BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between LODGE NO. 487 OF THE INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS AND HELPERS, AFL-CIO and KEWANUEE ENGINEERING CORPORATION	Raymond Kaye grievance dated 3-7-91 Case 18 No. 45427 MA-4762

Appearances:

Mr. Howard L. Cole, International Representative, Boilermakers Local 487, 2400 East Devon (Suite 218), Des Plaines, IL 60018, appearing on behalf of the Union and Grievant.

Mr. Dennis Rader, Godfrey & Kahn, S.C., Regency Office Center, 333 North Main Street, PO Box 13067, Green Bay, WI 54307-3067.

ARBITRATION AWARD

The undersigned Arbitrator was designated in response to the parties' request that the Wisconsin Employment Relations Commission designate an arbitrator to hear and decide a dispute concerning the above-noted grievance under the grievance arbitration procedures contained in the parties' May 7, 1988 to May 3, 1991 Labor Agreement, (herein Agreement).

The parties presented evidence and arguments to the Arbitrator at a hearing at the Company's offices in Kewaunee, Wisconsin on July 24, 1991. A transcript was made of the proceedings. The Union summed up on the record at the hearing. The Company summed up in a written brief received on September 6, 1991. Accordingly, the evidence and arguments in the matter were fully submitted as of September 6, 1991.

ISSUES:

At the hearing, the parties authorized the Arbitrator to frame the issues for decision based on the parties' respective presentations. At the conclusion of the proceedings on July 24, the Arbitrator advised the parties that the issues for decision in the matter would be as follows:

1. Did the Company violate the Agreement by requiring employes to sign Exhibit 11?

2. Was there just cause for the discipline imposed by the Company for Grievant's refusal to sign Exhibit 11 on March 5, 1991?

3. If either 1 or 2 or both are so, what shall the remedy be? [More properly, ISSUE 3 should read as follows: "If the answer to 1 is "Yes" or the answer to 2 is "No," what shall the remedy be?]

FACTUAL BACKGROUND

The Company fabricates large heavy metal parts for travel lifts, beams, boxes, frames and large welding components. It maintains and operates a variety of heavy equipment, welding equipment and overhead cranes at its Kewaunee, Wisconsin plant location. The Union represents a bargaining unit consisting of the Company's production and maintenance employes, referred to generally herein as the shop employes.

As required by regulations issued by the Occupational Health and Safety Administration [OSHA], the Company, with the assistance of its Worker's Compensation insurance carrier, developed a lockout/tagout safety procedure and a program to train the Company's shop employes regarding that newly developed procedure. The lockout/tagout procedure is intended to prevent injuries that might otherwise occur due to start-up of equipment at times when, for a variety of reasons, that equipment ought not be started-up. The Company's lockout/tagout training program involved various supervisors presenting a video tape and handing out written materials to small groups of employes. Both the tape and the written materials dealt with the subject of lockout/tagout procedures. The lockout/tagout training was discussed during joint Union/Company Safety Committee meetings, but the subject of requiring employes to sign a document in connection with the training was not extensively discussed in those meetings.

As a part of its training program, the Company directed the supervisors to obtain the signature of each employe attending the training on a form (Exhibit 11) which read as follows:

KEWAUNEE ENGINEERING CORP.

LOCKOUT/TAGOUT TRAINING CERTIFICATION

THE FOLLOWING EMPLOYEES ACKNOWLEDGE THAT THEY HAVE ATTENDED THE TRAINING SESSION HELD ON _____ FOR THE PURPOSE OF INSTRUCTION ON JOB DUTIES AND HOW IT RELATES TO THE KEWAUNEE

ENGINEERING LOCKOUT/TAGOUT PROCEDURE:

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

TRAINING PROVIDED BY: _____

DATE: _____

In the past, since at least 1986, the Company has required employes to sign documents acknowledging their receipt of separate training regarding potentially hazardous chemicals and hearing protection, and regarding their receipt of a copy of the Agreement. All the employes involved, including Grievant, signed those documents without a grievance being filed. The Company has also presented a variety of other training and materials to employes on safety and other subjects, without requiring employe signatures. For one Company training program, employe signatures were optional but certificates of completion were issued only to those of the employes who signed the document associated with the program. The Grievant (and perhaps others) did not sign that document and did not receive a certificate of completion.

With regard to the lockout/tagout training, the Company required all of its shop employes to sign Exhibit 11 upon completion of their training session. All but Grievant signed Exhibit 11 on the date their session was conducted. Grievant refused to do so at the conclusion of the training session he attended on March 5.

Prior to March 5, another shop employe, Gary Jacobs, had initially refused to sign Exhibit 11 following his receipt of the lockout/tagout training. Jacobs was suspended briefly, but he signed moments later in exchange for supervision's canceling of the suspension. There followed a meeting between local Union representatives and Company representatives at which the Union asserted that the signature requirement was improper and the Company asserted that it was a

reasonable request within the Company's rights such that employes refusing to sign would be subject to discipline for insubordination. There followed an exchange of letters on or about February 14, 1991, between the Union International Representative and the Company Vice President and General Manager, taking basically the same respective positions. A substantial number of the employes attending training were reluctant to sign Exhibit 11. Some of those employes apparently signed in response to suggestions from the local Union officers that they sign to avoid disciplinary action while the Union pursued its contention that the Company had no right to require employe signatures on the Exhibit 11 forms.

On March 5, after Grievant viewed the video and received the written lockout/tagout materials, he refused to sign the Exhibit 11 form when the supervisor presented it to him for his signature. In further discussions with various Company personnel, ultimately including the Plant Manager, Grievant continued to refuse to sign Exhibit 11. During the course of those discussions, Grievant requested and was provided with Union representation. Grievant expressed concern that the Company could use the signature against Grievant later to reduce Worker's Compensation insurance benefits in the event he was injured on the job. Supervision responded that Exhibit 11 was only intended to prove that Grievant had viewed the lockout/tagout video and had received the lockout/tagout written materials and that Exhibit 11 had nothing to do with Worker's Compensation or insurance benefits at all. Supervision read Exhibit 11 aloud to Grievant and again asked him to sign, warning that if he did not he would be facing discipline up to and including discharge. Supervision also gave Grievant a further opportunity to confer with his Union representatives and to reconsider after warning him that he was facing discipline if he continued to refuse to sign. When he again refused to sign, the meeting ended and the Plant Manager shortly thereafter decided to impose a suspension without pay for the remainder of the day on March 5 (about 1.25 hours) and for two additional days thereafter.

Grievant was issued a written suspension which was read aloud to him by the Company Human Resources Manager, stating as the basis for the suspension that Grievant had "Refused reasonable request by Supervisor and plant Manager to sign as attending Lockout/Tagout Procedure Meeting. Repeated action will result in additional disciplinary action, up to and including discharge."

Upon his return to Company premises after serving the suspension, Grievant again initially refused to sign Exhibit 11. Union representatives were brought in and supervision told Grievant that his continued refusal would subject him to additional discipline up to and including discharge. Grievant thereupon conferred with an additional attorney and at that attorney's suggestion, he finally signed Exhibit 11 on condition that an additional "signed under protest" notation was entered next to his signature. Then and only then was Grievant allowed to return to work.

The instant grievance was timely filed challenging both the Company's requiring employes to sign Exhibit 11 and the Company's suspension of Grievant for having refused to do so.

PERTINENT PORTIONS OF THE AGREEMENT

PREAMBLE

. . .

It is the intent of this agreement that noting contained herein shall infringe on or prevent the normal function of an employee to perform his work to the best of his ability and the Company to perform management functions.

. . .

MANAGEMENT
ARTICLE III

Section 1. The Company shall have the right to exercise its functions of management, among which shall be the right to hire new employees, direct the working force, to suspend or discharge for cause, to lay off employees because of lack of work, require employees to observe reasonable Company rules and regulations, to decide the product to be manufactured, the schedule of production including the means and processes of manufacturing. None of these functions or prerogatives shall operative contrarily to other provisions of this agreement nor to be used for the purpose of unjust discrimination against any employee.

. . .

SAFETY, SANITATION AND MISCELLANEOUS
ARTICLE XII

Section 1. The Company shall provide all safety devices as required by the health and safety regulations of the State of Wisconsin and the United States Department of Labor. The Company and the Union shall cooperate to instruct employees in the use of Safety Devices.

Section 2. The Company shall provide and maintain such safety and sanitary needs as are necessary to protect and preserve the health and welfare of the employees.

. . .

[back cover]

INJURIES

CAN BE PREVENTED AND ELIMINATED

by following

SAFE SHOP PRACTICES

In case of accident or injury
report immediately to
FIRST AID

UNION MEETINGS
First Tuesday - Every Month

POSITION OF THE COMPANY

Various provisions of the Agreement, including the back cover, emphasize the parties' mutual concern about employe safety. The Agreement, Arts. III and XII obligate the Company to provide the training in question in this case and give the Company the sole right to determine how the attendance verification should be accomplished at safety training meetings.

The Company's exercise of those rights in this case was reasonable. The purpose of the signature requirement was to insure clear records to verify that OSHA-mandated training took place as required by OSHA regulations. If attendance records were only kept by supervisors, without personal signatures of attending employes, the Company could later be accused by OSHA of falsifying attendance sheets.

The evidence shows that the Company has required employe signatures with respect to some OSHA-mandated training programs in the past and with respect to receipt of a copy of the Agreement, all without a grievance having been filed. The evidence also shows that the OSHA regulations regarding lockout/tagout were new such that previous Company decisions about whether and how to keep attendance records of employe attendance at other meetings regarding safety or other matters ought not be controlling. Whenever the Company required all shop employes to sign Exhibit 11 type forms, all the employes except Grievant in this case signed those documents at or about the time their signature was requested.

Employes who attended the lockout/tagout training had no reasonable basis for refusing to sign the Exhibit 11 forms as requested by the Company. Nothing in Exhibit 11 waived future Worker's Compensation rights or affirmatively stated that the employes had understood the

training. The signature was requested merely to prove that the employes had attended the training session and thereby to establish that they saw the movie and received the written materials distributed at the session. The employes were not told they were going to be tested on any information presented during the training.

If on March 5 Grievant was relying on advice he had received from his private attorney to the effect that the Company could not require him to sign Exhibit 11, that advice was wrong. An employer has the right to require employe signatures where, as here, the circumstances show the signature is solely for the purpose of confirming the undisputed fact that the employe attended a legally-mandated Company training session and was not required for the further purpose of waiving any employe rights. Citing, James B. Beam Distilling Co., 90 LA 740 (Ruben, 1988). The Grievant's reliance on poor legal advice should not work to the detriment of the Company.

There is no law prohibiting the Company from implementing such a requirement. The fact that Grievant or other employes did not want to sign their names to a list presented by the Company to prove attendance at the training session is irrelevant.

Because the signature requirement in this case was reasonable, the Company properly viewed Grievant's refusal to sign as an insubordinate refusal to comply with a reasonable supervisory request. When Grievant initially refused to sign, he was provided with Union representation at his request. Grievant was told by supervision that his signature was needed for keeping a record that he had received the literature and had viewed the video. Grievant was properly warned that he could be disciplined up to and including discharge if he did not sign Exhibit 11 acknowledging his attendance at the safety training session. His continued refusal to sign constituted just cause for the suspension imposed.

In addition, Grievant could and should have mitigated his economic loss on March 5 by following the principle of work now and grieve later. He did not do so. For that reason alone, Grievant ought not be awarded any relief in this matter.

For all of those reasons, the grievance should be denied in all respects.

POSITION OF THE UNION

The Company's insistence that the employes sign Exhibit 11 was not reasonable in the circumstances. The Company could have met its recordkeeping needs just as well by having the supervisors take roll in writing at the training sessions to later establish who was or was not there. The Company's concern that OSHA will be aggressively investigating the adequacy of its training is unfounded in light of the Union's evidence regarding OSHA's limited resources and non-aggressive enforcement attitude in recent times.

It remains the Union's position, as stated in the International Representative's February 14

letter, that an employer can only require employes to sign applications for employment, their tax withholding form, insurance documents, and endorsements on their paychecks. The fact that the Union did not grieve in some previous instances when employes were asked to sign for a copy of the Agreement or for receiving certain training does not establish that the Union agrees that the Company had the right to require signatures in those circumstances, let alone in the circumstances of this case.

The employes' concerns about signing their names to Exhibit 11 are valid. One can never know how or when these signed papers are going to be used against the employe in the future.

The evidence clearly shows that the Company has not required signatures regarding numerous other safety training sessions and various other kinds of meetings and distributions of information. The Company has no published work rule stating when it will and when it will not require signatures. Thus, the decision to require it in this case appears selective on the Company's part.

The Company first told the employes that it was required by law to obtain their signatures such that it had no choice but to require them to sign. When asked to produce that law, the Company failed to do so and retreated to a claim that management's rights under the Agreement authorized it to discipline employes for refusing the reasonable request that employes sign Exhibit 11. The record before the Arbitrator contains no law, regulation, Agreement provision or published work rule specifically requiring or authorizing the Company to obtain employe signatures on a document such as Exhibit 11.

The Company's action in this case appears to be a hostile response to the International Union Representative's February 14 correspondence on the subject. There is no other reasonable explanation for the Company threatening the job of an employe who has nearly 23 years on the job just because he refused to sign a piece of paper that they don't ordinarily require people to sign.

Grievant found himself in between the Union and the Company. His private attorney had advised him in advance of March 5 not to sign his name because Grievant did not understand why the Company needed to have him sign or what use against Grievant the Company would later make of his signature.

The Company's decision to send Grievant home for the balance of the day plus two additional days was a subjective decision made on the spur of the moment. It appears to have been designed to punish Grievant and to hold a tool over the heads of all of the employes. The Company could just as easily have given him a verbal warning or sent him home just for the rest of the day.

In any event, Grievant was not really guilty of insubordination. Insubordination ordinarily involves conduct such as not doing a job the employe is told to do or making an obscene gesture at

or remark to a supervisor. It should be recognized that Grievant did eventually sign the document "under protest."

In all of the circumstances, the Arbitrator should answer ISSUE 1 "Yes" and ISSUE 2 "No." By way of remedy, the Arbitrator should order the Company to stop the practice of requiring employe signatures regarding training sessions, to destroy the signatures of all employes who have previously signed in such circumstances, to make Grievant whole (with interest) for his lost time, and to expunge the suspension from Grievant's record.

DISCUSSION

The Arbitrator finds no merit in the grievance in any respect.

Article XII, Section 1 requires the Company to "provide all safety devices as required by the health and safety regulations of the State of Wisconsin and the United States Department of Labor." It further provides that the "Company and the Union shall cooperate to instruct employees in the use of Safety Devices." Article XII, Section 2 goes on to require the Company to "provide and maintain such safety and sanitary needs as are necessary to protect and preserve the health and welfare of the employees." The Company's provision of the subject training session concerning new OSHA-mandated lockout/tagout procedures was an exercise of its rights and obligations pursuant to Art XII as well as of its more general "right to exercise its functions of management" recognized in Art. III and in the Agreement Preamble. Those rights and obligations also authorize the Company to determine the methods and means for maintaining Company records concerning which employes received that training.

The Arbitrator is satisfied that the Company's exercise of those rights in this case did not exceed either the express limitations contained in the last sentence of Art. III or the additional implied obligation that the Company not exercise its management rights in an arbitrary or capricious manner.

The Arbitrator finds that the Company's purpose in requiring signatures on Exhibit 11 was to maximize its proof of compliance with the OSHA training requirements, rather than to arbitrarily demonstrate its control over employes or to arbitrarily insist on exercising a right merely because the Union asserted that it did not have such a right.

The fact that the Company was required by OSHA regulations to provide the training it provided is not disputed. The Arbitrator is persuaded that the Company was within its rights under Arts. XII, III and the Preamble to decide that the records it kept of attendance at the lockout/tagout procedure training sessions would be kept in the form of employe signatures on the Exhibit 11 form, rather than by other possible methods of record keeping. It was not an arbitrary or capricious exercise of those rights for the Company to conclude that requiring signatures would better protect its training procedure from OSHA challenge than supervisors merely taking roll

without benefit of the employes' supporting signatures. Whether OSHA is aggressive or passive in its enforcement activities at present does not remove the legitimacy of the Company's business purpose in deciding to require employe signatures as part of its proof--when and if needed--that all of its shop employes attended the movie and received the written materials distributed at the training session.

The wording of Exhibit 11 indicated that by signing it, the employes were acknowledging only the facts (which none of the employes could reasonably dispute) that they had "attended the training session" on the date specified and that the training session was held "for the purpose of instruction on job duties and how it relates to the Kewaunee Engineering lockout/tagout procedure." The wording of Exhibit 11 did not state that the employes understood the film presented at that session or the written materials distributed at that session. The Company's response to the Union International Representative's February 14 letter assured the Union that "The purpose of signing is only to comply with the [OSHA law] requirement that all employes be given this safety training - not to in any way effect employee rights or liability." To the same effect, when Grievant expressed concern that he would, by signing, be affecting his rights to future Worker's Compensation benefits, supervision assured him that the signature request had nothing to do with Worker's Compensation or insurance benefits. And when Grievant was ultimately willing to sign with the words "under protest" inserted next to his signature, the Company treated that as compliance with its signature requirement.

Neither the fact that the Company has previously required employe signatures regarding some safety training programs without a grievance being filed nor the fact that the Company has not required employe signatures regarding other safety training programs is controlling on the question of whether the Company had the right under the Agreement to require employes to sign Exhibit 11 in the instant circumstances. The mere non-exercise of a right by the Company or the Union in the past does not extinguish that right in the future.

To the extent that the Company may have led employes to believe that the Company considered itself required by law to obtain employe signatures, the Company contributed to the degree of employe resistance to providing signatures when the Company was unable to produce any law specifically requiring it to obtain employe signatures on a document such as Exhibit 11. Nevertheless, even if the Company is viewed as having "retreated" to its reliance on its rights under the Agreement, that retreat in this case was to firm and safe ground.

In sum, the Arbitrator concludes the Company, in requiring employes to sign Exhibit 11 in the instant circumstances, has exercised a right reserved to it under the Agreement which the Company exercised in a manner that was not arbitrary, capricious, unjustly discriminatory against any employe or otherwise violative of the Agreement.

For those reasons, the Arbitrator's answer to ISSUE 1, above, is "No."

The instant disciplinary suspension consisted of sending Grievant home for about the half-day balance of work on March 5, and for two additional days. That suspension was imposed only after Grievant had repeatedly refused clear supervisory orders that he sign the Exhibit 11 form. The suspension also followed Grievant having been afforded: Union representation upon his request; a clear warning that he was facing disciplinary action up to and including discharge if he continued to refuse to sign Exhibit 11; and an opportunity to confer with his Union representatives before supervision concluded that he was continuing his refusal in the face of the warning. The Arbitrator is also satisfied that the Company properly made sure Grievant understood what was being required of him on March 5 by having Exhibit 11 read aloud to him and by assuring him that signing it had nothing to do with Workers Compensation or insurance, when he expressed concern that the signature might later be used against him to reduce benefits.

Grievant's refusals of supervision's reasonable order that he sign Exhibit 11 in the circumstances of this case constituted just cause for discipline and for the suspension imposed. Especially so, since Grievant could and should have complied with supervision's order on March 5 and grieved later to seek removal of his signature from the Exhibit 11 form. That is the approach he properly utilized when he finally agreed to sign "under protest" days later.

Supervision's decision to impose a suspension consisting of two days plus the balance of the day on March 5 did not exceed the range of reasonable disciplinary penalties which the Company might have chosen to impose in the circumstances, even when Grievant's length of service is taken into consideration. The manner in which the disciplinary action was taken was not such as would warrant the Arbitrator's second-guessing management's exercise of discretion as to the severity of the disciplinary action taken.

While it is unfortunate that Grievant was advised by his private attorney not to sign the Exhibit 11 in advance of March 5, that advice is neither a valid defense/excuse nor a mitigating factor as regards Grievant's improper resort to self-help in the form of his refusals to sign Exhibit 11 on March 5.

For the foregoing reasons, the Arbitrator's answer to ISSUE 2 is "Yes."

DECISION AND AWARD

For the foregoing reasons and based on the record as a whole it is the DECISION AND AWARD of the undersigned Arbitrator on the ISSUES noted above that:

1. No. The Company did not violate the Agreement by requiring employes to sign Exhibit 11.

2. Yes. There was just cause for the discipline imposed by the Company for Grievant's refusal to sign Exhibit 11

on March 5, 1991.

3. Accordingly, no consideration of remedy is necessary or appropriate and the subject grievance is denied.

Dated at Shorewood, Wisconsin by
this 3rd day of December, 1991

Marshall L. Gratz /s/
Marshall L. Gratz, Arbitrator