

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Respondent.

3. Complainant and Respondent have been parties to a collective bargaining agreement effective May 1, 1979 through April 30, 1980 and continuing from year to year thereafter except in the event of written notice given by either party between sixty (60) and ninety (90) days prior to April 30 in the year 1980 or subsequent years terminating or requesting modification of said agreement. Said collective bargaining agreement (hereinafter referred to as the "Agreement") was in effect between the parties at all times relevant hereto and contained inter alia

the following provisions:

ARTICLE 5 - SENIORITY

. . .

Section 5. Loss of Seniority. Seniority shall cease for the following reasons: (a) the employee voluntarily quits; (b) the employee is discharged for just cause; (c) the employee is laid off for twelve (12) months or the length of his seniority, whichever is less; (d) in the event of a lay-off, the employee laid off is given notice of recall, mailed to his last known address by registered mail or certified mail, and if the employee does not report for work within five (5) working days; (e) absence from work for two (2) consecutive days without notifying the Personnel Department, (this shall not apply to any employee who is on leave of absence or who for good cause is unable to give such notice); (f) failure to return to work at expiration of leave of absence. The term "just cause" means: (a) that the employee has violated a reasonable and published Company rule or (b) that the employee has violated a provision of this Agreement or (c) that the employee has committed an offense that is against the law while on Company property or Company time.

. . .

ARTICLE 12 - LEAVES OF ABSENCE

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Section 6. Medical Leaves of Absence. A full time employee who has been excused from work for a period of more than five (5) work days because of illness or injury, substantiated by a doctor's note of necessity, will be placed upon a medical leave of absence. At the employee's written request, this leave may be extended for additional periods of one (1) month each, up to twelve (12) months, or length of seniority (whichever is less), provided the request is supported by a statement from the employee's doctor giving an explanation of the nature of the illness or injury and justification for the additional leave. A medical leave of absence will be limited to twelve (12) consecutive months, or length of seniority (whichever is less). Failure to return to work upon expiration of a medical leave of absence will result in automatic termination. The Company is not obligated to pay the cost of such employee's health, sickness and accident and life coverages beyond one hundred eighty (180) days of continuous leave, in the aggregate.

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ARTICLE 19 - COLLECTIVE BARGAINING AND GRIEVANCE PROCEDURE

. . .

Section 2. A grievance is defined as any controversy or claim on the part of any employee, group of employees, or the Union, that his/her or its rights as an employee or the Union, under this Agreement, have been violated in respect to:

- (a) Any matter involving the interpretation of this Agreement.

- (b) Any matter involving an alleged violation of this Agreement.

Section 3. A grievance shall not be considered if based upon a condition or event that has not occurred or continued to exist during the fifteen (15) days immediately prior to the date on which the grievance is presented.

Section 4. The Company and the Union agree to the following system of presenting and adjusting grievances, to-wit:

- (a) Any employee who has a grievance shall first go to his/her Foreman, or Steward if the employee prefers, and explain the nature of the grievance. The Foreman shall attempt to make a settlement within one (1) working day.*
- (b) In the event no mutually satisfactory settlement is reached in the above step, the grievance shall be reduced to writing, and presented to the General Foreman or his designate. The General Foreman or his designate shall attempt to make a satisfactory settlement within one (1) working day in writing.
- (c) In the event no mutually satisfactory settlement is reached in the above steps, the grievance may be presented to the Management Committee within three (3) working days. The Management Committee, the Union Committee and representatives and the employees shall meet within the next three (3) working days to attempt to resolve the grievance. The Management shall reduce the results of the meeting to writing within (2) working days, and give it to the Union.
- (d) If the grievance has not been settled as provided in (a) of this Section 4, then the party wishing to go further shall proceed under Chapter 111 of the Wisconsin Statutes, and this shall be the sole recourse.

. . . .

ARTICLE 22 - MANAGEMENT RIGHTS

Section 1. Except as otherwise limited by a specific provision of this Agreement, the Management of the plant and the affairs of the Company, and the direction of working forces are vested exclusively in the Employer, including, but not limited to, the right to hire, the right to discipline or discharge for cause, the right to layoff, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons, the right to promote or demote employees, the right to transfer employees between jobs, the right to

* A "work day" under this Article means 24 consecutive hours, excluding Saturdays and Sundays.

change the content of jobs, the right to assign work, the right to determine the number of employees, the number of hours, and the schedules of employment, the right to prescribe and enforce reasonable work rules, the right to determine the work to be done and the manner and methods for efficiently doing the work, and the right to determine suppliers, prices, products, and hours and whether any of the work will be subcontracted or be performed by supervisors. The listing of specific rights in this Agreement is not intended to be nor shall it be restrictive nor a waiver of any of the rights of Management, whether or not such rights have been exercised by the Company in the past. The reasonableness of the Company's rules will be subject to the Grievance Procedure.

4. The Respondent has with the Complainant's concurrence published in summary form its rules, procedures and policies governing employer-employee relations and employee obligations as an "Employee Handbook", the provisions of which govern unless as otherwise limited by the provisions of the Agreement. Said "Employee Handbook" provides in pertinent part as follows:

ATTENDANCE

It is important that you attend work regularly. It is also important to be on time. If your job does not get done on time, others may not be able to do theirs. A whole section might be thrown off schedule. You are expected to be ready and fit to work when your shift starts. Regular, hourly employees will be rewarded for perfect attendance (no absence, tardiness, or leave during working hours) with a gift to a local restaurant for each consecutive 12 month period.

You have an obligation and responsibility concerning absence. It doesn't make any difference if you are a regular, part-time, or temporary employee, or what position or work assignment you have, or whether it is a regularly scheduled work day or a non-scheduled work day.

1. Advance Notice - When you know you are going to be absent from work, you must tell your Foreman or Assistant Foreman promptly.
2. Notice of Unexpected Absence - If you did not give us notice in advance and you cannot come to work because of an emergency, notify the Foreman or Assistant Foreman the first hour of your shift. If you are absent from work for two consecutive days without notifying them, you will lose your job.

When you come back to work after being absent, you must complete a Report of Absence form. If you are absent due to illness for over five consecutive working days, you may be asked to furnish a report from your doctor.

It will be noted how often you come to work and how often you are on time. If you are prompt and regular, it will be in your favor. If you must leave the Plant during your working hours, get prior permission from your Foreman (or Assistant Foreman).

People who are absent, leave during working hours, or who are tardy three full infractions or more in any one 30-day period, or seven times (four times for probationary employees) or more

in a 90-day period will be disciplined. If an employee is less than thirty minutes late after their scheduled starting time, leaves during the day for less than thirty minutes, or leaves less than thirty minutes prior to the end of scheduled work period, it will be considered to be one-half infraction. Absences for longer periods, in any one day, will be a full infraction.

Absences which can be excused, with limitations as outlined herein or union contract, are:

1. Death in your immediate family
2. Jury duty or subpoena
3. Vacation
4. Marriage
5. National Guard or Military Reserve
6. Approved leaves extending for more than five work days
7. Very serious causes beyond your control
8. Industrial Accident

A note of caution: Even "excused" absences may be excessive, and if they are, they may be the basis for disciplinary action.

When you leave work early without a good reason, it is just as bad as being tardy. If you must leave work early, you will be asked to complete a Request For Time Off Form.

5. Kathleen Nicosia has been an employee of the Respondent since April 1973 as a Packer Assembler, and has performed various functions related to assembly and packaging of the Respondent's products. Ms. Nicosia served in said capacity on a continuous full-time basis until her discharge on June 25, 1980, except as specifically noted herein.

6. Ms. Nicosia has for a period of many years suffered from a chronic bronchial asthmatic condition which causes her recurring respiratory difficulties, and that as a result causes her to be periodically absent from her place of employment. Ms. Nicosia noted said asthmatic condition upon her application for employment with the Respondent, but stated on said application that it was "light, has not interfered with work".

Due primarily to said condition, Ms. Nicosia's attendance record from the commencement of her employment until June 18, 1979 was as follows:

(Chart follows on Page 6)

<u>Period</u>	<u>Days Absent (8 hours/day)</u>	<u>Days Left Early</u>	<u>Hours Lost on Days Left Early</u>
April 1973 - April 1974	Ms. Nicosia was off for a total of 375 hours (46 days, 7 hours) from April 1973 through April 1974 (a 12 month period).		
Remainder of 1974	22	5	14 hours 26 minutes
1975	19	5	11 hours 19 minutes
1976	20	3	9 hours 14 minutes
1977	132 $\frac{1}{/}$	0	0
1978	60 $\frac{2}{/}$	2	13 hours 0 minutes
Jan. 1 - June 18, 1979	18 $\frac{3}{/}$	1	3 hours 30 minutes

<u>Period</u>	<u>Days Tardy</u>	<u>Hours Lost on Days Tardy</u>	<u>Total Time Off</u>
April 1973 - April 1974	Ms. Nicosia was off for a total of 375 hours (46 days, 7 hours) from April 1973 through April 1974		
Remainder of 1974	12	7 hours 3 minutes	197 hours 29 minutes
1975	5	5 hours 10 minutes	168 hours 29 minutes
1976	2	8 minutes	169 hours 22 minutes
1977	0	0	1056 hours 0 minutes
1978	3	2 hours 4 minutes	495 hours 4 minutes
Jan. 1 - June 18, 1979	0	0	147 hours 30 minutes

Approximate Ratio of Time Lost To Total Working Time $\frac{4}{/}$

April 1973 to April 1974	19.58%
Remainder of 1974	13.68%
1975	8.75%
1976	8.80%
1977	55.00%
1978	25.78%
Jan. 1 - June 18, 1979	15.91%
Total (Apr. 1973 - June 18, 1979)	21.81% $\frac{5}{/}$

7. The Respondent exhibited continual concern regarding Ms. Nicosia's attendance at work throughout the period from 1973 through 1979. The Respondent raised the issue with and provided warnings to, Ms. Nicosia at the following times:

Verbal Warning	8-23-73
Verbal Warning	4-24-74
Verbal Warning	10-14-74
Verbal Warning	2-13-75
Appraisal	9-26-75
Verbal Warning	1-21-76
Appraisal	2-02-76
Written Warning	3-11-76
Appraisal	5-28-76
Appraisal	8-27-76
Verbal Warning	11-30-76
Discussion	2-17-77
Discussion	10-07-77
Appraisal	11-23-77
Letter	12-12-77
Discussion	12-12-77
Letter	2-14-78
Discussion	2-14-78
Appraisal	5-26-78
Final Written Warning	9-22-78
Appraisal	12-06-78

1/ The figure includes the following leaves of absence taken by Ms. Nicosia during calendar year 1977:

Jan. 25, 1977 - Feb. 7, 1977	(9 work days)
Mar. 7, 1977 - June 6, 1977	(65 work days)
Aug. 1, 1977 - Oct. 3, 1977	(45 work days)
Dec. 15, 1977 - Feb. 13, 1978	(total 92 work days; 8 falling during calendar year 1977 and included in the number of days absent for that year)

2/ This figure includes 30 work days lost during calendar year 1978 while on leave of absence from December 15, 1977 - February 13, 1978. It also includes a leave of absence from Oct. 2 - Oct. 30, 1978 comprising 20 work days.

3/ This figure includes a leave of absence commencing May 29, 1979 and totalling 14 work days.

4/ These figures are approximate only and are based on an average of 240 working days (1920 working hours) per year (2080 hours minus 10 holidays and 10 vacation days). The denominators for the following periods were based on the following calculations:

April 1973 - April 1974	(12 months) - 1920 hours
April 1974 - December 1974	(9 months) - 1440 hours
Jan. 1 - June 18, 1979	(approximately 5.6 months) - 924 hours

The 1979 figure was calculated on the basis of half of a calendar year less 36 hours (9 days) representing the number of working days from June 19, 1979 through the end of the month. The percentages reflect a numerator of the numbers of hours lost by Ms. Nicosia rounded up or down to the nearest hour.

5/ Representing (approximately) 2609 hours absent, tardy or early departure out of a total of 11,964 hours during the entire period.

8. On June 11, 1979, during Ms. Nicosia's leave of absence commencing on May 29, 1979, the Respondent sought to involuntarily change Ms. Nicosia to "temporary" status. Mr. Port notified Ms. Nicosia of said action by letter which stated as follows:

June 11, 1979

Miss Kathleen Nicosia
S11 W26418 Banningway
Waukesha, Wisconsin 53186

Dear Kathy:

Since our letter to you on February 14, 1978, here is what your attendance record looks like:

April 10, 1978	Absent
April 11, 1978	Absent
April 20, 1978	Absent
June 19, 1978	Absent
June 20, 1978	Absent
June 21, 1978	Absent
June 22, 1978	Absent
June 23, 1978	Absent
August 2, 1978	Absent
August 3, 1978	Absent
August 22, 1978	Leave Early
September 6, 1978	Leave Early
September 18, 1978	Tardy
September 29, 1978	Leave Early
October 2, 1978	L.O.A. till Oct. 30, 1978 (20 work days)
November 13, 1978	Tardy
November 21, 1978	Tardy
January 19, 1979	Absent
February 27, 1979	Absent
February 28, 1979	Absent
March 1, 1979	Absent
April 10, 1979	Leave Early

You have been absent since May 29th. You have indicated that you are going to request a leave of absence, but you have not followed our procedures in making a written request for the leave. Your absence continues, and we have no idea as to when or whether you will return to work.

Kathleen, we find that we cannot rely upon you to work with any degree of regularity. Accordingly, upon your return (assuming that you make proper request for leave of absence and do return), you will be placed in the status of temporary employee. In that way your erratic attendance will not be so disruptive to us, and we may be able to adjust our needs to your availability for work. We hope that this arrangement will be workable and that you will be able to cope with a less demanding work schedule. Let's try it. If it works out, that will be fine. If it does not, then you will be terminated.

Very truly yours,

S-B Manufacturing Co., Ltd.

George C. Port

9. The Complainant filed a grievance concerning Ms. Nicosia's involuntary change of status on June 18, 1979, seeking her reinstatement as a full-time employee. Said grievance was subsequently settled by the parties. The terms of said settlement were set forth in a letter from Mr. Port to the Complainant's then-President, Ms. Michele Ernst which read as follows:

July 5, 1979

Allied Industrial Workers of America
Local 659

Michele Ernst - President

Re: Grievance No. 51

Dear Michele:

In the meeting for the settlement of Grievance No. 51, it was mutually agreed that the Company would re-instate Kathleen Nicosia as a full time employee, if she would meet the following conditions:

1. Kathleen must bring a doctor's certificate stating that she may return to her normal duties with no work restrictions.
2. Kathleen must sign and return to the Company a medical Information Authorization form, allowing the Company to check with her doctor, if it becomes necessary to do so.
3. Kathleen must give the Company a letter stating that when she returns to work she will improve her attendance, and try to meet the factory average of all full time employees.

Kathleen complied with these conditions on July 2, 1979, and returned to work on July 3, 1979.

Very truly yours,

S-B Manufacturing Co., Ltd.

George C. Port

10. From Ms. Nicosia's return to work on July 3, 1979 until June 17, 1980, Ms. Nicosia was absent for 6 days and lost an additional 3 hours due to early departure.

11. On May 27, 1980, Mr. Port sent to Ms. Nicosia, the following letter on behalf of the Respondent:

May 27, 1980

Miss Kathleen Nicosia
S11 W26418 Banningway
Waukesha, Wisconsin 53186

Dear Kathleen:

On July 2, 1979, you submitted a letter to the Company in which

you promised to improve your attendance to comply with the Company absenteeism average. We have noticed your efforts and improvement in your attendance record.

On May 22, 1980, however, you left work early raising your average above that of the Company's. We are not taking disciplinary action against you at this time. We only wish to inform you of the facts and to caution you to be even more aware of the importance of your presence at your work station. Once again, the Company's average absenteeism is 2.3% per week. Your average is now 3.0% per week.

Should you fail to improve your attendance, you will subject yourself to further disciplinary action, possibly discharge.

Very truly yours,

S-B Manufacturing Co., Ltd

George C. Port

12. On June 17, 1980, Ms. Nicosia suffered a recurrence of her asthmatic condition, necessitating hospitalization and an extended absence from her employment. Ms. Nicosia subsequently requested that the Respondent grant her a medical leave extending from June 17 through July 30, 1980, comprising a period of 32 work days, which request was not received by the Respondent until June 26, 1980.

13. On June 25, 1980, Ms. Nicosia's parents telephoned the Respondent and during the ensuing conversation informed the Respondent that Ms. Nicosia would be requesting a medical leave of absence extending for approximately 30 working days.

14. Following said telephone conversation, the Respondent determined to discharge Ms. Nicosia from her employment. Said decision was communicated to Ms. Nicosia by letter dated June 25, 1980 and signed by Mr. Kleba, which letter read as follows:

June 25, 1980

Miss Kathleen Nicosia
S11 W26418 Banningway
Waukesha, WI 53186

Dear Kathleen:

On June 18, 1979, you were offered continued employment as a temporary employee since it was apparent to us that your health and physical condition failed to allow you to attend regularly and undertake the duties required of you as a regular full-time employee. You rejected this offer despite the fact that I explained to you that I would have to take appropriate action to prevent your absences should they continue.

The Company reinstated you as a full time employee on July 2, 1979, under the condition that you would improve your absenteeism record. You presented the Company with a letter to the effect that you would try and improve your record to meet that of our average employee. You were also told if you did not improve, you would be discharged.

Your present average is greater than that of our average employee.

Along with your absenteeism problem you have again failed to comply with the Leave of Absence requirement, to have your application for your leave approved.

Your record of absences both before the offer and afterwards is appended to this notice.

As I have explained to you, your absences, though due to a physical ailment requiring medical attention, prevent you from being available for and reporting regularly for work as required of you and all other employees, and your absences place an undue burden upon the Company in scheduling the work and maintaining a regular operating crew in your department, as well as placing an added burden at times upon your fellow employees during the times of your absences.

In view of the foregoing from which it appears that your physical condition does not give assurance that you can be available and report regularly for work as required of you in your job, the Company regretfully finds it necessary and does hereby terminate your employment.

Very truly yours,

S-B Manufacturing Co., Ltd.

Philip Kleba

PK:jk

CC: Anna Turtenwald - President
Allied Industrial Workers

15. On June 24, 1980, Dr. J. L. Buhl, M.D. released Ms. Nicosia to return to work as of Monday, June 30, 1980. Due to her discharge, Ms. Nicosia did not return to work on that date.

16. The Agreement is silent concerning the right, if any, of an employee to return to work prior to the expiration of a period of a requested medical leave of absence.

17. Had Ms. Nicosia returned to work on Monday, June 30, 1980, her approximate ratio of time lost to total working time for the period subsequent to her reinstatement on July 3, 1979 would have been 6.51%. 6/ Had Ms. Nicosia remained on leave of absence until Wednesday, July 30, 1980, as she had requested, her approximate ratio of time lost to total working time for said period would have been 14.59%. 7/

6/ Representing 15 days, 3 hours (123 hours) of time lost out of 1888 hours total working time. The former figure includes 6 days 3 hours lost prior to June 17, 1980 (see Finding of Fact number 10 above) plus 9 days lost during the period June 17-30, 1980. The latter figure reflects the fact that the period July 3, 1979 - June 30, 1980 represents one year less four working days (1920 less 32 working hours).

7/ Representing 38 days 3 hours (307 hours) of the time lost out of 2104 total working hours during the period July 3, 1979 - July 30, 1980 (one year plus 23 working days, or 1920 + 184 working hours).

18. On July 2, 1980, the Complainant grieved the discharge of Ms. Nicosia. The Respondent's final position on said grievance was communicated by Mr. Port to Ms. Anna Turtenwald, the Complainant's President in a letter dated July 21, 1980 which letter read as follows:

July 21, 1980

Allied Industrial Workers of America
Local 659

Anna Turtenwald - President

Re: Grievance No. 75

Dear Anna:

We have considered your discussion on behalf of the Grievant at the July 17, 1980, grievance meeting.

As we stated, the arguments advanced by you in her support were addressed to discipline, rather than the chronic absenteeism, (non-availability for work), problem which was the basis for our action.

For the reasons set forth in our letter to Kathleen, dated June 25, 1980, her grievance is denied.

Very truly yours,

S-B Manufacturing Co., Ltd.

George C. Port

19. Article 19 Section 4(d) of the Agreement provides that the unfair labor practice procedures set forth by the Wisconsin Employment Peace Act shall be the "sole recourse" for any party thereto wishing final and binding determination of grievances by an impartial third party.

20. Ms. Nicosia's discharge on June 25, 1980 was not motivated solely by her request for medical leave of absence, but rather was motivated largely by her record of chronic intermittent absenteeism dating back to the commencement of her employment with the Respondent, and by the Respondent's reasonable belief that such absenteeism would continue indefinitely.

21. Ms. Nicosia's chronic intermittent absenteeism and resultant discharge was caused by physical circumstances beyond her control that prevented her from performing her assigned duties in an adequate fashion i.e. recurrent bronchial asthma, and therefore the imposition of disciplinary sanctions in this matter would be neither appropriate nor effective.

22. Ms. Nicosia's chronic intermittent absenteeism, although excused was of such frequency as to place an undue burden upon the Respondent by requiring the Respondent to hire replacements during her periods of absence, by subjecting the Respondent to frequent difficulties in maintaining and scheduling production and by requiring the Respondent to compensate Ms. Nicosia on a full-time basis while not receiving her services on a full-time basis.

23. Ms. Nicosia received ample warning and notice throughout the course

of her employment that her chronic intermittent absenteeism was a subject of continuing concern to the Respondent and might ultimately result in her discharge.

24. The record fails to establish that the Respondent's discharge of Ms. Nicosia was arbitrary and/or discriminatory.

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

CONCLUSION OF LAW

S-B Manufacturing Company, Ltd. did not violate the parties' collective bargaining agreement by its discharge of Kathleen Nicosia from her employment on June 25, 1980 and therefore, said Respondent has not committed any unfair labor practices pursuant to Section 111.06(1)(f) of the Wisconsin Employment Peace Act.

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

ORDER

That the Complaint filed in this matter is hereby denied and dismissed.

Dated at Milwaukee, Wisconsin this 9th day of January, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Stuart S. Mukamal
Stuart S. Mukamal, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT
CONCLUSIONS OF LAW AND ORDER

The matter involved in this proceeding concerns the Respondent's discharge of Kathleen Nicosia from her employment on June 25, 1980, and the issue of whether said discharge violates the parties' existing collective bargaining agreement (hereinafter the "Agreement").

The Complainant filed the instant complaint on August 6, 1980 contending that the Respondent had discharged Ms. Nicosia without just cause in violation of Article V Section 5 of the Agreement. In particular, the complaint alleged that as a result of the settlement of an earlier grievance reached in July, 1979, the Respondent had agreed to retain Ms. Nicosia in full-time employment status provided that she "thereafter met the same attendance standards that was required of all other employees covered by the labor contract", and that Ms. Nicosia's subsequent discharge violated that agreement. It seeks reinstatement of Ms. Nicosia with full back pay and benefits to the date of her termination.

The Respondent's Answer, filed on September 15, 1980, alleged that the grievance settlement involving Ms. Nicosia referred to above conditioned her continued employment in a full-time capacity upon a different attendance standard than that applicable to other employees covered by the Agreement - the "factory average" attendance of all full-time employees of the Respondent. It denied that its discharge of Ms. Nicosia on June 25, 1980 violated either that grievance settlement or any provision of the Agreement, and seeks dismissal of the instant complaint.

BACKGROUND

The Respondent is a manufacturer of hardware and houseware specialties. Kathleen Nicosia has been employed by the Respondent since March 7, 1973 in the classification of Packer Assembler. Her position involved assembly and manufacture of the Respondent's products in an assembly line setting.

For a considerable period of time, Ms. Nicosia has suffered from chronic bronchial asthma. This condition causes her periodic but severe respiratory difficulty, and has necessitated her absence from work time to time. Ms. Nicosia noted this condition on her employment application but also stated that it was "light" and it had not interfered with her work.

At the time of the hearing in this matter, the Examiner was provided with a detailed record of Ms. Nicosia's work attendance dating back to April, 1974, listing the dates upon which she had been absent and/or tardy and the dates upon which she had left work earlier than her scheduled departure time, together with the time lost during each incidence thereof. 8/ From this raw data, the Examiner has compiled the table set forth in Finding of Fact number 6 hereinabove, and has calculated the approximate percentage of time lost against total working time. At the risk of

8/ No detailed record was provided for the period of March 7, 1973 through April, 1974, although it was noted that for the 12-month period of April 1973 - April 1974, Ms. Nicosia has been away from work for a total of 375 hours.

repetition of those percentages, they are as follows for the period from April 1973 through June 18, 1979:

April 1973 - April 1974	-	19.58% ^{9/}
Remainder of 1974	-	13.68%
1975	-	8.75%
1976	-	8.80%
1977	-	55.00%
1978	-	25.78%
Jan. 1 - June 18, 1979	-	15.91%
Total for period	-	21.81%

Ms. Nicosia thus was away from her employment due to absences, tardiness, or early departures slightly more than one-fifth of the time during this period. Although no evidence was provided as to the cause of each incidence of time lost, it was apparent that Ms. Nicosia's asthmatic condition was the chief contributing factor, accounting for the bulk of the lost time. Ms. Nicosia's absences varied in length, and included both numerous short term absences, tardiness and early departures and several long term absences (the longest of which ran from March 7, 1977 through June 6, 1977). On six occasions, Ms. Nicosia was granted leaves of absence ranging from 9 to 65 working days.

Ms. Nicosia's attendance record was a matter of continuing concern to the Respondent as noted in Finding of Fact number 7 hereinabove. During the period from August 1973 through December 1978, Ms. Nicosia received six verbal warnings and two written warnings concerning her attendance. In addition, the Respondent discussed the matter with her on four separate occasions, two of which were accompanied by letters. The matter was also raised on seven separate occasions during "appraisals" of Ms. Nicosia's work (presumably, these were periodic performance evaluations).

On May 29, 1979, Ms. Nicosia began a leave of absence that ultimately extended for 14 working days. On June 11, 1979, during that leave of absence, the Respondent sought to transfer her to the status of a temporary employee. Mr. George C. Port, the Respondent's Plant Manager, explained the Respondent's motivation to Ms. Nicosia as follows:

"Kathleen, we find that we cannot rely upon you to work with any degree of regularity. Accordingly, upon your return (assuming you make proper request for leave of absence and do return), you will be placed in the status of temporary employee. In that way, your erratic attendance will not be so disruptive to us, and we may be able to adjust our needs to your availability for work. We hope that this arrangement will be workable and that you will be able to cope with a less demanding work schedule. Let's try it. If it works out, that will be fine. If it does not, then you will be terminated."

The Complainant grieved Ms. Nicosia's transfer. The parties subsequently resolved the grievance by reaching an agreement affording Ms. Nicosia the opportunity to return as a full-time employee. In a letter

^{9/} Calculated on the basis of 375 hours lost during this period, n. 8 supra.

dated July 5, 1979, to the Complainant's then-President, Mr. Port set forth the terms of that agreement as follows:

In the meeting for the settlement of Grievance No. 51, it was mutually agreed that the Company would re-instate Kathleen Nicosia as a full time employee, if she would meet the following conditions:

1. Kathleen must bring a doctor's certificate stating that she may return to her normal duties with no work restrictions.
2. Kathleen must sign and return to the Company a Medical Information Authorization form, allowing the Company to check with her doctor, if it becomes necessary to do so.
3. Kathleen must give the Company a letter stating that when she returns to work she will improve her attendance, and try to meet the factory average of all full time employees.

Ms. Nicosia returned to work on July 3, 1979 as a result of the foregoing agreement. In fulfillment of condition number 3 above, she wrote a letter to the Respondent on July 2, 1979 which stated as follows:

Gentlemen,

To resolve grievance number 51, upon my return to work as a regular full-time employee, I, Kathleen Nicosia will try to improve my absentism (sic) to that of the average regular full time employee of S-B Mfg. Co. I hope to perform my job satisfactory (sic) to all concerned.

Sincerely yours,

/s/ Kathleen Nicosia

During the ensuing months following her return to work, Ms. Nicosia's attendance record markedly improved. During the period from July 3, 1979 through June 16, 1980, she lost 51 hours - six days absent and one early departure of three hours. 10/ On May 22, 1980, Ms. Nicosia received a written warning from the Respondent stating that her absenteeism rate had risen above the plant average, but no action was taken by the Respondent at that time.

On June 17, 1980, Ms. Nicosia suffered a recurrence of her asthmatic condition which required her hospitalization. On that date and on each morning for the next few working days, her parents telephoned in order to inform the Respondent that she would not be able to report for work. On June 25, 1980, Ms. Nicosia's parents informed the Respondent that their

10/ The Complainant grieved the Respondent's accounting of a two-day absence by Ms. Nicosia on February 25-26, 1980 as two absences rather than one absence. Said grievance was denied by the Respondent and the record does not indicate whether the Complainant pursued it further. This grievance is irrelevant to the matter at hand, inasmuch as it relates to possible disciplinary action that the Respondent may have contemplated taking against Ms. Nicosia. As will be subsequently

daughter would be requesting an extended medical leave of absence. At about the same time, Ms. Nicosia requested in writing a medical leave of absence to run until July 30, 1980 together with a physician's statement that she had been hospitalized for bronchial asthma. The Respondent alleged it did not receive this request until June 26, 1980 and that it was unaware of its existence at the time that Ms. Nicosia's parents telephoned on June 25.

Following said telephone call, the Respondent made the decision to terminate Ms. Nicosia's employment. It did not indicate this decision to her parents. Mr. Philip Kleba, the Respondent's Assistant Personnel Manager, wrote a letter to Ms. Nicosia which stated as follows:

One June 18, 1979, you were offered continued employment as a temporary employee since it was apparent to us that your health and physical condition failed to allow you to attend regularly and undertake the duties required of you as a regular full-time employee. You rejected this offer despite the fact that I explained to you that I would have to take appropriate action to prevent your absences should they continue.

The Company reinstated you as a full time employee on July 2, 1979, under the condition that you would improve your absenteeism record. You presented the Company with a letter to the effect that you would try and improve your record to meet that of our average employee. You were also told if you did not improve, you would be discharged.

Your present average is greater than that of our average employee. long with your absenteeism problem you have again failed to comply with the Leave of Absence requirement, to have your application for your leave approved.

Your record of absences both before the offer and afterwards is appended to this notice.

As I have explained to you, your absences, though due to a physical ailment requiring medical attention, prevent you from being available for and reporting regularly for work as required of you and all other employees, and your absences place an undue burden upon the Company in scheduling the work and maintaining a regular operating crew in your department, as well as placing an added burden at times upon your fellow employees during the times of your absences.

In view of the foregoing from which it appears that your physical condition does not give assurance that you can be available and report regularly for work as required of you in your job, the Company regretfully finds it necessary and does hereby terminate your employment.

10/ (cont'd.) noted, Ms. Nicosia's discharge was not disciplinary in nature, and therefore, the calculation of the number of infractions - the controversy involved in that grievance - is not at issue. The matter involved herein concerns a problem of chronic intermittent non-attendance, and the relevant measure thereto is the total amount of time lost rather than the number of infractions upon which discipline might be based.

Mr. Kleba testified that, the Respondent did not again offer Ms. Nicosia the option of remaining as a "temporary" employee because it felt that she would reject the offer, as she had on the previous occasion.

On June 26, 1980, Ms. Nicosia's physician released her to return to work on Monday, June 30. The Complainant grieved Ms. Nicosia's discharge on July 2, 1980, which grievance was denied by the Respondent. The Complainant thereupon filed the instant action in accordance with Article 19 Section 4(d) of the Agreement.

Testimony taken at the hearing in this matter revealed that twelve to fifteen other full time employees of the Respondent had higher percentages of time lost compared to total working time than did Ms. Nicosia for the period between Ms. Nicosia's return to work on July 3, 1979 and her discharge on June 25, 1980 and that said employees were still employed on the latter date. Although the total number of the Respondent's employees varied from time to time, it ranged during the first six months of 1980 from a low of 67.5 to a high of 91.3, with an average of approximately 76.4. No further information concerning the basis for the attendance records of these employees on the Respondent's failure to discharge them was provided to the Examiner.

POSITIONS OF THE PARTIES

The Complainant contends that Ms. Nicosia's discharge violated the Agreement because it resulted from the discriminatory and unwarranted application of a standard of attendance not imposed upon the Respondent's other full-time employees - i.e. a "factory average" standard. It claims that nothing contained in the July, 1979 settlement of Ms. Nicosia's earlier grievance ever permitted the application of an attendance standard to Ms. Nicosia that was in any way different than that applied to the Respondent's other employees covered by the Agreement. The Complainant further argues that, in view of the 1979 grievance settlement involving Ms. Nicosia, only her post-July 3, 1979 attendance record is relevant herein, and that her attendance during that period exhibited distinct improvement. It further argues that virtually all of her absences during that period were excused by the Respondent. Noting that a number of the Respondent's other full-time employees had worse attendance records during this period, the Complainant concludes that such further supports the view that Ms. Nicosia's discharge was discriminating in nature. It claims that the Respondent's real concern here is that Ms. Nicosia has been exercising her privilege of utilizing her group health insurance benefits, and that such was the true motivating factor behind the Respondent's efforts to transfer her to temporary status, which would deprive her of those benefits.

The Complainant also contends that the Respondent has never requested Ms. Nicosia to undergo a physical examination to determine her fitness for continued employment and therefore that the Respondent's doubts in that regard have never been established. Furthermore, it notes that Ms. Nicosia has had her condition under control through the use of appropriate medication.

The Respondent contends that Ms. Nicosia's erratic attendance record provides sufficient just cause for her termination. It notes that Ms. Nicosia was warned about her attendance problems on numerous occasions and that such warnings did not alleviate the problem. It claims that its earlier effort to change her status to that of a temporary employee was based upon its perception that her attendance was not sufficiently regular to warrant her classification as a full-time employee and her receipt of contractual benefits in accordance therewith.

The Respondent claims that Ms. Nicosia's reinstatement on July 3, 1979

to full-time status was based upon her efforts to meet the "factory average" attendance record of all of its full-time employees, and that Ms. Nicosia failed to comply with this requirement. In this regard, the Respondent produced statistics which showed that its "factory average" absenteeism for the first half of 1980 was 2.208% and, including employees on leaves of absence, that it was 5.224%. 11/ It contends that Ms. Nicosia's absenteeism rate as of May 22, 1980 had reached 3% (above the "factory average") for the period since her reinstatement, and that the grant of her request for an extended medical leave of absence through July 30, 1980 would have raised her absenteeism rate for that period to 16% (three times the "factory average" including leaves of absence).

The Respondent contends that Ms. Nicosia's discharge was necessitated as a result of her chronic absenteeism, her periodic unavailability for work, the resultant undue burden placed upon it and her fellow employees and her alleged failure to observe the terms of the grievance settlement reached in July, 1979. It claims that full time employees are obligated to attend work regularly and to maintain regular hours, and that Ms. Nicosia has repeatedly demonstrated over a prolonged period of time her inability to meet those obligations. It claims that Ms. Nicosia's attendance problem was not disciplinary in nature, but was due to a genuine physical disability, and that invocation of its progressive disciplinary procedures would be inappropriate. Citing the Examiner's decision in the somewhat similar case of Andis Clipper Company. 12/ It concludes that Ms. Nicosia's discharge was the inevitable result of a problem of which she had been continually warned and been unable to correct, and therefore that it did not violate the "just cause" provisions of the Agreement.

DISCUSSION

Prior to addressing the central issue involved herein - whether Ms. Nicosia's chronic intermittent absenteeism provided sufficient cause for her discharge on June 25, 1980 - it is necessary to determine several subsidiary matters.

First, the Agreement does not specifically and clearly spell out "just cause" standard. Article 22 (Management Rights) grants to the Respondent the right "to discipline or discharge for cause, the right to layoff, terminate or otherwise relieve employees from duty for lack of work or other legitimate reasons" and the right to prescribe and enforce reasonable work rules". Article 5 Section 5 (Loss of Seniority) provides that seniority shall cease for certain specified reasons, one of which is discharge for just cause. That Section further defines "just cause" to include (among other things not pertinent herein) that "the employee has violated a reasonable and published Company rule". The Respondent's rules are published in an "Employee Handbook". On pages 7-8 of that Handbook, a section is devoted to the subject of attendance, which has been quoted in Finding of Fact number 4 hereinabove. When the Agreement and the Employee Handbook are considered in tandem - as the contractual definition of "just cause"

11/ Respondent's Exhibit 19, based on weekly figures for the weeks ending Jan. 6 - June 29, 1980.

12/ (10634-A), 11/72.

suggests - they indicate clearly that prompt, regular attendance is and has been a continuing concern of the Respondent. Certainly the Respondent could not continue to manufacture and market its products in a timely and profitable fashion if such a standard were not expected from its employees. Therefore, the terms "cause", "just cause" and "legitimate reasons" as used in the Agreement to denote the prerequisites for discharge must be held to include attendance failures, if those failures are sufficiently serious under the particular circumstances to support a discharge.

Second, the Respondent's apparent claim that Ms. Nicosia's failure to meet the "factory average" for attendance in and of itself provides sufficient cause for her discharge is without merit. At no time did Ms. Nicosia or the Complainant consent to or authorize the application to Ms. Nicosia of such an attendance standard or, for that matter, of any attendance standard other than that set forth by the Agreement as applicable to the Respondent's other full-time employees. The July 1979 grievance settlement involving Ms. Nicosia's involuntary transfer to temporary status merely required her to use her best efforts to attempt to meet the "factory average", and her attendance subsequent to her return work on July 3, 1979 certainly demonstrated that she fulfilled this obligation. Ms. Nicosia therefore clearly is in compliance with the July, 1979 grievance settlement. If Ms. Nicosia's discharge is to be upheld, it therefore must be done in accordance with the standards set forth by the Agreement and the Employee Handbook as applicable to all of the Respondent's full-time employees.

Third, the Complainant's contention that the July, 1979 grievance settlement rendered Ms. Nicosia's attendance record prior to that time irrelevant to this matter is similarly without merit. The Respondent has demonstrated continuing concern regarding Ms. Nicosia's attendance record since the start of her employment in 1973. This concern was communicated to Ms. Nicosia on numerous occasions and Ms. Nicosia was explicitly warned that the continuation of her attendance pattern could result in her discharge. Ms. Nicosia's attendance problem has been chronic in nature, and is apparently the result of a physical disability beyond her control. This physical disability allegedly affects her ability to perform her assigned duties in the manner expected of her. Were this a disciplinary matter, and if the attendance problem were solely within Ms. Nicosia's control, the Complainant's contention as to the relevance of her pre-July, 1979 record would have merit. However, this is not the case. Certainly, Ms. Nicosia's entire attendance record dating back to her initial employment in 1973 is relevant - in fact essential - to the determination of whether she is physically able to perform her assigned duties as expected, although greater weight may be given to more recent periods of time.

Fourth, this matter is clearly not disciplinary in nature, and therefore the progressive disciplinary procedure set forth in the Employee Handbook is inapplicable to this matter. Were this a disciplinary discharge, the Respondent would clearly be obligated to follow that procedure. The purpose of progressive discipline is to induce an errant employee to correct his or her behavior so as to avoid further and more severe discipline. ^{13/} However, in a situation such as this, where the cause of the underlying problem is not attributable to the fault of the

^{13/} See for example Michigan Seamless Tube Co. 24 LA 132 (Ryder, 1955) at pp. 133-134 in which the arbitrator stated that:

" . . . [I]f the employer so chooses, and it is common practice in the industry, the employer may adopt a corrective

of the employee involved, and where correction of the problem is not really within the employee's control, imposition of progressive discipline would serve no purpose.

From the foregoing, it is clear that the standard applicable to the resolution of this dispute must be that which has generally governed discharge cases involving chronic, allegedly excessive, non-disciplinary absenteeism.

It is well established by arbitrators that excessive absenteeism can form sufficient basis for the discharge of an employee, even if the cause of the absenteeism is due to a physical condition beyond the control of the employee. The basis for such a discharge is that chronic absenteeism in and of itself can impose an undue burden upon an employer even if the absences are excused and the employee involved is not at fault in any way. The general rule was stated by Examiner Torosian in the Andis-Clipper Company decision referred to above 14/ as follows:

"In the employer-employee relationship it is the basic responsibility of the employee 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 employee who is not able to regularly report for work. Where employee'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 employee and where progressive discipline will have no effect on the absences, discharge of an employee may be proper even without progressive discipline."

13/ (Cont'd.) approach toward penalty by making second and third offenses of the same nature, or of another nature, cumulative in terms of the degree of severity of penalty imposed for each of the subsequent proven offenses so as to dissuade any further commissions.

. . . By adopting a practice of increasing the degree of penalty for subsequent offenses, all employees are treated equally and the employer exacts greater employee respect for the shop or contract rules that are required to be enforced. This also adjusts the penalty to the past, disciplinary record of each given employee wherever he may stand as a repeat violator. Industry and unions have found this system to have corrective and rehabilitative value.

14/ Supra, n. 12.

Numerous arbitration awards have dealt with this issue and have upheld the foregoing standard. Thus, for example, in Koenig Iron Works 15/ it was stated that:

"The relationship of employer and employee contemplates that an employer is entitled to expect normal and reasonable attendance by its employees to insure the scheduled production requirements of its business. It is therefore well recognized by arbitrators that a company has the right to terminate an employee for excessive absenteeism and tardiness regardless of the legitimacy of the underlying reasons."

In Westinghouse Electric Corporation 16/ the arbitrator stated that:

" . . . [R]epeated absences, over a long period of time, even for valid reasons such as genuine illnesses, may make an employee of so little value, if not an actual handicap to the Company, as to justify a severance of the employment relationship."

In Union Carbide Corp. 17/, the arbitration board stated that:

"Ordinarily 'normal' absenteeism due to illness, particularly where it is confirmed not only by medical certificates but by the Employer's own insurance carrier, would not justify discharge but might if regular and recurrent justify, as an initial corrective, a warning followed by a suspension without pay. But where the evidence, as here, discloses regular, constant, consistent and recurrent absences for illnesses and otherwise which are for lengthy periods of time, a warning or suspension could not possibly correct the condition for undeniably the grievant's physical condition is such as to indicate that he must of necessity continue to be absent for illness despite any warnings or disciplinary suspensions. . . .

Under these circumstances, where attendance is so very irregular and absences due to illnesses are for such protracted periods of time and where the illnesses must of necessity continue, the Employer should not be burdened with the problem of scheduling of work merely to accommodate one employee's physical condition. No Employer can operate properly without the assurance that its employees will, within reason, report regularly for work. Consideration that may be due an employee for his long service and sympathy which the Board feels for his physical condition cannot outweigh the needs and rights of the Employer. To do otherwise might seriously affect the existing relationship of the Employer with its other employees."

15/ 53 LA 594 (Ray, 1969)

16/ 39 LA 187 (McCoy, 1962)

17/ 46 LA 195 (Cahn, Chmn., 1966). The number of cases upholding this proposition are legion, and the Examiner has chosen a few for illustrative purposes. For additional citations, see the cases cited by Examiner Torosian in Andis Clipper Company, supra n. 12, at fn. 2

Clearly, the Respondent had just cause to discharge Ms. Nicosia if it can prove that her absences, even if excused by illness, were in fact excessive and if her continued employment would place an undue burden upon the Respondent. The resolution of that issue must be determined on a case-by-case basis, with particular attention to the number of absences, and time involved in toto and the prospects for future absences.

In Finding of Fact number 6 hereinabove, the Examiner has prepared an analysis of Ms. Nicosia's attendance record. The result of that analysis was a finding that Ms. Nicosia lost close to 22% of her total working time to absence, tardiness or early departure during the period from April 1973 through June 18, 1979 when the Respondent sought to transfer her to temporary status, although the percentage fluctuated widely from period to period. This amounts to more than one-fifth of her total working time throughout the period.

Ms. Nicosia's attendance record improved for a number of months following her return to work on July 3, 1979. However, subsequent to January 1, 1980, her attendance record once again deteriorated, in large measure due to the recurrence of her asthmatic condition that resulted in her hospitalization on June 17, 1980.

On or about June 20, 1980, Ms. Nicosia requested a lengthy medical leave of absence, to run from June 17, 1980 until July 30, 1980, which would have encompassed 32 working days. This request did not reach the Respondent until June 26, 1980, which was subsequent to her discharge, and therefore, it was not granted. In fact, once the Respondent learned from Ms. Nicosia's parents that a request for such a leave of absence would be forthcoming, it decided to discharge her. Subsequent to her discharge, Ms. Nicosia was released by her physician to return to work as of Monday, June 30, 1980. However, the Respondent had no indication whatsoever that Ms. Nicosia would be returning to work prior to the end of her requested leave on July 30, 1980 at the time of her discharge, and it based the decision to discharge her upon its reasonable belief that she would not be able to return to work until that time. 18/

In Finding of Fact number 17, this Examiner found that Ms. Nicosia's rate of lost working time for the period following July 3, 1979 would have been approximately 6.51% if she had returned to work on June 30, 1980 and 14.59% if she has returned on July 30, 1980. For the period beginning on January 1, 1980, her rate of lost working time would have been over 10% even if she had returned to work on June 30 19/, and it would have been in excess of 20% had she returned on July 30, 1980. 20/ As earlier indicated, it was entirely reasonable for the Respondent to consider the higher figures.

17/ (Cont'd.) p. 8 of the Memorandum portion of the decision, and see also Husky Oil Co. 65LA 53 (Richardson, 1975) and the numerous cases discussed therein. See also Elkouri and Elkouri, How Arbitration Works (3d. ed., 1973) at pp. 545-546.

18/ The record does not establish whether or not Ms. Nicosia would have been permitted to return on June 30, 1980 if she had been granted a longer medical leave of absence, or whether she had ever returned to work prior to the scheduled end of any of her prior leaves of absence.

19/ 12 days 3 hours (99 hours) lost out of approximately 950 total working hours (one-half year) for the period January 1 - June 30, 1980).

20/ 35 days 3 hours (283 hours) lost out of approximately 1120 total working hours for the first seven months of 1980.

Clearly, Ms. Nicosia could not be discharged merely for requesting an extended leave of absence. Indeed, she had requested and had been granted six leaves of absence, some of them quite lengthy, dating back to January, 1977. It is also doubtful whether her post-July 3, 1979 attendance record, in and of itself would have established just cause for her discharge. However, the significance of that request, for leave of absence, and what was apparently the triggering factor of her discharge, was its indication to the Respondent that Ms. Nicosia's physical ailments were still persistent, and that her previous pattern of irregular attendance would continue indefinitely.

Ms. Nicosia's attendance during the final year of her employment cannot be considered in isolation, but must be viewed against her entire attendance record dating back to 1973. Her "lost time" rate of nearly 22% prior to July, 1979, and the highly irregular attendance pattern that she developed during that period of time clearly rendered her unproductive as an employee and placed an undue burden upon the Respondent. The Respondent was placed in a position of not being able to foretell whether Ms. Nicosia could be depended upon to report for work on any particular day. Although the rate itself improved somewhat during the ensuing period, Ms. Nicosia's illness in June, 1980 clearly indicated that the underlying attendance problem would persist. Given that the problem stemmed from an apparently uncontrollable physical condition, and that Ms. Nicosia had failed to correct the problem despite numerous prior warnings and discussions, the Respondent reasonably concluded that amelioration of the problem would not likely occur in the future. Given further Ms. Nicosia's past record and the fact that assembly line work necessarily places a very high premium upon prompt, regular attendance in order to maintain production, the Respondent also reasonably concluded that Ms. Nicosia's continued employment would result in an unjustifiably high, continuing economic cost to itself and would unduly interfere with the efficient operation of its plant.

The Complainant's remaining contentions are without foundation and are therefore rejected. The Respondent did not have any obligation to arrange for a physical examination to determine Ms. Nicosia's continued fitness for employment. Although Ms. Nicosia claimed that subsequent to June, 1980, her asthmatic condition had been brought under control, no further evidence to support this contention was provided. Given the fact that bronchial asthma is a severe and recurring condition not apparently susceptible to permanent cure and that Ms. Nicosia herself had suffered recurring episodes of that condition, the Respondent had sufficient justification for its belief that Ms. Nicosia's attendance would not significantly improve in the future from what it had been in the past. Finally, although it appears that a number of employees who were not discharged had worse attendance records than did Ms. Nicosia during the final year of her employment, the evidence presented at the hearing does not establish that the Respondent acted in an arbitrary or discriminatory fashion in discharging Ms. Nicosia. First, this claim is based on the period from July 3, 1979 through Ms. Nicosia's discharge on June 25, 1980, which in view of Ms. Nicosia's illness on that date and the certainty of additional absences artificially understates her rate of lost time. ^{21/} Furthermore, the Complainant failed to establish that those employees with worse attendance records than Ms. Nicosia's for that period were in comparable circumstances. For example, it may well have been that those employees had numerous unexcused absences (which would have required the Respondent's invocation of the appropriate progressive disciplinary procedure), or that

^{21/} Ms. Nicosia's approximate rate of lost time from July 3, 1979 - June 25, 1980 was 5.72% (13 days 3 hours or 107 hours lost out of a total of 1872 working hours, or one year less six working days for the period).

they were long-time employees with good attendance records who lost time due to a single but serious illness or injury. Given that no information was provided concerning the actual attendance records or the circumstances of those employees with worse attendance records than Ms. Nicosia's for the period July 3, 1979 - June 25, 1980, any claim of discriminatory treatment of Ms. Nicosia on the basis thereof would be too speculative and unsubstantial for this Examiner to sustain.

It is very unfortunate that the Respondent found it necessary to discharge Ms. Nicosia, particularly in view of the fact that her discharge was attributable to a chronic and intermittently uncontrollable physical condition, rather than to any willful action on her part. However, Ms. Nicosia's attendance indicated that she was for a lengthy period of time simply physically unable to perform her duties on a full-time basis, as expected of her, and that she would very likely continue to be unable to do so in the future. Particularly in light of the nature of the Respondent's business and the nature of Ms. Nicosia's employment, prompt and regular attendance is a necessary requirement of employment. An employee's failure to observe that requirement for whatever reason unduly disrupts the affected employer's efforts to operate its business in a productive and efficient manner and interferes with the performance of that employer's other employees. On the basis of the record, the Respondent did have just cause to discharge Ms. Nicosia on June 25, 1980 and thus committed no violation of the Agreement. The instant complaint is therefore dismissed in its entirety.

Dated at Milwaukee, Wisconsin this 9th day of January, 1981.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Stuart S. Mukamal
Stuart S. Mukamal, Examiner