

BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GLENDALE SUPPLY COMPANY

and

TEAMSTERS LOCAL 200

Case 2

No. 62396

A-6073

(Skiba Grievance)

Appearances:

Ms. Jill Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., 1555 North River Center Drive, Suite 202, P.O. Box 12993, Milwaukee, WI 53212, on behalf of the Union.

Mr. Henry W. Sledz, Jr., Schiff, Hardin & Waite, Attorneys at Law, 6600 Sears Tower, Chicago, IL 60606-6300, on behalf of the Company.

ARBITRATION AWARD

According to the terms of the 1999-2004 labor agreement between Glendale Supply Company (Company) and Teamsters "General" Local Union No. 200 (Union), the parties jointly requested that Sharon A. Gallagher be appointed as impartial arbitrator to hear and resolve a dispute between them regarding the discharge of James Skiba. Hearing in the matter was scheduled and conducted at Glendale, Wisconsin, on October 28, 2003. No stenographic transcript of the proceedings was made. The parties agreed that they would postmark their briefs December 1, 2003, and send a copy directly to each other with a copy to the Arbitrator. The parties waived the right to file reply briefs. The briefs herein were received by the Arbitrator on December 10, 2003, whereupon the record was closed.

ISSUES

The parties stipulated that the Arbitrator should resolve the following issues in this case:

Was there just cause for the Grievant's discharge? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE X

VACATIONS

Section 1. All employees who have completed one (1) year's service or more shall be given one (1) week of vacation with pay. All employees who have completed two (2) years' service shall receive two (2) weeks' vacation with pay. All employees who have completed nine (9) years' service shall receive three (3) weeks' vacation with pay. All employees who have completed fifteen (15) years' service shall receive four (4) weeks' vacation with pay. All vacation pay shall be based on a forty (40) hour week at the regular-hourly rate. A maximum of one (1) employee per shift shall be allowed to take vacation during any calendar week except the week prior to the fiscal year end. No employee can work during his vacation and receive an extra check. HE MUST TAKE A VACATION.

Section 2. A vacation list shall be posted December 1 of each year and taken down on December 31. Employees shall pick by seniority and classification. All selections made after December 31 shall be made in writing initialed by the supervisor as approved on a first come, first approved basis. The Employer shall provide a vacation request form, a duplicate copy type form. One copy shall be retained by the Employer and one copy retained by the requesting employee. Employees may take up to five (5) vacation days during a twelve (12) month period, one day at a time, provided there is no conflict within the vacation schedule. All vacation requests shall be made a minimum of one (1) week in advance.

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ARTICLE XII

DISCHARGE OR SUSPENSION

Section 1. The Employer shall not discharge or suspend any employee without just cause, but in respect to discharge or suspension shall give at least (1) verbal warning and one (1) written warning letter, with a copy to the Union. If the employee affected received two (2) written warning letters in a twelve (12) month period for the same offense, the employee is subject to a two (2) day suspension. If the employee affected receives a third (3rd) written warning, the employee is subject to discharge. Discharge must be by a proper-written notice to the employee, with a copy to the Union. The warning notice, as herein

provided, shall not remain in effect for a period of more than one (1) year from the date of the warning notice. Warning notices are subject to the grievance procedure, if the employee affected protests them. Appeal from discharge, suspension, or warning letters must be made within seven (7) workdays from the date the employee receives them.

Section 2. This Article is subject to Appendix "A" attached hereto and made apart hereof.

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APPENDIX A

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ASENTEE POLICY

The Company will determine if an employee will work or not work for any tardiness later than thirty (30) minutes. Tardiness, absence and no/call-no/show points will not be compounded for one (1) day.

POINTS ASSESSMENT

CATEGORY		POINTS
TARDY:	If an employee punches in after their scheduled start time.	1
ABSENCE:	Being absent from work for a full shift and call in at least one-half (1/2) hour before scheduled starting time. After four (4) paid absence allowance days.	2
EXTENDED ABSENCE:	Absent three (3) or more consecutive scheduled work days (must have a detailed physician's release to work note.)	2
NO-CALL/ NO-SHOW:	Failure to call in absence at least one-half (1/2) hour before scheduled starting time and no-show.	4

CORRECTIVE ACTION

No paid time off shall be used to enhance or implement discipline.

Corrective action is administered on a progressive basis, and is determined by the number of points accumulated as shown below:

VERBAL WARNING (VERIFIED)	10 POINTS
WRITTEN WARNING	12 POINTS
2ND WRITTEN WARNING	14 POINTS
SUBJECT TO TERMINATION	16 POINTS

ROLL-BACK

All points are removed (1) year from the date the points are received.

BACKGROUND

The Employer is a distributor of plumbing products to licensed plumbing contractors and kitchen and bath shops. The Company employs 46 employees at its Glendale facility, 20 of whom are covered by the Union contract, these being the truck drives and warehouse employees. The Company operates two shifts at its Glendale facility. First shift starts between 6:00 and 8:00 a.m. and 15 bargaining unit employees are assigned to that shift: 10 truck drivers and 5 warehouse employees; second shift begins between 1:30 and 3:30 p.m. and 5 warehouse employees are employed on it.

The contractual Absentee Policy (Policy) was placed into the labor agreement by mutual, voluntary agreement of the parties, approximately six years ago (the labor agreement in effect prior to the 1999-04 labor agreement). No changes have been made to the Policy since its inclusion in the labor agreement. It is undisputed that termination is not automatic at 16 points under the Policy and past practice. Employees who have given information to management regarding why they have missed work so that it could be placed in their files, employees with medical problems, family emergencies or who were late or absent due to weather conditions, have not been terminated even if they reached 16 points under the Policy.

As a general rule, employees receive four personal days after they have completed their probationary period and at the beginning of each calendar year thereafter, and under the Policy there is no need for the employee to give any reason for the use of a personal day. These personal days are separate from vacation which is covered by Article X. Article X provides that a list will be posted on December 1st of the prior year and employees can sign for vacation in the following year by seniority until December 31st. After December 31st, employees make their vacation selections in writing to their supervisors using a form requesting same; vacation is then granted on a first come, first served basis from December 31st on. It is also undisputed that the Company does not allow more than one employee per shift off on vacation or a personal day.

The general procedure for an employee to request a vacation day is for the employee to go to his supervisor and ask for the day off; the supervisor will then check the master calendar which is posted in the facility in the supervisors' office in plain view where employees can see it, and see if there is anyone else off on vacation that day. If no one else is off, the supervisor will give the employee a vacation request form which the employee will then fill out with the specific dates of absence and the supervisor will sign it, approving the day(s) off. The supervisor then gives the employee a copy of the approved vacation request form, the supervisor makes an entry on the master calendar on behalf of the employee, and then records the day off in the employee's attendance controller document. 1/

1/ The attendance controller shows 12 months in calendar form on one sheet of paper. Supervisors can mark employees off work, either unexcused, personal day or vacation, and make notations regarding the reasons therefor if any. An attendance controller for each year is kept for each employee. Supervisor Slivka (Skiba's supervisor) also keeps a notebook with all the dates of absence of each of his employees, as well as any points assessed therefor and reasons why points were assessed.

When an employee calls in or is absent without notice, the supervisor will wait until the shift begins to assess attendance points in case the employee reports to work at the last moment or late. After an employee has amassed 10 points, the employee receives a verbal warning which is confirmed in writing, wherein the number of points assessed to date is listed; after 12 points, the employee receives a written warning again with the number of points assessed to date; after 14 points, the employee receives a written warning (confirming the number of points amassed) and may be subject to a two-day suspension; at and after 16 points, the employee is subject to termination which means that the Company may terminate the employee, depending on the circumstances. The Company has described its Policy as a modified no-fault policy.

It is undisputed that employees can make vacation requests on the same day and although these vacation requests are to be handled on a first come, first served basis, when two employees make a vacation request for the same day, the Company has applied seniority to approve those. Once approved, no employee has been bumped out of his/her approved vacation due to a more senior employee making a request therefor. It is undisputed that once approved, vacation time off is "carved in stone." However, vacation days have been canceled if the Company needs to do inventory. On April 25, 2003, there was no inventory being done at the Company.

The Grievant, James Skiba, had the following record of attendance violations prior to April 25, 2003:

	"First offense"
6-24-02	2 pts assessed for absence on 6/18/02. Verbal warning issued and confirmed in writing (total 10 pts).

8-14-02	“Second offense” 2 pts assessed for absence on 8/14/02. Second verbal warning issued 8/14/02 (total 10 pts).
9-20-02 2/	“Third offense” 1 pt assessed for tardiness on 8/21/02. Third written warning issued (total 12 pts).
11-13-02	“First offense” 2 pts assess for absence on 11/12/02. Verbal warning (confirmed in writing) issued (total 11 pts).
11-19-02	“Second offense” 2 pts assessed for absence on 11/19/02. Written warning issued (total 13 pts).
1-7-03	“Third offense” 1 pt assessed for tardiness on 1/7/03 Given a 2-day suspension (total 14 pts).

2/ The August 21st incident was grieved. Originally, 4 points were assessed for no call/no show on August 21st. As Skiba showed up at work on August 21st and was allowed to work that day, the parties agreed to reduce the 4 points to 1 point.

On July 29, 2002, and October 29, 2002, Supervisor Slivka apparently assessed Skiba two points each date for which Skiba received no written or verbal warnings. Also on February 26, 2003, Skiba apparently left work early and was assessed one point by Slivka, which again Slivka failed to document in any way in Skiba’s work record. However, all three of these instances were listed by Slivka in his personal notebook showing Skiba’s absence record. There is no evidence herein whether Slivka counseled Skiba regarding Slivka’s point assessments for these instances. 3/ Only the August 21, 2002 incident among those listed above was grieved.

3/ Slivka’s notes show that without these three additional instances, Skiba had only accumulated 10 points prior to April 25, 2003. If one counts the July, October, 2002, and February, 2003, instances, Skiba had 15 points amassed prior to April 25, 2003.

FACTS

James A. Skiba was employed by the Company from July 1, 1996 until his discharge on April 28, 2003. Skiba was employed originally on the second shift as a warehouse employee until his promotion to warehouse manager approximately two and one-half years after his hire. Skiba held the warehouse manager position for approximately one year when he was told by management that he was not working up to their standard. At this time, Skiba decided to return to working on the second shift as a warehouse employee. Thereafter, Skiba got a warehouse position on the first shift, working 7:30 a.m. to 4:00 p.m. His supervisor for approximately the year prior to his discharge was James Slivka.

It is undisputed that in early April, 2003, Skiba had used all of his personal days; he asked Slivka if he could work through his lunch hour and leave work early one day in order to participate in his bowling league starting at 3:30 p.m. Slivka stated herein that Skiba came to him and asked him about it and that Slivka okayed it after he checked the calendar to make sure that no one was off on vacation that day. Skiba was not assessed any points for this incident and he did in fact work through his lunch and left at 3:30 p.m., ahead of his normal quitting time on that day in early April, 2003.

On or about April 11, 2003, Skiba told Slivka that he needed a couple of days off; 4/ Skiba stated that he was not sure which day he needed off, but asked Slivka for April 25 and May 2, 2003. Skiba stated that he would get back to Slivka on which one of the days he definitely needed off for sure. 5/ Slivka went to the supervisors' office and checked the master calendar, finding no other employee off on vacation, Slivka allowed Skiba to make out a vacation request form requesting vacation on both April 25th and May 2nd which Slivka then approved. Slivka handed a copy of his approved vacation request to Skiba that day. 6/ Slivka also wrote Skiba's approved vacation into the master calendar and recorded it on Skiba's attendance controller, deducting the appropriate vacation time from Skiba's total accrued vacation. Slivka stated that he told Skiba that he needed to know which day Skiba needed off for sure one week before the date of the day off.

4/ Slivka denied that Skiba told him he needed a couple of days off.

5/ I have credited Skiba regarding the content of his conversation with Slivka on April 11th, in part because under Skiba's testimony herein, there is little difference between what Skiba told Slivka and what Slivka understood Skiba to mean.

6/ At this time, Skiba had more than enough vacation to cover the two days.

On April 14, 2003, Skiba left Slivka the following note:

Jim,
May 2, is the vacation day I need. Thanks
Skiba

After receiving this note, Slivka stated that he went to Skiba and asked if Skiba was canceling vacation for April 25th and Slivka stated that Skiba responded yes. Slivka stated that he then crossed off Skiba's name from the master calendar and changed Skiba's attendance controller to show that he was not taking eight hours of vacation on April 25th. According to Slivka, on April 16, 2003, Juan Torres asked Slivka if he could have April 25th off on vacation. Although on April 14, Slivka had already spoken to Skiba, crossed off Skiba's vacation for April 25th from the master calendar and changed Skiba's attendance controller to show that Skiba would be working that day, Slivka went to Skiba and asked Skiba again if he wanted to cancel vacation for April 25th because Torres wanted Slivka to confirm Skiba's intent. According to Slivka, Skiba stated "right."

At this point, Slivka stated he went back to Torres and told him that Skiba did not want vacation on April 25th and Slivka then approved Torres' request for vacation and marked Torres off on vacation on the master calendar, on April 25th. 7/ It is undisputed that between April 16 and April 25, 2003, Skiba and Slivka had no conversations. Skiba did not call in to work and did not show up for work on April 25, 2003.

7/ Juan Torres did not testify herein. The Company submitted the "request for time off" form of Juan Torres dated April 16, 2003, into the record in this case, wherein Torres requested April 25, 2003, off on vacation, which Slivka signed and approved.

Skiba specifically denied that he and Slivka had any conversations (that Slivka testified to) on April 14th and 16th. Skiba stated that Slivka was lying regarding his testimony on those points in this case. Skiba stated that he believed that he had approved vacation for April 25th; that he never told any employer representative that he was canceling vacation for April 25th, and that he never got any documentation showing that his vacation day on April 25th had been canceled. Skiba stated that he does not look at the master calendar located in the supervisors' office and that in fact he did not look at that calendar during April, 2003. Skiba stated that when he got his "request for time off" signed by Slivka on April 11, 2003, as approved, he believed he had both April 25th and May 2nd off on approved vacation.

Skiba stated that he never spoke to Slivka about the note he left Slivka, but that what he meant to do by this note was to tell Slivka his priorities in case something came up at work and that he (Skiba) would be willing to come into work if there were a heavy workload and he might be needed on the job. Skiba stated that this happens all the time. However, Skiba also stated that he was not aware of any employee who was on an approved vacation being called

back to work. Finally, Skiba stated that as of March 26, 2003, he knew he was close to 16 assessed points under the Company's Policy, as Slivka had given him a copy of his personal notes regarding Skiba's absences and tardiness across the past several years.

Slivka stated that on April 25th, after Skiba failed to call in or report to work, that Slivka decided to fire Skiba based on Skiba's points. Skiba then prepared a termination slip for Skiba and dated it April 25th. Slivka stated that he then passed his decision to fire Skiba by managers Bruce and Halliburton. 8/ Bruce and Halliburton agreed with him that Skiba should be terminated on April 28, 2003, after Slivka told them the number of points Skiba had. No one from management ever spoke to Skiba about his side of the story prior to the decision being made to terminate Skiba on April 25th. Bruce stated herein he could not recall what Slivka told him about Skiba's requests for time off except that Bruce stated Slivka told him that Skiba had asked for 2 days off but he (Skiba) had rescinded one day's request.

8/ Halliburton did not testify herein.

On April 28, 2003, when Skiba arrived at work Slivka called Skiba into a meeting with Union Steward Sweeney and himself in which Slivka told Skiba that he was being terminated for his absences. At this point, Skiba stated that he thought he had approved vacation for April 25th and that the note he had left for Slivka was just to verify which date was more important for him to be off. During this meeting, Slivka did not remind Skiba of the two conversations (April 14 and 16) Slivka asserted herein he had with Skiba questioning whether by his note, Skiba had, in fact, intended to cancel vacation for April 25th.

Slivka stated that at the time of Skiba's termination, there was no space on the "request for time off" form for an employee to formally cancel their previously approved vacation request and that such cancellations were always done verbally. However, after Skiba's termination, Slivka stated that the Company changed the "request for time off" form to include a formal space upon which an employee could cancel their vacation in writing.

POSITIONS OF THE PARTIES

The Company

The Company urged that Skiba had received six separate warnings for poor attendance from June of 2002 through the first part of January, 2003; and that as of his no call-no show on April 25, 2003, Skiba had 19 points against him under the Company's Absentee Policy. As Skiba did not come forward with an acceptable excuse on April 28, 2003, for his absence on April 25th, he was properly terminated for his knowing misconduct. The Company argued that

it had appropriately applied its Policy to Skiba; that Skiba was aware of the Policy and had been progressively disciplined under the Policy in the past; that Skiba had received six separate written warnings in a one-year period prior to his discharge; and that Skiba went over the 16 points under the Policy, which would trigger termination. Thus, the Company urged that it met its burden of proof to show that Skiba was discharged for just cause.

The Company also argued that Skiba's due process rights were not violated in this case. Although due process analysis is not uniformly accepted in labor arbitration cases, the Company argued that even if it were applied in this case, the Arbitrator would find no fault with the Company's actions. In this regard, the Company noted that it let the Grievant know of the allegations against him, gave him the opportunity to prepare a defense and confront his accusers, that the Company thoroughly investigated the case and that Slivka conferred with upper level management regarding his decision to terminate Skiba and gave Skiba a chance to rebut the evidence against him.

The Company contended that credibility issues in this case should be resolved in the Company's favor and against the Grievant. On this point, the Company observed that the Grievant accused Slivka of multiple lies in his testimony herein. However, the Company noted that Slivka had nothing to gain but that the Grievant had everything to gain (reinstatement) by lying in this case. Here, the Grievant and his supervisor Jim Slivka had a good relationship and the Grievant could give no reason why Slivka might be "out to get him." Furthermore, the documentary evidence supported Slivka's version of his conversations with Skiba. In this regard, the Company observed that Skiba's note to Slivka used the word "the" when referring to the vacation day he really wanted and it did not refer to any priorities, requiring a conclusion that by his notes, Skiba intended to cancel his April 25th vacation day. In addition, Skiba's verbal request to Slivka regarding taking two days off would not require a note unless Slivka's testimony is credited. Finally, Skiba never explained why he needed either day off and did not give a reason in his note to Slivka.

Thus, the Company urged that discharge is the appropriate penalty in this case. The Company contended that no approved vacations have ever been cancelled during at least the last six years (by admission of Skiba) and that Skiba and Slivka admitted that vacations are "carved in stone" once they are approved. As the Union offered no evidence to show why Skiba would be treated worse than other employees and given that the Grievant had an abysmal attendance history, the Arbitrator should sustain the discharge and refuse to negatively impact the morale and productivity of the Company by reinstating Skiba.

The Union

The Union noted that Skiba never spoke to or wrote to Slivka that he was canceling his approved vacation on April 25, 2003. Indeed, the note that Skiba left for Slivka does not refer to April 25th in any way. In addition, the Union noted that the decision to terminate Skiba was

made before anyone from the Company spoke to Skiba about his version of the events; and that the discharge form was dated April 25, 2003, prior to any meeting by Company officials with Skiba. Furthermore, as Slivka never mentioned the alleged conversations he had with Skiba in mid-April regarding his wish to cancel his approved vacation for April 25th, the Union urged that Slivka should not be credited herein.

The Union contended that the Company has the burden of proving that it had just cause to discharge Skiba and that such a burden of proof in a discharge case must be to a high degree of certainty necessary to support the discharge decision. The Company violated Skiba's due process rights by deciding to discharge him before giving him a chance to respond to allegations against him and by conducting an essentially unfair investigation of the situation. On this point, the Union observed that Slivka prepared a Notice of Termination on April 25th (without conducting an investigation) and thereafter Slivka talked to upper level managers who agreed with him that Skiba should be terminated. Slivka told Skiba he was fired immediately upon his arrival on April 28th without questioning Skiba as to why he had not come in or called in on April 25th.

In this case, Skiba had completed and received approval for two days off: April 25th and May 2nd. Since he needed two days off and one for sure, he stated he would let Slivka know which was more important to him. Skiba left a note essentially to this effect for Slivka. However, the note did not cancel his vacation for April 25th; it only mentioned May 2nd as being a more important date for Skiba to be off. In addition, Skiba was shocked when he reported to work on April 28th and was told he was fired.

Slivka's testimony regarding the two conversations with Skiba is not credible because one such conversation would have been sufficient. It simply is not believable that Torres would have asked Slivka to confer with Skiba regarding whether Skiba wanted the date of April 25th off, as Slivka contended. Here, Skiba denied having either conversation with Slivka. Finally, as Slivka never mentioned these two alleged conversations with Skiba when he fired Skiba, Slivka's version should not be credited.

Skiba's outburst at his discharge demonstrates that he was telling the truth and it is not proper to presume here that the Grievant would automatically lie. The Company's decision to change its vacation request form to show a written request to cancel vacation amounts virtually to an admission by the Company that its procedures were unfair. Therefore, the Union sought reinstatement with full back pay for Skiba and that the grievance be sustained in its entirety.

DISCUSSION

There is no question, based on this record, that Skiba had serious tardiness and absenteeism problems prior to his discharge, having been assessed 14 points therefor as of January 7, 2003. Although Slivka's notes show that Skiba received 5 additional points for

three instances (July 29 and October 29, 2002 and February 26, 2003), in my view, these points cannot fairly be counted against Skiba because there is no evidence to show that Skiba received proper warnings therefor as required by the Policy with proper verification of the number of points he had amassed for these instances or that Slivka ever counseled Skiba regarding these instances. Therefore, in fairness, these 5 points have not been considered herein.

The Company's Policy is not a strict no-fault attendance policy. In a true no-fault attendance policy, warnings, suspensions and terminations are automatic whenever an employee receives the designated number of points. This means that excuses and justifications by the employee for absences are neither relevant nor considered by the employer under a strict no-fault policy. Under its Policy, the Company has latitude to decide not to terminate employees based on the circumstances of each case. However, no evidence was submitted herein to show that the Company has ever informed employees under what circumstances they might expect to receive "a pass" rather than be terminated under the Company's Policy.

In this case, Skiba had requested and received approval in writing to take off on April 25th and May 2nd and Skiba had accumulated vacation time to cover these two days. The Company has argued that Skiba's original request for vacation was conditional because he advised Slivka that he only needed one of two days off that he had requested and Skiba had stated to Slivka that he would later confirm which one of the two days he truly needed off. The parties dispute whether Skiba said he needed a couple of days off and one day for sure, as Skiba stated herein, or whether Skiba told Slivka that he was not sure which day he needed off but he asked for both April 25th and May 2nd, advising Slivka he would tell Slivka later which day he needed for sure, as Slivka stated herein.

A resolution of credibility regarding this testimony is not determinative of the controversy here. What is determinative is that Skiba received written approval for his absence on both April 25th and May 2nd pursuant to the Company's Policy and its established procedures. Here, the facts undisputedly show that Slivka checked the master calendar and found that no one else was off on that shift on those two days; Slivka gave Skiba a vacation request form which Skiba filled out clearly and unequivocally requesting both April 25th and May 2nd off; Skiba then unconditionally approved that form by signing it; Slivka returned a copy of the approved request to Skiba and then put Skiba in the master calendar and deducted Skiba's vacation on his attendance controller document. At this point, Skiba had approved vacation on both April 25th and May 2nd and Skiba was entitled to rely on that approval.

The next question which arises herein is what effect did Skiba's note to Slivka have on his approved vacation for April 25th. It is significant that the Company's Policy makes no provision for vacation cancellation and that the Company had no known procedures and no form for cancellation of vacation as of April 25, 2003. It is also relevant to this case that the Company changed its procedures to require written cancellation of vacation by employees after it terminated Skiba. Although such evidence is not conclusive of the issues, it tends to support the Union's argument that the Company's procedures at the time Skiba was terminated were at least insufficient if not fair.

A head-to-head credibility issue must be dealt with next in determining the effect of Skiba's note on this case. Skiba sent a note to Slivka sometime in mid-April 2003 stating, "May 2, is the vacation day I need." In this note, Skiba did not mention April 25th in any way. Thus, in my view, it cannot be argued that Skiba clearly canceled his April 25th vacation day by sending this note to Slivka. Indeed, Slivka asserted herein he went to Skiba twice after receiving this note to verbally confirm that Skiba meant to cancel his vacation on April 25th. These actions by Slivka support a conclusion that Skiba's note was ambiguous and did not clearly cancel his April 25th vacation.

Skiba has denied having any conversations with Slivka regarding vacation cancellation in April, 2003. At the instant hearing, both Slivka and Skiba appeared to be believable witnesses based on their demeanor. In these circumstances, it is difficult to credit one of them over the other. However, it is clear that Skiba was under no obligation to check the master calendar after he received written approval for his vacation and that Skiba was under no obligation to give reasons why he wanted vacation on April 25th and May 2nd, pursuant to the Company's Policy/Procedures. In addition, I find it disturbing that Slivka twice went to Skiba to ask him if he meant to cancel his April 25th vacation. Certainly, one conversation should have been enough. Slivka must have been unsure what Skiba intended or he would not have sought Skiba out twice. It is also disturbing that Juan Torres did not testify herein so that Slivka's assertions stand unsupported that Torres asked him to confirm Skiba's vacation cancellation and that Slivka did so and then told Torres that Skiba had canceled his April 25th vacation.

In any event, it would have been reasonable for Slivka to have gotten something in writing from Skiba showing that Skiba had requested to cancel his approved vacation on April 25th before Slivka granted Torres' vacation request in writing. This is particularly true, where as here, Skiba had a very poor attendance record over several years and Slivka knew or should have known that Skiba was close to amassing the maximum number of points under the Policy. 9/ However, Slivka neither requested nor got anything in writing from Skiba so that as of April 25th, both Skiba and Torres had approved vacation forms covering that day. This would have been a violation of the Company's rule that only one employee per shift may be off on any particular work day and such a violation could easily have subjected Slivka to discipline by the Company.

9/ The fact that Slivka had let Skiba leave early on one day in early April, 2003, without assessing him any points, supports a conclusion that Slivka likely checked Skiba's points prior to making this accommodation for him.

The Union has argued that Skiba was denied due process because Slivka decided to discharge Skiba without investigating the situation or seeking Skiba's side of the story prior to the discharge. In most cases, this kind of argument is not particularly persuasive, as the Union has a heavy burden to prove a violation of due process. However, in this case, where the

Company's Policy is not a strict no-fault policy, where the evidence showed that some employees who have reached 15 points have not been terminated under the Policy while the Grievant was terminated, where the Policy has been improperly applied to the Grievant in the past (July 29, October 29, 2002 and February 26, 2003), it is clear that in fairness, Slivka should have at least gotten Skiba's side of the story before deciding to terminate Skiba and preparing the termination letter.

In addition, Slivka's conference with Bruce and Halliburton about Skiba's discharge was merely *pro forma* based on the record here. Slivka had already prepared Skiba's termination slip and had dated it April 25, 2003, when he gave the "facts" to Bruce and Halliburton. Bruce recalled herein Slivka telling him the number of points Skiba had amassed and that Skiba had requested two days off but that Skiba had later rescinded one day; Bruce did not recall Slivka telling him how Skiba had requested the rescission, however.

The fact that at his termination meeting on April 28, 2003, Skiba immediately protested that he had approved vacation on April 25th, when Slivka announced the reason for his termination, tends to support a conclusion that Skiba believed in good faith he had approved vacation on April 25th. In contrast, Slivka's failure on April 28th to respond to Skiba's protestation by mentioning the two conversations he stated he had with Skiba in mid-April confirming Skiba's cancellation of his vacation on April 25th tends to undercut Slivka's testimony. In all the circumstances of this case and in light of the fact that Slivka stated that Skiba was a good worker and no evidence was proffered to show that Skiba has had any other problems at work, I find that the discharge penalty is too severe in this case and I issue the following

AWARD

The Company did not have just cause to discharge James Skiba. The Company shall, therefore, immediately reinstate Skiba with full back pay and benefits (effective April 28, 2003) and it is ordered to expunge Skiba's record of the 4 points assessed against him for his absence on April 25, 2003. 10/

10/ I shall retain jurisdiction of the remedy only for sixty (60) days after the date of this Award.

Dated at Oshkosh, Wisconsin, this 5th day of February, 2004.

Sharon A. Gallagher /s/

Sharon A. Gallagher, Arbitrator

SAG/anl
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