BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
CARPENTERS LOCAL UNION 2190 AND THE MIDWESTERN INDUSTRIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	Case 7 No. 44728 A-4708
and	
STAINLESS TANK & EQUIPMENT, INC.	
In the Matter of the Arbitration of a Dispute Between	
CARPENTERS LOCAL UNION 2190 AND THE MIDWESTERN INDUSTRIAL COUNCIL OF THE UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA	Case 9 No. 44730 A-4710
and	
STAINLESS TANK & EQUIPMENT, INC.	

Appearances:

Mr. George F. Graf, Gillick, Murphy, Wicht & Prachthauser, Suite 260, 300 North Corporate Drive, Brookfield, Wisconsin 53045, appearing on behalf of Carpenters Local Union 2190 and the Midwestern Council of the United Brotherhood of Carpenters and Joiners of America, referred to below as the Union.

Mr. Jack D. Walker, Melli, Walker, Pease & Ruhly, S.C., Suite 600, 119 Martin Luther King, Jr., Boulevard, P.O. Box 1664, Madison, Wisconsin 53701-1664, appearing on behalf of Stainless Tank & Equipment, Inc. referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to a collective bargaining agreement which was in effect at all times relevant to this proceeding and which provides for the final and binding arbitration of certain disputes. The parties jointly requested that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a dispute reflected in grievances filed on behalf of Kelly Moll and Dennis Lalley. The Commission appointed Richard B. McLaughlin, a member of its staff. Hearing on the matter was held in Madison, Wisconsin, on March 6, 1991. The hearing was transcribed, and the parties filed briefs by April 10, 1991.

ISSUES

The parties did not stipulate the issues for decision. I have determined the record poses the following issues:

> Were the discharges of the two Grievants proper under the terms of the collective bargaining agreement?
>
> If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

> **Article IX. Pension Program**
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> . . .
>
> Section 6. This contract must conform with all state, federal and local laws.
>
> **Article XI. Attendance Program**
> Good attendance is both necessary and important to the efficient and orderly operation of a business. This attendance program is designed to eliminate possible inconsistencies in applying corrective disciplinary

action to employees with unsatisfactory attendance records and to insure equality of treatment for all employees.

Section 1. **Disciplinary Action** An employee's attendance record will be based on a point system. An employee will receive corrective disciplinary action based on the number of accumulated points in any month on the following basis:
Note: All employees will start at "0" points on May 1, 1990.

Step One: When an employee accumulates at least six (6) points but less than nine (9) points, a meeting with the employee and a Union Representative will be held to review the employee's attendance record and to review the Company's attendance program. The employees will be issued a "First Offense-Disciplinary Action" letter.

Step Two: When an employee accumulates at least nine (9) points but less than twelve (12) points, a "Second Offense-Disciplinary Action" letter will be issued to the employee and a copy sent to the Union.

Step Three: When an employee accumulates at least twelve (12) points but less than fifteen (15) points, a "Third Offense-Five (5) Day Lay-Off" letter will be issued to the employee and a copy sent to the Union. The five (5) day lay-off will be without pay.

Step Four: When an employee accumulates fifteen (15) or more points a "Fourth Offense-Termination of Employment" letter will be issued to the employee and a copy sent to the Union. Any employee who receives two 5 day suspensions in a six (6) month period will be terminated.

. . .

Notwithstanding this attendance program is designed to correct intermittent absence, tardiness and leaving work early, a situation could occur where an employee is absent for such a long period of time that he is no longer an effective employee of the Company and subject to disciplinary action.

NOTE: As provided for under the current Collective Bargaining Agreement, an employee's seniority will be terminated if he is absent for three (3) consecutive working days without notifying the Company, unless a satisfactory reason is given in writing for not notifying the Company.

NOTE: Chronic or excessive absenteeism for whatever reason is defined as, when having nine (9) absences in or up to 180 calendar days and where no "Leave of Absence" has been granted, this shall be cause for immediate discharge.

The above attendance program is not intended in any manner from preventing the Company from taking disciplinary action against an employee for other misconduct or violations of plant rules with an employee's unsatisfactory attendance record and applying a penalty without the requirement of following the sequential steps provided above.

. . .

Section 5. **Reasons for not Being Charged Points** An employee will not be charged points if he misses time for work for the following reasons:

. . .

10. Personal leaves of absence for five (5) consecutive scheduled working days or more that is approved in writing in advance by the Personnel Department.

15. If an employee is absent consecutive days for the same personal illness, the same personal injury or approved personal leave of absence (except for provided for under #10 above), an employee will be charged points only for the first day of such consecutive days of absence.

. . .

Article XII. Discipline and Discharge

. . .

Section 2. **Major Offenses** For the purpose of this Article typical examples of major offenses are as follows:

. . .

X. Chronic or excessive absenteeism for whatever reason shall be defined as nine (9) absences in a 180 calendar day period and where no "Leave of Absence" has been granted, this shall be cause for immediate discharge.

The above offenses are cause for immediate termination of the employee.

. . .

Article XVII. Management

Section 1. **General** Except as otherwise provided in this Agreement, nothing herein shall limit the Employer in the exercise of the rights and functions of ownership or Management. Including, but not limited to, the right to manage the operations of the Employer and direct the working force, the right to hire new employees, and the right to discharge or layoff employees for just cause, to assign work, to determine the number of locations of its operations, the products it deals with, the quality of production and the sources of materials and components used therein.

. . .

BACKGROUND

The Discharge of Dennis Lalley

The Employer notified Lalley on September 28, 1990, 1/ that he was discharged effective October 1. His letter of termination noted that the basis of the discharge was that he had been absent nine times or more in a six month period running from May 1 through September 19.

The Employer records absences under Article XII, Section 2X, on the same personnel form utilized to track the Article XI Attendance Program. Article XII absences are checked under a column headed "NUMBER of ABSENCES." That column has the following dates checked: June 22; June 29; July 11; July 30; August 13; September 12; September 13; September 14; and September 19. The form has a column headed "COMMENTS" to record the basis for each entry. The comments listed for each date noted above reads thus:

DATE	COMMENTS
6-22	Absent - Dr. Appt. Called 4:00 pm - No Dr. slip

1/ References to dates are to 1990, unless otherwise noted.

6-29	Absent - SICK - called 4:00 pm - Brought Dr. slip
7-11	Absent - personal called 5:14 pm
7-30	Absent - SICK called 5:36 pm - Brought Dr. slip
8-13	Absent - Car trouble called 5:42 pm
9-12	Absent - Sick - called 3:12 PM
9-13	Absent - SICK - called 2:10 PM
9-14	Absent - Still sick girl friend cal(l)ed 3:45 PM
9-19	Absent - stepped on nail - called 3:30 PM - No Dr. slip

Lalley was hired by the Employer on August 29, 1988. Lalley received a Step One disciplinary letter, under the Article XI Attendance Program, dated July 23. Attached to that letter was a copy of the personnel record summarized above, in then-current form. That record included two check marks in the "NUMBER OF ABSENCES" column. Lalley's personnel record indicates he was issued a second Step One disciplinary letter on August 15. He received a Step Two disciplinary letter, dated August 22, which included a copy of his then-current personnel record. That record included five check marks in the "NUMBER OF ABSENCES" column.

Rick Lester is the Employer's Plant Superintendent, and testified that neither Lalley nor any Union representative questioned the accuracy of the Employer's personnel records during the Step One or Step Two meetings. He did state that Lalley, at the Step Four meeting, questioned the total number of absences reflected on his personnel record.

Lalley acknowledged that he did not challenge his point totals at the Step One and Two meetings. He stated he did challenge, at the Step Four meeting, the number of absences reflected in his personnel record, and that he and Lester reviewed each recorded absence. Lalley also stated that he specifically challenged the absences on June 22 and 29 on the basis that each was due to migraine headaches caused by a work related injury. He testified that he was physically unable to see the doctor on June 22. He did see a doctor on June 29 because he was losing feeling in two of the fingers on his left hand. He experienced similar difficulty on July 30. The September 12-14 illness was, according to Lalley, due to an intestinal flu.

Lalley testified he was unaware that the June and July absences were caused by a neck injury, which had occurred at work in March, until he was examined by a surgeon in August. He first saw this surgeon in April, when he underwent knee surgery. The surgeon informed Lalley the loss of feeling in his fingers was probably due to a neck injury, and that he should have his neck examined after his recuperation from the surgery. At that examination in August, the surgeon, after reviewing some X-ray views of Lalley's back, told Lalley the migraine headaches and the loss of feeling were due to the neck injury. Lalley had consulted different physicians at the time he had experienced the migraine headaches.

Lester denied that Lalley, at the Step Four meeting, informed him that any of the absences were work related.

The Discharge of Kelly Moll

The Employer discharged Moll on August 20 for having been absent nine times between May 10 and July 23.

The "NUMBER of ABSENCES" column from Moll's personnel record has the following dates checked: May 10; May 14; May 15; May 16; July 10; July 16; July 17; July 18; and July 26. The "COMMENTS" column for each of those entries reads thus:

DATE	COMMENTS
5-10	Absent - SICK called 7:15 am - No Dr. slip
5-14	Absent - SICK called 7:30 am
5-15	Absent - still SICK called 7:10 am

5-16	Absent - still SICK called 8:29 am
7-10	Absent - SICK - called 6:25 am - no Dr. slip
7-16	Absent - SICK called 6:45 am - no Dr. slip
7-17	Absent - Dentist appt - Brought Dr. slip
7-18	Absent - SICK told day before
7-19	Brought Dr. slip for 7-17 & 7-18
7-26	Absent - Dr. appt - Brought Dr. slip called 6:30 am

Moll was hired by the Employer on October 17, 1988. Moll's personnel record indicates he was issued a Step One disciplinary letter on July 17 and a Step Two disciplinary letter on July 31. Moll denied having had a Step One or a Step Two meeting on those dates. His personnel file does not contain disciplinary letters for either date. Moll stated he was never warned regarding the number of Article XII absences he had accumulated. He did not see the personnel record summarized above until his Step Four meeting. Moll stated Lester called him into an office on August 20 and informed him that he was being terminated due to an excessive number of absences and that there was nothing he could do about it. Moll stated he was aware he might have accumulated enough points to receive a Step One or Step Two letter, but that he was surprised at the termination, because he had assumed those absences covered by a doctor's excuse would not be counted toward termination.

Moll testified that the Employer did initially question the sufficiency of his doctor's excuse for the May 14-16 absence, but that his doctor was able to address this problem to the Employer's satisfaction. The July 17-18 absence was due to oral surgery.

Bargaining History

Section 2X, of Article XII; the second NOTE to Article XI; and Section 6 of Article IX were first inserted in the parties' 1990-95 labor agreement. The Union made the first proposal for a successor to the 1987-90 agreement. Included in that proposal was the language ultimately incorporated into Article IX, Section 6. The Employer did not present any proposal at the first negotiation session, but did include in its initial proposal the language ultimately incorporated into Article XII, Section 2X, and the second NOTE to Article XI. The overview of the balance of the evidence on these points will be set forth as a summary of the testimony of individual witnesses.

Mike Kenny

Kenny serves as an Assistant Business Agent for the Union, and served as the Union spokesman during the negotiations for the 1990-95 agreement. Kenny acknowledged that absenteeism was discussed at each bargaining session. He gave the Employer a copy of the Wisconsin Family or Medical Leave Act (the Act), and acknowledged he compared the provisions of the Act to the nine absences provision proposed by the Employer. He stated the two provisions were not, however, linked. He testified that the first time he read the Employer's proposal to make nine absences within a six month period cause for immediate termination, he initiated the following dialogue with Alex Falch, the Employer's President and Chief Executive Officer:

> I said are you telling me that if I broke my leg on Monday and I didn't show up for work for ten days I would be fired? And he said well, of course not. And then there was some expletives he put in besides that, and I said, "how are you going to interpret this?" And he said, "that law is for the guy that wants to go fishing on Tuesday morning and doesn't want to come to work, then we got them for the one day." And I said, "well, what if a person does break their leg, what do they do?" He said, "just bring in a doctor's excuse and it will be okay." 2/

Kenny further detailed the discussions thus:

2/ Transcript (Tr.) at 182-183.

Q Now, was there discussion as to whether or not the doctor's certificates for purposes of the chronic absence clause would be the same as under the attendance policy clause?

A That was our thinking behind it, yes. 3/

Kenny stated the Union did not connect the "Leave of Absence" reference in Article XII and the second NOTE in Article XI exclusively to the Act "(b)ecause it was never discussed." 4/

Greg Seltzner

At the time of the negotiations for the 1990-95 agreement, Seltzner was the Union's Chief Steward. Seltzner testified that Kenny asked about the impact of a doctor's excuse on the Employer's nine absences proposal, and was informed "if we brought a doctor's slip in it would not be counted against our absences." 5/ Seltzner denied that leaves under the nine absences proposal were specifically linked to the Act, and stated that the Employer noted that the proposal was not designed to punish legitimately ill employes.

Paul Krueger

Krueger is the Employer's Vice-President, and served on the Employer's bargaining committee for the 1990-95 agreement. Krueger summarized the parties' discussions on the relationship of a doctor's excuse to the nine absences proposal thus:

Q Okay. But you do remember Mr. Kenny pressing that point what happens if the employee has a doctor's certificate?

A Yes, he brought up the deal about a doctor's certificate.

Q And do you recall Alex's response to that?

A Alex's response was that we would conform to the Family Leave Law and Mike had the law there, had it a couple of times and asked if we were aware of it and we said yes, and we agreed to conform to it. We had no choice. It was the law.

Q But you do not recall specifically Alex saying that if you got a doctor's excuse it won't be counted as an absence?

A No, I do not remember any interpretation of that.

Q You don't recall it?

A No.

Q You don't recall that discussion?

A I recall a discussion. I do not recall agreeing to any interpretation of it. 6/

Alex Falch

Falch denied telling Kenny that the nine absences proposal would not be applied against legitimately ill employes, or that absences excused by a doctor would not be applied against the nine absences. He summarized the across the table discussions on the linkage of the Act and the nine absences proposal

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3/ Tr. at 184.

4/ Tr. at 187.

5/ Tr. at 207.

6/ Tr. at 159-160.

thus:

> (T)he only thing I can recall is Mike Kenny bringing out the Family Leave Law, and he says are you aware of this and I says yes. I said I've got a copy right here, and we got into a discussion on mandated federal laws, the federal and the state and the Wisconsin Medical Family Leave Law, and he says, "well, you know, they've got ten days in a year," and I says, "that's what the law says." I says, "I can read." And he says, "well, you know, all they have to do is bring a doctor's excuse." I said, "if it's according to the family leave and medical law, yeah, that's right. If they bring in a document according to the family medical leave," and that was the end of the conversation. 7/

Events Following Ratification Of The 1990-95 Contract

It is undisputed that the Employer made a series of postings regarding the Act. The timing of certain of these postings is disputed. It is not, however, disputed that the first posting which provided a form specifically designed for leave requests under the Act was made on August 23. The Employer had, prior to that posting, denied at least two requests for such leave based on a lack of detail in the request. No specific request for leave under the Act was made by Moll or Lalley. No employe has filed a charge with the Department of Industry, Labor and Human Relations alleging that the Employer has violated the Act.

Further facts will be set forth in the DISCUSSION section below.

THE UNION'S POSITION

The Union phrases the issues for decision thus:

> Were the discharges of the two Grievants proper under the terms of the Collective Bargaining Agreement? If not, what is the appropriate remedy?

After a review of the evidence, the Union asserts that the parties' conflicting phrasing of the issues exemplifies their positions on the merits.

Contending that the Employer's narrow view of the issue points to construing the contract "in a vacuum," the Union asserts that its view appropriately points to construing the contract "in light of all its applicable provisions," and in light of "common sense." Beyond this, the Union contends that accepting the Employer's interpretation would produce an unduly harsh result.

More specifically, the Union argues that a determination of the parties' intent must underlie any reasonable interpretation of a labor agreement. In this case, the Union contends that "the intent of the Parties is quite clear from what they discussed at negotiations." The evidence establishes, according to the Union, that during negotiations the Employer disavowed "any intention to penalize people who had legitimate medical excuses." Beyond this, the Union argues that the evidence establishes that there was "no formal procedure for securing a medical leave of absence" until after Moll had been fired, and shortly before Lalley's discharge. This establishes, according to the Union, that the parties never linked disciplinable absences under Section 2X of Article XII with the Act.

Beyond this, the Union contends that the contract must be interpreted as a whole, and that the Employer's interpretation renders Articles XI and XVII, Section 1, meaningless. That the Employer failed to specifically warn either Grievant of their jeopardy under Article XII, Section 2X, prior to discharge, and that the Employer has counted as an absence time covered by a physician's statement underscores this point, according to the Union.

The Union next contends that contract interpretation should seek to avoid harsh, absurd or nonsensical results. Accepting the Employer's assertion that any absence not covered by an approved leave under the Act is disciplinable is, the Union contends, a harsh and a nonsensical result without any evidentiary basis. Even if this interpretation could be considered persuasive, the Union argues that the medical excuses proffered by each Grievant would "bring them in line with the requirements of the Wisconsin Family Leave Law."

7/ Tr. at 161-162.

Viewing the record as a whole, the Union concludes that the Employer lacked cause to discharge either Grievant, and the Union concludes that the following remedy is thus appropriate:

> (T)he Arbitrator (should) sustain the Grievances and order that the two employees involved be reinstated and made whole for any losses that they have suffered as a result of the Company's improper actions.

THE EMPLOYER'S POSITION

The Employer phrases the issues for decision thus:

1. Was grievant Dennis Lalley absent nine times in six months?

2. Was grievant Kelly Moll absent nine times in six months?

After a review of the evidence, the Employer asserts that the parties' labor agreement clearly and unambiguously governs each issue. It follows, the Employer concludes, that since "there is no ambiguity, there is no power to interpret."

The Employer contends that Article XII, Section 2X, defines chronic absenteeism as a major offense, and further establishes that "nine (9) absences in a 180 day calendar day period" define chronic absenteeism. Since the provision provides "no exceptions for absences due to illness or any other reason" other than where a "Leave of Absence" has been granted, it follows, according to the Employer, that the governing language is without ambiguity.

The major offense defined at Article XII, Section 2X, must not "be confused with the pre-existing attendance program" according to the Employer. Rather, the "excessive absenteeism provision . . . was agreed upon in addition to the attendance program." The Employer notes that the provisions are separately set forth in the contract, and can not be considered inter-related.

Beyond this, the Employer contends that the Union's "understanding" that "absences for which an employee presented a doctor's slip would not count toward the nine absences" is both irrelevant and unproven. The Employer contends this "understanding" is irrelevant because "there is no ambiguity in the contract language (and) (o)ne cannot find ambiguity by looking at bargaining history." The Employer also contends the "understanding" is unproven because whatever understanding was reached was fully addressed by adding a provision requiring compliance with federal, state and local laws. The Employer argues that the "understanding" asserted by the Union "is not expressed in the contract language that was adopted."

The Employer notes that the parties' agreement denies an arbitrator the authority to address the reasonableness of the no-fault attendance program. Arbitral precedent does, however, establish, according to the Employer, both that no-fault absenteeism programs can be reasonable and that excessive absenteeism "constitutes cause for discharge, even when the excessive absenteeism is caused by illness." Against this background, the Employer contends its termination of both Grievants was proper.

The evidence firmly establishes, according to the Employer, that each Grievant accumulated nine absences within six months. Since neither Grievant requested a Leave of Absence; both Grievants were on notice of the chronic absenteeism provision; both Grievants were on notice that "their attendance was a problem"; neither Grievant has demonstrated any absence qualifying as "a serious health condition under the new law"; and neither Grievant has "filed any charges with DILHR claiming a violation of the Family and Medical Leave Act," it follows, the Employer concludes, that the chronic absenteeism provision must be given its intended effect.

Viewing the record as a whole, the Employer concludes that each Grievant was treated as any other employe would be treated under the contract, and that it follows that "the grievances should be dismissed."

DISCUSSION

I have adopted the Union's proposed issues as those appropriate to this record. I have rejected the Employer's because each issue states a purely factual determination, admitting only one answer. Accepting the Employer's

arguments on the merits requires at least enough contractual analysis to support the conclusion that Article XII, Section 2X, is sufficiently clear to permit only one interpretation. Beyond this, the effect of the factual determination sought by the Employer is unclear. Presumably, either issue could be answered "yes" or "no," but the implications of a "no" answer are not immediately apparent. This may indicate that there is no possibility of a remedial dispute, but the point should not be left implicit.

Although the substantive difference between the parties' statement of the issues could, potentially, be significant, that difference is something less than pivotal here. Although the Employer's statement of the issues is a bit too narrow, it underscores that grievances should be resolved on as narrow a basis as possible to avoid undue arbitral interference in the bargaining process codified in the collective bargaining agreement. Beyond this, the Employer's issues appropriately focus on Article XII, Section 2X, which is the provision governing both grievances. That provision was bargained in addition to the Article XI Attendance Program, and can not be presumed to conflict with the just cause provision of Article XVII, Section 1. Whether such a conflict can be posed on other facts must be left for the parties to consider or litigate on such facts. The conflict can not be presumed here because the parties have already considered that general point by noting in Article XII, Section 2X, that excessive absenteeism "shall be cause" for discharge.

Article XII, Section 2X, must, then, be given its bargained effect, and the issue posed here is what that effect should be regarding Moll and Lalley. The Employer poses the essential issue here through its assertion that the section is sufficiently clear and unambiguous to preclude any interpretation other than that given it by the Employer.

The Employer's assertion that Article XII, Section 2X, is clear and unambiguous must be rejected. Initially, it can be noted that the significance of the terms "Leave of Absence" are not, standing alone, unambiguous. The Employer seeks an implication that those terms be read "Leave of Absence under the Wisconsin Family or Medical Leave Act." More significant here, however, is whether the term "absences" can be read only as the Employer asserts.

The Employer acknowledges that "absences" does not cover absence due to work related injury. This may be a necessary implication from other contract provisions, but does establish that the term can not be read standing alone, and is amenable, in that instance, to division into excused and unexcused absences.

The more fundamental ambiguity here, however, is what period of time constitutes an "absence." For example, Lalley missed September 12, 13 and 14 due to a virus. Moll missed May 14, 15 and 16 due to strep throat. Each illness was covered by a Doctor's excuse. Should these occurrences each count as one absence of three days' duration or three absences of one day's duration?

The term "absence" admits either interpretation. Webster's New Collegiate Dictionary includes this definition of the term: "the period of time that one is absent." 8/ Other dictionaries also state this definition. 9/ Arbitral precedent demonstrates that bargaining parties can define the occurrence of an illness stretching over more than one day as a single absence. 10/ Sub-section 15 of Article XI, Section 5, of the parties' agreement counts only the first day of "consecutive days of absence" for "the same personal illness (or) personal injury" as chargeable under the Article XI Attendance Program. In effect, this treats consecutive days of absence for an illness or injury as one absence. In sum, the term "absence" permits more than one interpretation, and the Employer's assertion that the term is so clear that it precludes any view other than its own must be rejected.

Bargaining history is the best guide available to resolve this ambiguity. Past practice would be a more reliable guide, but Article XII, Section 2X, was first inserted into the 1990-95 agreement, and there is no binding past practice. Bargaining history is, however, a troublesome guide here, since each

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8/ (G & C Merriam Co., 1977).

9/ See, for example, The American Heritage Dictionary of the English Language, (Houghton Mifflin, 1981); New Standard Dictionary of the English Language (Funk & Wagnall's, 1929).

10/ See, for example, Centel Business Systems, Inc., 90-2 ARB Par. 8558 (Morris, 1990).

party seeks more from the term "absences" than the evidence will support.

Neither Krueger's nor Falch's testimony indicates the parties discussed, much less agreed, that each consecutive day of an excused illness would count as a separate absence under Article XII, Section 2X. At most, their testimony establishes that the Employer agreed to exempt from Article XII, Section 2X, any period of time for which an employe had been granted a leave under the Act. Neither witness could recall further discussions, but neither witness denied the occurrence of more detailed discussions, and Krueger recalled that such discussions had occurred. It is implausible that the Union, which had originally opposed the continuation of the Article XI Attendance Program, would agree to the nine absences provision without any discussion of how absences were to be totalled. On balance, the testimony demonstrates no agreement to count absences as the Employer asserts here.

Kenny's and Seltzner's testimony indicates that the parties generally discussed the impact of the nine absences proposal on an employe with a legitimate illness or injury. The Union asserts the testimony establishes the parties agreed to exempt from the nine absences provision any absence covered by a doctor's statement. Fully crediting their testimony will not, however, establish that the parties agreed to this interpretation, which both Krueger and Falch denied. At most, Kenny's and Seltzner's testimony establishes that the Union inferred, from the absence of specific discussion from the Employer to the contrary, that absences excused by a doctor would not constitute absences under Article XII, Section 2X. This does not demonstrate a meeting of the minds on this point. Such an understanding is as important here as with the Employer's interpretation, since it is implausible that the Employer would accept, without discussion, a more lenient standard for counting absences under Article XII than that in effect for Article XI. Beyond this, the Union's interpretation is undercut by the request stated in each grievance that "absences should be reduced to the amount of days (each Grievant was) charged points."

The evidence establishes, then, that the parties discussed the problem of absenteeism at length, but reached no specific agreement on how to define the term of an absence under Article XII, Section 2X. The lack of a specific agreement poses the interpretive problem here, since "absences" can not be considered so clear and unambiguous that it is amenable to only one definition.

This does not, however, preclude drawing any conclusions from the parties' 1990 bargaining history. Rather, the sole solid basis on which to define "absences" lies in the context of that bargaining. The Article XI Attendance Program, both before and after the 1990 bargaining, counted consecutive days missed due to the same illness or injury as a single instance. This states the context in which the parties bargained the 1990-95 agreement.

This context is significant here, for the Article XI standard was, as of April and May, mutually understood and thus the basis upon which further contractual refinements on the absenteeism issue would be made. The evidence indicates that the Employer failed to extend that definition to each consecutive day of the same injury or illness, and that the Union failed to exempt absences excused by a doctor from that definition. More significantly, the evidence indicates that this standard survived the parties' failure to agree on a different definition. Each grievance, as noted above, specifically requests that absences reflect the days "charged points" under the Article XI attendance policy. Beyond this, Article XII is silent on a different definition than that established by Subsection 15 of Article XI, Section 5, yet the parties repeated the operative language of Article XII, Section 2X, in the second NOTE contained in Article XI. The inclusion of this language in both Articles makes it improbable that the parties implicitly understood "absences" would be treated differently under Article XII than under Article XI.

It follows that the consecutive days of the same illness or injury which the Employer counts as a single illness or injury under Article XI should be counted as a single absence under Article XII, Section 2X, and its related NOTE in Article XI.

This conclusion resolves both grievances adversely to the Employer, since the Employer counted consecutive days of the same illness as multiple absences to total nine absences for each Grievant. Lalley missed September 12, 13 and 14 due to the same illness, and the Employer counted that illness as three absences. It can also be noted that Lalley claims that two and perhaps three of his absences were due to a work related injury. Since there was no specific warning or discussion of the Article XII absence totals prior to Step Four, this claim arose as a surprise at the arbitration hearing. As a result, the

record on this point is sketchy, and no definitive conclusion can be made. The AWARD entered below addresses this on a general level only, to permit further exploration by the parties of this point. Moll missed May 14, 15 and 16 due to the same illness, and the Employer counted that illness as three absences. Similarly, Moll missed July 17 and 18 due to oral surgery, and the Employer counted that instance as two absences. The AWARD entered below requires the Employer to change the number of absences for each Grievant to comply with the conclusion stated above.

The balance of the AWARD entered below states a traditional make whole remedy to be applied to each Grievant, and does not require any detailed discussion.

AWARD

The discharges of the two Grievants were not proper under the terms of the collective bargaining agreement, since neither Grievant had totalled nine absences within a 180 calendar day period.

As the remedy appropriate to the Employer's violation of the collective bargaining agreement, the Employer shall make Dennis Lalley and Kelly Moll whole by reinstating them to the position each would have held but for their discharges, and by compensating each employe for the wages and benefits lost due to their respective discharges. The Employer shall also expunge any reference to each employe's discharge from each employe's personnel file. The Employer shall further amend each employe's personnel record so that neither employe is charged with an Article XII, Section 2X, type of absence due to a work related injury, or with more than one Article XII, Section 2X, type of absence for the same legitimate illness or injury which extends for two or more consecutive days.

Dated at Madison, Wisconsin, this 13th day of June, 1991.

By _____
Richard B. McLaughlin, Arbitrator