

IN THE MATTER OF ARBITRATION BETWEEN

**United Food and Commercial Workers,
Local 527 [Josh Bach]**

And

**Opinion and Award
FMCS Case No. 1356921**

Red Wing Shoe Company, Inc.

ARBITRATOR

Joseph L. Daly

APPEARANCES

On behalf of UFCW, Local 527

Timothy J. Louris

Miller O'Brien Jensen

Minneapolis, Minnesota

On behalf of Red Wing Shoe Company, Inc.

Lee A. Lastovich

Fellhaber Larson Fenlon and Voigt

St. Paul, Minnesota

JURISDICTION

In accordance with the Agreement between UFCW, Boot and Shoe Workers, Union Local 527, and the Red Wing Shoe Company, Inc., November 15, 2011-November 15, 2013; and under the jurisdiction of the United States Federal Mediation and Conciliation Service, Washington, DC, the above grievance arbitration was submitted to Joseph L. Daly, Arbitrator, on October 2, 2013, in Red Wing, Minnesota. Post-hearing briefs were filed by the parties on November 8, 2013. The decision was rendered by the arbitrator on November 26, 2013.

ISSUES AT IMPASSE

The Employer states the issue as:

- 1) Whether the company breached the contract by – under the terms of the negotiated Attendance Policy – terminating the Grievant for exceeding the maximum disciplinary points under that policy?
- 2) If so, [what] is the remedy?

The Union states the issues as:

- 1) Whether the Employer had just cause to terminate the Grievant, Mr. Josh Bach?
- 2) If not, what remedy is appropriate?

RELEVANT CONTRACT LANGUAGE

ARTICLE VII Disciplinary Process

Discharge or suspension: The Employer shall not discharge or suspend any employee without just cause.

ARTICLE VIII Employee Attendance Policy

Effective 01/01/06, a “no-fault” absence program recognizes the inevitability of occasional absence, and avoids the dilemma of judging which absences are excused and which are unexcused. The no-fault concept disposes of the problem of unequal treatment of employees, supervising inconsistencies, and favoritism.

This attendance policy uses an easy to understand point system. It is designed to ensure uniform and equitable treatment based on objective standards. It will provide every employee with clear guidelines to know where he/she stands with regard to attendance at any given time, and to assist in correcting any absentee problem. This is how it works:

1. NEW EMPLOYEES – New employees will start with zero points upon hire.
2. TIME PERIOD – The Attendance program is based upon a rolling twelve-month period.
3. POINTS – The following absences will not result in any points being assessed:
 - Vacation
 - Reserve Duty
 - Court Appearance by Subpoena
 - Holidays
 - Absences Excused by Law
 - Contractual Time off

- Jury Duty
- Industrial Injury (work comp)
- Approved leave of Absence
- Company excused due to lack of work (BC)

(It is the responsibility of the employee to provide documented proof of any “point-free” absences. Such documentation must be presented to the Human Resources Department or to the supervisor. All other absences not listed will result in one point being assessed for each day missed.)

A. ABSENCES WITHOUT PROPER NOTIFICATION – All absences must be reported by the employee not later than one hour after the start of their scheduled work time. If not reported within the first hour, one-half (1/2) point will be assessed. Failure to report an absence any time during their scheduled work time will result in the assessment of two (2) points, one (1) from the absence and one (1) for not properly reporting in.

B. ABSENCES, TARDIES AND LEAVING EARLY – Missing work will be assessed points as follows:

- Missing up to one hour = One-half (1/2) point
- Missing more than one hour, but less than the whole day = Three-quarters (3/4) point
- Missing the whole day and/or missing mandatory overtime = One point (1)

NOTE: If an employee is absent, tardy or leaves early more than five (5) times in a rolling 12-month period, the points assessed in item b will be doubled.

C. REPORTING TO WORK – Anyone who is absent for more than one (1) day, and/or did not report more than one (1) day of absence must call in every day to report their absences. If the person notifies us the exact time he/she will be off, subsequent calls are not necessary. After a person is on an approved leave of absence, he/she need not call daily.

4. CORRECTIVE ACTION/ATTENDANCE RELATED WARNINGS

- 1) An employee who reaches five (5) points in any rolling twelve-month period will receive a Verbal Warning and the attendance policy will be reviewed with him/her.
- 2) Seven (7) points in any rolling twelve-month period will result in a Written Warning.
- 3) Eight (8) points in any rolling twelve-month period will receive a 2nd Written Warning. The employee must submit a written plan on how he/she will correct the problem. Failure to do so will result in termination.
- 4) Ten (10) or more points in any rolling twelve-month period will result in automatic termination.

* Any employee who fails to call in and is absent for 3 consecutive days, will be considered an automatic quit.

CALL IN PROCEDURE

The employee is responsible and accountable to leave a message or speak with their supervisor if they are going to be late or absent from work.

Employees shall call prior to their start time or within one hour after the start of their shift. Failure to call in during the window of time as stated above will result in points assessed per Article VIII 3.A, it will be considered failure to report.

ARTICLE XIII

Vacations

[...]

3. Annual Vacation Scheduling Process. During the month of February, employees shall, in seniority order (unless an employee voluntarily defers their selection to a later position in seniority order) and by production line/shift (if employee is designated to a production line) or by department/shift (if employee is not designated to a production line), have the opportunity to lock in one week of vacation for the upcoming vacation year that runs from June 1 to May 31. If an employee is unprepared to select in seniority order, said employee shall be deemed as deferring their selection and should notify their supervisor when they are prepared to make a selection based on the weeks available at the time of selection. No more than 5% (round up) of the production line/shift or department/shift, as defined above, shall be allowed to lock in for any given week. Any locked in vacation days shall be recorded and paid as such.

When locking in vacation for a week containing a holiday, employees shall be allowed to lock in the number of work days scheduled during the holiday week. (For example, on a 4-day work schedule with 1 holiday, employees shall be allowed to lock in three days.)

4. Monthly Vacation Scheduling Process. During the first full week of each month, based on seniority, the percentage remaining from the Annual Vacation Scheduling up to a total of 5% (round up) of the production line/shift (if employee is designated to a production line) or by dept/shift (if the employee is not designated to a production line) may lock in weekly blocks of vacation to be taken during the next four months. Any locked in vacation days shall be recorded and paid as such.

When locking in vacation for a week containing holiday, employees shall be allowed to lock in the number of work days scheduled during the holiday week. (For example, on a 4-day work schedule with 1 holiday, employees shall be allowed to lock in three days.)

The remaining percentage (up to 8% total (round up) unless business circumstances allow more) will be allocated by seniority by production line/shift (if employee is designated to a production line) or by department/shift (if employee is not designated to a production line) provided the employee gives the Employer at least fourteen (14) calendar days' notice. **Employees may use vacation in hourly increments provided said employee gives a minimum notice of 24 hours and falls within the 8% total.**

5. Exception to Prior Notice Provision. The two (2) weeks notice provision will not apply to vacation taken on a day when mandatory overtime has been scheduled. The 8% limit will apply. Employee shall submit a vacation request within 24-hours of mandatory overtime posting to the Employer.

FINDINGS OF FACT

1. On June 6, 2013, Mr. Josh Bach, a two and a half year "floater" on the night shift at Red Wing Shoe, Inc. was terminated under the No-Fault Attendance policy by having accumulated 10.5 points.

Mr. Bach filed a grievance that same day stating the contract had been violated due to "past practice." His statement of the grievance was "in the past I have called in for a vacation day and been given a vacation day. That practice should continue and I should be reinstated and made whole, and should not have received a point for my absence on 6-5-13." [Employer exhibit #5].

2. Through the vacation scheduling procedure, Mr. Bach had scheduled vacation days for a fishing trip on June 3 and June 4, 2013. He had also scheduled a vacation day for June 12, under the mistaken belief that June 12 was the last day of school for his children. However, while he was fishing, he realized that the last day of school – including the student track-and-field day and bike rodeo- was on June 5, not June 12, as he previously thought.

On the evening of June 4, 2013, when he had returned from the fishing trip at approximately 6 p.m., Mr. Bach called the voice-mail number for his new supervisor, Kevin Elberg, to request that his June 12 vacation be switched to June 5 so that he could attend the school activities with his children. Otherwise, Mr. Bach was scheduled to work the second shift beginning at 4 p.m. on June 5, which meant he would miss the last day of his childrens' school activities.

Mr. Bach's message to Mr. Elberg specifically requests that Mr. Elberg call him back if there was any problem with Mr. Bach using a vacation day on June 5, 2013. Mr. Bach left his

cellphone number where he could be reached at anytime. Mr. Elberg did not return the call. Mr. Bach did not come to work on June 5, nor did he call in his absence that day. On June 6, 2013, when he returned to work, he discovered he had not been granted a vacation day and instead had been assessed attendance points for missing work. When he sought out Mr. Elberg to inquire why he had been assessed attendance points rather than a vacation day, Mr. Elberg requested him to report to Human Resources Manager Dan Dean. When Mr. Bach and Mr. Elberg arrived at Mr. Dean's office, Mr. Bach was informed that his employment had been terminated under the CBA no-fault policy. Mr. Bach responded that he left a message regarding the absence and had asked Mr. Elberg to notify him if his request for vacation could not be granted. Mr. Elberg responded, "It's not my job to call you back." Mr. Bach received a termination report citing "attendance" as the reason for discharge, effective June 6, 2013.

3. The general practice for years at Red Wing Shoe, Inc., was that supervisors did not return calls left on the attendance line. The attendance line exists as a mechanism for employees to leave notice regarding lates, tardies, and other absences, not as a means to secure last-minute vacation approval. Failure to provide notice of absence results in the assessment of additional disciplinary points, and the attendance line provides the means for an employee to leave a message with such notice, not to request a return call. Testimony at the arbitration hearing showed that Red Wing Shoe, Inc., has approximately 400 employees at Plant 2, and supervisors have no time to track down and return calls to all the various employees who leave voice mail messages regarding a wide array of attendance matters. Mr. Elberg followed the long-term practice of the company of not returning messages left on the attendance line. Further, with respect to short-term requests, employees cannot invoke vacation to avoid discipline. Past practice has established that the company does not knowingly allow an employee facing discipline under the points system to invoke vacation to avoid being assessed a point and the resulting discipline.

4. From the employer's perspective, Mr. Bach's attendance record was "awful." [Post-hearing brief of employer at 5]. Mr. Bach already had received multiple written warnings. In the first six months of 2013, Mr. Bach reached the point threshold for "second written warning" three times. As soon as Mr. Bach "earned back" or reduced his total attendance due to the operation of the rolling twelve-month policy, he would be absent again.

In mid-May 2013, two weeks prior to his termination, Mr. Bach received 9.25 points due to another absence and received his third “second written warning” of the year, which reminded him “ten or more points in any rolling twelve-month period will result in automatic termination.” [Employer exhibit #3 (c)]. That same warning required Mr. Bach to submit a “written plan on how [he] would correct [his] attendance problem.” Mr. Bach responded that he planned to keep better track of when he was absent on the calendar, “I will keep better track of my points so when something comes up I will points to use.” [Employer exhibit #3 (c), page 2].

Mr. Bach testified at the hearing he knew at the time that he was only a fraction of a point away from termination. Company witnesses confirm that Mr. Bach’s failure to attend work on June 5, 2013, left the company short handed in Mr. Bach’s area of operations. Testimony indicated that even if Mr. Bach had met personally with his supervisor to request vacation for June 5, 2013, that request would have been denied because other employees already took the shift off and the company needed Mr. Bach to do his job. [Testimony of Mr. Elberg]. Another employee on Mr. Bach’s shift who asked in person for a last minute vacation for June 5, 2013, was denied. When she did not work her shift, she was disciplined.

5. The basic contentions of Red Wing Shoe, Inc., are:
 - A. As a threshold matter, given the inclusion of the negotiated attendance policy in the contract, the Union bears the burden to demonstrate that the Company breached the agreement by discharging the grievant. It is not the Company’s burden to prove “just cause.”
 - B. The grievant violated the policy, and discharge is the appropriate penalty.
 - C. Mr. Bach has only himself to blame for losing his job. During his time at Red Wing Shoe, Inc., he worked another job, and since termination, he also went back to his previous employer so that now he works two jobs. Perhaps those opportunities were more attractive to him than retaining employment at the Company. Regardless, he forfeited his job by repeatedly not coming to work, despite warnings of the consequences. Mr. Bach violated the contract and his termination should stand.
6. UFCW, Local 527 and Mr. Bach essentially argue:
 - A. The employer lacks just cause for termination. The employer bears the burden of proof in establishing there was just cause for discharge.

B. The employer lacks just cause because its history of lax enforcement of attendance rules reasonably led Mr. Bach to believe his actions were not punishable, and the employer never notified Mr. Bach that it intended to strictly enforce the contractual no-fault policy. The employer has unilaterally perpetuated a long-standing practice of supervisor discretion regarding unexcused absences, whereby supervisors have been allowed to subjectively decide whether to allot attendance points or allow employees to use “short-notice vacation.” In fact, Mr. Dean, Senior Human Resources, in an email to president of the Union dated August 22, 2013, stated, “Lastly, the criteria for scheduling vacation is described in the CBA and followed as such. As has been discussed on numerous occasions, there is no ‘policy’ for scheduling vacation outside the CBA. However, supervisors have the latitude to approve short-notice vacation days if able to accommodate without a negative impact on the business, BUT not as a means for an employee to avoid a disciplinary step in the attendance policy. This has been the practice for a long time.” [Union exhibit #2, emphasis in original]. This proves, argues the union, the employer has over time fostered an attendance system that permits technical, but good faith, violations of the no-fault policy. In this case, the employer has demonstrable history of lax enforcement of the contract’s no-fault attendance policy. It makes no sense to bargain with the union for a strict “no-fault” attendance policy, but then knowingly allow supervisors to depart from that negotiated policy. But that’s exactly what the employer has done. [Post-hearing brief of union at 17]. “The natural result of the employer’s inconsistency...is that employees like [Mr. Bach] have been led to believe that certain violations of the attendance policy will be tolerated by management.” [Id.] Mr. Bach testified that his previous supervisor expressly informed him early in his employment that short-notice vacation requests for family-related absences were permitted. His previous supervisor did not refute that testimony at the hearing. When Mr. Elberg replaced his previous supervisor, neither Mr. Elberg nor anyone else warned Mr. Bach that his previous supervisor’s “particular brand of leniency would not continue.” [Id.] Mr. Bach had no reason to know that Mr. Elberg personal attendance policy differed in any respect from the attendance rules previously implemented by his previous supervisor. Mr. Bach acted in good faith believing that he was following the rules. [Id.]

C. Red Wing Shoe, Inc. lacks just cause because it does not enforce attendance rules evenhandedly in its practice. Supervisor discretion as practiced at Red Wing Shoe, Inc.- even done in good faith for the benefit of the employees- sometimes results in unequal treatment of employees. It is well established that arbitrators are free to overturn employee discipline if an employer enforces a rule unequally, arbitrarily, or capriciously. It is also well settled that employees who engage in this same type of misconduct should be disciplined evenhandedly. It is clear that Mr. Bach has been permitted by management in the past to use short-notice vacation as a means of avoiding attendance points for otherwise unexcused family-related absences.

D. Red Wing Shoe, Inc. failed to consider mitigating circumstances. While Mr. Bach has received attendance-related notices in the past, the record is clear that he has no history of misconduct on the job or other behavioral issues that would prevent his successful return to the work place. In fact, it should be considered that Mr. Bach testified at the hearing that he takes full responsibility for compliance with the attendance policy going forward, he understands what is required of him, and he hopes to have a successful career at Red Wing Shoes. [Post-hearing brief of Union at 25]. Mr. Bach requested short-notice vacation on June 5, 2013, in good faith. He was under the belief that his actions were consistent with the rules.

The union requests that Mr. Bach be given immediate reinstatement with full back pay and benefits along with any other appropriate remedy.

DECISION AND RATIONALE

The employer must prove by a preponderance of the evidence just cause to uphold the termination of an employee. “The employer shall not discharge nor suspend any employee without just cause.” [Collective Bargaining Agreement Article VII Disciplinary Process]. Both the contract and fundamental industrial due process require that the employer carry this burden. The employer has carried its burden of proof by proving that Mr. Bach, under its no-fault attendance policy, reached 10 points in a twelve-month period. Mr. Bach clearly understood he was at risk of termination. He knew, or should have known, that when he reached his third “second written warning” of the year, he was .75 points away from termination. If these were the only facts, his termination would be upheld.

However, the no-fault employee attendance policy “is designed to ensure uniform and equitable treatment based on objective standards. It will provide every employee with clear guidelines to know where he/she stands with regard to attendance at any given time, and to assist in correcting any absentee problems.” [CBA Article VIII]. The problem here is that there is an unwritten policy which both has allowed for lax, unequal, and possibly, arbitrary enforcement. Mr. Dean’s email of August 22, 2013, to the president of the local states “however, supervisors have the latitude to approve short-notice vacation days if able to accommodate without a negative impact on the business...” [Union exhibit #2].

In this case, Mr. Bach had a previous supervisor who interpreted this unwritten “short-notice vacation day” practice more liberally than his new supervisor. There is no question that the employer has unilaterally permitted this long-standing practice of supervisory discretion regarding unexcused absences. The supervisors have been allowed to subjectively and possibly, unequally, decide whether to allot attendance points or to allow the use of “short-notice vacation.” Red Wing Shoe’s supervisory discretion, as practiced, has resulted in unequal treatment of some employees like Mr. Bach. In such cases;

Arbitrators have not hesitated to disturb penalties where the employer over a period of time has condoned the violation of the rule in the past. Lax enforcement of rules may lead employees reasonably to believe that the conduct in question is tolerated by management. Even where the employee has engaged in conduct is obviously improper, such as threatening a supervisor, the fact that management has failed to impose discipline in the past can be a signal that unacceptable behavior will not be penalized. [Elkouri and Elkouri, **How Arbitration Works 6ed. 994 (2003) (citations omitted).**

Typically, an arbitrator should not substitute his/her judgment and discretion for the judgment and discretion of management.

If an arbitrator could substitute his[/her] judgment and discretion for the judgment and discretion honestly exercised by management, then the functions of management would have been abdicated and unions would take every case to arbitration. The result would be as intolerable to employees as to management. The only circumstances under which a penalty imposed by management can be rightfully sent aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary actions are proved – in other words, where there has been abuse of discretion. [*Stockholm Pipefittings Company*, 1 LA 160, 162 (Arbitrator McCoy, 1945)].

But, enforcement of rules and assessment of discipline must be exercised in a consistent manner. All employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis exists for variations in the assessment of punishment. In this case, the company sometimes allows employees to take vacation on shorter notice in certain circumstances, depending upon business conditions. Both the employer and the union have accepted this as a past practice. On such occasions, the company, with the tacit agreement of the union, goes above and beyond the terms of the contract to allow additional vacation to accommodate employees. But both the employer and the union confirm with respect to such short-term requests, employees cannot invoke vacation to avoid discipline. Yet, in one case, a supervisor allowed at least one employee to use short-notice vacation in hourly increments to avoid attendance points for tardiness. [Testimony at arbitration hearing]. On another case, a supervisor unilaterally offered to retroactively eliminate prior attendance points so that another employee could avoid formal discipline. [Testimony at arbitration hearing]. In this case, Mr. Bach testified that after having worked with his previous supervisor and having taken short-notice vacation days on several occasions without receiving an attendance point, he was under the impression that such absences were acceptable and would not result in discipline if they related to family matters. Lax enforcement of rules and unequal or discriminatory treatment in the application of those rules permit an arbitrator to disturb the penalties of the employer. Of course, if the employer has previously been lax in enforcing rules of conduct, the employer can turn to strict enforcement of the CBA after giving clear notice of the intent to do so. See Elkouri and Elkouri at 994. It is understandable that an employer would prefer to have “latitude to approve short-notice vacation days if able to accommodate without a negative impact on the business.” On the other hand, the collectively bargained for written agreement calls for a system “to ensure uniform and equitable treatment based on objective standards.” [Article VIII]. Yet the employer recognizes there is an unwritten informal policy that does give supervisors “latitude to approve short-notice vacation days.” The criteria used by various supervisors is not written, is unequally enforced, and has led to confusion. Certainly the employer can: 1) strictly enforce the contract by providing written notice to the union and employees that it intends to do so; 2) put language in the contract regarding the specific exceptions and the specific methodology for granting or not granting those exceptions; 3) define more clearly supervisory discretion in permitting short-notice vacation days; 4) negotiate a new Article in the contract that covers the confusion.

In this case, this arbitrator is disturbing the penalty enforced by the employer because the employer has been lax, arbitrary, and unequal in the enforcement of the rule. Mr. Bach reasonably and in good faith concluded that his conduct on June 4-June 5 was tolerated by management. While his conduct was improper under the no-fault policy, his good faith belief under the circumstances that he was doing what he was permitted to do, even though unacceptable under the precise language of the CBA, cannot fairly be penalized.

Based on the above reasoning, Mr. Bach will be immediately reinstated with full back pay and benefits. There will be a set off for all pay he has received in other employment since his termination.

November 26, 2013
Date

Joseph L. Daly
Arbitrator