

FEDERAL MEDIATION AND CONCILIATION SERVICE

ARBITRATION AWARD

_____)	
IN THE MATTER OF ARBITRATION)	
)	
Between)	
)	FMCS# 08-53736
RED WING SHOE COMPANY)	
)	
and)	
)	John Remington,
)	Arbitrator
UNITED FOOD AND COMMERCIAL, BOOT)	
and SHOE WORKERS #527)	
_____)	

THE PROCEEDINGS

The above captioned parties, having been unable to resolve a dispute over the amount of Company contributions to the collectively bargained pension fund, selected the undersigned Arbitrator John Remington, pursuant to the provisions of their collective bargaining agreement and under the rules and procedures of the Federal Mediation and Conciliation Service, to hear and decide the matter in a final and binding determination. Accordingly, a hearing was held on October 1, 2008 in Red Wing, Minnesota at which time the parties were represented and were fully heard. Oral testimony and documentary evidence were presented; no stenographic transcription of the proceedings was taken; and the parties requested the opportunity to file post hearing briefs which they subsequently did file on December 1, 2008.

The following appearances were entered:

For the Company:

Thomas R. Trachsel, Esq.

Felhaber, Larson Fenlon & Vogt
Minneapolis, MN

For the Union:

Roger A. Jensen, Esq.

Jensen, Bell, Converse & Erickson
St. Paul, MN

THE ISSUE

DID THE COMPANY VIOLATE THE PARTIES' COLLECTIVE AGREEMENT WHEN IT MADE CONTRIBUTIONS TO THE PARTIES' PENSION FUND BASED ONLY ON EMPLOYEES' STRAIGHT TIME EARNINGS AND, IF SO, WHAT SHALL THE REMEDY BE?

RELEVANT CONTRACT PROVISIONS

PENSION AGREEMENT (1957)

I.

The Company agrees to adopt and establish forthwith a Pension Plan in the form attached hereto and made part hereof entitled "Red Wing Shoe Company Pension Plan for Hourly Wage Employees." Said Plan is hereinafter referred to as the "Plan." Terms and expressions used in this agreement shall have the same meanings as the same terms and expressions have in the Plan.

II.

The Union accepts and approves said Plan and all of the terms and provisions thereof.

III.

In the event favorable determinations shall be procured pursuant to Section IV hereof (approval under Sections 401(a) and 501(a) of the Internal Revenue Code of 1954), but not otherwise, the Company agrees to pay over to the Trustee as its contributions in support of the Plan 3% of its gross payroll paid to Hourly Wage Employees in each month while this agreement is in full force and effect, commencing with December 15, 1957.....

VII.

The Company agrees not to amend the Plan or terminate it as to employees of the Company represented by the Union while this agreement is in full force and effect without the consent of the Union.

ARTICLE XVIII
Benefits

CBA LINE 2335 PENSION

- 2336 Benefits per year of credited service to January 1, 2002 is
- 2337 \$41.00
- 2338 Year-to-date total hours worked will appear on each check
- 2339 stub.
- 2340 Time spent by Union Officials on Union Business may be
- 2341 counted as hours worked for pension credit.
- 2342 Contributions rate at 5% of gross pay. The Benefit level is
- 2343 established by the Hourly Pension Committee.
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BACKGROUND

The Red Wing Shoe Company, Inc., hereinafter referred to as the "COMPANY," manufactures boots and shoes at a single production facility known as "Plant #2" in Red Wing, Minnesota. All employees at this plant excluding managers, office workers, truck drivers, shipping room and warehouse employees and sales personnel are represented, for purposes of collective bargaining, by the United Food and Commercial Workers of

America and its Boot and Shoe Workers Local #527, hereinafter referred to as the “UNION.” The parties are governed by a collective bargaining agreement effective November 15, 2007 through November 15, 2011.

The facts surrounding this grievance are essentially undisputed. On January 21, 2008 the Union filed the following grievance on behalf of “all present and past bargaining unit members” which alleges:

RWSC (Red Wing Shoe Company) has violated the Labor Agreement Articles dealing with contributing 5% of gross pay to the pension plan by excluding vacation pay, holiday pay, overtime premiums, bonuses, funeral pay and jury duty pay. The pension plan should be made whole for the funds which have not been paid into the plan, and the Company should use the aforementioned items when calculating payments to the plan beginning 11-16-07 and going forward.

The Company does not dispute the Union’s assertion that it has excluded vacation and holiday pay, overtime premiums, bonuses, funeral pay and jury duty pay from its calculations of amounts due to the pension plan and has instead based these payments on straight time pay/ hours actually worked only.

The record reflects that the pension plan is a single employer defined benefit plan established in 1957. Pension language was first incorporated into the collective agreement in 1958 but the contract did not specify the amount of the Company’s contribution at that time. A January 1960 Company newsletter (Employer Exhibit #4) noted the existence of the then new pension fund and contained the following sentence:

As you know, the company is contributing 3% of straight hourly earnings for all employees covered by the plan.

While the pension language and the corresponding section of the collective bargaining agreement have been essentially unchanged over the years, the percentage of gross pay contributed by the Company was increased to 5% effective January 2, 1970 and this provision was added to the collective agreement. The contribution rate has continued at 5% to the present time. However, it is noted that the 5% language was excluded from the 1971-72 contract and again from the 1974-76 contract. The 5% language was later amended to the 1974-76 agreement and has been included in the collective agreement since that time. Further, the record reflects that in the negotiations for the 1992-94 collective agreement the Company included the increase in pension contributions which would be generated by the adding of an extra holiday and the adding of brother-in-law and sister-in-law coverage for funeral leave in its valuation of the contract proposal (Union Exhibit #11). This exhibit at least suggests that the Company was then proposing to make pension contributions based on holiday pay and bereavement pay. In September of 1997 the Company circulated an internal memo to management employees to clarify apparent confusion over the basis for pension contributions. This memo was written by Chief Financial Officer Jerry Bristol and states, in relevant part:

There appears to be some confusion/ concern as to the amount of our annual contribution to our hourly pension fund. The following discussion is an attempt to establish the ground rules for compensation of the contribution. The term "gross wages" for pension contribution purposes is intended to mean "earned wages" from hours adding value. This exempts benefit wages as follows: vacation pay, holiday pay, jury duty pay, sickness and accident pay, funeral and overtime premium.

This memo was not shared with the Union. The Union became aware of its existence late in 2006 after questioning contributions made on behalf of part-time employees to the pension fund.

The Union next raised the question of the basis for pension contributions in a November 27, 2006 letter from Union President Roger Spindler to Company Human Resources Vice President Jerry Dietzman. This letter states:

It has recently come to the attention of the Union's Pension Committee that the company has not been contributing 5% of the wages earned through vacation pay, holiday pay, overtime premium, bonus or profit sharing plans, funeral pay, jury duty pay and disability insurance payments to the pension plan. Please advise me as to when this practice began.

Dietzman responded on November 29, 2006. He wrote, in relevant part:

As you know, Local 527 officials and Red Wing Shoe Company management have both been researching pension documents and negotiations related documents to determine what the situation is. At this point, management has reviewed a number of related documents and we have interviewed Gerald Bristol, former Vice President and Chief Financial Officer, as well as Rich Chalmers, former Vice President who was in charge of the Human Resources Department. What we have found is that there has been no change. As far as we can determine, the practice of not contributing 5% of wages earned for the items you list is the way it has always been and, presumably, what the two parties have agreed upon through the labor negotiations process.

The above response by Dietzman apparently precipitated the filing of Grievance No. 5452 by the Union. This grievance was settled on September 6, 2007, as follows:

Red Wing Shoe Company agrees to make a \$250,000 contribution to the Red Wing Shoe Company Hourly Pension plan by September 15, 2007. By making the contribution by that time there will be an approximate \$2000 savings in PBGC premiums. This resolves all

claims by Local 527 regarding pension contributions through November 14, 2007 and Local 527 agrees that no grievances will be processed regarding pension contributions for any time period prior to November 15, 2007. (This grievance was settled on a “non-precedent setting basis.”)

The parties met to discuss the instant grievance on January 29, 2008 and held a Step 2 Grievance meeting on February 11, but did not reach a settlement. The Company then denied the grievance in a memo from Personnel Manager Tom Magnan to UFCW Local President Spindler, as follows:

The Company does not believe it is in violation of the contract with regard to pension contributions. The same categories of earnings have been used as the basis for these contributions for many years. The Company is however willing, as mentioned at the meeting on 2/11/08, to enter into meaningful discussions regarding pension related issues as we recognize that this is a significant concern with most of our employees. We look forward to your response to this offer. Grievance denied.

The record does not reflect how the parties further disposed of this grievance in terms of the negotiated procedure set forth in Article XI of their collective agreement. It would appear that the grievance was advanced immediately to Step 4 of that procedure (arbitration committee) for selection of a neutral arbitrator. There is no dispute concerning timeliness or the procedure followed by the parties in handling this grievance. Accordingly, the Arbitrator finds that it is properly before him for final and binding determination.

CONTENTIONS OF THE PARTIES

The Company takes the position that it has properly limited its pension contribution to a percentage of straight time hourly earnings; that it has consistently followed this practice since the creation of the pension fund; that the Union has been, and continues to be, aware of this practice; and that although there have been some changes in the pension language over the years, these changes have not changed the basis for contribution. The Company argues that the above noted newsletter reference clearly sets forth the basis for contributions and that the Union initially acknowledged this basis through the participation and implied endorsement of Al Murtinger, an original Union-appointed Pension Committee member who also served on the Union bargaining team in the years surrounding the publication of the 1960 newsletter. The Company's position in this regard was supported by the testimony of former Company Chief Financial Officer Jerry Bristol who was first employed by the Company as a bargaining unit employee in 1958. Bristol's position in this matter is cited above in the 1997 internal memo. Finally, the Company argues that its position concerning the interpretation of "gross" payroll or pay is consistent with the nomenclature used in cost accounting.

The Union takes the position that the language of the Pension Agreement and the collective bargaining agreement concerning pensions is clear and unambiguous. It further takes the position that, even if the language is less than clear, the usual and ordinary definition of "gross" is as an all inclusive adjective to describe the noun which follows it. In this instance, gross pay or payroll means all pay from whatever source derived (Internal Revenue Code) or the "whole; entire; total; as the gross sum, amount weight- as opposed to net" (Black's Law Dictionary), or "total of an employee's regular

remuneration including allowances, overtime pay, commissions, and bonuses, etc. before any deductions re made. (Business Dictionary.com) The Union contends that the Company's argument concerning past practice must be rejected, both because the language is clear and unambiguous and because there is no evidence that the Union has ever been aware of the Company's claimed practice.

DISCUSSION, OPINION AND AWARD

The crux of this matter is clearly the definition of "gross payroll" as set forth in the 1957 Pension Agreement. While the terms "gross pay" and "gross wages" have been used interchangeably with "gross payroll" in this dispute, the Arbitrator finds that this difference in terminology is not significant with respect to the issue before him. This is so because the parties agree that the dispute only involves whether or not vacation pay, holiday pay, overtime, bonuses or profit sharing, funeral pay, jury duty pay, etc. are to be included in the calculation of the pay basis to which the 5% contribution to the pension fund will be applied. Given the fact that the Company has moved away from the piece rate compensation system utilized in 1957 to a straight hourly pay basis, it is not surprising that "gross payroll" in the original pension agreement has become "gross pay" in the current collective bargaining agreement. The critical term continues to be "gross," a term which can only mean total in this context.

As a general rule in arbitration, the Arbitrator's role is to determine the intent of the parties as set forth in the language of the agreement. When that language is clear and unambiguous, the Arbitrator is constrained to so find. Where the language is clear he is not permitted to ascertain whether or not there is a bona fide past practice since past

practice is only applicable when the contract is silent. Neither is he permitted to apply any of the various principles concerning the interpretation of ambiguous language in determining the intent of the parties in the face of clear and unambiguous language. Accordingly, the Arbitrator may not ignore or amend the plain language that the parties have agreed to. Despite the Company's urging to the contrary, the Arbitrator must here find that "gross pay" or "gross payroll" means all pay. There simply is no basis in the collective agreement or the pension agreement to support the Company's contention that gross wages somehow means only "earned wages from hours adding value."

It is certainly possible that the Company has, over the fifty years that the pension fund has been in existence, consistently applied the above limited definition of "gross wages." However, even its own documents offered into evidence at the hearing question such an assertion. For example, the negotiation over the 1992-94 agreement suggests that the Company was including at least some indirect wages in its pension contribution calculation. Indeed, the Company's 1997 internal memo cited above reveals that at least some Company officials (and the Company's accounting firm) were confused or concerned "as to the amount of the annual contribution" to the pension fund. The credibility of the Company's position in this regard is further diluted by its refusal to timely share knowledge of this apparent confusion and concern with the Union, together with its ready settlement of Grievance No. 5452 by paying an additional \$250,000 into the pension fund. While this grievance was settled on a non-precedent basis and the Company may have had other valid reasons for settlement, it cannot be denied that this grievance was resolved in the Union's favor. In this connection it is also noted that the

cost accounting argument and example (Shillinglaw, *Cost Accounting: Analysis and Control*) set forth in the Company's brief actually supports the Union's argument.

The Company's reliance on its asserted past practice of basing pension contributions on straight time earnings fails even assuming, arguendo, that the gross wages language is ambiguous. This is so because there is no evidence, save the testimony of Bristol and former Vice President of Human Resources Rich Chalmers, that the Union was aware of the basis for contributions being applied by the Company. While the testimony of Bristol and Chalmers was generally credible, it failed to establish that the Union had actual knowledge of the Company's practice. In a less than credible response Chalmers testified that he had told Union members of the pension committee in 1981 that the Company's practice had always been to pay pension contributions on straight time wages only because that was the way it had been negotiated. Chalmers had only been employed by the Company for six years at the time of this exchange and clearly had no knowledge of the original pension negotiations. While it is true, as Chalmers testified, that the Union could have determined the Company practice based on information provided annually by the Company, the Union would have had no reason to do so. The bottom line is that the Company had many opportunities to clear up what it recognized was confusion over the basis of the pension contribution with either the Union or its own representatives in collective bargaining as revealed by the letter of November 27, 2006 from Dietzman to Spindler noted above.

Union President Spindler, a long time employee and Union officer and Pension Committee member, rebutted, at least in part, the testimony of Bristol and Chalmers. He testified that during his tenure the Company had never told the Union that it was only

paying pension contributions based on straight time pay. Spindler credibly testified that he had researched Union records and spoken with retired Union officers but was unable to find any communication from the Company disclosing their practice to the Union. Indeed, there is nothing within the record, save the 1997 internal memo noted above that was withheld from the Union for nearly ten years, to show that the Company ever revealed its method of calculating the pension contribution to the Union. On the contrary, the 1992-94 negotiations noted above and the 1997 internal memo suggest that the Company may not have always utilized the straight time only calculation procedure and that, at the very least, Company representatives were uncertain and confused about the Company's actual practice. There can be little doubt that the Union was unaware of this practice and that there was no mutuality of agreement between the parties. The Company's assertion of a past practice must therefore be rejected.

Brief comment is warranted concerning the Company's contention that the January, 1960 newsletter hereinabove noted establishes that the Company only agreed to contribute "3% of straight hourly earnings" into the pension fund. This assertion appears on the last page of the newsletter and is not attributed to any individual although it is likely that it was written by a representative of the Company. The names of the then members of the Pension Committee are listed later in the article. While then Union representative Al Murtlinger refers to the Pension Fund in another section of the newsletter, his informational comments can hardly be deemed an endorsement of the "3% of the straight hourly earnings" statement. The newsletter article about the pension plan is simply too vague and unsupported by testimony to be deemed compelling. It raises more questions than it answers. For example: does "straight time hourly earnings"

include vacation pay, holiday pay, bonuses etc.; was the phrase intended to exclude overtime, piece rate differentials, or both? While the newsletter may well be an accurate reflection of the parties' intent in 1960, as a matter of evidence it is insufficient by itself to trump the clear language of the 1957 Pension Agreement.

The Arbitrator has made a particularly detailed review and analysis of the entire record in this matter, and he has carefully read and considered the arguments advanced in the thorough post hearing briefs submitted by the parties. Further, he has determined that the critical issues raised in this dispute have been addressed above, and that certain other matters mentioned at the hearing or in the post hearing briefs must be deemed immaterial, irrelevant, or side issues at the very most and therefore have not been afforded any significant treatment, if at all, for example: whether or not the pension plan is currently underfunded; whether or not the Union called Jane Quade or any other signatory Grievant; whether or not the Company insisted that they had no intention of changing the pension contribution basis when it settled Grievance No. 5452; whether or not the settlement of Grievance No. 5452 was non-precedent setting or that it cost the Company nothing; the Foot Tanning Company collective agreement; and so forth.

Having considered the above review and analysis together with the findings and observations hereinabove made, the Arbitrator has determined, and so he finds and concludes, that with the specific facts of the subject grievance and within the meaning of the parties' collective bargaining agreement, that the Union has established, by a preponderance of the evidence, a Company violation of the collective bargaining agreement and original pension agreement. This violation occurred when the Company

failed to make full contributions on employee gross wages. Accordingly, an award will issue, as follows:

AWARD

THE COMPANY VIOLATED THE PARTIES' COLLECTIVE BARGAINING AGREEMENT WHEN IT MADE CONTRIBUTIONS TO THE PARTIES' PENSION FUND BASED ONLY ON EMPLOYEES' STRAIGHT TIME EARNINGS.

REMEDY

THE COMPANY SHALL IMMEDIATELY COMMENCE MAKING CONTRIBUTIONS TO THE HOURLY PENSION PLAN OF 5% OF GROSS WAGES INCLUDING VACATION PAY, HOLIDAY PAY, OVERTIME PREMIUMS, BONUSES, FUNERAL PAY AND JURY DUTY PAY.

FURTHER, THE COMPANY SHALL REIMBURSE THE HOURLY PENSION FUND FOR ALL CONTRIBUTIONS BASED ON THE ABOVE GROSS PAY ITEMS (VACATION PAY, HOLIDAY PAY, OVERTIME PREMIUMS, BONUSES, FUNERAL PAY AND JURY DUTY PAY) THAT HAVE NOT BEEN MADE SINCE NOVEMBER 15, 2007.

THE ARBITRATOR FINDS THAT THE SETTLEMENT OF GRIEVANCE NO. 5452 RESOLVED AND SATISFIED ANY CLAIM FOR UNDERPAYMENT PRIOR TO NOVEMBER 15, 2007.

John Remington
Arbitrator

January 20, 2009

St. Paul, MN