

**FEDERAL MEDIATION AND CONCILIATION SERVICE
UNITED STATES GOVERNMENT
UPPER MIDWESTERN REGION**

AGGREGATE INDUSTRIES,

EMPLOYER,

-and-

ARBITRATOR'S AWARD
FMCS Case No. 070906-59979-3
(Contract Interpretation)

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL NO. 120,

UNION.

ARBITRATOR:	Rolland C. Toenges
GRIEVANTS:	All Affected Members
DATE OF GRIEVANCE:	August 15, 2007
DATE ARBITRATOR SELECTED:	October 18, 2007
DATE & PLACE OF HEARING:	January 30, 2008 St. Paul, Minnesota
RECEIPT OF POST HEARING BRIEFS:	March 31, 2008
DATE HEARING RECORD CLOSED:	April 5, 2008
DATE OF AWARD:	April 5, 2008

ADVOCATES

FOR THE EMPLOYER:

Martin J. Costello, Attorney
Hughes & Costello

Katrina E. Joseph, Attorney
Hughes & Costello

FOR THE UNION:

Brian M. Mumaugh, Attorney
Holland & Hart

WITNESSES

Randy Gaworski, Operations Manager
Aggregate Industries

Dave Schrunk, Business Agent
Teamsters, Local 120

ALSO PRESENT

Megan Wassenberg, Human Resources Mgr.
Aggregate Industries

Jeff Snethen, Steward
Teamsters, Local 120

Coleman Kelly, Driver
Aggregate Industries

COURT REPORTER

Anne Marie Holland
Esquire Deposition Services

ISSUE¹**UNION:**

Whether the Employer violated the Collective Bargaining Agreement by forcing employees to use a vacation or personal day when they called in sick and simultaneously assessing points against the employees under the attendance policy; if so, what is the appropriate remedy?

EMPLOYER:

Is the Union equitably barred on the grounds of estoppel, waiver and /or laches from pursuing its grievance against the Employer, that the May 1, 2007 Time Off Procedure, and the subsequent revisions to that policy, violates the CBA or the practice of the parties, and, if so, what is the nature and scope of the appropriate remedy?

Is the Company's May 1, 2007 time off policy and the subsequent revisions to that policy permissible under the terms of the Collective Bargaining Agreement or the practice of the Parties.

¹ It is noted that the following issue statements were those submitted in the Parties' Post Hearing Briefs and may vary somewhat from the issue statements submitted at the hearing.

JURISDICTION

The instant matter, regarding a claim of contract violation (interpretation of terms and conditions) came on for hearing pursuant to the Arbitration Procedure contained in the Collective Bargaining Agreement (CBA) between the Parties. Said Arbitration procedure (Paragraph 29 of the CBA) defines applicable issues as follows:

Paragraph 29. Arbitration:

- (A) “Should any controversy arise under the interpretation of and/or adherence to the terms and provisions of this Agreement, it shall first be referred to a meeting between the Union and the Employer.”
- (B) If the controversy is not satisfactorily resolved under step (A) above, it shall be referred to the Joint Committee which shall consist of no less than four (4) persons, two (2) to be chosen by the Union and two (2) to be chosen by the Employer. It shall be the function of this Joint Committee to adjust disputes, which cannot be settled between the Employer and the Local Union. Where the Joint Committee, by a majority vote, settles a dispute, no further appeal may be taken and the decision shall be final and binding on both parties.”
- (C) “If the controversy is not satisfactorily resolved under step (B) above, it may at the request of either party be referred to a board of arbitration consisting of one (1) representative of the Union and one (1) representative of the Employer. In the event that these two (2) fail to reach an agreement within five (5) days, a third (3rd) neutral member shall be selected from a list requested of the Federal Mediation Conciliation Service. The majority decision of this board shall be final and binding on both the Union and the Employer in any controversy so settled. The Union and the Employer shall each pay their own representatives on the board and the third (3rd) member’s compensation shall be divided equally between the Employer and the Union.”

In the interest of resolving the matter in dispute, the Parties selected Arbitrator Rolland C. Toenges from a panel provided by the Federal Mediation and Conciliation Service.

The arbitration proceeding was conducted in accordance with the rules of the Federal Mediation and Conciliation Service and as provided by the CBA. The Parties were afforded full opportunity to present evidence, testimony and argument bearing on the matter in dispute. All witnesses were sworn upon oath and were subject to cross-examination.

The Parties jointly stipulated that the Arbitrator has jurisdiction to hear and render a decision on the matter in dispute.

A transcript was prepared of the hearing proceedings and provided to all Parties.

The Arbitrator received comprehensive post-hearing briefs from the Parties on March 31, 2008. The hearing record was held open through April 5, 2008, pending any further submissions. No further submissions were received and the hearing record was then closed.

BACKGROUND

Aggregate Industries (Employer) produces construction materials, including aggregates, pre-mixed concrete (ready mix), concrete products (Master Block), asphalt and does contracting. Aggregate Industries serves much of central Minnesota, especially the twin cities of Minneapolis – St. Paul, as well as eastern North Dakota and small parts of Wisconsin. The Company is the second largest producer of ready mix in the Minneapolis – St. Paul metropolitan area and operates a fleet of 150 trucks. There are some 300 employees, including union and non-union. The instant dispute arises out of the Employer's attendance procedure in its ready mix operations

Ready mix is a mixture of water, aggregate and cement that is delivered to construction sites in a semi-fluid state in truck mounted mixers. Due to the relative short time period this material remains viable, prompt delivery is critical

Ready mix must arrive at the construction site in a timely manner. Failure to do so can result in its rejection (i.e., DOT specifications require a sixty to ninety minute window from the time the ready mix is placed in the delivery vehicle until it is deposited at the delivery site). Also, untimely delivery can increase the labor cost of crews waiting to place and finish the ready mix at the delivery site and negatively affect project quality. A load of ready mix is typically valued at \$1,000.00.

The International Brotherhood of Teamsters, Local 120 (Union) represents Aggregate Industries employees that operate the ready mix trucks (Drivers), employees that maintain and repair equipment (Mechanics and Welders), employees that operate the ready mix (batch) plants (Batchmen) and utility workers that service equipment (Greasers).

The Parties are signatories to a Collective Bargaining Agreement (CBA) in effect from May 1, 2004 through April 30, 2009². The instant grievance was filed on August 15, 2007 and is covered by said CBA.³

Although the previous CBA⁴ and current CBA⁵ contained a provision titled “Violation of Work Rules,”⁶ Aggregate Industries did not have a comprehensive set of published working rules until May 1, 2007. However a “Time Off Policy” was implemented effective April 1, 2006.⁷

² Union Exhibit #1B.

³ Union Exhibit #6.

⁴ Union Exhibit #1A. (This CBA was in effect from May 1, 1999 through April 30, 2004, and contained the same language in Paragraph 29 that appears in the current CBA as Paragraph 30.

⁵ Union Exhibit #1B.

⁶ CBA, Paragraph 30. Violations of Working Rules. “Employees covered by this Agreement will observe such working rules as may be posted by the Employer for the promotion of health, safety, and welfare of the Company and its employees, provided such rules do not conflict with or supersede any of the terms of provisions of this Agreement. The Employer may prefer charges against an employee for alleged violation of working rules. The Union shall make immediate investigation of the charges and a settlement of the case shall be made as provided under Paragraph 28. The Employer will have a drug and alcohol policy, which will become part of the work rules.

⁷ Union Exhibit #4A.

With respect to use of sick days and vacation, the April 1, 2006 “Time Off Policy” provided in relevant part:

- “We expect, if there is an illness, (yours, family, or medical appointments), you will use a sick day.
- If you have utilized your sick days, you will be given the option to use a vacation day. If a vacation day is not used, an unexcused absence will be documented. [Emphasis Added]
- After 3 consecutive days off, a medical release for full duty will be required on your return to work.”

The April 1, 2006 “Time Off Policy” also contained the following statement:

- “Aggregate Industries reserves the right to discipline for tardiness and/or absenteeism, including unplanned paid days off, in accordance with the union contract.”

The 2006 “Time Off Policy” further provided that:

“Any or all guidelines are subject to change at any time.”

On or about May 25, 2006, the Union sent a communication to the Employer indicating that the “Time Off Policy” as written was acceptable to the Union.⁸

In late 2006 and early 2007, the Employer began drafting a comprehensive set of Working Rules. The Working Rules covered a wide variety of working condition issues. However, only provisions relating to time off, attendance and discipline are at issue in the instant proceeding.

In January 2007, the Employer presented an overview of the proposed Working Rules to employees at the Company’s annual meeting via a power point presentation.⁹ Union represented employees and Union representatives were present. The Employer explained that the proposed Working Rules were currently in a draft stage and a final draft would be available in a couple months with a planned implementation date of May 1, 2007.

⁸ Union Exhibit #4B.

⁹ Employer Exhibit #4

The Employer explained that the Working Rules would include clear expectations of how to use vacation, sick, personal, unplanned, and FMLA time off and that a progressive discipline, point-value system would be applied to unplanned days off. The Employer stated that employees would be required to sign an acknowledgement that they had received the new rules prior to May 1, 2007.

Between the Employer's January 2007 introduction of the proposed Working Rules to employees and implementation of the Rules on May 1, 2007 there were several discussions between the Employer and Union regarding their content. In early April 2007, the Employer met with the Union to review the Company's proposed working rules. The Employer noted a number of comments, suggestions and objections the Union made to the proposed Rules.¹⁰

Among the Union's objections noted was a provision in the Rules giving the Employer the right to add to/delete/modify any rules at any time. The Union wanted this deleted. The Employer did not delete this provision but added the following language:

“Any changes to these working rules will be communicated via company posted memorandums.”

The Union also objected that the time off provisions in the new rules were too harsh, particularly regarding sick leave. A provision in the new Working Rules (Time Off Procedure) removed a provision in the 2006 Time Off Policy allowing employees the option to use a personal day or vacation day if out of sick leave. The new Working Rules required use of personal days and vacation if out of sick leave and further considered the vacation an unexcused absence for which disciplinary points would be assessed.¹¹

The Employer made some changes in the proposed Time Off Procedure in response to the Union's input, but the Parties are not in agreement that there was an Employer response

¹⁰ Employer Exhibit #6.

¹¹ Employer Exhibit #1.

to the Union's suggestions, comments and objections. The Employer believes a response was sent to the Union, but the Union claims it did not receive a response.

On April 16, 2007 the Employer's proposed Working Rules (Version #3) were communicated to the employees and Union via a cover memorandum from the Employer.¹² A document was included that employees were required to sign and return to the Employer as an acknowledgement that they had received the Work Rules. Thereafter, discussions continued between the Employer and Union. The Union maintained its position that the Time Off Procedure was too restrictive.

On June 8, 2007 the Employer posted and distributed a revised version of the Working Rules to employees.¹³ The Employer noted the following changes in the Time Off Procedure:

1. The 48 hour advanced notice provision was expanded and relaxed.
2. Penalties for sick days were expanded and relaxed.
3. Early Offs/Late Starts were more clearly defined and relaxed.

On July 26, 2007 the Employer posted and distributed another revised version of the Time Off Policy. The Employer made the following changes to the Time Off Policy:

1. Contact phone and fax numbers were updated.
2. If dispatch was closed, employees are to leave a message on the after hours number listed.

Shortly after distribution of the July 26, 2007 revisions to the Time Off Procedure the Union, voicing objection to the requirement that an employee must use vacation or a personal day when no sick leave is available, notified the Employer that it "cannot be in the Policy." The Employer made no further changes in the Time Off Policy.

¹² Employer Exhibit #2; Union Exhibit #4C & 4D.

¹³ Union Exhibit #4E; Employer Exhibit #3.

Under the new Attendance Rules, if an employee is off work and not in compliance with Time Off Procedures it is an “Unplanned Day Off.”¹⁴ The new Time Off Procedure requires an employee to use sick leave for personal illness, illness in family, or any medical/dental/etc. appointments. The new Time Off Procedure further provides that an employee who has utilized their sick days will be required to use any remaining personal days first and vacation days, second, as applicable.¹⁵

Under the terms of the CBA employees earn two (2) days of sick leave per year. Unused sick leave can be carried over from year to year, but may not exceed ten (10) days.¹⁶ Employees with more than six (6) months service receive one (1) Personal Holiday (personal day) and must request this day off at least two (20) weeks in advance.

If an employee does not have sick days to cover an absence, the employee will be charged an “Unplanned Day Off,” even though the employee used an available personal day or vacation day to cover the absence.¹⁷ The new Working Rules (Disciplinary Guidelines) provide that an employee having an “Unplanned Day Off” is assessed three (3) disciplinary points. An employee assessed six (6) points calls for a written verbal warning; eight (8) points calls for a written warning; ten (10) points calls for a one-day (1) suspension; a next offense calls for a three-day (3) suspension; a second next offense calls for suspension and/or termination.

As of August 15, 2007, the Employer had issued at least four (4) disciplinary actions under the new Working Rules (Time Off Procedure, Attendance Rules and Disciplinary Guidelines). The discipline included two (2) written verbal warnings, one (1) written warning and a one-day (1) suspension

The Union filed the following grievance on August 15, 2007:

¹⁴ Union Exhibit #4D, “Attendance Working Rules.”

¹⁵ Union Exhibit #4F.

¹⁶ Union Exhibit #1B. Article 37.

¹⁷ Union Exhibit #5.

“COMPLAINT DETAIL: Protesting the Company forcing employees to take a vacation or personal day when they call in sick or have a doctor’s note. Article 30, Working Rules and any/all other applicable articles and /or pertinent information. Requesting Company cease and desist this practice immediately. More evidence to be provided at time of hearing.”¹⁸

The Parties were unable to resolve the dispute via the CBA Grievance Procedure culminating in the instant arbitration proceeding.

POSITIONS OF THE PARTIES

THE UNION PRESENTS THE FOLLOWING ARGUMENTS IN SUPPORT OF ITS POSITION:¹⁹

- Under the 2006 Time Off Policy, employees had the option of using personal days or vacation if they had no sick days available. In 2007, the Employer unilaterally changed the procedure to force employees to use personal days and vacation when sick leave days were exhausted.
- Also, in 2007, the Employer unilaterally implemented an attendance policy and began charging disciplinary points for “unplanned” days off.
- The Union had agreed to the 2006 Time Off Policy, but did not agree to provisions in the 2007 Working Rules and Time Off Procedure.
- The CBA (Article 8) requires the Employer to maintain all working conditions at no less than the highest minimum standard in effect at the time of the signing of the Agreement.
- The CBA (Article 30) provides that working rules posted by the Employer shall not conflict with or supersede any of the terms or provisions of the Agreement.
- There is nothing in the CBA authorizing the Employer to charge an employee both a vacation day and an unauthorized [unplanned] absence.
- Under the 2006 Time Off Policy, an employee out of sick days had the option of using a vacation day to cover the absence. If the employee opted to not use a vacation day, the absence was documented as unexcused.

¹⁸ Union Exhibit #6.

¹⁹ The Union cited numerous cases in support of its arguments. In the interest of brevity they have not been repeated in this award.

- The 2007 Working Rules not only requires an employee out of sick leave to use a vacation day, but also assesses points under the Attendance Working Rules that lead to discipline.
- During the several times the Union met with the Employer, to discuss the 2007 Working Rules, it never agreed to the right of the Employer to arbitrarily take a day of the employee's earned vacation for a sick day.
- During discussions with the Employer, the Union voiced its objections to the new 2007 Policy.
- Almost immediately upon implementation of the 2007 Policy Union members began suffering discipline (verbal, written reprimands and suspensions) for violation of Rule 4,C ("Unplanned" days off).
- On July 26, 2007, the Union discovered the Employer was implementing the new Rules and filed a timely grievance on August 15, 2007, protesting the Employer's unilateral action.
- The Union requests that the Employer cease and desist from this practice, including, but not limited to, removing all disciplinary points from all employees who have been charged with an "Unplanned" absence, as a result of having no sick leave available.
- The Arbitrator should reject the Employer's challenge that the grievance is untimely. The grievance was filed timely for several reasons:
 - The CBA does not prescribe a time limit to file a grievance.
 - The grievance was filed within a reasonable time of the implementation of the Employer's 2007 Rules.
 - When the Union discovered that the Rules had been imposed and how it was being implemented, the Union readily filed the Grievance.
 - The Grievance is a continuing CBA violation, which may be grieved at any time.
 - The arbitration of the Grievance is equitable, given that (1) no prejudice has occurred; (2) the Grievance is clear, definite, and certain; and (3) grievances should not be strictly construed to the prejudice of either party.
 - Federal labor policy favors the determination of grievances on the merits and disfavors forfeitures of grievances. Doubts concerning arbitrability should be resolved in favor of arbitrability.

- The Employer has not met its burden, especially given that there is no CBA language imposing a time limit.
- It is a fundamental rule of law that the employer has a duty to negotiate any changes in the terms and conditions of employment with the duly certified exclusive representative of its employees.
- While the employer has a right to issue and enforce reasonable shop rules, including attendance rules, this right cannot extend to a subject that is a mandatory subject of bargaining.
- Attendance rules have been found to be subject to the collective bargaining obligation if they are “material, substantial or significant.”
- The Employer’s 2007 Attendance Rules affected the employees’ terms and conditions of employment and therefore were a mandatory subject of bargaining.
- Creation of vacation allotments and a cap on excused absences made a “material, substantial and significant” change in the terms and conditions of employment and are mandatory subjects of bargaining.
- In contrast, the 2006 Time Off Policy that was proper as it was duly negotiated, but the 2007 changes were not agreed upon.
- The Employer’s quantitative assertions regarding improvement in attendance and on-time performance do not justify unilateral change and are not supported by empirical evidence.
- The 2007 Attendance Rule substantively conflicts with the CBA. The CBA provision allowing the Employer to create working rules may not conflict with or supersede any of its terms or provisions.
- There is nothing in the CBA that gives the Employer the right to require employees to use their vacation days or personal day for illness reasons and then to discipline them when required to do so.
- There is nothing in the CBA that gives the Employer the right to assess discipline points for an employee legitimate use of sick leave.
- Arbitrator Gentile in Six Flags, 119 LA 885, ID at 888. Found persuasive the union’s contention that where sick leave was a benefit negotiated by the parties and included in the agreement, the company had by its sick leave policy turned the benefit in to a weapon and chilled its normal use.

- In summary, the Employer's attendance policy requiring an employee who has used up sick leave to use vacation leave and assessing that employee an unexcused absence violates the CBA.
- The Employer's Attendance Policy, as it is currently being implemented, is unreasonable and unjust. It not only charges an excused absence (vacation leave) from an employee who has no more sick leave – it also assesses that employee with an unexcused absence for the very same working day. This constitutes a double consequence for the same event.
- The Employer's Attendance Policy assigns discipline points with out regard to the legitimacy of the employee's absence and in effect disciplines the employee for being ill.
- In Avery Dennison Corp. and Graphic Communications Industrial Union Local 546M, 119 LA 1170 (Imundo 2004), The arbitrator cited six factors for use in determining the reasonableness of an attendance policy:
 1. Whether the problem the policy was designed to address really was a problem;
 2. Whether the policy appears fair on its face;
 3. Whether the policy's operation produces just results in particular cases;
 4. Whether the policy exempts those absences that are protected by the CBA or by law;
 5. Whether absences are weighed according to severity or whether all absences are weighed equally; and
 6. Whether the policy is understandable and one the employees can comply with.

The arbitrator found that the employer's policy did not satisfy criterion #2, and what made it "unreasonable is that employees with good, or even excellent attendance records are likely to be the recipients of disciplinary action. . ."

- The Employer's policy at issue in the instant case is not fair on its face (Criterion #2 above) for it imposes a double consequence for a single day off.
- The Employer's policy at issue in the instant case does not produce just results (Criterion #3 above) because employees who are sick or must go to medical appointments are punished twice (have vacation taken away and assessed disciplinary points).
- The Employer's policy at issue in the instant case does not exempt those absences protected by the CBA (Criterion #4 above).
- The Employer's 2007 Attendance Rule is unreasonable and unfair – it must not be allowed to continue implementing the inequitable policy.

- The Employer's unilaterally established Rules violated its obligations under federal law and the CBA.
- The appropriate award is that the Employer should cease and desist from implementing the 2007 policy, which categorizes vacation days and personal days as an unplanned absence when an employee has insufficient sick leave available. The Award should also require the Employer to cease and desist from assessing disciplinary points and taking away a day of earned vacation or personal day for each day an employee is ill.
- Further, the Employer should remove all unplanned absence points from the records of aggrieved employees that have been so assessed under the 2007 Rules.

THE EMPLOYER PRESENTS THE FOLLOWING ARGUMENTS IN SUPPORT OF ITS POSITION:²⁰

- The CBA grants the Employer the right to unilaterally establish working rules.
- In the interest of fostering good labor relations and to be open, inclusive and transparent throughout the process of devising the rules at issue, the Employer reached out and solicited the input of the Union and employees in drafting new working rules and time off policies.
- Accordingly, the Employer met extensively with its drivers and Union representatives sharing the vision and specific language of various proposed rules.
- The Employer solicited feedback from the Union and employees, and even revised portions of the rules and policies in response to their concerns.
- With regard to the Time Off Procedures, the Employer proposed not one but four different versions.
- Each time the Union made a specific protest about a particular issue, the Employer considered it and responded, often by reworking the language in the policy to address what the Union had raised.
- During the long process of formulating, discussing and revising the Time Off Procedure, the Union never once objected to a particular provision found in the "Sick Days" section at bullet #4.

²⁰ The Employer cited numerous cases in support of its arguments. In the interest of brevity, they have not been repeated here.

- The language in bullet #4 did not change at all between the four different versions of the policy. The Union's implicit consent to that provision was clear.
- Not until mid August 2007, months after the good faith effort of the Employer did the Union raise its first complaint about bullet #4 and filed a grievance.
- Equity demands that the grievance be denied. The Union sat on its purported concern for far too long, when it had sufficient notice and every opportunity to object in a timely manner.
- The grievance must be denied because it lacks any substantive merit. The CBA grants the Employer the right to unilaterally implement and/or revise working rules, including time off procedures. The Union's consent or approval to such a rule or revision is not necessary.
- The Employer implemented bullet #4 in response to serious deficiencies in driver availability and on-time deliveries to customers. Deficiencies in delivery to customers were costing the Employer tens of thousands of dollars in revenue every month and hurting customer relationships.
- In just one month, bullet #4 had a dramatic effect on solving this serious problem. Thus, bullet #4, which is inherently reasonable and fair, and also fulfills legitimate management objectives that must be upheld.
- Driver availability directly affects on-time delivery, and both of these factors are critical components of customer service and the success of Aggregate Industries' business.
- At any given time, prior to May 2007, the Employer could expect to have a maximum of ten percent (10%) of its drivers off, with significantly higher rates on Mondays and Fridays. A large part of the attendance problem was due to drivers calling in sick at the last minute.
- After implementation of the new Working Rules on May 2, 2007, the Employer achieved an all time high of delivery efficiency – 92.5 percent. Driver availability increased about two percent, which meant about three additional drivers per day.
- On Mondays and Fridays, the Employer experienced an improvement in available drivers of five per day. Prior to implementation of the new rules, driver absences averaged twenty per day during the busy season. After the new rules were implemented, the average absence was fifteen drivers per day.
- The new Work Rules do not reduce the amount of a driver's vacation. In fact, the new Rules present more options for getting time off and are more lenient than the 2006 Time Off Policy. Drivers can receive up to twenty sick days in on year without any penalty.

- It is well established that management has the fundamental right to establish unilaterally reasonable workplace rules not inconsistent with law or the CBA. Thus, the Employer's Time Off Procedure must be upheld unless it is unreasonable or violates the CBA.
- The test of reasonableness is whether or not the rule is reasonably related to legitimate objective of management, and is clearly stated so employees can appreciate its import.
- The rule at issue is inherently reasonable because it directly relates to a legitimate objective of management and is easily understood by the employees.
- In fact, most drivers support the new procedure, and it has successfully achieved the intended purpose by significantly increasing driver availability, which in turn, boosts customer satisfaction, sets the Company and its drivers apart in a very tight and competitive market, and increases Company revenues. This policy is good for everyone.
- The creditable evidence demonstrates the Union has agreed to Sick Days bullet #4 of the 2007 Time Off Procedure, and equity demands that it not be permitted to undo that agreement at this late stage. To do otherwise, would be destructive to the labor-management process and throw away many months of invested resources.
- It is undisputed that the Employer provided all drivers and the Union with more than enough notice and information about the policy revisions. The Employer went out of its way to actively seek comments and input from drivers and the Union.
- The Union had ample notice and opportunity to raise questions or file a grievance about Sick Days bullet #4 in a timely fashion. Instead, the credible evidence demonstrates that no such concern was ever raised.
- Certainly, after receiving four different proposals, each with bullet #4 unchanged, the Union can reasonably be expected to have documented its objection in some manner. The Employer went through the expense and effort of republishing the policy to its drivers four times, just to accommodate the Union's suggestions.
- The testimony of the Employer and Union witnesses is starkly opposite in several critical respects and it will need to be determined whose testimony is most creditable. The most credible testimony is that the Union never expressed a specific objection to the Employer regarding Sick Days bullet #4.
- The Union's testified that it waited to file its August 15, 2007 grievance until there was an adverse impact from the new Rules. However, the Union

acknowledged under cross-examination that employees had been disciplined in early June.

- The Union grievance does not even mention discipline or the points assessed under the new policy. The grievance is limited solely to Sick Days bullet #4 in the Attendance Rule and does not protest the progressive discipline point-value system of the separate working rules.
- The Employer reasonably relied upon the Union's implicit agreement. Reversing that agreement now would prejudice the Employer, damage labor relations, and waste considerable resources that have been invested in this project since 2006.
- There is literally nothing more the Employer could have possibly done to involve the Union in this process. A grievance at the end of this long and well-intentioned process is not the right result. The Arbitrator should act to preserve the more than twelve-month effort of the Parties. The Union should be barred from grieving bullet #4 on the grounds of estoppel and laches.
- The Employer has the right to manage its workforce and to establish reasonable work rules. The Employer's rights are given up only to the extent evidenced in the CBA.
- Bullet #4 is reasonable and it is entirely consistent with and contemplated by Articles 9 and 30 of the CBA.
- There is no established practice or provision in the CBA requiring the Employer to obtain the Union's approval prior to issuing working rules or revising the Time Off Procedure.
- In addition to the equitable grounds for dismissing the grievance, it should also be denied on substantive grounds.
- Article 9 of the CBA, provides management rights to the Employer and requires employees to use procedures established by the Employer.
- Article 30 of the CBA, specifically grants the Employer the right to create working rules, and requires employees to observe those rules.
- The Employer is not obligated to give the Union advance notice of revisions to the working rules or to obtain the Union's approval for any such changes. The Union completely failed to prove that the Employer is obligated to negotiate changes to the Time Off Procedure.
- The Union expressly agreed to the 2006 Time Off Policy which provided that: "Aggregate Industries reserves the right to discipline for tardiness and/or

absenteeism, including unplanned paid days off, in accordance with the Union Contract”

- The only limitations on the Employer in establishing working rules and procedures is that they be reasonable and not violate the CBA.
- Bullet #4 is inherently reasonable and does not violate the CBA. The pattern of unplanned absences being experienced by the Employer prior to implementation of the new Time Off Procedure and Attendance Rules was adversely affecting its competitiveness and financial well-being.
- Bullet #4 is understandable to the employees. The use of vacation, when out of sick leave, was in effect as a result of the 2006 Time Off Policy, which the Union approved. In fact, most drivers preferred to do this.
- Bullet #4 does not violate the CBA. The CBA does not prohibit the substitution of vacation leave for sick leave. No bid vacation is ever lost, even when employees substitute vacation leave for time off due to illness. The employees still get their bid time off when they originally scheduled it.
- Bullet #4 does not violate Article 37, Sick Leave, of the CBA. This Article only addresses accrual and scheduling issues. It does not have any definitional restrictions or other provisions that would support a contrary argument by the Union.
- The CBA does not address how vacation is to be utilized or whether it can be exchanged for other types of leaves. Nothing in this language alters the parties' past practice or the Union's prior consent in this regard.
- The new 2007 Time Off Procedure, including Sick Days bullet #4, successfully accomplished the legitimate management objective to increase driver availability, customer satisfaction, and revenues.
- Bullet #4 does not harm the drivers. What potentially harms the drivers is the new point-value discipline system under the Working Rules. An employee who calls in sick at the last minute, after already utilizing all of his sick leave and personal days, will be required to use vacation. The employee will incur disciplinary points even though using vacation because use of vacation requires a 48-hour advanced notice.
- The progressive discipline, point-value system under the new Working Rules creates the only arguable difference between the 2006 Time Off Policy and the new 2007 Work Rules. That difference, ultimately, is irrelevant to the present arbitration: the progressive discipline, point-value system in the Working Rules is not part of the grievance and is, therefore, unarbitrable.

- No governing case law prohibits bullet #4. The instant arbitration does not involve FMLA. Under the 2007 Working Rules, employees are not required to use vacation for FMLA leave. Further, no employee will lose any bid vacation time off. The vacation time off will just be unpaid if the driver was previously paid for that time off.
- The point system is not arbitrable because it was not grieved. The Union's grievance protested one issue: "The Company forcing employees to take a vacation or personal day when they call in sick or have a Doctor's note."
- Clearly, the Union's grievance is directed to bullet #4: "If you have utilized your sick days, you will be required to use remaining personal days first and vacation days second, as applicable." The Union did not grieve the progressive discipline point-value system in the Working Rules.
- The grievance does not contemplate or reference any discipline whatsoever. Thus, this issue is not properly before the Arbitrator and cannot be considered. Likewise, the Union's requested remedy to "restore" points is improper and unarbitrable.
- The Employer is well within its rights to unilaterally establish the progressive discipline, point-value system under Articles 9 and 30 of the CBA. Further, in the 2006 Time Off Policy, the Union consented to the Employer's right to discipline for tardiness and/or absenteeism, including unplanned days off such as last minute and/or excess days, which is precisely what the progressive discipline point-value system does.
- Finally, not one of the employees who was purportedly disciplined or assessed points for excess sick days under bullet #4 filed a grievance on those points. In short, this is not a discipline case, but a contract case. If, at some point, an individual employee believes he has been disciplined under the point-value, the proper remedy for such a claim is to grieve the discipline.
- In the instant case, the Union seeks to end-run the entire process and, at the same time, eviscerate management's right to manage the workforce.
- For the foregoing reasons, this grievance must be denied on equitable grounds of estoppel and laches, and also for its lack of any substantive merit.

EXHIBITS

UNION EXHIBITS:

- 1A – Collective Bargaining Agreement, 5/2/1999 – 4/30/2004.²¹
- 1B. – Collective Bargaining Agreement, 5/1/2004 – 4/30/2009.
- 2. - Company Website Information.
- 3A. – Master Seniority List.²²
- 3B. – Plant Seniority Lists.²³
- 4A. – Attendance Policy, 4/01/2006
- 4B. – Union Letter Agreeing to April 1, 2006 Time Off Policy.
- 4C. – 2007 Proposed Time Off Procedure. (Version #3)
- 4D. – May 1, 2007 Working Rules.
- 4E. – June 8, 2007 Time Off Procedure.
- 4F. – July 26, 2007 Time Off Procedure (Version #5).
- 5. - Employee Disciplinary Forms (10).²⁴
- 6. – Grievance No. 03-5928, filed 8/15/2007.
- 7. Letter from Employer Denying Grievance.
- 8. Memorandum Appointing Arbitrator Rolland Toenges, 10/18/2007.

EMPLOYER EXHIBITS:

- 1.– Time Off Procedure, Effective 2007 (Version #2).
- 2.– Time Off Procedure, Effective April 16, 2007 (Version #3).
- 3.– Time Off Procedure, Effective July 26, 2007 (Version #5).
- 4.– Working Rules – Power Point Presentation.

²¹ Employer’s objection to relevancy is noted.

²² Employer’s objection to relevancy is noted.

²³ Employer’s objection to relevancy is noted.

²⁴ Employer’s objection to relevancy is noted – that disciplinary actions are beyond the scope of the Union’s grievance.

5.– Time Off Policy, Effective 2007 (Version #1).

6.– MEMO, Gaworski to et.al., Working Rules–Union Meeting–Open Questions.

DISCUSSION

Arbitrability

The threshold issue to be determined is the Employer's position that the Union's grievance is not arbitrable based on the doctrines of estoppel and laches.

Estoppel

A common definition of "estoppel" is: "A bar that prevents one from asserting a claim or right that contradicts what one has said or done before or what has been legally established as true."²⁵

In the instant case the Employer argues that the Union is barred from grieving the matter at issue because it previously agreed to substitution of vacation for sick leave in the 2006 Time Off Policy. The 2006 Time Off Policy also included the following caveats:

- "Aggregate Industries reserves the right to discipline for tardiness and /or absenteeism, including unplanned paid days off, in accordance with the union contract," and
- "Any or all guidelines are subject to change at any time."

The record indicates that each Party had a different perception of what was taking place with respect to the establishment of the 2006 Time Off Policy and the new 2007 Working Rules, including the Time Off Procedure, Attendance Working Rules and Disciplinary Guidelines. In both the 2006 and 2007 processes, there was interchange between the Employer and Union regarding the content of the proposed rules.

²⁵ Black's Law Dictionary, Second Edition (2001).

The record indicates that the Employer was acting on the belief that it had authority to unilaterally establish rules and policies affecting the working conditions of employees and involved the Union as a matter of courtesy and good labor-management practice.

The record also indicates that the Union was operating under the perception that the rules and policies were, at least to some degree, subject to the Union's agreement. This was evidenced by the Unions communication to the Employer setting forth agreement with the 2006 Time Off Policy.²⁶

In development of the 2007 Working Rules, the record shows that there were a number of exchanges between the Employer and Union. The record shows there were several versions drafted evolving from comments, suggestions and objections raised by the Union. The 2007 Working Rules were first presented as an overview to employees and the Union in January 2007, with the final version dated July 26, 2007.

The record shows that that the Employer accommodated some of the Union's objections to the 2007 Working Rules, but there were objections the Employer did not agree to change. As recorded in the hearing transcript, Union witness, David Schrunk, testified to the Union's objections:

- “We agreed to the attendance policy in 2006, but we never agreed to the attendance policy as it now states.”
- “I object that they take a day for, if they call in sick and they use one of their personal days or one of their vacation days. And I also object to the position that they get points put on their attendance record for that.”
- “They [Policies] were discussed, but never agreed upon.”
- “. . . it was never agreed upon that they could take a day arbitrarily.”
- “Because the vacation is a bargain issue and they take vacation as it states in the contract, that they have to have, you know, two weeks to get their vacation day or they have to revise it so you can have “48 hours to get your vacation days.

²⁶ Union Exhibit #4B.

There is nothing in the contract that hasn't ever been bargained that they can just take a vacation day."

- "Well, the policy, as you can see, changed about once a month. And we were just trying to -- when we finally got this policy out and some the -- the action occurred, that's when we filed the grievance on it. On all affected members, not just one or two."
- "I always disputed the one that I'm complaining about in this grievance." "I always verbally disputed it."

Randy Gaworski's memorandum of April 9, 2007 (Employer Exhibit #6) identifies Union objections to the 2007 Working Rules as of early April 2007. The Union's objections, based on Mr. Gaworski's interpretation, included the following item relevant to the instant dispute:

- ". . . remove the fact that we have the right to add/delete/modify these working rules at any time.. ."

Gaworski noted that this item is not being removed but the Employer added the following:

- "Any changes in these working rules will be communicated via company posted memorandums."

Although the Union agreed that vacation could be substituted when an employee was out of sick leave in the 2006 Time Off Policy, there is a significant difference in how vacation is to be substituted in the 2007 Time Off Procedure. In 2006, the substitution was at the employee's option. If the employee chose not to substitute vacation, the absence was categorized as an unexcused absence.

The 2006 Time Off Policy did not have a point-value system or formula specifying what, if any, discipline would be administered for unexcused absences. The only reference to discipline was "Aggregate Industries reserves the right to discipline for tardiness and/or absenteeism, including *unplanned paid days-off*, in accordance with the union contract."

[Emphasis Added]

The 2006 Time Off Policy did not define “unplanned days-off.” The 2007 Time Off Procedure defines “unplanned day off” as: “Driver calls in one hour prior to scheduled start time, does not follow time off procedures, takes day off.” Under the 2007 Time Off Procedure, use of a vacation day is not an option, but is required and is categorized as an “unplanned day off” for which three disciplinary points are charged.

The 2007 Working Rules include not only a Time Off Procedure, but also Attendance Rules and Disciplinary Guidelines. The Time Off Procedure, rather than giving the employee an option of taking a vacation day when out of sick leave, requires taking a vacation day.

Even though the employee is taking a paid vacation day, the vacation is categorized as an “unplanned day off.” The 2007 Disciplinary Guidelines prescribe that an Unplanned Day Off is to be charged three (3) disciplinary points. Even though an employee complies with the Sick Day requirement to call in a minimum of one (1) hour before their start time, the vacation is still categorized, as “unplanned day off.” This is because the Time Off Procedure requires vacation requests must be submitted 48 hours in advance of the requested day off.²⁷

The 2007 Time Off Procedure would appear to preclude an employee from complying with the 48 hour advanced request for vacation even if an employee, without sufficient sick leave, knew in advance that he would not be able to work due to a health related reason. This is because the 2007 Time Off Procedure provides that “You are required to

²⁷ The latest version of the 2007 Time Off Procedure provides a possible exception to the 48 hour advanced notice requirement:

“Exceptions to the 48 hour rule *may* be granted under the following conditions: A driver calls at least one hour in advance of their start time (but no earlier than 4:30 pm the day before), and requests to use a vacation day. Dispatch grants this request based on the company’s assessment of business demands and driver availability. If granted, the driver completes and submits the required paperwork within 36 hours of their original start time.”

use a sick day, if there is an illness, (yours, family, or any medical/dental etc. appointments), and also provides that “Sick days cannot be ‘scheduled’ in advance.”

The Arbitrator does not find a sufficient basis to support the Employer’s claim of estoppel. As herein noted, there is sufficient difference between the 2006 Time Off Policy and the 2007 Working Rules (including Time Off Procedures, Attendance Policy and Discipline Guidelines) to support a finding that the Union’s agreement with the 2006 Time Off Policy cannot be construed to constitute agreement with the 2007 Working Rules.

Laches

A common definition of “laches” is an: “Unreasonable delay or negligence in pursuing a right or claim – almost always an equitable one - in a way that prejudices the party against whom relief is sought.”²⁸

In the instant case the Employer argues that the Union is barred from grieving the matter at issue because it failed to raise objection to the issue grieved in a timely manner, which has adversely affected the Employer’s interests.

The record shows the Employer had begun working on the 2007 Working Rules sometime in 2006 and informed the Union in January 2007 of this endeavor. There were two versions drafted by the Employer in the early months of 2007. The first version presented to the Union was on April 16, 2007.²⁹

Notwithstanding objections from the Union, the Employer implemented its Rules effective May 1, 2007. The record shows that thereafter discussions continued between the Employer and Union with revised rules being distributed to employees and the Union

²⁸ Black’s Law Dictionary, Second Edition (2001).

²⁹ Employer Exhibit #2.

on June 8, 2007 and again July 26, 2007. The record shows that during June and July 2007 the Employer administered at least three disciplinary actions under the new rules.³⁰

The Union filed the instant grievance on August 15, 2007; approximately 14 weekdays after the Employer posted its final changes to the Working Rules on July 26. The Union's filing of the grievance on August 15 does not constitute a procedural defect under the CBA as no time limits are specified.

The Arbitrator does not find sufficient evidence in the record to support the Employers position of laches. Although the record is not complete as to what exactly was being discussed between the Employer and Union, there is sufficient basis to conclude that the Union had a reasonable expectation, until the July 26, 2007 posting, that more of its objections might be accommodated, as had been the case in earlier revisions.

Further, there is insufficient evidence to support a finding that the Employer has been unduly prejudiced by the Union filing its grievance on August 15, 2007. The record shows that the 2007 Working Rules had been in effect and administered from May 1, 2007. The record also shows that the Employer had implemented its discipline system under the 2007 Working Rules, for several disciplinary actions had been taken by July 26, 2007.³¹

Scope of Grievance

The Employer argues that the disciplinary point system is not properly before the Arbitrator because the Union's grievance did not grieve the progressive point-value system in the Working Rules. The Employer argues that the Union's requested remedy to "restore" points is likewise not properly before the Arbitrator as it was only first raised at the hearing.

The Union's grievance contains the following language:

³⁰ Union Exhibit #5.

³¹ Union Exhibit #5.

“COMPLAINT DETAIL: Protesting the Company forcing employees to take a vacation day or personal day when they call in sick or have a Doctor’s note. Article 30, Working Rules and any/all other applicable articles and/or pertinent information. Requesting Company cease and desist this practice immediately. More evidence to be provided at time of hearing.”³²

The Arbitrator finds the grievance language sufficiently encompassing to cover the matters being grieved by the Union.

The Arbitrator finds a strong nexus between the forced vacation issue and the progressive point-value disciplinary system issue. They are so inextricably intertwined that one cannot be reasonably considered separately from the other.

What makes the forced vacation and the disciplinary matters inseparable is that the employee is forced to take the vacation and the unavoidable consequence is being charged disciplinary points.

The record indicates that the forced vacation matter does not involve an economic issue. Even though an employee is required to use vacation, when no sick leave is available, the employee’s bid vacation is not affected as the rules provide the employee can still take the bid vacation time off. There is no economic issue as the vacation is paid when forced rather than when the employee’s takes the bid vacation. Either way the employee’s vacation pay is the same and the vacation benefit is not reduced.

The forced vacation does appear to create a vacation timing issue when not all of an employee’s vacation is used during the bid period. The issue is the employee’s vacation time off being forced by the Employer rather than taken at a time of the employee’s preference. The 2007 Time Off Procedure provides that non-bid vacation requests are to be submitted 48 hours in advance of the requested time off.

³² Union Exhibit #6.

Obviously, if an employee is forced to use vacation when out of sick leave, that vacation will not be available at other times the employee may have preferred to use it. To a large extent, this has the effect of undermining the purpose of the vacation benefit.

Management Rights – Duty to Bargain

The Employer cites two articles in the CBA (Articles 9 and 30) as its authority to unilaterally establish working rules and to administer discipline for attendance policy violations.

Article 9, Management Rights Clause, provides that the “Employer has the right to retain or to reduce or increase the number of employees and reserves the right to manage its job or business, so long as exercising such rights does not violate any provisions of this Agreement. The employee shall use any tools, machinery, equipment or procedures required by the Employer.” [Emphasis Added]

Interpretation of the term “procedures” in the above Article may be open for debate. Is this in reference to procedures the employees are to be using in performing their assigned work duties? Is it also in reference to time off procedures? There is nothing in the record in support of, or contrary to, either interpretation.

Article 30, Violation of Working Rules, provides that “Employees covered by this Agreement will observe such working rules as may be posted by the Employer for the promotion of health, safety, and welfare of the Company and its employees, provided such rules do not conflict with or supersede any of the terms or provisions of this Agreement. The Employer may prefer charges against an employee for alleged violation of working rules. The Union shall make immediate investigation of the charges and a settlement of the cases shall be made as provided under Paragraph 28. The Employer

will have a drug and alcohol policy, which will become part of the work rules.

[Emphasis Added]

A broad reading of the term “welfare of the Company” would appear to be applicable to the instant issue involving attendance practices that enhance the Company’s economic welfare and quality of customer service.

Matters at issue in the instant case are addressed in Elkouri & Elkouri, How Arbitration Works:

“It is well established in arbitration that management has the fundamental right unilaterally to establish reasonable plant rules not inconsistent with law or the Collective Bargaining Agreement . . . management has the right unilaterally to establish reasonable work rules, including rules governing attendance. Attendance policies that disregard all excuses, including personal or sick days to which employees are contractually entitled, or that treat all categories of absence as carrying equal weight have been struck down as unreasonable. . . After Plant rules are promulgated, they may be challenged through the grievance procedure (including arbitration) on the ground that they violate the agreement or that they are unfair, arbitrary, or discriminatory. . . This right to challenge applies also where the agreement expressly gives management the right to establish plant rules. . . Moreover, plant rules must be reasonable not only in their content but also in their application . . . Even where the agreement gave management a general right to make and modify rules ‘for purposes of discipline and efficiency,’ it was held that ‘after they have once become a subject of mutual agreements, very specific bargaining and agreement are required to make their modification again exclusively a matter of company decisions and announcements. . .’³³

Although the above referenced excerpts can be read to support the Employer’s position of having the unilateral right to establish the Rules at issue in the instant proceeding, they can also be read to support the Union’s position that the Employer has a duty to bargain on the matters in dispute and the rules and procedures grieved are unreasonable and unjust.

³³ Elkouri & Elkouri, *How Arbitration Works*, 5th Ed., app. 764-768.

The CBA also contains maintenance of standards provision. Article 8, Conditions of Employment provides as follows:

“The Employer agrees that all conditions of employment relating to wages, hours of work, overtime differential and general working conditions shall be maintained at not less than the highest minimum standards in effect at the time of the signing of this agreement and the conditions of employment shall be improved wherever specific provisions for improvement are made elsewhere in this Agreement, for all employees covered by this Agreement.” [Emphasis Added]

The above CBA provision was cited by the Union in its post-hearing brief as having been violated by the Employer. Again, the term “general working conditions” is open to interpretation. However, if the terms from Articles 9 and 30 are to be given a sufficiently broad interpretation to encompass the Employer’s right to unilaterally establish the Working Rules at issue, as the Employer contends, consistency requires an equally broad interpretation to the term “general working conditions” in Article 8.

It is noted that Article 9 contains the following qualifier:

“. . . so long as exercising such rights does not violate any provisions of this agreement . . .”

It is also noted that Article 30 contains the following qualifier:

“. . . provided such rules do no conflict with or supersede any of the terms or provisions of this Agreement . . .”

A literal interpretation of the above qualifiers in Articles 9 and 30, in relation to the maintenance of standards provision in Article 8, is that the general working conditions in effect during the term of the CBA may not be less than those in effect on the effective date of the CBA or as modified by bargaining thereafter.

The record does not show what the time off working conditions were on the effective date of the current CBA or how the 2006 Time Off Policy differed. However, the record shows that, although the Union and Employer appear to differ as to whether the 2006 Time Off Policy was bargained, the Union’s written confirmation of agreement is

sufficient evidence that there was mutual agreement to implement whatever changes were involved.

FINDINGS

1. The Union's grievance is not barred based on the doctrine of estoppel.
2. The Union's grievance is not barred based on the doctrine of laches.
3. The Union's grievance is stated in sufficiently broad terms to encompass the issues of forced vacation and personal days, including the disciplinary sanctions thereto.
4. The Employer has the right to unilaterally establish reasonable rules and policies that do not conflict with or supersede the terms and conditions of the CBA.
5. The Employers right to establish rules and procedures is subject to the terms and conditions of Article 8 of the CBA, that requires working conditions be maintained at not less than the highest minimum standards in effect at the time of the signing of the CBA, or as bargained thereafter.³⁴
6. Under the terms and conditions of Article 8 of the CBA the unilateral establishment of a more restrictive Working Condition, than contained in the mutually agreed upon 2006 Time Off Policy, is a violation of the CBA and is subject to collective bargaining.

³⁴ Working conditions as set forth in the 2006 Time Off Policy may have been more restrictive than those in effect on the execution date of the current CBA. However, the record shows that the Parties mutually agreed to the 2006 Time Off Policy.

AWARD

The grievance is sustained.

The provision in the 2007 Working Rules, involving more restrictive working conditions than existed in the 2006 Time off Policy relating to forced vacation, forced personal leave and disciplinary sanctions thereto, is subject to collective bargaining in accordance with Article 8 of the CBA, “Conditions of Employment.”

Upon receipt of this Award, the Employer is to cease and desist from forcing employees to use their vacation or personal day when they call in absent for health related reasons and charging them with disciplinary points based on the forced vacation or personal day.

Disciplinary points that have been assessed based on forced vacation or personal leave days are to be rescinded.

COMMENT

Due to the unique and time sensitive nature of the ready-mix business, the Arbitrator fully recognizes the critical importance reliable worker attendance has on the Company’s economic welfare, customer service and employee job security. This Award is based on an interpretation of the terms and conditions the Parties agreed upon in their CBA. This Award is not intended to diminish the importance of attendance management or limit the Employer’s use of progressive discipline administered for just cause as a means to manage attendance, when in compliance with the CBA.

CONCLUSION

The Parties are commended on the professional and thorough manner with which they presented their respective cases. It has been a pleasure to be of assistance in resolving this grievance matter.

Issued this 5th day of April 2008 at Edina, Minnesota.

ROLLAND C. TOENGES, ARBITRATOR