, #94-51

Union Exhibit No. 3 - Documents concerning Dean Skaja grievance, #94-11 dated 4/6/94

Union Exhibit No. 4 - Documents concerning Phil Parsneau grievance, #95-84

Union Exhibit No. 5 - Arbitration Award by Thomas Levak, 1987

Company Exhibit No. 1- Photo of bottom of combi press

Company Exhibit No. 2 - Photo of pick-up felt or combi top felt

Company Exhibit No. 3- Schematic of No. 3 Paper Machine

## **I. INTRODUCTION**

This dispute, between Smurfit-Stone Container (the Employer) and PACE, Hellgate Local 8-0885 (the Union), concerns a class grievance which the Union timely submitted to the Employer on May 18, 2000, pursuant to the parties' current and effective Collective Bargaining Agreement. The grievance alleges that the Employer violated the Labor Agreement when a supervisor, a vendor and two group leaders performed bargaining unit work. The parties were unable to resolve the grievance pursuant to the dispute resolution provisions of their Labor Agreement. Accordingly, they submitted the dispute to arbitration. At an arbitration hearing held on April 5, 2000, in Missoula, Montana, the parties had the opportunity to make opening statements, submit documentary evidence, examine and cross-examine sworn witnesses and argue the issues in dispute. The parties stipulated that the dispute was properly before the undersigned Arbitrator who has the authority to issue a final and binding decision as to the issues submitted herein. The parties also stipulated that the Arbitrator would retain jurisdiction, for 90 days, over the remedial aspect of the dispute should a remedy be awarded in favor of the Union. The proceedings were transcribed by a court reporter. Upon the receipt of both parties' closing briefs to the Arbitrator on May 15, 2001, (both of which were postmarked on May 11, 2001), the hearing closed and the case stood fully submitted for decision.

## **II. SUMMARY OF THE EVIDENCE**

The Employer owns and operates a paper mill in Frenchtown (near Missoula), Montana. The mill produces about 2100 to 2200 tons of linerboard per day. The Union represents a bargaining unit of nonsupervisory mill workers and quasi-supervisory "group leaders." Despite their inclusion in the bargaining unit, group leaders are not allowed under the Collective Bargaining Agreement to perform bargaining unit work. (Tr. p. 9-10). The mill operates 24 hours a day, 365 days a year, except for planned maintenance shutdowns. This planned

maintenance includes replacing wet felt and dryer felt in the paper machines. The blanket-like pieces of felt are wide and flat and are installed around rollers. (Tr. p. 43).

Occasionally during operation of the paper machines, the felt will "rope up," or twist and fold instead of moving flat against the rolls. The roped-up felt must be straightened as soon as possible to avoid having to replace it, which would cost about \$23,000-30,000 in materials, plus lost production time. (Tr. p. 58). It takes about six or seven people to straighten out roped-up felt. (Tr. p. 50). Employees must enter the paper machine to straighten out the felt. As a safety precaution, anyone planning to enter a machine must first place a lock on it to prevent it from running.

On May 10, 1999, from the morning until 6 p.m., the mill underwent a planned shutdown to replace two felts in the No. 3 paper machine. The startup was timed to coincide with a shift change. As the No. 3 paper machine was started back up, a third felt – not one of those which had been replaced -- roped up. (Tr. p. 55). Group leaders Don Nagy and Jerome Gregory, supervisor Doug McLean, and apparently a felt vendor all helped straighten the felt, along with bargaining unit employees on the night crew. However, the two group leaders failed to follow proper safety procedures by placing their locks on the machine. They were each given three-day suspensions, which they grieved. (Tr. p. 8, 15).

When the Union found out about the incident, it objected to the fact that supervisory personnel had entered the machine to work on the felt. The Union believed that this was bargaining unit work and thus filed a grievance. (Tr. p. 8, 16). Mike Johnson, the local Union president, testified that group leaders have never been allowed to do bargaining unit work. He said that they are essentially supervisors, except that they do not have the authority to hire and fire. (Tr. p. 16-17).

Supervisor Doug McLean testified that a roped-up felt must be pulled out as soon as possible to avoid irreparable damage to the felt. (Tr. p. 48). Group leader Don Nagy indicated

that group leaders and supervisors need to be involved because machine crew members may not have experience pulling out a roped-up felt. McLean testified that he and group leaders routinely instruct employees on how to pull out roped-up felts. Helping out with the actual work is part of that routine, he stated. (Tr. p. 55, 59-60, 70). McLean and Nagy testified that felts typically rope up one to four times a year and that extra employees have never been called in to help pull out felt on the combi press, the part of the No. 3 paper machine on which the felt roped up. (Tr. p. 51, 83). McLean testified that no grievances have ever been filed as a result of his instructing and helping employees straighten a roped-up felt. (Tr. p. 55-56).

Union president Mike Johnson testified that he has never known supervisory personnel or vendors to be allowed to perform bargaining unit work. (Tr. p. 18-19). Jim Bradford, Union shop steward, indicated that in the case of a felt change or related activity, extra crew are called in to help, even for an emergency. He stated he has never seen the Employer use a supervisor or a group leader, even in emergencies. (Tr. p. 37-38).

The Union introduced into evidence several earlier grievances in which group leaders or supervisors allegedly performed bargaining unit work. In the most relevant case (Union Exhibit No. 1), a group leader assisted the regular crew in installing a felt. The Employer agreed to pay two senior employees off the volunteer list for four hours' work. In its answer, the Employer agreed with the Union that "group leaders should not have assisted in pulling on the rope when changing seamed felts." (Exh. U-1, Tr. p. 23, 74).

### **III. ISSUES**

The parties stipulated to the following statement of the issues:

Did the Company violate the Labor Agreement including Section 28 when a supervisor, Doug McLean, two group leaders, Jerome Gregory and Don Nagy and a non-employee vendor representative helped pull a paper machine felt on May 16, 2000?

If so, what shall be the remedy?

## **IV. RELEVANT CONTRACT LANGUAGE**

### **SECTION 1. PURPOSE OF AGREEMENT**

1.1 The parties of this agreement recognize the desirability of a prosperous operation for the employer and the highest practical standard of wages and working conditions for the employees.

Therefore, the general purpose of the agreement is, in the mutual interest of the employer and the employee, to provide for the operation of the plant under methods which will further, to the fullest extent possible, the safety, welfare and health of the employees, economy of operation, quality and quantity of output, cleanliness of the plant and protection of property.

It is recognized by this agreement to be the duty of the Company, the Union and the employees to cooperate fully, individually and collectively for the advancement of said conditions.

### **SECTION 7. ARBITRATION**

7.4. The decision of the arbitrator shall be final and binding upon both parties. The decision shall be within the scope and terms of this agreement and shall not change any of its terms or conditions nor deprive the Company or the Union of any of its rights expressly implied or reserved by the agreement.

### **SECTION 9. SENIORITY**

9.5 Group Leaders will be assigned to duties or projects that are not in conflict with this agreement or the National Labor Relations Act.

### **SECTION 28. MANAGEMENT AGREEMENTS**

28.1 Supervisory personnel will not perform work normally done by employees covered by this agreement except in cases of emergency, in the course of training and instructing employees and to protect the safety of employees and equipment. It is understood that no bargaining unit employee covered by this agreement will lose time (straight time or overtime) as a result of the exceptions made in the foregoing sentence.

## **V. POSITIONS OF THE PARTIES**

### **Position of The Union:**

The three supervisory personnel illegally performed bargaining unit work, which is clearly prohibited by the parties' Collective Bargaining Agreement.

1. Section 28.1 provides that supervisors will not perform work normally done by bargaining unit members.
2. Work on the paper machine during felt installations is normally done by bargaining unit members.
3. Pulling on a newly-installed, roped-up felt is part of a felt installation.
4. The supervisor, two group leaders, and felt salesman who all helped pull the felt essentially replaced bargaining unit employees, who should have been called in to do this work.
5. The Employer, in Union Exhibit No. 1, has already agreed that "pulling on the rope when changing seamed felts" is bargaining unit work, no matter how little time it takes.
6. The grievance detailed in Union Exhibit No. 1 shows that the supervisors argued that they were not essential to get the work done but were merely helping out. This is the same argument advanced in the instant dispute.
7. Union Exhibits No. 2, 3, and 4 show that the issue of supervisors not doing bargaining unit work is not isolated to the paper-making area and has already been settled.
8. The Employer, through the instant dispute, is attempting to re-litigate an issue that has already been decided, namely the interpretation of Section 28.1 (see Union Exhibit No. 5, decision of Arbitrator Levak).

**Position of The Employer:**

The parties' agreement was not violated when supervisory personnel helped a crew pull out a roped-up felt on a paper machine. The Employer followed the letter and the spirit of Sections 1.1 and 28.1 of the Agreement.

1. The grievances and arbitration award entered into evidence by the Union do not apply to the instant dispute.
  - a. The decision by Arbitrator Levak applied to old wording of Section 28.1 of the Collective Bargaining Agreement. The wording has since been changed.
  - b. The grievance cited in Union Exhibit No. 1 centered on a planned felt change. The instant dispute differs because it is about events occurring after a planned felt change, because the events occurred after the startup of the machine.
  - c. The delays in startup in the decision of Arbitrator Levak were anticipated, contrary to the events in this dispute.
  - d. It is illogical that Jerome Gregory, the grievant in a former case cited by the Union, would violate the contract or its intentions while working as a group leader.

2. It is important to have knowledgeable supervisors and group leaders present as instructors when pulling out a roped-up felt.
  - a. These events occur infrequently; not everyone on a crew will know how to remedy the situation.
  - b. Roped-up felt must be pulled out as quickly and carefully as possible to avoid damage to the felt and to avoid compromising the safety of the employees.
3. The supervisory personnel followed established practice when they helped pull the felt.
  - a. Pulling out ropes has historically been performed by one crew. Doug McLean testified that he has never called in extra crew to pull out felt.
  - b. Doug McLean testified that he needed to enter the machine to investigate the cause of the malfunction. Failing to remedy the cause could create a worse roping situation in the future, potentially very costly and unsafe.
  - c. Instructors were needed to coordinate the pulling-out of the felt. Pulling out felt without instructors' help would be considered negligent.
  - d. There is not enough physical room for more than one crew to work on a roped-up felt.
4. Section 28.1 of the parties' agreement allows for supervisors and group leaders to help in the case of roped-up felt. This section allows for them to provide training and instruction of employees.
  - a. Had the situation involved a wire or a felt change, the Union's position would be correct. But the felt changes occurred earlier in the day. This was a different event, one associated with the startup of the machine.
  - b. The salesman's alleged assistance should be discounted. Don Nagy testified that because of the confined space, there was only room for the one crew. If a felt salesman were nearby, any assistance would be nothing more than a gesture.

## **VI. DISCUSSION AND ANALYSIS**

### **A. Applicable Contract Principles**

The burden of proving a contract violation is on the party asserting the same. Arbitrator

Justin stated:

[t]he mere assertion of a claim by one Party against the other under a collective bargaining contract, does not prove or establish the validity of that claim. Nor does a claim by one party, alleging that the other party violated a contract provision, unsupported by any proof, compel the other party to disprove it.

*Hirst Enterprises, Inc.*, 24 LA 44, 47 (Justin, 1954). See also, *Columbus Bottlers, Inc.*, 44 LA 397, 400 (Stouffer, 1965) ("the Union is the complaining party and in the absence of provisions to the contrary, it follows that the burden of proof rests with it to show that the Employer's [action] constituted a violation of the Agreement ..."). Thus, in this case, the burden of proof rests with the Union, and I have kept that burden in mind in reaching a decision herein.

An arbitrator's goal in a contract dispute is to determine and implement the probable mutual intent of the parties. The arbitrator seeks a contract interpretation that is most consistent with the parties' evident intent when negotiating the language in dispute. 1 *Labor and Employment Arbitration*, §14.01[2] T. Bornstein and A. Gosline, eds., (Matt. Bender, 1991).

When contract language (reading the contract as a whole in light of its circumstances) is clear as to the issue in dispute, it ordinarily will be given effect. Language is ambiguous (i.e., language is unclear) if it can be reasonably construed in more than one way. *Black's Law Dictionary*, 73 (5th ed., 1979).

When contract language requires interpretation, arbitrators apply one or more of several aids or guidelines that assist in determining the parties' mutual intent. These include extrinsic aids, such as past practice, bargaining history, and grievance and arbitration history, as well as intrinsic aids, which are principles that assist with the interpretation of language from within the four corners of the document. See generally, *Elkouri and Elkouri, How Arbitration Works*, Ch. 9, 479 *et seq.*, M. Volz & E. Goggin eds. (5th ed., BNA 1997); *Fairweather's Practice and Procedure in Arbitration*, 178-182 (R. Schoonhaven ed., 1991). However, in applying these aids one must also include a strong dose of common sense in order to keep in mind that the ultimate objective of this exercise is to determine what the parties would have agreed to had they negotiated the precise issue in the case.

Regarding past practice, this evidence is used to show the parties' intentions in drafting the language in the manner that they did:

Past practice may be defined as a consistent prior course of conduct in a recurring situation that is regarded by the parties as the correct and required response under the circumstances. In order for a past practice to have persuasive effect, the practice should be one that has been consistently applied, was well-known to the parties, and has existed over a relatively long period of time."

1 *Labor and Employment Arbitration*, §14.03[5] (T. Bornstein and A. Gosline, 1990). See also, R. Mittenthal, "Past Practice and the Administration of Collective Bargaining Agreements," 59 *Mich. L. J.* 1017, 1025 (1961).

## **B. Meaning of Contract Language At Issue**

Section 28.1 of the Labor Agreement is at the core of this dispute. Parsed, it allows supervisors (including group leaders) to do shop floor work under the following circumstances:

1. when the work is NOT normally done by bargaining unit employees,
2. in emergencies,
3. to train and instruct employees, or
4. to protect employee and equipment safety.

The Employer's argument implies that the work at issue qualifies for all four of the above exceptions; it focuses specifically on the third exception. The Union disagrees, and reinforces its position with evidence of past practice in the form of grievance resolutions.

The Employer contends that the situation with roped-up felt is different from that involving a change of wire or felts, work that must be done by bargaining unit members, and that the Union improperly fails to make this distinction. According to the Employer, a change of wire or felts is a planned event that has always involved the exclusive utilization of bargaining unit members. It is not an event that constitutes an emergency, it is one done with sufficient frequency so that no instruction is required, and no safety issues are involved. A roped-up felt occurring when the paper machine has started up is different. It must be attended to immediately because the down-time is costly. The machine must be inspected by a supervisor for any damage – damage that could pose a future safety hazard to employees. It occurs

relatively infrequently; therefore, bargaining unit members need direction and instruction from supervisors on straightening the felt. Finally, the work must be done in tight quarters; there is no room for an additional bargaining unit crew. Therefore, this particular work has never been considered exclusively bargaining unit work under Section 28.1.

The Union essentially contends that the start-up of the paper machine is part and parcel of the change of felt, and that the roping up of the felt should be viewed as part of the day-long task of replacing the felt and getting everything running again. The grievance history on this issue has uniformly been resolved favorably for the Union; that history includes one arbitration award in its favor. Witnesses testified that the parties' consistent practice has been to restrict all work associated with the felt change to members of the bargaining unit. Group leaders, supervisors and certainly outside vendors should not be performing any of this work .

The key to this dispute centers on one's view of the facts. After reviewing the testimony received at hearing, the parties' exhibits, and their written arguments, I must conclude that the Union has not sustained its burden of proving a Contract violation by the Employer. The Employer has the better case for the reasons that follow.

As stated previously, Section 28.1 does not restrict all work on the shop floor to bargaining unit members. It admits of four exceptions: emergencies, safety, instruction, and by inference, situations that are not normally exclusively bargaining unit work.

On the facts here, Doug McLean and Don Nagy testified, without contradiction by any Union witnesses, that:

- It's important to straighten out a roped-up felt as quickly as possible and as efficiently as possible; otherwise, it has to be cut off, which basically destroys a very expensive part. If a felt is not straightened properly, it is useless, and has to be cut off and destroyed. (Tr. p. 48-9). The plant loses about \$21,000 to \$30,000 an hour for down time on a roped-up felt. (Tr. p. 58). The felt in question cost about \$23,000. (Tr. p. 59). McLean testified that the felt at issue weighed 600-700 pounds dry, and twice that wet.
- It takes less than an hour (McLean, Tr. p. 49) to 1.5 hours (Nagy, Tr. p. 79) to correct a roped-up felt.

- Although felts must be straightened three to four times a year, McLean testified that he has never during his experience at the plant called in extra crew. (Tr. p. 50-51). Nagy testified that in his 35 years of experience, he has never known of other people being called in to assist with a roped-up felt. (Tr. p. 83). McLean explained that he's never called in an extra personnel for a roped-up felt because "it's unnecessary." "One crew can do it in the first place. It only takes -- it takes less than an hour. So, by the time we went over and called people in, it would have been pulled out anyway. And, so, we don't need to call people in." (Tr. p. 73).
- McLean has used two crews on wire changes as standard procedure. When felt changes are scheduled, an extra five or six people are scheduled. He also would call in another crew on a different press (the "third press") having an endless felt (not a seamed felt) needing to be cut off. (Tr. p. 51).
- On the date in question, after a 12-hour shut-down and shift change, with the presses running on crawl, McLean testified that he learned that the combi bottom felt had roped up, and employees had shut the machine down. After looking at the felt, McLean told the machine tender and the utility person to put two locks on the press section on the combi press. He waited for them, and then instructed them to get the rest of the crew (seven employees in all) and go down into the "basement" to start pulling out the felt. (Tr. p. 45).
- As they worked on the felt, McLean needed to find out why the felt roped up - that's his job. (Tr. p. 45-6). He went to one side of the machine and inspected the guide palm, which he found was functioning properly. He then went around the back of the machine and found stock buildup, which is pulp buildup, as the probable cause of the felt problem. He instructed one employee to wash up the stock, as the other employees worked on pulling the felt out. (Tr. p. 46).
- McLean didn't know how many employees were on the front, because he was on the back side. In the course of attempting to straighten the felt, McLean stated that:
 

"I put my foot on the roll and rolled it, but then I ended up getting up on the felt, which I shouldn't have done because you're not supposed to get on there unless your lock is on there. And then when we were pushing it over, I think two or three other employees came up -- I guess that the other two employees came up and helped out, and that was the two group leaders were up. And, so, there was five people up there pushing down on the felt, and the other people down were pulling the felt out downstairs. Now, normally, the whole crew would do it this way, you know. But because we were getting ready to start up and everybody was there, it's just normal for people to help one another out. So, we all pushed it so the people downstairs, it would be easier on them for pulling the felt out. And I didn't know anything about the guy on the front side. I didn't know there was a supplier [salesman] here. I never did see him, but I heard about it later." (Tr. p. 53-4).
- McLean never saw the salesman on the felt, but heard that he was there and explained that he works for the felt vendor and normally comes in to make sure that

their felts are put on right. (Tr. p. 54). Two felts had been installed that day - but not the same felt that roped up. (Tr. p. 55).

- McLean described his participation on the roped up felt as typical. (Tr. p. 55). He testified that:

Normally, I would be down instructing the people down on the floor and pushing the felt, showing them how to push it, which way to push it and I would be hands-on, too. I have pulled on the felts with those guys before to help assist them. You know, showing them how, instructing them in how to move the felt. (Tr. p. 55).

- McLean testified that he has to instruct because of the size and the weight of the felt, to make sure it is done properly, and because of the number of people on the crew who haven't done the job before. (Tr. p. 56). McLean believed the contract allows what he did because he's "instructing employees." (Tr. p. 70). Part of instructing is telling "people which way to pull. Or if we're going to lift a roll up, or if we're going to pull on the felt to turn it before we pull it up, I instruct them on which way to go because it's my responsibility to make sure the felt is pulled out as fast as we can get it pulled out." (Tr. p. 71).
- McLean testified that it is important for the group leaders to assist and instruct the crew in pulling the felt out because of the importance of getting it pulled out as quickly as possible and having the job done properly. (Tr. p. 59-60). But, McLean conceded that "the group leaders and vendors didn't have to really help." (Tr. p. 69). He went on to state, "But everybody helps out when a felt ropes up to get it back in place. It's just a common courtesy we do with our employees to help out. It's not taking bargaining work, as far as I'm concerned, away from anybody because we do it at night. At night shifts, we have always had just the crew pull a felt out and I've assisted there. When I was a shift foreman, I would help them pull it out, as I was instructing them how do did it." (Tr. p. 69-70).
- Nagy testified that he worked in his capacity as group leader to tell the crew members when and where to pull "because this is a large cumbersome piece of equipment" (Tr. p. 81) that is difficult to rectify. Without that guidance, the potential for damaging the felt is real, according to Nagy.
- McLean testified that this is routine for him in his 36 years in the paper business; this is the first grievance filed on the issue. (Tr. 56).
- McLean personally worked on straightening the felt for about 15 to 20 minutes. McLean was certain that a lack of manpower didn't cause supervisory personnel to work on the felt problem. (Tr. p. 69). McLean testified that he did not personally direct the group leaders and the vendor to help pull out the felt. (Tr. p. 70). Nagy testified that he never directed or asked a vendor (salesman) to assist in pulling the felt. The crew from the prior shift had already gone; McLean could not have held them over to help out. (Tr. p. 68).
- McLean agreed with a prior grievance response stating, "In reviewing this situation, I agree with the Union that the group leaders involved should not have assisted in

pulling on the rope when changing seamed felts. They have been properly instructed concerning their actions even though the amount of time involved was very short, ten minutes." (Tr. p. 74, emphasis added).

The Union evidence was not to the contrary and it presented no evidence specific to the occurrence in question. Mike Johnson testified only to planned outages (management schedules people in from the list the day before) (Tr. p. 37) or when "they lose a felt or lose a wire, then they have to go to the call-in list and start with the senior qualified people and go on down that list," even in emergencies. (Tr. p. 38, emphasis added).

All witnesses agreed that the plant has never engaged the services of a felt salesman, two group leaders and a supervisor. Nevertheless, that configuration is so odd that its absence as a prior occurrence is not remarkable, in my opinion.

The Union's evidence was of past practice in the form of grievance settlements and an arbitration award. The question is whether the grievance settlements are apropos to the facts of the instant case. I agree with the Employer that they are not.

Exhibit U-1 concerned a 1995 incident involving the use of seamed wet felts on the paper machine, at the time a relatively new procedure. The problem concerned the installation of the felt, and a group leader assisted for about ten minutes. The Employer agreed that a Contract violation occurred and agreed to pay two senior employees on the call list two hours of pay each. This grievance is distinguishable because it involved the installation of a felt, which McLean agreed requires no supervisory involvement and was not an emergency.

Exhibit U-2 concerned the use of a group leader in 1994 to "establish a lock box on the M&P digester from 9 a.m. to 3 a.m." The facts of this grievance do not provide guidance as to the resolution of the instant dispute.

Also in 1994, the Union grieved the Employer's use of a group leader as a switch person who helped move hog fuel cars from the chip dock to the waste fuel dump. Exh. U-4. The Employer agreed this violated the Collective Bargaining Agreement; there is no evidence that

the situation involved instruction, an emergency, a safety issue, or work that is not normally bargaining unit work. Therefore, it is distinguishable.

The facts surrounding Exhibit U-4 are not entirely clear, but it appears that a group leader took it upon himself to come in on overtime to help on an issue, but did not actually supervise. The Employer agreed with the Union's position on the grievance because the group leader should not have acted on his own initiative. It appeared that the group leader performed work that a bargaining unit instrument mechanic should have performed. No contractual exception was applicable, making the situation distinguishable.

Finally, in 1988 Arbitrator Thomas Levak sustained the Union's grievance over a supervisor doing bargaining unit work. Exh. U-5. The facts concerned a supervisor's performance of bargaining unit work during a scheduled maintenance shutdown that encountered unexpected difficulties with a wire change and caused a delay in the start-up. In that case, different contract language contained a total prohibition against supervisors doing bargaining unit work, except in emergencies (underscored):

28.1 It is recognized that the duties of supervisors, excluded from the terms of the Agreement, are not the same as those performed by employees in the bargaining unit. Therefore, supervisors will not perform any of the work normally done by hourly paid employees except in emergencies and then only until replacements can be secured.

By comparison, the current Agreement language contains the following additional language, underscored:

28.1 Supervisory personnel will not perform work normally done by employees covered by this agreement except in cases of emergency, in the course of training and instructing employees and to protect the safety of employees and equipment. ....

I agree with the Employer that both the facts and contract language of the dispute addressed in Arbitrator Levak's award are distinguishable.

In sum, the weight of the evidence demonstrated that Doug McLean's involvement was needed to instruct and guide the rest of the crew in an arguably emergency situation. The

reasons for the involvement of the group leaders is more problematical, given the inconsistency in McLean's own testimony. However, with the absence of direct refutation by the Union, and given that the work involved a large area where personnel could not easily see or hear one another, or so the evidence indicated, it seems logical that further direction from the group leaders was needed. Their hands-on involvement does not concern me. It would seem ludicrous, at least as I envision the task at hand, for them to merely provide verbal directions without actually working the felt themselves.

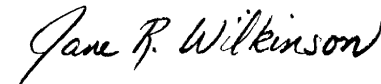
A question concerning the felt salesman remains. The facts concerning the nature of his assistance were unclear. No witness testified to actually seeing this person render assistance; they simply heard about it later. McLean denied directing the salesman to help; in fact, he was unaware of the person's involvement at the time. Thus, the evidence suggests that if the salesman did help out, it was strictly as a volunteer over whom management lacked immediate control. While the salesman should not be performing bargaining unit work, the evidence is insufficient to show that if he did so, it was with management's knowledge and acquiescence, that his assistance was needed, and that he displaced any bargaining unit employee. Under the circumstances, the maxim of "no harm, no foul" should apply.

## **VII. AWARD**

For the reasons set forth in the foregoing discussion and analysis, the grievance herein is DENIED. The Employer did not violate the collective bargaining agreement when it used a supervisor and group leaders to instruct and assist in straightening a roped-up felt under the circumstances in effect on May 16, 2000. The salesman's involvement was unclear and if it occurred, it was not with management's knowledge, direction or acquiescence, was not needed, and did not displace any bargaining unit work.

Pursuant to Section 7.3 of the parties' Agreement, the parties will share equally in the fees and expenses of the Arbitrator.

Date: June 12, 2001

A handwritten signature in cursive script that reads "Jane R. Wilkinson".

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Jane R. Wilkinson  
Labor Arbitrator