BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
OUTAGAMIE COUNTY HEALTH CENTER EMPLOYEES UNION, LOCAL 980, AFSCME, AFL-CIO	:	Case 179 No. 43612 MA-6020
and	:	
OUTAGAMIE COUNTY	:	

Appearances:
Mr. Gregory N. Spring, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 1121 Winnebago Avenue, Oshkosh, Wisconsin 54901, appeared on behalf of the Union.
Mr. Lon D. Moeller, Esq. and Mr. Roger Walsh, Esq., Davis and Kuelthau, S.C.,

ARBITRATION AWARD

On February 1, 1990, Outagamie County Health Center Employees Union, Local 980, AFSCME, AFL-CIO and Outagamie County jointly requested the Wisconsin Employment Relations Commission to appoint William C. Houlihan, a member of its staff, as arbitrator to hear and issue a final and binding award on a pending grievance. A hearing was conducted on May 15, 1990 in Appleton, Wisconsin. The proceedings were not transcribed. Briefs and reply briefs were filed and exchanged by August 24, 1990.

This case addresses the reasonableness of the County Nursing Center's sick leave control policy.

BACKGROUND AND FACTS:

Outagamie County operates a long term health care facility located in Appleton, Wisconsin. The center provides care and treatment for geriatric patients, developmentally disabled patients and for the chronically mentally ill. The County health center employs approximately 250 employees, 190 of whom are in the bargaining unit represented by Local 980.

The Health Center has had an excessive absenteeism plan in effect since at least 1985. That policy was promulgated by the County and was, at least in written form, a procedure for maintaining and recording absence and tardiness. The policy has been amended by the County a number of times. Prior to the amendments giving rise to this grievance, the policy included the following among its provisions:

OUTAGAMIE COUNTY HEALTH CENTER
Administrative Policy

Program for Excessive Absenteeism

. . .

> It is the policy of Outagamie County Health Care Center to follow a written absenteeism and tardiness Control Program and to enforce the policies and procedures within that program. The Health Center will also follow a systematic discipline program to deal with these employees who show excessive absenteeism and/or tardiness or fail to provide a physician's substantiation when requested.
>
> Outagamie County Health Center entitles employees to sick leave for illness only. Those employees eligible for sick leave with pay may use such sick leave upon

approval of their Department Head. When use of sick days becomes an absenteeism problem, the following policy will ensue.

It is the policy of Outagamie County Health Care Center to follow a written absenteeism program and to enforce the policies and procedures of that program.

The Health Center has established 5.0 sick days or less per full time employee per year as the acceptable average. This number is consistent with the national average. The acceptable average number of sick days per part time employee is proportional to the average number of hours they work. Example: If an employee works 50% of the time, and if the standard for a full time employee is 5.0 days per year, the acceptable number of days for this part time employee is 2.50 days per year. The Health Center realizes that extenuating circumstances exist wherein an employee may use more days. Situations like hospitalization or maternity leave will not be considered as excessive or contributing to an absenteeism problem.

There existed an Administrative Procedure relative to administration of the absenteeism policy. It read as follows:

1. The immediate supervisor will monitor employee absences with each absence.

2. The Department Head will monitor employee calendars at least monthly.

3. When an employee's sick leave usage becomes excessive the Supervisor will require physician's substantiations for each future absence.

*3a. Failure to provide the required substantiations will result in non-payment for the day off. Disciplinary actions will be issued when required physician's substantiations are not supplied by an employee.

b. Employees will be allowed to return to work regardless if they have a substantiation or not, unless contraindicated due to injury or contagion.

c. Examples of excessive absenteeism are:
   i) Repeatedly calling in one day per month
   ii) Repeatedly callin in the day before or after holidays and/or scheduled days off
   iii) Repeatedly calling in on weekends
   iv) Unsubstantiating five or more days off.

d. Exceptions to this general rule are:
   i) Maternity leave
   ii) Hospitalizations and period of home recovery
   iii) Incidents where administrative staff send an employee home
   iv) Substantiated employee assistance counseling sessions for an employee or his/her immediate family (immediate family is defined as the employee's spouse or dependent children in the employee's household).

4. Unsubstantiated days off will be treated as an attendance problem.

*4a. The sequence for disciplinary actions will be:
   i) First incident - verbal counseling
   ii) Second incident - verbal warning
   iii) Third incident - written warning
   iv) Fourth incident -

suspension

v) Fifth incident - termination

*4b. All disciplinary actions will take place with the employee, a union representative (if the employee desires), the employee's immediate Supervisor, and the Administrator (See attached Guidelines for Disciplinary Actions.)

During the fall of 1988, the County determined that it desired to change the absenteeism policy and raised the matter with the Union at the November 21, 1988 regularly-scheduled Labor-Management meeting. Minutes of that meeting, which were provided to the Union, indicate:

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> . . .Mark questioned why some staff were required to bring in substantiations for illness following maternity leaves. Dave will look into the situation. Dave also felt that requiring physician substantiation for all illnesses beyond five days was unreasonable. Dave responded that arbitration cases in the state have upheld the use of discipline when an employee's sick leave use exceeds what they can accumulate by contract. He also stated that he would like to see that type of program started at the Health Center. At this point it appears as if that type of program may be more palatable for all parties.

"Mark" is Mark Sipple, Union President. "Dave" is David Rothmann, County Health Care Center Administrator.

Rothmann testified that the parties discussed the matter again at a labor-management meeting held February 20, 1989. Rothmann indicated that the Union was given the County proposed changes in writing, including the following:

> When an employee's sick leave exceeds the entitlement, he/she will be disciplined for an attendance problem. The decision whether or not to discipline an employee will occur when the administrator reviews the calendars on a quarterly basis. Physician substantiations will not excuse sick leave in excess of the entitlement. This policy will not supersede any language in the bargaining unit contract.

Sipple, who attended the February 20 meeting denies that written modifications were supplied but acknowledges that the parties discussed the substance contained in the excerpted document. Rothmann testified that he informed the Union that the revised policy would go into effect April 1. Both Rothmann and Sipple indicated that the issue was to be taken up at the next Labor-Management meeting. That meeting did not occur. A dispute arose as to compensation of meeting attendees and the meeting was not held. In April of 1989, the following policy was implemented:

OUTAGAMIE COUNTY HEALTH CENTER
Administrative Policy

Program for Excessive Absenteeism Policy #7

It is the policy of Outagamie County Health Center to record on the Employee Calendar of each employee those days an employee is absent or tardy from their scheduled hours of work. Days absent include sick days, comp-time, vacation, funeral, industrial, leave of absence, etc. The present and previous year's calendars are kept by management personnel.

It is the policy of Outagamie County Health Center that all immediate Supervisors review their employees' calendars with the employee for absenteeism and lateness after each incident of absenteeism or lateness. The Administrator will review all calendars with Department Heads and/or Coordinators on a quarterly basis. (April, July, October, January).

It is the policy of Outagamie County Health Center to have management personnel fill out an Employee Absenteeism and Lateness Report with each employee after each absence or lateness episode. These reports are kept on file in the employee's personnel file.

It is the policy of Outagamie County Health Center that an employee when absent or tardy, will call in and report the absence or tardiness to the Nursing Supervisor. The Nursing Supervisor will record the appropriate information on the Daily Absenteeism and Lateness Log. The Log is sent to the Business Office every morning by 8:30 a.m. for proper recording.

It is the policy of Outagamie County Health Center to follow a written absenteeism and tardiness Control Program and to enforce the policies and procedures within that program. The Health Center will also follow a systematic discipline program to deal with these employees who show attendance and/or tardiness problems.

Outagamie County Health Center entitles employees to sick leave for illness only. Those employees eligible for sick leave with pay may use such sick leave upon approval of their Department Head. When use of sick days becomes an attendance problem, the following policy will ensue.

It is the policy of Outagamie County Health Center to follow a written absenteeism program and to enforce the policies and procedures of that program.

The Health Center has established 6.0 sick days or less per full time employee per year as an acceptable average. The acceptable number of sick days per part time employee is proportional to the average number of hours they work. Example: If an employee works 50% of the time, and if the standard for a full time employee is 6.0 days per year, the acceptable number of days for this part time employee is 3 days per year. The Health Center realizes that extenuating circumstances exist wherein an employee may use more days. Situations like hospitalization or maternity leave will not be considered as excessive or contributing to an absenteeism problem.

The Health Center has established 6.0 tardy days or less per full time employee per year as the acceptable average. The acceptable number of tardy days per part time employee is proportional to the average number of hours they work. Example: If an employee works 50% of the time, and if the standard for a full time employee is 6.0 days per year, the acceptable number of days for this part time employee is 3 days per year.

When an employee's sick leave exceeds the entitlement he/she will be disciplined for an attendance problem. The decision whether or not to discipline an employee will occur when the infraction occurs. Physician substantiations will not excuse sick leave in excess of the entitlement. This policy will not supersede any

language in the bargaining unit contract.

The policy was placed in the operations manuals located in the Health Care Center. It was also outlined in "Speak Easy", an employee newsletter which is published and generally distributed.

The first discipline invoked under the new policy was an oral warning received by Julie Larson on August 8, 1989. A grievance was filed over that warning on August 19. Ms. Larson subsequently left County service and the grievance was not pursued.

A class action grievance was filed over the policy on October 3, 1989. The grievance was returned to the Union as "incomplete" with a request for the names of affected individuals. The steward (Ms. Biese) replied, on October 17 that the class action grievance and the Larson grievance, then still pending, were properly filed and would be processed to the next step. The parties conducted a grievance meeting on November 2, 1989 and on November 21, 1989 Emil Meyer, County Personnel Director, denied the grievances on the grounds that they were untimely. The matter was appealed to arbitration, leading to this proceeding and Award.

ISSUES:

The parties stipulated to the following:

1) Is the grievance arbitrable?

2) If so, does the absenteeism policy violate the collective bargaining agreement?

3) If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT:

ARTICLE I - MANAGEMENT RIGHTS

1.01 - Unless otherwise provided herein, the management of the work and the direction of the working forces, including the right to hire, promote, transfer, demote or suspend, or otherwise discharge for proper cause, and the right to relieve employees from duty or to layoff employees is vested exclusively in the Employer.

1.02 - The Employer shall adopt and publish reasonable rules which may be amended from time to time. Except for rules, regulations and directives from the State of Wisconsin, approving agencies such as the American Hospital Association, or other governmental agencies, having jurisdiction over the Institutions, such rules and regulations shall be submitted to the Union for its information, thirty (30) days prior to their effective date.

1.03 - Action to amend or alter or otherwise change said rules and regulations shall be subject to the grievance procedure in this Agreement. If any action taken by the Employer is proven not to be justified, the employee shall receive all wages and benefits due him for such period of time involved in the matter.

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ARTICLE VII - GRIEVANCE PROCEDURE

7.01 - The parties agree that only matters involving the interpretation, application or enforcement of the terms of this Agreement shall constitute a grievance.

7.02 - Any grievance or misunderstanding which may arise between the Employer and an employee (or employees) or the Employer and the Union, shall be handled by the Union Grievance Committee. A grievance not initiated within fifteen (15) calendar days of the date the incident occurred shall be considered invalid.

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Step 4. If a satisfactory settlement is not reached at Step 3, the Union shall notify the Administrator in writing of its intent to submit the grievance to arbitration within ten (10) working days

of receipt of the Step 3 response or last date said response was due. At the same time of giving the above notice of intention to arbitrate, the Union shall also request the Wisconsin Employment Relations Commission to appoint an arbitrator from its staff. Arbitration proceedings shall be implemented in a manner prescribed by the arbitrator. The decision of the arbitrator shall be final and binding on both parties, subject to judicial review. The cost of the arbitrator shall be divided equally between the Union and the Employer. In rendering his decision, the Arbitrator shall neither add to, detract from, nor modify any of the provisions of this Agreement. The Arbitrator shall be requested to render his decision within thirty (30) days after close of hearing or receipt of briefs, whichever is later.

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7.05 - "Working day" shall not include Saturdays, Sundays or holidays. Any time limit provided for in this Article may be extended by mutual agreement of the parties.

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ARTICLE XIII - SICK LEAVE

13.01 - Every permanent full-time employee shall be entitled to sick leave of one (1) workday with pay for each completed month of service with the County, regardless of department or bargaining unit, after satisfactory completion of the probationary period following initial employment. Permanent part-time employees who work at least an average of sixteen (16) hours per week shall receive sick leave on the above basis pro-rated according to actual time worked in relation to a full-time employee. A full month of service is any month in which the employee has received pay for at least ten (10) regular workdays. A full month of service for a part-time employee is any month in which the employee has received pay for at least one-half (1/2) his regular monthly work hours.

13.02 - All employees must call in at least one (1) hour before the shift starts unless unusual circumstances prevail in order to receive sick pay.

13.03 - Unused sick leave may be accumulated to a total of one hundred twenty (120) days.

13.04 - Employees absent from work on legal holidays, during sick leave, vacation or disability arising from injuries sustained in the course of their employment, or for other authorized leaves of absence with pay shall continue to accumulate sick leave at the regularly prescribed rate during such absence as though they were present for duty.

13.05 - An employee eligible for sick leave with pay may use such sick leave upon approval of his department head for absence due to illness, injury, exposure to contagious disease, or due to illness in the employee's immediate family (i.e., the employee's spouse or dependent children living in the employee's household) requiring the employee's personal attendance. An employee on sick leave shall inform his department head and/or the Director of Nurses of the reason therefore as soon as possible and failure to do so within a reasonable time may be cause for denial of pay for the period of absence. Permanent full-time employees who work on a five (5) day, Monday through Friday, workweek may also use such sick leave upon approval of his or her department head for absence due to dental, optical, or medical appointments for examination or treatment for the employee personally, provided however, that the employee has attempted to schedule such appointment during non-working time and that such appointment is scheduled as close as possible either to the lunch period or to the employee's starting or quitting time.

13.06 - The Administrator may require, when in his opinion, there may be jeopardy of the patient care

and well-being, a doctor's certificate from an employee before the employee may return to work following absences of three (3) or more working days.

13.07 - Absences for a fraction or part of a day that are chargeable to sick leave in accordance with these provisions shall be charged proportionately in an amount not smaller than one-half (1/2) day provided, however, that absences for dental, optical, or medical appointments referred to in Section 13.05 above shall be charged to sick leave on an hour for hour basis.

13.08 - Employees shall be paid for all of their unused accumulated sick leave upon honorable separation from the County service. In the event of death, such unused sick leave shall be paid to the employee's beneficiary (this beneficiary being the one that the employee has indicated in the Wisconsin Retirement Fund Plan).

13.09 - If an employee's paid sick leave is exhausted due to extended personal illness or injury, such employee shall be granted a leave of absence without pay for up to six (6) consecutive months. An employee desiring such leave shall notify the Board of Trustees in writing of the reason for such leave in advance of taking such leave, and shall support such request with written physician's substantiation. This leave may be extended by mutual agreement of the parties. An employee taking a leave under this provision shall be required to furnish the Employer with a medical status report from his/her doctor for each six (6) weeks of leave. An employee who is on an extended medical leave of absence shall be permitted to return to his job within one (1) year with a doctor's certificate. However, time not worked shall not be computed to accrued benefits.

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ARTICLE XXVI - DISCIPLINARY PROCEDURE

26.01 - The following disciplinary procedure is intended as a legitimate management device to inform employees of work habits, etc., which are not consistent with the aims of the Employer's public function, and thereby to correct those deficiencies.

26.02 - Any employee may be demoted, suspended or discharged for just cause. As a general rule, the sequence of disciplinary action shall be: Oral reprimands, written reprimands, suspension and discharge. A written reprimand sustained in the grievance procedure, or not contested within forty-eight (48) hours shall be considered a valid warning. Except for resident care warnings, no valid warning shall be considered effective for longer than a nine (9) month period.

26.03 - The above sequence of disciplinary action shall not apply in cases which are cause for immediate suspension or discharge. For example: theft of personal or public property, drinking on the job, drunk on the job and any violation of Section 940.29 are hereby defined as cause for immediate discharge, and gross negligence or willful dereliction of duty or violation of the grievance procedure are hereby defined to be immediate cause for suspension.

26.04 - Any discharged employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 3 within fifteen (15) calendar days of notice of discharge. A copy of the grievance shall at the same time be submitted to the Administrator.

26.05 - Any suspended employee may appeal such action through the grievance procedure and shall initiate grievance action by immediate recourse to Step 2 within fifteen (15) calendar days of notice of suspension. Suspension shall not be less than two (2) days, but for serious offense or repeated violations suspension may be more severe. No suspension shall exceed thirty (30) calendar days.

26.06 - Notice of discharge or suspension shall be in writing and a copy shall be provided the employee and the Chairman of the Grievance Committee. It is hereby agreed that the oral and written reprimands shall not be used in order to intimidate, harass or otherwise subvert the intentions of this Article.

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ARTICLE XXVIII - AMENDMENTS

28.01 - Amendments to this Agreement may be made with mutual consent of the parties hereto.

ARTICLE XXIX - CONDITIONS OF AGREEMENT

29.01 - This Agreement constitutes an entire agreement between the parties and no verbal statement shall supersede any of its provisions.

29.02 - If any Article of this Agreement or any addendum thereto shall be held invalid by operation of law or by any tribunal of competent jurisdiction, or if compliance with or enforcement of any Article should be restrained by such tribunal, the remainder of this Agreement and addendum shall not be affected thereby, and negotiations on the same subject matter shall be instituted to adjust, if possible, such Article.

POSITIONS OF THE PARTIES:

The Union contends that the grievance is both timely and meritorious. It alleges that it was never given a copy of the policy prior to its implementation. The Speak Easy newsletter of May 26 was not provided to the Union and does not satisfy the County's obligation to provide the policy to the Union. The manuals are three-inch thick documents. In the view of the Union, insertion of a changed policy within these substantial manuals is not effective notice. The Union alleges that the violation is of a continuing nature, with every incident of discipline triggering a new filing period. Finally, it is the view of the Union that the employer should not be allowed to raise procedural defenses (timeliness) since it has failed to honor the contractual timelines in handling the grievance.

On the merits, the Union argues that the policy is unreasonable. This is so because it allows for discipline even under circumstances where the employee is legitimately ill and has available sick leave. The Union complains that under this policy abusers are actually afforded latitude with respect to their abusive behavior, while potentially ill employees with good work records face the potential of severe discipline merely for being ill. The Union is not attempting to defend abuse, but rather legitimate sick leave use.

The Union alleges that there has been no waiver of its right to contest this policy. The Labor-Management sessions were not negotiation sessions, and no waiver to this challenge occurred. Article XXIX precludes a finding that the parties ever intended a verbal modification of the terms of the Agreement.

The County argues that the plan is not a no-fault plan. It is rather, applied on a case by case basis, with certain uses not counted. An employee is only subject to discipline for exceeding six days in a calendar year. If extenuating circumstances are applicable, discipline will not apply.

The County believes that the grievance was not timely. The grievance, filed October 3, 1989, contends that the policy violates the contract. The grievance does not take issue with any specific event or application of the policy. Policy changes were made in January, 1989 and implemented April 1, 1989. Revisions were discussed in Labor-Management meetings in November, 1988 and February 20, 1989. The revised policy was placed in the Operations Manual and in the Speak Easy employee newsletter. Six to eight employees were disciplined under the policy, including Julie Larson, who filed, and subsequently had dropped, a grievance. The County cites a 1990 Arbitration Award, by Arbitrator Amedeo Greco involving these same parties where the Arbitrator concluded that the Union, by talking to the employer about scheduling and not grieving the employer's changed scheduling procedure for over one year, had waived its right to challenge the revised procedure.

The Union was on notice of the revised policy. Union Steward Biese filed the Larson grievance alleging that the policy was unreasonable.

In summary, the employer believes it has a right to promulgate reasonable work rules. This rule promotes regular attendance and is therefore premised on a legitimate objective.

DISCUSSION:

The threshhold issue raised here is whether or not this grievance is timely. Article 7.02 provides that "a grievance not initiated within fifteen (15) calendar days of the date the incident occurred shall be considered invalid." The policy took effect April 1, 1989. This grievance was filed October 3, 1989. Obviously, this time lapse is well in excess of 15 calendar days.

The Union has advanced a number of arguments as to why April 1 should not be regarded as an appropriate triggering date for the filing of a grievance. Each will be discussed.

First, the Union claims that notice of the changed policy was flawed in a number of ways. The first such claim is that the Union did not receive the rule changes 30 days prior to their effective date, per Article 1.02. It is the view of the Union that it never received a copy of the modified rules nor was it ever informed of when they were to be effective. It seems clear to me that in November of 1988 the parties, in the context of a Labor-Management meeting, discussed the possibility of changing the sick leave utilization program. The Union was certainly on notice that something was afoot. The parties agree that the matter was again discussed on February 20, 1989. While they disagree as to whether or not the proposed modifications were submitted to the Union in writing, there is no disagreement that the substance of the modifications was discussed. I believe this meeting should have reasonably put the Union on notice that the County was serious in its previously expressed desire to alter the sick leave program.

The County implemented its changes April 1. I agree with the Union's contention that neither the Operations Manual nor the Speak Easy piece constitute formal notice to the Union. However, publication and distribution of the new policy in these places certainly served to publicize the new approach. Employees were told to take a copy of the Speak Easy as they collected their paychecks.

At any rate the policy was implemented and employees were subject to discipline pursuant to its terms. In August, employee Julie Larson was disciplined under the policy. She grieved. Her grievance was handled by Dee Darrell, an inexperienced steward. The grievance was lost somewhere between steps. Larson left County employment and the grievance was never processed. However, Ginny Biese testified that she helped file the Larson grievance. That grievance says, in relevant part:

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> (Circumstances of Facts): **(Briefly, what happened)** On August 8, 1989, employee was given an oral written reprimand regarding an alleged attendance problem and alleged use of sick leave over and above what is entitled to by contractual language.
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> . . .
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> (The Request for Settlement or corrective action desired): 1. Rescind unreasonable policy 2. Remove disciplinary action from any and all files 3. Make employee whole

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It appears that someone was aware of what was characterized as an "unreasonable policy" in August, 1989. The complaint of the grievance, that discipline was being imposed for contractually contemplated sick leave use, strongly resembles the claim of the Union in this proceeding.

As a practical matter, the Union was aware of the existence of the modified policy long before this grievance was filed. The County put Union officers on notice of the proposed changes in Labor-Management meetings. It is undisputed that the substance of the changes were presented at the February meeting. The policy was implemented and publicized in April. Employees were subject to discipline thereafter. Employee Larson grieved in August with the assistance of two stewards. That grievance made specific objection to the new policy. Certainly by August, if not before, the Union was on actual notice that a new policy had been implemented and was being enforced. The October grievance does not fall within 15 calendar days of even the August dates.

The Union contends that the County was dilatory at later stages of the grievance procedure. The County action in this regard occurred after the filing of the grievance and cannot form a basis to ignore the 15 day filing standard. More to the point, the contract specifically provides that a grievance not initiated within 15 calendar days of the incident is invalid. It further provides that a failure of the Employer to timely respond permits the Union to further appeal the grievance. Since the parties have addressed both of these occurrences, I am not free to impose an alternative result.

In the view of the Union, this is a continuing violation and every incident of discipline triggers a new filing period. While I agree that that is true relative to individual episodes of discipline, I do not agree that to be the case relative to this grievance. The grievance in this case is a class action grievance which alleges that the "sick policy contradicts contract". There is no individual grievant. This grievance, an attack on the policy itself, was not filed within 15 calendar days of any event in the general formulation, promulgation, or implementation of the policy.

I agree with the Union's contention that there is an ongoing dimension to this dispute. If the implementation of this policy violates a substantive contractual provision, nothing in this Award precludes filing a grievance over that action. I believe that this class action attack on the changed policy came too late. I do not believe that individual grievances over specific disciplinary actions are barred by this Award. This Award does not purport to address the merits, i.e., whether application of discipline pursuant to the Absenteeism Policy violates a provision of the contract.

AWARD

The grievance is denied as untimely.

Dated at Madison, Wisconsin this 19th day of April, 1991.

By William C. Houlihan /s/
William C. Houlihan, Arbitrator