

**IN THE MATTER OF ARBITRATION BETWEEN**

DISTRICT LODGE NO. 165  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS  
Union

OPINION AND AWARD

ATTENDANCE POLICY GRIEVANCE

and

ELECTROLUX HOME PRODUCTS  
Employer/Company

FMCS Case No. 10-55861-3

Award Dated November 15, 2010

Date and Place of Hearing:

August 31, 2010  
Holiday Inn  
St. Cloud, Minnesota

Date of Receipt of Post Hearing Briefs:

October 15, 2010

**APPEARANCES**

For the Union: Colleen Murphy-Cooney  
Business Representative  
IAMAW District 165  
1903 4<sup>th</sup> Street North  
St. Cloud, MN 56303

For the Company: Keith L. Prytel, Esq.  
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3480 West Market Street, Suite 300  
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**ISSUE**

1. Was the grievance filed in a timely manner in accordance with the grievance procedure of the Collective Bargaining Agreement?
2. If so, did the Company violate the Collective Bargaining Agreement in the manner it administered its attendance policy? If so, what shall the remedy be?

**WITNESSES TESTIFYING**

Called by the Union

Janice M. Lehr  
Union Shop Chair

Barbara Tabatt,  
Quality Audit Control

Called by the Company

Kelly C. Fleming,  
Labor Relations Manager

**ALSO PRESENT**

On Behalf of the Union

No others were present

On Behalf of the Company

Beverlee Steffy,  
Directory of Human Resources

**JURISDICTION**

The issue in grievance was submitted to the Arbitrator for a final and binding resolution under the terms set forth in Article 14 of the Collective Bargaining Agreement (Joint Exhibit 1) between the parties and under the rules of the Federal Mediation and Conciliation Service. The Arbitrator was mutually selected by the parties from a list of names of arbitrators submitted to them by the Federal Mediation and Conciliation Service. They stipulated at the hearing that he had been properly called. The Company argued at the hearing that the grievance was not timely, and was therefore barred from arbitration. The issue of timeliness was deferred to the arbitrator along with the merits of the grievance.

At the hearing the parties were given full and complete opportunity to examine and cross-examine witnesses and present their proofs. Final argument was provided through post hearing briefs submitted to the Arbitrator by each party. The briefs were received by the

agreed upon deadline. With the receipt of the briefs by the Arbitrator, the record in this matter was closed, and the issue is now ready for determination.

### **STATEMENT OF THE ISSUE**

The issues to be resolved in this case are the following:

1. Was the grievance filed in a timely manner in accordance with the grievance procedure of the Collective Bargaining Agreement?
2. If so, did the Company violate the Collective Bargaining Agreement in the manner it administered its attendance policy? If so, what shall the remedy be?

The grievance cites a violation of Article 6.1 and all applicable clauses of the Collective Bargaining Agreement and is dated July 9, 2009 [Joint Exhibit 2]. It reads in relevant part as follows:

The Company is taking more points from employees than should be taken per occurrence for sickness or accident.

The Union is asking the Company to only take two points per occurrence when an employee is out for sickness or accident as according to the Company's attendance policy.

The Company responded to the grievance on July 14, 2009 as follows:

The Two point deduction is limited to an Employee that qualifies for Sickness and Accident Benefits under the Sickness and Accident Policy.

The controlling contract language is found, in relevant part, in the following Articles of the Collective Bargaining Agreement:

#### **ARTICLE 6. MANAGEMENT RESPONSIBILITIES**

**Section 6.1.** The Company retains the sole right to manage its business, including the right to ... establish and enforce reasonable policies, ... subject only to such restrictions governing the exercise of these rights as are expressly provided in this Agreement.

**ARTICLE 13. GRIEVANCES**

\* \* \* \*

**Section 13.4** Any complaint not taken up under Step One with the Employee’s immediate Supervisor within six (6) working days, exclusive of days excused absence, after the occurrence of the incident from which the complaint arose, cannot thereafter be processed from the grievance procedure. If, however, the incident giving rise to the grievance could not have become known until after expiration of the six- (6) working day period, such period shall be automatically extended to six- (6) working day period, such period shall be automatically extended to six- (6) working days after it could have become known to the aggrieved Employee. The grievance shall be considered settled if the decision of the Company is not appealed to the next higher step in the above procedure with five (5) working days.

\* \* \* \*

**ARTICLE 14. ARBITRATION**

\* \* \* \*

**Section 14.3.** The arbitration board or Arbitrator acting under this Article shall not have the power to add to, to disregard or to modify any of the provisions of this contract and shall have authority to decide only the issues submitted.

\* \* \* \*

In addition to the above cited contract language the Company has established pursuant to bargaining and agreement with the Union an Attendance Policy that bears on this case.

That policy has been modified from time to time since its inception in 2001 pursuant to the parties bargaining on those modifications. The relevant portion of that policy relates to “Sickness and Accident” absences and has been in the policy substantially unchanged since its original draft issued on January 8, 2001. The only changes to that specific policy language related to the maximum deduction for a “Sickness or Accident” absence. The policy has continuously provided for a deduction of one point per day for

any “Sickness or Accident” absence that did not qualify for the Family Medical Leave Act and was less than ten (10) working days. The maximum deduction for a “Sickness or Accident” absence, however, was modified from time to time. The most recent, and controlling version of the Attendance Policy [Union Exhibit 1 – p.5] provides for a maximum deduction of two (2) points for a “Sickness or Accident” absence. The specific relevant portion of the Attendance Policy reads as follows:

**Attendance Policy Procedure:**

1. Absences of both full and partial days will result in the loss of attendance points.
2. This policy is based on an eight-(8) point system with points deducted for full-day, half-day, or tardiness an employee incurs. Points will be deducted from an employee record for such absences from scheduled work time.

Tardy incidents. Two tardiness [sic] within a 30-day period will result in the deduction of one half (1/2) point. A tardy incident is defined as the arrival to work after the start of the shift but less than two (2.0) hours into the shift or returning to work after having left the premises but within fifteen (15) minutes or less after the end of a lunch break.

Partial day. Absences of four (4.0) hours or less (excluding tardiness) will result in the deduction of one half (1/2) point.

Full day. Any absence missed in excess of four (4.0) hours per shift will result in the deduction of one (1.0) point.

Leave Work Early. Employee’s [sic] who leave work for doctor/dental appointments two (2.0) hours or less prior to the end of their shift twice within a 30 day period will receive a one half (1/2) point deduction on the 2<sup>nd</sup> occurrence. Acceptable documentation must be provided for each occurrence. Employee’s [sic] will be allowed to leave work early once to pick up their sick child or due to a school closing and no points will be deducted. Acceptable documentation must be provided.

Sickness and Accident. Any Sickness or Accident absences which do not qualify for FMLA (Family Medical Leave Act) will result in the deduction of one point per day with a maximum of two (2) points deducted per occurrence.

The Attendance Policy provides the adding back of points for good attendance as described in the policy. It also provides for a written warning when an employee's point level is in the range of 2.5 to 4.0 points, a final warning notice at 2.0 points or less, and termination of employment when the employee's point level drops to zero or below.

### **FACTUAL BACKGROUND**

Involved herein is a grievance related to the administration of the Company's Attendance Policy. The Company produces residential refrigerator/freezers at its plant in St. Cloud, Minnesota. The refrigerator/freezers are marketed under the Company's own labels as well as under the private labels of certain of its customers. The Union is the exclusive bargaining representative for the hourly paid employees as described in Article 2, Section 2.1 of the Collective Bargaining Agreement. The parties have maintained a collective bargaining relationship for many years. The parties entered as Joint Exhibit 1 the Collective Bargaining Agreement that ran from November 19, 2006 through November 18, 2009. While that labor contract had expired at the time of the arbitration hearing, no representation was made by the parties that the language cited above had changed in any way that would affect this case.

The grievance was filed on behalf of all covered employees on July 9, 2009. It asserts that the Company was deducting more points than it should have when an employee is absent due to sickness or accident. The grievance claims that a maximum of two points per occurrence should be deducted when an employee is absent under those circumstances. The Company contends that the two point maximum deduction applies

only when an employee has an absence that meets the requirements of the Sickness and Accident benefit plan. That plan is administered by a third party and requires an employee to obtain a medical statement certifying that the employee could not work.

It is not disputed that the attendance policy is a “no-fault” attendance policy that has certain broad exceptions contained within it. It is also not disputed that the parties have negotiated the language of the attendance policy and changes to it over the period it has been in force. With regard to the “Sickness and Accident” language in the attendance policy the record shows that the parties have negotiated a maximum point cap to be applied when an employee is regarded as being absent for reasons of Sickness or Accident. That cap started out at a maximum of three points, changed to one and one-half points, and then changed to the current two points for each occurrence. Except for the “Sickness and Accident” language in the policy there is no reference in the policy to a cap on the deduction of points.

The Company testified without challenge that it has consistently administered the attendance policy in a manner that would provide for the “Sickness and Accident” cap to be applied only when an employee was absent due to a sickness or accident that met the requirements of the “Sickness and Accident” benefit plan of the Company administered by a third party. The Sickness and Accident benefit plan provides for short term disability benefits for an employee who meets the requirements of the plan. Among

those requirements is medical certification of the need for an employee to be absent from work, and the employee to be under the continuous care of a licensed physician during the period of his or her absence. Unless those requirements are met the third party administrator denies coverage for the employee under the Sickness and Accident benefit plan. The Company offered unchallenged testimony stating that unless the absence was covered under the Sickness and Accident benefit plan the point deduction was not capped, and the absence would accrue deduction points at the rate of one point per day of absence without limit.

The instant grievance [Joint Exhibit 2] was filed on July 9, 2009 as a “Union Grievance”. As such it is regarded as a class action grievance filed on behalf of all bargaining unit employees. In it the Union claims that any absence due to sickness or injury of an employee, whether or not covered by the Sickness and Accident benefit plan, should be subject to the two point cap of point deduction.

The instant grievance was preceded by a grievance [Union Exhibit 5] filed by Grievant Barbara Tabatt on December 3, 2008. In that grievance Ms. Tabatt grieved that she was charged four points for four days of absence. Her grievance states that she called in sick on November 11, 2008 and again on November 13, 2008. For the four days that she was absent she was charged with four points which were deducted from her point bank. On December 12, 2008 the Company responded to her grievance stating that “Ms. Tabatt did not apply for Sick and Accident benefits therefore a four point deduction is appropriate.”

The report from the third party administrator [UNUM] dated January 16, 2009 in regard to Ms. Tabatt's absence advised as follows:

"After completing its review of your disability claim, Unum Life Insurance Company of America regrets that it is unable to approve your request for benefits.

As you may know, your employer's plan states:

"'Disability' and 'disabled' means that because of illness or injury you cannot perform each of the material duties of your occupation.

Furthermore, you are not considered disabled or under a disability unless you are under the regular care and treatment of a licensed physician, who is practicing within the scope of his/her license during the entire period of disability."

Based on the information in our file, we have concluded that disability is not supported by medical documentation. We received communication from the facility where Dr. Parson's is located and was advised that he is no longer with this facility. The doctor you are seeing now indicates that you should have not missed any time for your condition, therefore, we are unable to approve your request for Short Term Disability benefits."

After Ms. Tabatt was denied short term disability benefits the Union asked the Company on January 28, 2009 to identify the section of the attendance policy on which it was basing the deduction of points for her absence. The Company referred the Union by fax on February 3, 2009 that it was basing its deduction of points for Ms. Tabatt on Section Two of the attendance policy procedure pertaining to a full day absence. That section provides for the deduction of one point for any absence in excess of four hours per shift.

The record provides through Ms. Tabatt's grievance [Union Exhibit 5] that the Union was aware as of February 3, 2009 how the Company was deducting points for an absence that did not qualify under the Sickness and Accident policy for short term disability benefits.

There is nothing in the record of the instant case to show that Ms. Tabatt's grievance was

appealed to arbitration or discussed any further by the parties. Union Exhibit 5 does show that the Union intended to arbitrate the Tabatt grievance, but there is no evidence that the case was ever heard by an arbitrator.

The instant grievance, filed on July 9, 2009, claims that the two point cap should be applied for any sickness or accident regardless of whether or not it qualified under the Sickness and Accident policy. The Company responded to the grievance on July 14, 2009 by noting that the two point deduction is limited to an employee that qualifies for Sickness and Accident Benefits under the Sickness and Accident Policy. The instant grievance proceeded through the steps of the grievance procedure without resolution, and was heard in arbitration on August 31, 2010.

## **POSITION OF THE PARTIES**

### **Position of the Union**

It is the position of the Union that the grievance be sustained and that the Company be directed by arbitral order to “stop adding language to the Attendance Policy, apply the language by its face, [and] any employees that have lost more than two points in past counseling for an occurrence should be corrected in further counseling.” In support of that position the Union offers the following arguments:

1. The Company is taking more points from an employee than allowed under the 2001-2005 Attendance Policy.
2. The procedure an employee was to follow to obtain Sickness and Accident certification for an absence has changed. Company witness Fleming testified that the employee is to apply to UNUM, Union witness Lehr testified, however, that the employee must have his/her doctor fill out paperwork for any kind of approval. The Attendance

Policy does not state that an employee must qualify for benefits to be considered an occurrence.

3. The corrective action notices and the accompanying record of attendance of Dexter Stanton [Union Exhibit 3] clearly show that the Company capped the points to be deducted for consecutive days of absence.
4. When the Attendance Policy first went into effect on January 8, 2001 an occurrence clearly meant, no matter what an employee's reason for not coming to work, as long as the absence days were consecutive it was considered one occurrence.
5. The Union never negotiated changes to the way the Sickness and Accident provision of the Attendance Policy was administered because there was no reason to bargain for change. The Company had been regarding consecutive absences as one occurrence and for that reason there was no basis for the Union to pursue a change.
6. At no time were employees told that they must qualify for short term disability for a sickness to be considered an occurrence.
7. In the arbitration of the Beverly Schmatz termination grievance Arbitrator Sara Jay noted that the Employer stated "only 2 points should have been deducted for the entire three-day absence." Nowhere in the Schmatz case was it mentioned that she received Sickness and Accident benefits for her three day absence.
8. Exhibit A-1 in the Collective Bargaining Agreement - Group Insurance Program, Article II, Section 2, paragraph (d) provides that "If disability is due to sickness, benefits start on the fourth day of disability". Ms. Schmatz was out of work for three days and did not qualify for benefits under Weekly Sickness and Accident Benefits of the Working Agreement.
9. Under the Sickness and Accident section of the Attendance Policy employees only lose two points per occurrence if the occurrence does not qualify for FMLA. Nowhere in the Sickness and Accident section of the Attendance Policy does it state that an employee must qualify for Sickness and Accident Benefits to be considered an occurrence. If the intent of the language was to qualify for benefits it would have been specifically stated in the Sickness and Accident section of Attendance Policy.
10. The language of the Sickness and Accident section of the Attendance Policy is misleading. The Company has taken it upon itself to change

policy without meeting with Union representatives. They are implementing non existing language which is unreasonable to all employees. The Attendance Policy does not say an employee must qualify for Sickness and Accident benefits to qualify as an occurrence.

11. The manner in which the Company is interpreting the Weekly Sickness and Accident Benefits language found on page 66 [et.seq.] of the Collective Bargaining Agreement is unreasonable and makes the Sickness and Accident section of the Attendance Policy confusing.

### **Position of the Company**

It is the position of the Company that the grievance should be denied because it was not timely. Additionally, the Company argues that the grievance should be denied on its merits. In support of their position the Company offers the following arguments:

1. The parties have placed an unambiguous six calendar day deadline for lodging Step One grievances challenging any term and conditions of employment. Whether measured from January 8, 2001 when the Sickness and Accident point cap was first negotiated into effective existence by the bargaining parties, and was administered in a consistent fashion for the next nine successive years, or measured from the date Ms. Tabatt received four separate points for a successive string of absences that did not rise to the level of Sickness and Accident eligibility, more than six working days have unquestionably lapsed before this grievance was presented. Under the Collective Bargaining Agreement the Arbitrator cannot add to, disregard, or modify any provisions of the contract. Accordingly, the Arbitrator lacks authority to decide this grievance due to its lack of timely filing.
2. The grievance is without merit. The cap on the point deductions appears in the Sickness and Accident section of the Attendance Policy. "Sickness and Accident" is written with a capital "S" and capital "A" throughout the Attendance Policy. That is in contrast to other point policies under the Attendance Policy. Company witness Fleming testified without challenge that the reason the parties used initial caps was precisely to unambiguously link absences due to Sickness and Accident to the Sickness and Accident benefit program contained the labor agreement.
3. The text of the no-fault Attendance Policy, coupled with the text of the labor contract, supports the Company's nearly decade long, uniform administration of the no-fault absentee policy.

4. The negotiating history clearly shows that the parties intended the cap to be limited to those conditions qualifying for Sickness and Accident benefits under the parties Collective Bargaining Agreement. Not once in the continuing negotiations on the Attendance Policy that occurred over the intervening years from 2001 did the Union propose to alter the deduction cap to make it applicable to absences caused by cuts, scratches, minor headaches, splinters, and the like.
5. The Union in this case is asking the Arbitrator to put in place an unprecedented expansion of the point subtraction cap, without ever bothering to propose such during good faith labor negotiations.
6. Kelly Fleming was, at the time the Attendance Policy was negotiated, a recognized Union representative on the Attendance Committee. Mr. Fleming testified without contradiction, that during the 2001 negotiations it was the intent of the parties to have a Sickness and Accident point subtraction cap apply only to conditions eligible for treatment for Sickness and Accident benefits under the labor contract. That intent never once changed despite the several negotiation sessions over the Attendance Policy by the parties.
7. The Union's position in this case seeks a harsh, illogical result. It would permit employees to absent themselves from work for minor injuries or illness without any bolstering medical documentation. The suggestion that the Company agreed to a no-fault attendance policy that would allow workers to absent themselves from work for minor ailments, without so much as even foundation medical certification is antithetical to the negotiated commitment to "combat absenteeism" that sent in motion the formation of the bi-lateral Attendance Committee.

### **ANALYSIS OF THE EVIDENCE**

A threshold issue to be decided in this case is whether or not the grievance was filed in a timely manner. The controlling contract language on timelines to be followed in filing a grievance is found in Section 13.4 of the Collective Bargaining Agreement. That Section clearly provides that a grievance must be filed at Step One "within six (6) working days, exclusive of days of excused absence, after the occurrence of the incident from which the complaint arose ...". In the instant grievance, filed on July 9, 2009, the Union complains

that the Company has deducted too many points from employees for an absence occurrence due to sickness or accident. The Union asserts that only two points per occurrence when an employee is out for sickness or accident should be deducted.

A very similar complaint was made in the Tabatt grievance filed on December 3, 2008 and to which the Company gave a final response by fax on February 3, 2009. Union Exhibit 5 shows that the Union moved that grievance to arbitration. There is no evidence in the record of this case, however, to show that the Tabatt grievance was ever arbitrated, much less what the arbitrator's award was in that case. Accordingly, the Company's last response, on February 3, 2009, in which it continued to deny the Tabatt grievance is determinative of how the Company was applying an uncapped deduction of points when an employee's absence did not qualify for Sickness and Accident benefits. Also, and importantly, it is determinative of when the Union must have known that there was no cap being applied to absences that did not qualify for Sickness and Accident benefits. In the instant grievance the Union is complaining of substantially what it complained of in the Tabatt grievance. Through the Tabatt grievance the Union was made aware, at least by February 3, 2009 that the Company was not capping the point deduction when an absence did not qualify under the Sickness and Accident benefit plan.

In the instant grievance the Union also asserts that only two points per **occurrence** should be deducted, notwithstanding the fact that the Grievant's absences were not qualified under the Sickness and Accident plan. The Schmatz grievance which was decided by Arbitrator Jay on September 29, 2006 came close to speaking to that point [Union Exhibit

4]. Ms. Schmatz was absent for three days in March 2006 for reasons that did not qualify her absence as a Sickness and Accident absence. In the factual findings of that award Arbitrator Jay noted that the Company conceded as follows:

“ ... that the Grievant [Ms. Schmatz] should not have been charged a full point for the third day of absence, but instead should have been charged ½ of a point because she had taken a half-day of vacation, making the other half of that day chargeable.” [Union Exhibit 4 – p. 6]

It is clear from that finding that Ms. Schmatz was not capped at two points for her absence even though it was non-sickness and accident related, but simply should have had ½ point less deducted because she was on vacation for one-half day. Stated another way, the Company in the Schmatz case is found to have continued to apply the one-point per day or one-half point for a partial day of absence for an absence that was not qualified under the Sickness and Accident plan, and that those points were not capped. Accordingly, the Schmatz case does not demonstrate that the Company had in the past capped deductions at two points for non Sickness and Accident absences based on a “per occurrence” reasoning. To the contrary that case is supportive of the Company’s position in the instant grievance that it has consistently applied a one point per day deduction [or one-half point per day for partial day] for any absences that are not qualified under the Sickness and Accident plan regardless of the absences being consecutive days in a single “occurrence”.

The “per occurrence” phrase in the instant grievance was considered as an aspect of this case that might distinguish it from the Tabatt grievance or the Schmatz grievance and perhaps demonstrate a basis for confusion on the Union’s part as to what was the deadline for filing the instant grievance. The above analysis of the Tabatt and Schmatz

cases compels a finding that there was no evidentiary basis for confusion by the Union as to when it needed to file the instant grievance. Giving great allowance for any doubt that may be present, the Union must have known by February 3, 2009 what the practice of the Company was in regard to deducting points for absences that did not qualify under the Sickness and Accident plan. The instant grievance was not filed until July 9, 2009, approximately five months after the Company's final position statement in the Tabatt grievance was made known to them. The Collective Bargaining Agreement requires that a grievance must be filed within six (6) days of when the Union became aware of the event giving rise to the grievance. The instant grievance was not filed anywhere close to that deadline and therefore is barred from determination by this Arbitrator.

Arbitrators generally loathe denial of a grievance on the basis of timeliness because doing so denies a decision on the merits of a case to the parties. That said, however, the language of Section 13.4 of the parties Collective Bargaining Agreement is clear and unambiguous. The parties have limited the time for filing a grievance, and an arbitrator must enforce that provision of the contract as well as provisions that would speak to the merits of a case. Moreover, and importantly, Section 14.3 of the contract contains the usual restriction on the authority of an arbitrator to not disregard or modify any provision of the agreement. Accordingly, the Arbitrator must deny the grievance on the basis that it was not timely filed.

The Company, in raising its objection to the lack of timeliness of filing the grievance, deferred the merits of the case to the Arbitrator. The entire record of testimony and

evidence in this case was carefully considered in regard to the merits. The record shows that the Company had consistently applied the two point limit to only absences that qualified under the Sickness and Accident plan. Such action is reasonable when it is noted that the only language that contains such a limit on the days deducted appears under the Sickness and Accident clause of the Attendance Policy. There is no such limitation found anywhere else in the policy. Had the parties intended that such a cap on point deductions be applied to any absence due to any illness or injury they would clearly have been able to state their intention in the policy. Since they did not, it must be concluded that was not their intent. The evidence of how the Company was applying the cap to only absences that qualified under the Sickness and Accident plan supports that finding. If the parties desire to change the scope of application of the cap in point deduction, the place to do that is at the negotiating table. An arbitrator does not have the authority to make that change for them. With the current language of the Attendance Policy, the practice of the parties, and the limitations imposed on the Arbitrator, the merits of the grievance would have to be denied.

**AWARD**

**IN THE MATTER OF ARBITRATION BETWEEN**

DISTRICT LODGE NO. 165  
INTERNATIONAL ASSOCIATION OF  
MACHINISTS AND AEROSPACE  
WORKERS  
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OPINION AND AWARD

ATTENDANCE POLICY GRIEVANCE

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FMCS Case No. 10-55861-3

Based on the evidence and testimony entered into the record of this hearing, the grievance and all remedies requested are denied.

11/15/2010

James L. Reynolds

Dated: \_\_\_\_\_

\_\_\_\_\_  
James L Reynolds,  
Arbitrator