STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LODGE NO. 437, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, Complainant, vs. ANDIS CLIPPER COMPANY, Respondent.	Case VII No. 15056 Ce-1379 Decision No. 10634-A

Appearances:
Mr. Allen Johns, appearing on behalf of the Complainant.
Peck, Brigden, Petajan, Lindner, Honzik & Peck, Attorneys at Law, by Mr. Patrick H. Brigden, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Lodge No. 437, International Association of Machinists and Aerospace Workers, AFL-CIO having filed a complaint with the Wisconsin Employment Relations Commission alleging that Andis Clipper Company, has committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act; and the Commission having appointed Herman Torosian, a member of the Commission's staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Employment Peace Act; and hearing on said complaint having been held at Racine, Wisconsin, on June 5, 1972, before the Examiner; and the Examiner having considered the evidence and arguments of the parties and being fully advised in the premises, makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That Lodge No. 437, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter referred to as the Complainant, is a labor organization with offices at 50 West Oakton Street, Des Plaines, Illinois.

2. That Andis Clipper Company, hereinafter referred to as the Respondent, is a manufacturer of electric hair clippers, vibrators and precision built tools and is located at 1718 Layard Avenue, Racine, Wisconsin.

3. That Complainant and Respondent were parties to a collective bargaining agreement effective September 1, 1969, through August 31, 1971; that said agreement, in accordance with Article XV contained therein, was extended an additional 90 days by mutual agreement; and that said agreement contained the following provisions material herein:

"ARTICLE III--GRIEVANCE PROCEDURE

Section 1. The Company and the Union agree to the following procedure for settling differences or grievances which may arise:

(a) If an employee has a complaint, he shall first take the matter up with his foreman. He may ask the foreman to send for the department committeeman for the purpose of settling the complaint.

(b) If such is not settled, it shall be considered a grievance and reduced to writing. It shall be signed by the aggrieved employee and shop committeeman. The foreman will write his decision thereon at once.

(c) Such decision is final unless within twenty-four (24) hours of the day of the decision, a request is made to the superintendent for review.

(d) If such request is made, the same will be disposed of within twenty-four (24) hours by the superintendent.

(e) The decision of the superintendent shall be final unless within twenty-four (24) hours of the date of the decision a request is made to the management for review. Thereupon the matter shall be disposed of at a meeting between the management and shop committee within a period of three (3) days.

(f) If the parties can not reach an agreement under (e) above, another meeting may be arranged at which time either one of them may be assisted by its authorized representative.

(g) All written grievances shall be in triplicate, one copy to the management, one copy to the shop committee and one copy to the employee.

(h) Meetings are to be held between the Company and the shop committee at some convenient place in the office of the Company.

(i) There shall be no stoppage of work on the part of the employees or lockout on the part of the company until the above steps of the grievance procedure have been complied with."

"ARTICLE IV--SENIORITY

. . .

Section 10. Loss of Seniority. An employee shall lose his seniority for the following reasons:

(a) If he shall quit.

(b) If he shall have been discharged for cause.

(c) If for any reason he is absent from work for a period three (3) consecutive days without notifying the Company.

(d) If he is notified to report for work and does not report or give satisfactory explanation within three (3) days for not reporting, he shall be considered to have voluntarily terminated.

(e) No employee shall lose his seniority when his failure to report for work is caused by sickness or accident and report is made to the Company, provided such employee, upon his recovery, shall report to the Company for work and present necessary proof for his absence if requested by the Company. A person so absent will notify the Company within the three-day period set forth in (c) above."

4. That Hazel Hahn has been an employe of Andis Clipper Company since March of 1966; that during her employment Hahn has performed various jobs including bench assembly, final assembly, soldering, coil winding and packaging; that Hahn for at least the last several years has suffered from asthmatic bronchitis which, under certain conditions, causes Hahn breathing difficulties; that due primarily to said condition, Hahn was absent a total of 49 days from June 1968, to June 1969, 41 1/2 days in calendar year 1970, and as of September 20, 1971, the date of her discharge, a total of approximately 27 days for calendar year 1971.

5. That in regard to said absences the following letter, over the signature of P. J. Coulter, Plant Manager, dated June 20, 1969, was sent to Hazel Hahn:

"I am writing this letter to you because we have become quite concerned over your attendance during the past year. Our records indicate that you were absent a total of 49 days since the beginning of June, 1968.

We do appreciate that your absence from work was due to sickness over which you have no control, but I feel sure you will appreciate that it is impossible for us to operate efficiently unless we can rely upon the regular attendance of our employees.

We trust that your health is such that you will, in the future, be able to report for work regularly, since otherwise it will be impossible for us to continue your employment with the company."

That another letter was sent by Coulter on December 19, 1969, as follows:

"I understand that Ray Brockman, who is in charge of the Assembly Department, has spoken with you regarding your absenteeism, and the amount of time you spend away from your work place talking with other employees and in the rest room.

You must appreciate that it is impossible for a company to maintain a production schedule unless it can rely upon its employees. In a small organization such as ours the absence of one employee can, and does, have a serious effect on our ability to produce.

Your absentee record is far from satisfactory, and although it is noted that much of the absence is reported as due to sickness, this does not help the situation; further more, the amount of time you spend away from your work place is unwarranted and cannot be allowed to continue.

Unless you are able to maintain a better attendance record and spend more time at your work, there is no alternative but that we replace you with someone else and terminate your employment with the company. I regret having to write this letter, and trust that it will not be necessary for me to take any further action."

6. That the following final letter discharging Hazel Hahn for chronic absenteeism was sent by Coulter on September 20, 1971:

"I regret very much having to write this letter to you, but your continued absence from your work is a situation which we are no longer in a position to accept.

In July of 69 I advised you by letter that you had been absent a total of 49 days from June 68 to June 69, and that unless, in the future you were able to report regularly for work we would have no alternative but to terminate your employment with the company. It was hoped that your health would be sufficiently improved to allow you to do this, however, this was not the case and again in December of that year it was necessary for me to send you a further letter reiterating the companies position in relation to your absence, and the amount of time you spent away from your work place and in the rest room while in the plant.

To date there has been no improvement. Our records indicate that in 1970, you were absent due to sickness a total of 42 days, and this year to date a total of 27 days.

We appreciate that your absence is due to sickness over which you have no control. For this reason and also in consideration of the position you hold with our union, we have been particularly tolerent in the past. It is, however, impossible for us to maintain a production schedule, with the small number of employees we now have unless we can rely upon their regular attendance. Unfortunately because of your present physical condition, this you are unable to do.

We regret that we are now terminating your employment with the company due to your present physical condition. Should your health inprove in the future to the extent that you are able to work regularly we shall be only too pleased to consider you, along with other applicants for any position that is available.

Please advise me if you have any personal effects in your locker, so that arrangements can be made for their collection."

7. That at the time of her discharge Hazel Hahn was injured and had been since August 30, 1971, and was not able to work due to said injury until October 13, 1971; that a grievance was filed over said discharge and processed in accordance with Article III of the collective bargaining agreement; that said grievance procedure, however, does not provide, as a final step, final and binding arbitration.

8. That Hazel Hahn was not discharged solely for her absence on September 20, 1971, but also because of her absences dating back to approximately 1968; and that said failure to report to work by Hahn, for which she was discharged, was primarily caused by sickness, i.e., her asthmatic bronchitis condition.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSION OF LAW

That Andis Clipper Company, by its discharge of employe Hazel Hahn for chronic absenteeism, caused primarily by illness, violated Article IV, Section 10(e) of the collective bargaining agreement, and therefore, by said discharge, Respondent committed and is committing an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Andis Clipper Company, its officers and agents, shall immediately:

1. Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

   (a) Immediately offer to Hazel Hahn full and complete reinstatement to her previous position or a substantially identical position; restore to her all seniority rights and benefits lost due to the discharge and make Hazel Hahn whole by paying to her an amount of money equal to that which she would have earned, based on Hahn's record of absences due to illness for the previous three calendar years, had she not been discharged, less any amount of money that she earned or received while discharged that she otherwise would not have earned or received.

2. Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the receipt of a copy of this Order as to what action it has taken to comply herewith.

Dated at Madison, Wisconsin, this 2nd day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian
Herman Torosian, Examiner

ANDIS CLIPPER COMPANY, VII, Decision No. 10634-A

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complainant, in its complaint filed on November 8, 1971, alleges that the Respondent committed an unfair labor practice within the meaning of Section 111.06 of the Wisconsin Statutes by discharging employe Hazel Hahn without just cause in violation of the parties' 1969-1971 collective bargaining agreement.

Respondent, by its Answer filed on December 6, 1971, claims that the National Labor Relations Act preempts the Wisconsin Employment Relations Commission's jurisdiction over the subject matter of the complaint. Further Respondent denies violating the collective bargaining agreement and claims the termination of Hazel Hahn was for cause.

The instant matter was first set to be heard on December 14, 1971, and then on December 21, 1971. Prior to said hearing and at the request of the parties, said matter was postponed indefinitely to provide the parties an opportunity to settle the dispute. No settlement was reached and the instant matter was heard on June 5, 1972. The parties submitted final post-hearing briefs on September 6, 1972.

At the hearing held on June 5 Respondent moved for dismissal; first, on the basis that the Wisconsin Employment Relations Commission lacks jurisdiction, and secondly, on the grounds that the scope of the proof as stated by the Complainant at the hearing, even if proven, would not constitute a violation of the law. The Examiner reserved ruling on both motions.

The Examiner hereby denies both motions. The record does not establish Respondent as an interstate commerce employer within the jurisdiction of the NLRB, but even assuming same, it has been held that although an employer is otherwise subject to the jurisdiction of the NLRB, the Wisconsin Employment Relations Commission has jurisdiction to determine whether there has been a violation of a collective bargaining agreement, since violations of collective bargaining agreements are unfair labor practices under Section 111.06 of the Wisconsin Statutes and are not so regulated by the federal act.1/

As to Respondent's second motion the Examiner concludes that the Complainant has made a claim which, if proven, would be a violation of Section 111.06 of the Wisconsin Statutes, and therefore a determination on the merits will be made in the instant case by the undersigned.

The fact that Hazel Hahn suffered an injury and for said reason was absent from work beginning August 30, 1971, is not disputed. She tried to return on September 7, 1971, but had to leave because she was not physically able to perform the work required. On September 20, 1971, Hahn was terminated.

The Union argues Respondent, by its September 20 letter, discharged Hahn solely for her injury at the time and not for chronic absenteeism as alleged by Respondent. In regard to Respondent's claim of chronic absenteeism due to illness, the Union contends that discharging an employe who is absent due to an injury or illness violates Article IV, Section 10(e) of the agreement and for said reason cannot constitute just cause for discharge.

1/ Retail Store Employees Union, Dec. No. 8409-C, 6/68; Ladish Co., Dec. No. 8550, 5/68; American Motors Corp., Dec. No. 7079, 3/65, Aff. 32 Wis. (2d) 327, 10/66; and Tecumseh Products Co., 23 Wis. 2d 118, 3/64.

The fact that Hahn's absences, for the time material herein, were primarily due to her asthmatic bronchitis condition is not disputed by Respondent. Respondent argues, however, that Hahn, regardless of the reason, has a record of chronic absenteeism, and that she was discharged for said absenteeism and not solely for her absence on September 20.

The Examiner notes that Hahn received two letters in 1969 concerning her absences. Hahn was sent a letter dated June 20, 1969, in which P. J. Coulter, Plant Manager, stated that she had been absent a total of 49 days from June 1968, to June 1969. Coulter recognized her absences were due to illness but concluded the letter with the following:

> "We trust that your health is such that you will, in the future, be able to report for work regularly, since otherwise it will be impossible for us to continue your employment with the company."

A second letter was sent on December 19, 1969, stating in part the following:

> "Your absentee record is far from satisfactory, and although it is noted that much of the absence is reported as due to sickness, this does not help the situation; further more, the amount of time you spend away from your work place is unwarranted and cannot be allowed to continue.
>
> Unless you are able to maintain a better attendance record and spend more time at your work, there is no alternative but that we replace you with someone else and terminate your employment with the company. I regret having to write this letter, and trust that it will not be necessary for me to take any further action."

The following final letter was sent to Hahn on September 20, 1971, terminating her employment:

> "I regret very much having to write this letter to you, but your continued absence from your work is a situation which we are no longer in a position to accept.
>
> In July of 69 I advised you by letter that you had been absent a total of 49 days from June 68 to June 69, and that unless, in the future you were able to report regularly for work we would have no alternative but to terminate your employment with the company. It was hoped that your health would be sufficiently improved to allow you to do this, however, this was not the case and again in December of that year it was necessary for me to send you a further letter reiterating the companies position in relation to your absence, and the amount of time you spent away from your work place and in the rest room while in the plant.
>
> To date there has been no improvement. Our records indicate that in 1970, you were absent due to sickness a total of 42 days, and this year to date a total of 27 days.
>
> We appreciate that your absence is due to sickness over which you have no control. For this reason and also in consideration of the position you hold with our union, we have been particularly tolerent in the past. It is, however, impossible for us to maintain a production schedule, with the small number of employees we now have unless we can rely upon their regular attendance. Unfortunately because of your present physical condition, this you are unable to do.

We regret that we are now terminating your employment with the company due to your present physical condition. Should your health inprove in the future to the extent that you are able to work regularly we shall be only too pleased to consider you, along with other applicants for any position that is available.

Please advise me if you have any personal effects in your locker, so that arrangements can be made for their collection."

The first three paragraphs of said letter reviews Hahn's absenteeism record and prior warnings. Again the Employer acknowledges said absences were due to illness beyond Hahn's control but again stated the need for a regular full-time employe. Coulter then stated the following:

"We regret that we are now terminating your employment with the company due to your present physical condition. Should your health inprove in the future to the extent that you are able to work regularly we shall be only too pleased to consider you, along with other applicants for any position that is available."

In viewing the entire letter instead of just the above paragraph, and the fact that "regular" employment was stressed throughout said letter; and in considering previous letters sent to Hahn wherein she was warned about her absenteeism, the Examiner concludes Hahn was not terminated solely and specifically for her last absence from August 30 to September 20 but also because of her absentee record due to illness during the previous three years which prevented her from working "regularly" for the Employer.

Therefore, the issue to be decided by the Examiner is whether chronic absenteeism, even due to genuine illnesses, is cause for discharge within the meaning of the then existing collective bargaining agreement.

After reading all of the arbitration awards cited by both Complainant and Respondent in addition to numerous others researched by the undersigned,2/ the Examiner concludes that the consensus among arbitrators concerning absenteeism is as follows. In the employer-employe relationship it is the basic responsibility of the employe to report for work regularly and to give reasonable notice when circumstances prevent attendance. The Employer, in said relationship, can take disciplinary action to enforce such a requirement. Chronic absenteeism is "just cause" for discharge when it creates a hardship for the Employer. It can be said, generally, that the Employer should not have to alter his work and production schedule to fill the needs of an employe who is not able to regularly report for work. Where employe's excessive absenteeism can be corrected by progressive discipline, then the principle of progressive discipline should be followed. However, in cases where chronic absenteeism is due to genuine illness beyond the control of the employe and where progressive discipline will have no effect on the absences, discharge of an employe may be proper even without progressive discipline.

2/ Koenig Iron Works, 53 LA 594; Martin Electric Co., 49 LA 368; Westinghouse Electric Corp., 47 LA 464; United States Plywood Corp., 46 LA 436; Union Carbide Corp., 46 LA 195; Keystone Steel & Wire Co., 43 LA 703; Westinghouse Electric Corp., 39 LA 189; Pullman Standard, 36 LA 1042; Pacific Mills, 3 LA 141; Carter-Wallace, Incorporated, 69-1 ARB Par. 8372; Parks Products Company, Incorporated, 68-1 ARB Par. 8330; and National Anneating Box Company, 65-2 ARB Par. 8732.

Said cases of chronic absenteeism must, however, be decided on a case by case basis. For instance, in all of the cases researched by the Examiner, including those cited by the Respondent, not one case had a clause similar to Article IV, Section 10(e) of the 1969-1971 collective bargaining agreement which had to be reconciled with a just cause provision.

Without 10(e) the Examiner would be in total agreement with the conclusion reached by most arbitrators that chronic absenteeism, even if caused by genuine illnesses, is just cause for discharge when an employe cannot work full time and where there is no evidence that the illness or condition suffered has improved.

However, in the instant case, "discharge for cause", like in all cases, must be determined consistently with other provisions of the collective bargaining agreement. The parties are free to define or limit "cause" for discharge by the provisions of their agreement. 10(e) is such a provision. 10(e) states:

> "(e) No employee shall lose his seniority when his failure to report for work is caused by sickness or accident and report is made to the Company, provided such employee, upon his recovery, shall report to the Company for work and present necessary proof for his absence if requested by the Company. A person so absent will notify the Company within the three-day period set forth in (c) above."

Respondent argues that the import of Section 10(e) is its proviso which establishes the Employer's right to receive proof of absence and to insist upon the prompt return of the employe to his job upon his medical release. Respondent contends the language prior to the proviso, standing by itself, is superfluous, for to terminate an employe simply because he was absent due to a sickness or accident would be entirely unreasonable and would be hardly sustained as being for cause.

While the parties, by said proviso, gave the Employer the option of requiring excuses for absences as argued by the Employer, they also stated unequivocally that "no employee shall lose his seniority when the failure to report for work is caused by sickness or accident." The Examiner does not find the first part of 10(e) superfluous as argued by the Respondent. While absence due to illness or injury does not constitute just cause for discharge, chronic absenteeism, even if due to illness as discussed earlier, may very well be cause for discharge. The parties, by agreeing to 10(e), defined "cause" for discharge to exclude chronic absenteeism due to illness or injury. Section 10(e) therefore is not superfluous but instead protects an employe whose absence is caused by sickness or accident. In the instant case the fact that Hahn's failure to report for work was caused primarily by sickness or injury is not disputed.

Respondent also argued at the hearing that 10(e) was not intended to apply to short day to day illnesses, but only to accidents and unexpected type illnesses. There is, however, nothing in the record to support such a position.

In short, while the Examiner agrees with the Respondent that in fairness it should not be required to carry an employe who cannot work regularly, thereby requiring the Employer to adjust its production schedules to fit the needs of the employe, Section 10(e) requires otherwise. As stated above, the language of 10(e) is very clear and unequivocal. To interpret 10(e) differently requires some evidence that the parties intended a different meaning than that clearly stated in said Section. There is nothing in the record establishing or even suggesting a different intent by the parties. The fact that Hahn did not grieve prior warning letters issued in 1969 concerning her absentee record falls short of establishing such an intent.

Based on the above the Examiner concludes Hazel Hahn was discharged for her excessive number of absences from work, but inasmuch as her failure to report for work was caused by sickness or injury, said discharge violated Article IV, Section 10(e) of the collective bargaining agreement. Therefore the Examiner has today reinstated Hazel Hahn with back pay and no loss of seniority rights. For reason of Hahn's asthmatic bronchitis condition, Hahn's back pay should take into consideration her record of absences due to illness for the previous three calendar years, since apparently most of said absences were due to her condition.

Dated at Madison, Wisconsin, this 2nd day of November, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Herman Torosian
Herman Torosian, Examiner