BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	
UNITED TEXTILE WORKERS OF AMERICA, LOCAL NO. 78, AFL-CIO	Case 34 No. 50349 MA-5167
and	
APPLETON MILLS	

Appearances:
Mr. John S. Williamson, Jr., Attorney at Law, on behalf of United Textile Workers of America, Local No. 78, AFL-CIO.
Stroud, Stroud, Willink, Thompson & Howard, Attorneys at Law, by Mr. Robert

ARBITRATION AWARD

United Textile Workers of America, Local No. 78, AFL-CIO, hereinafter the Union, and Appleton Mills, hereinafter the Company, jointly requested that the Wisconsin Employment Relations Commission appoint a staff arbitrator to hear and decide the instant dispute between the Union and the Company in accordance with the grievance and arbitration procedures contained in the parties' labor agreement. The undersigned, David E. Shaw, of the Commission's staff, was designated to arbitrate in the dispute. A hearing was held before the undersigned on March 29, 1994, in Appleton, Wisconsin. A stenographic transcript was made of the hearing and the parties submitted post-hearing briefs in the matter by May 12, 1994. Based upon the evidence and the arguments of the parties, the undersigned makes and issues the following Award.

ISSUES

The parties stipulated to the following statement of the issues to be decided:

> Whether the Company violated the Collective Bargaining Agreement when it discharged the Grievant, James Barlament?
>
> If so, what should the remedy be?

CONTRACT PROVISIONS

The following provisions of the parties' Agreement are cited:

ARTICLE II
MANAGEMENT FUNCTIONS

Section 3. The management of the plant and the direction of the working force and of the affairs of the Company shall be vested exclusively in the Company as functions of management. Such functions of management include among others the following:

. . .

(b) The right to suspend, discharge, and lay off employees for legitimate reasons.

(c) The right to supervise the work of each employee, including the right to determine production schedules, and to assign individual jobs in each department.

(d) The right to establish reasonable rules and conditions for operating the plant and covering the conduct of employees in the plant, and to determine the time when shifts shall begin and end.

. . .

ARTICLE XIII - GRIEVANCES

. . .

Section 35. As used herein, the term "grievances" means complaints about the interpretation and application of this contract, alleged violations thereof, discharges without legitimate reason, abuses of discretion by supervisors in the treatment of employees, and complaints about working conditions; but it does not include dissatisfaction with the provisions of this agreement nor with the management of the Company in matters within the exclusive function of the management. The jurisdiction of the Board of Arbitration is limited to grievances as herein defined, which have been duly appealed to such Board in accordance with the procedure set forth in Section 34.

. . .

ARTICLE XV - HOLIDAYS

Section 38.

. . .

No employee shall be entitled to holiday pay for

any holiday occurring during a period when the employee is. . .on leave of absence.

. . .

An employee shall not be denied holiday pay because of failure to work the next scheduled work day next preceding or next following a holiday if the employee reports the cause of his absence to the Company prior to the scheduled work day and such failure is caused by:

(1) Death of a member of his immediate family.

(2) A required appearance before a court or other government agency.

(3) Illness of the employee substantiated by a doctor's statement if the Company requests it (the Company shall pay for the doctor's statement if requested by the Company), . . .

. . .

ARTICLE XIX
LEAVE OF ABSENCE

Section 42. An employee who becomes ill or suffers injury and whose claim of illness or injury is supported by satisfactory evidence, shall automatically be granted sick leave of absence until physically able to return to work; but such leave of absence shall terminate at the end of six month's unless the employee's doctor certifies in writing that the employee is not physically fit to return to work, but will probably be able to return to work later, in which case the leave of absence shall be extended, up to another six months. If the employee fails to return to work by the end of the second six months, his leave of absence shall not be further extended without the consent of both the Company and the Union.

With respect to work-related injuries only, if, at the end of one year, the disabled employee's doctor certifies in writing that the employee is not physically fit to return to work, but will probably be able to return to work later, the leave of absence shall be extended, up to another six months.

Leaves of absence shall be granted to employees for family leave or medical leave subject to the terms and conditions provided for in Section 103.10 of the Wisconsin Statutes. Notice of the right to family leave and medical leave shall be posted on the Company's bulletin boards in a conspicuous place.

All requests for leave of absence must be made in writing to the Personnel Department.

. . .

ARTICLE XXI

FEDERAL AND STATE LAWS

> **Section 45.** This contract is made subject to all applicable laws and governmental regulations, state and federal, and any provision hereof in conflict with any such law or regulation shall be ineffective while such conflict exists.

BACKGROUND

The Company operates a production facility in Appleton, Wisconsin and the Union is the collective bargaining representative of the Company's production and maintenance employes at that facility. The Grievant, James Barlament, had been employed approximately twelve years by the Company at the time of his discharge and is the President of the Union.

Sometime prior to 1993 the Grievant developed a lower back problem which became aggravated in December of 1992. In January of 1993 the problem was diagnosed as a herniated disc. The Grievant had missed work due to his back problem and had been given an oral warning for excessive absenteeism in November of 1992 and a written warning in January of 1993. The Grievant claimed his back problem was work-related and his physician initially recommended that the Grievant work less hours. That recommendation was subsequently changed to specify that the Grievant be limited to working 4 hours per day with a limit of 30 pounds for lifting and the physician indicated there might be times the Grievant would have to leave work earlier due to the pain. On days when the Grievant left work early, he would inform his supervisor that he was leaving and why, and then leave. Per the recommendations, the Grievant began working 4 hours per day on March 1, 1993, and continued until mid-April when the Company's Worker's Compensation carrier rejected the Grievant's claim that his back problem was work-related. At that point the Company no longer would accommodate the restrictions and the Grievant was placed on a leave of absence from April 20, 1993 until the end of May when he was returned to work by his physician on a full-time basis.

Based upon complaints from the Union and employes that the Company was not applying its absenteeism policy consistently, the Company developed a new "no fault" absence policy which it implemented effective June 2, 1993. Under the "no fault" policy all employes started with a clean slate on June 2nd, regardless of how many absences they had before that date, and regardless of whether they had been disciplined previously for tardiness or absenteeism.

The policy implemented on June 2nd read as follows:

ABSENTEEISM POLICY

> As a result of excessive absenteeism and/or tardiness, disciplinary action may be required and will be based on a point system in accordance with the following:
>
> * Absenteeism is defined as being absent from work on any scheduled work day, even though the employee has reported.
>
> * Each period of consecutive absence will be recorded as "one point" regardless of the number of days' duration.
>
> * The following will not be penalized under this policy:
>
> - Approved half day vacations

- Situations where work is not available

* Any employee who fails to clock in and/or out will be charged 1/4 point.

* Tardiness will be considered to be reporting to work within 6 minutes after the scheduled starting time. One occasion of tardiness will be charged as one-quarter point.

* Employees who report to work late (more than 6 minutes), as provided for in the reporting regulations, or who leave before the end of the shift (with the supervisor's knowledge) will be charged with one-half point for either of these occurrences. (Exceptions to this include individuals who work less than 2 hours; they will be charged with 1 point).

* Employees who call in after their scheduled shift begins and are absent will be charged with 1.5 points.

* Employees who are absent without call-in will be charged with two points. A call-in is defined as contacting a member of management or the answering machine.

* Absence due to funeral leave, military obligation, jury duty, union business, applied for and approved leave of absences, (as defined by the labor contract) will not be recorded as a point of absence for purposes of disciplinary action.

* Attendance records will be maintained for a consecutive 12-month period, starting with the employee's first partial or full point.

* Corrective discipline will be administered according to the following:

  - Four points, within a 12-month period: Verbal warning.
  - Six points, within a 12-month period: Written warning.
  - Eight points, within a 12-month period: 1-day suspension.
  - Ten points, within a 12-month period: 3-day suspension.
  - Twelve points, within a 12-month period: Discharge

* A number of extended absences may become a cause for disciplinary action if the employees accumulated time away from the job interferes with the efficient operation of the department.

* An employee's overall disciplinary record is to be taken into consideration when judging that person's performance. Therefore, this policy will be considered in conjunction with other

disciplinary actions as the need arises.

The Company had, prior to June 2nd, approached the Union about changing the absenteeism policy to a "no fault" policy, but the Grievant, as the Union's President, had indicated the Union was not interested in participating in drafting something that could lead to discipline. The Union filed a grievance on June 2nd alleging that such a policy must be bargained before any changes may be made in the existing absenteeism policy. The Company and the Union engaged in a number of discussions regarding the new policy and several revisions were made as a result. As of July 16, 1993, the final revisions included changing the six minutes to eight minutes regarding being late for work and added the following to the policy:

* Attendance records will be maintained for 52 consecutive pay periods starting with the employee's first partial or full point.

* For each individuals working 8 pay periods without a full or partial point, they will have 1/2 point deducted from their point total. The 1/2 point will be deducted from the individual's most recent points accumulated. Points cannot be banked.

* Individuals are allowed to call in and request vacation pay for a days absence. However, 1 point will be added to the individuals total. 1/

* Individuals are allowed to find other qualified people to cover their scheduled hours on weekends without prior management approval as long as the coverage is done in two hour increments. No points will be charged.

The grievance regarding the implementation of the new policy was subsequently dropped after the third step in the grievance procedure.

The parties stipulated to the Grievant's absence record for 1993, and set forth below is his absence record beginning with June of 1993:

tues.	06-08-93	absent
fri.	06-25-93	left early
weds.	06-30-93	left early
mon.	07-12-93	left early
tues.	07-13-93	left early
wed.	07-14-93	absent
fri.	07-23-93	left early
thurs.	07-29-93	absent
fri.	07-30-93	absent
mon.	08-02-93	left early
thurs.	08-05-93	left early
fri.	08-06-93	absent
sat.	08-14-93	no clk in/out
weds.	08-18-93	left early
thurs.	08-19-93	no clk in/out
mon.	08-30-93	absent

1/ Under Company policy employes must request vacation 16 hours in advance, and the Company and Union agreed that if that prior notice was given, employes would not be assessed a point.

tues.	08-31-93	absent
weds.	09-01-93	absent
tues.	09-07-93	left early

tues.	09-14-93 to 09-27-93	(Leave of Absence)	tues.
thurs.	10-07-93	no clk in/out	
mon.	10-11-93	left early	
thurs.	10-14-93	left early	
fri.	10-15-93	no clk in/out	
mon.	10-25-93	absent	

The Company at times runs shifts on Saturdays and Sundays. Weekend shifts are six hours long and are paid at a premium rate of time and one-half for hours from 11:00 p.m. Friday until 11:00 p.m. Saturday and double time from 11:00 p.m. Saturday to 11:00 p.m. Sunday. Employes are sometimes scheduled to work Saturdays, but working a double shift on a Saturday or working on a Sunday is voluntary. During the months of June through October of 1993, the Grievant worked the following hours on weekends:

Saturdays	Sundays
June 5 - 6 hours	June 27 - 6 hours
June 12 - 6 hours	July 18 - 6 hours
June 26 - 12 hours	July 25 - 6 hours
July 3 - 4 hours	August 1 - 6 hours
July 17 - 14 hours	August 8 - 12 hours
July 24 - 12 hours	August 15 - 18 hours
July 31 - 12 hours	August 22 - 6 hours
August 7 - 12 hours	August 29 - 6 hours
August 14 - 12 hours	September 12 - 6 hours
August 28 - 12 hours	
September 11 - 6 hours	
October 2 - 6 hours	
October 9 - 6 hours	

Under the "no fault" absenteeism policy the Grievant accumulated points as follows for his absences:

June 8 - 1.0 points	August 18 - .5 points
June 25 - .5 points	August 19 - .25 points
June 30 - .5 points	August 30 - 1.0 points
July 12 - .5 points	August 31 - 1.0 points
July 13 - 1.0 points	September 7 - .5 points
July 23 - .5 points	September 28 - .5 points
July 29 - 1.0 points	October 7 - .25 points
July 30 - .5 points	October 11 - .5 points
August 2 - .5 points	October 14 - .5 points
August 6 - 1.0 points	October 15 - .25 points
August 14 -.25 points	October 25 - 1.0 points

Based upon his accumulation of points under the policy, the Grievant received both oral and written reprimands on August 9th, a one-day suspension on August 20th (served August 23), a three-day suspension on September 29th (served October 4, 5 and 6). During the steps of the discipline, the Grievant was warned of what would happen if his absences continued and there were discussions about his getting into a work hardening program or taking a leave of absence. The Grievant called in and told his supervisor he would not be in on October 25th due to the pain in his back. Also on October 25th, the Grievant received written notice in the mail that he was being terminated. On October 27th, the Grievant's wife brought in slips from his chiropractor and his doctors stating he could not work due to his back problem. The slip from his chiropractor requested that the Grievant be excused from work on October 25th. Beginning with July 9, 1993, through December 10, 1993, the Company had

received eight reports from the Grievant's physician concerning his back condition. In December of 1993, the Grievant had surgery on his back.

The Grievant grieved his three-day suspension, but withdrew that grievance upon his termination and grieved only the latter. The grievance was processed at the third step of the grievance procedure and the parties proceeded to arbitrate the dispute before the undersigned.

POSITIONS OF THE PARTIES

Company

The Company takes the position that it did not violate the parties' Agreement when it discharged the Grievant under its "no fault" absenteeism policy.

First, the Company disputes the Union's claim that the policy is inconsistent with the Agreement, specifically Section 42 of the Agreement. A review of Section 42 makes clear that it is intended to cover long-term absences. If an employe became ill or was injured and supported his claim of illness or injury with satisfactory evidence, he would be granted a leave of absence until physically able to return to work. The Grievant conceded that the absences for which he was charged under the policy were absences to which Section 42 would not apply. The Grievant's doctor had certified to the Company that he was physically able to return to work and none of the absences for which he was disciplined were a direct result of becoming ill or suffering an injury, and none were supported by satisfactory evidence.

The Company asserts that there are no specific terms dealing with absenteeism in the Agreement. Pursuant to its rights under Section 3 of the Agreement, the Company has established and enforced rules with respect to absenteeism and tardiness under its reserved management functions. In its opening statement, the Union acknowledged the Company's right to establish an absenteeism and tardiness policy. The Union also acknowledged that its grievance over the implementation of the new policy was not pursued after the Company responded that the policy was within its management rights. Therefore, applying the definition of the term "grievances" under Section 35 of the Agreement, the Arbitrator can only find in the Grievant's favor if it is concluded that the Company violated the policy as it applied it to the Grievant.

Regarding the Union's reliance on Section 45, Federal and State Laws, of the Agreement as a basis for its claim that the policy violates the Agreement, the Company argues that since the policy was created by the Company under its Management Rights, and not through bargaining, it is not a provision of the Agreement, and Section 45 does not apply even if the policy was in conflict with a law or governmental regulation. However, there has been no ruling or decision by any court or agency that any part of the policy violates or conflicts with any state or federal law or regulation.

The Company notes that the Grievant had been disciplined for absenteeism prior to the effective date of the new policy and that there were other absences for which he was not disciplined, and asserts that one of the purposes for instituting the new policy was to provide a uniform system with respect to absenteeism applicable to all employes under all circumstances. It asserts that if it had the right to set a policy with respect to absenteeism and tardiness, it also has the right to change that policy from time to time, based on its experiences in administering the policy.

Although the Grievant's attendance problems preceded the effective date of the policy, the Company treated the Grievant and all other employes equally and fairly by allowing all employes to start on June 2, 1993, with a clean

record. The Grievant testified that after the new policy he never missed work for any reason other than his bad back. The Company asserts that is a subjective condition, not easily proved nor disproved. It asserts that it correctly charged the Grievant with those absences under the new policy since the Grievant did not become ill or suffer an injury as is required for a leave of absence under the Agreement. Further, on numerous occasions, and especially in July and August of 1993, the Grievant had a pattern of missing or leaving work early at the beginning or end of a work week and then working voluntarily on the weekends. He worked extra shifts on the last three weekends in July and every weekend in August, however, during the same period, he missed work on all or part of 12 different weekdays.

Regarding the Union's claim that the policy violates the Family and Medical Leave Act, the Company notes that the federal Act was not in effect at the time the Grievant was discharged and asserts any references to it are therefore irrelevant. The Company notes the Union's assertion that the congressional findings with respect to responsibility for family caretaking under the federal Act should be read as requiring that single female parents be given family leave whenever they have a sick or injured child under the Wisconsin Family and Medical Leave Act. In MPI, Wisconsin Machining Division, v. State of Wisconsin, DILHR, 46 N.W. 2d 79, 159, Wis. 2d 358, the Court of Appeals held to the contrary. Considering a "no fault" absence policy, and the State act, the Court analyzed the statutory definition of "serious health condition" as set forth in Sec. 103.10(1)(g), Stats. The Court held that when an illness does not involve an inpatient hospitalization, to qualify as protected leave under the Act, ". . .the absences must have been occasioned by a disabling illness that requires outpatient care with continuing treatment or supervision by a health care provider." (At 372). The Company asserts that it is clear from the testimony of the Union's witness, Gayle Coenen, offered by the Union as proof of the violation of the Act, that her absences to care for her daughter would not qualify her for leave under the Act. Similarly, none of the incidents for which the Grievant was charged points under the "no fault" policy would have qualified as leave protected under the Act. This is so since the Grievant was not hospitalized, and therefore his care by his physician was not continuous and first-hand contact subsequent to the initial outpatient contact, as contemplated by the Act.

The Grievant acknowledged that the Company posted the Family and Medical Leave law on the bulletin board. If the Grievant believed that he had been denied his rights under the Act, he had 30 days from the alleged violation in which to file a complaint with DILHR under Sec. 103.10(12)(b), Stats. Further, Sec. 103.10(4), Stats., limits an employe to two weeks of medical leave in a 12 month period and the Grievant had exceeded that even before June 2, 1993. Also, had the Grievant had a serious health condition which would have qualified him for medical leave under the Act, and if he had asked for such leave or for a substitute of leave, it is clear from the policy and the Agreement that he would not have been assessed points. The policy itself excepts leave to which the employe is entitled under the Agreement and the Agreement specifically permits family and medical leave as allowed by the Wisconsin Act. The Grievant was not charged with any points whenever he was granted a leave of absence or placed on a reduced work schedule as a result of his doctor's determination that he could not work an entire shift. The Grievant was charged points for absenteeism only when he left work early or failed to come in on his own volition, and not as a result of the recommendation of his health care provider. The Grievant's statements from his health care providers regarding his absence on October 25 was only given to the Company several days after he was terminated and they would not have qualified the Grievant for a leave of absence under the Agreement.

Regarding the allegation that the policy violated the Act because it did not permit the Grievant a medical leave of less than a full day, even if the Grievant had qualified for leave under the Act, he would not have had a right

to substitute the leave of absence granted under Section 42 because that is not a "leave. . .provided by the Employer". Citing, IND 86.03, Wis. ADM Code and Richland School District v. Department of Industry, Labor and Human Relations, 174 Wis. 2d. 878, at 896.

As to the Union's assertion in its opening statement that the policy conflicts with the State's Worker's Compensation law, that argument related to the penalty for refusing to rehire a person who has been injured on the job and that was not the situation in this case. In Dialectric Corporation v. Labor and Industry Review Commission, 111 Wis. 2d. 270, the Court held that an employer could discharge an employe, who had been rehired after worker's compensation leave, for absenteeism without violating Section 102.53(3), Stats.

Regarding the unfair labor practice filed by the Union for the Company's posting a notice asking for employe input with respect to the policy, since that occurred long after the Grievant's discharge, it is irrelevant and the unfair labor practice alleged is totally unrelated to the Grievant's discharge or the administration of the policy. Therefore, the grievance should be denied.

Union

The Union takes the position that the grievance should be sustained, the Grievant made whole, and the Company's leave of absence "no fault" policy declared void. In support of its position, it makes the following arguments.

Although some arbitrators have upheld "no fault" absenteeism policies, it is strange that they have done so since at least as early as 1677, courts have ruled that "a law which a man cannot obey, or act according to it, is void and no law." Thomas V. Sorrell, 1677. Here, because of the condition of his back, the Grievant could not obey the "no fault" policy. Therefore, the policy should be considered void, as it is obviously unjust to penalize a person for failing to comply with a rule because he is physically unable to do so. It is, however, unnecessary, for the Arbitrator to decide whether discharges under "no fault" policies of employes who are injured or become sick or who must care for their children are per se, legally invalid, since the "no fault" policy in this case conflicts with the collective bargaining agreement and applicable law. "No fault" policies have only been upheld by arbitrators where they have concluded that the policies were consistent with the applicable collective bargaining agreement and law.

The Company claims it intended its new "no fault" policy to eliminate unequal treatment that had occurred under its earlier policies and practices. The Company did not achieve its goal in that regard, and even if it had, the policy would remain unjust since equality of result is not always wise or just. Assuming the goal of treating absenteeism equally in this case, the substantive cost it imposes on employes is too high. The result of its "equal treatment" is the unnecessary imposition of the extra loss of jobs. Further, the Company violates the "leading precept" of equality which requires not only that like cases be treated alike, but also that "unlike cases be treated differently". Citing, Hart, The Concept of Law, 155. Treating an absence to retrieve an ill child from school and an absence to start "happy hour" early as conduct meriting discipline fails to make the distinctions that true equality requires. The "no fault" policy imposes unacceptable substantive costs on employes and is grossly inequitable in its application. Thus, the policy cannot be a valid basis for discharge.

Next, the Union cites Section 42 of the Agreement as providing, in relevant part, as follows:

> "An employee who becomes ill or suffers injury or whose claim of illness or injury is supported by

> satisfactory evidence, shall automatically be granted sick leave of absence until physically able to return to work. . ."

That language clearly and unambiguously permits an employe like the Grievant, who suffered an injury and provided satisfactory evidence of that fact, the right to sick leave. While both before and after adoption of the "no fault" policy the Grievant did not supply specific medical documentation for each absence, no one questioned that it was his back injury that caused him to be absent or leave early. The Company based its contention that an absence must be for at least two weeks to qualify for a leave of absence under Section 42 on an alleged secret agreement in the 1960's made through the Union's then-President, and the Company's then-Manager of Human Relations. There is no evidence, however, that such an agreement was ever conveyed to the Union membership; rather the evidence indicates that the alleged agreement was kept secret.

The Company also asserted that a past practice developed consistent with the alleged secret agreement and that this alleged practice benefits employes because a person on a leave of absence would otherwise lose holiday pay. The Union disputes those contentions, asserting that the language of Section 42 is clear and unambiguous and that the Company conceded that point. The Company also conceded that it applied Section 42 consistent with its language prior to the alleged secret agreement. Clear and unambiguous contract language prevails over any alleged secret oral agreement, unknown to the membership and not ratified by them, and over a past practice. The Union, however, disputes that there was any past practice. It asserts that before the adoption of the "no fault" policy, employes, such as the Grievant, who are entitled to leave, received it, whether the leave was for part of a day, a week, two weeks, or a month. Thus, there was no reason for the membership to know what bookkeeping practices the Company chose to follow. A past practice cannot exist without the knowledge of both parties. Further, the employes knew they received holiday pay when they were ill the day before or after a holiday even though they also believed they were on a leave of absence. Section 38 of the Agreement states, in relevant part, that:

> . . . "[n]o employee shall be entitled to holiday pay. . .when he is on leave of absence."
>
> . . .
>
> "An employee shall not be denied holiday pay because of failure to work the scheduled work day next preceding or next following a holiday if the employee reports the cause of his absence to the Company prior to the scheduled work day and such failure is caused by:"
> (3) Illness of the employee substantiated by a doctor's statement if the Company requests it (the Company shall pay for the doctor's statement if requested by the Company). . ."

Since specific language prevails over general language, the Union and the employes would believe that the above language explained why they received holiday pay when they were ill the day before or after a holiday. They had no reason to believe that they were the beneficiaries of an alleged secret agreement made in the distant past. The language of Section 38, sub.(3), also refutes the contention that the Grievant had to produce a doctor's statement each time he was off work for a day or part of a day. Under the Agreement, the burden is on the Company to challenge the validity of the employe's reason for the absence or illness claimed and the cost of such a challenge falls on the Company. More importantly, the language governing absences before and after

holidays shows how unreasonable the Company's position is. Under (3), employes only lose holiday pay if the Company successfully challenges their claim of illness; but under the "no fault" policy, they can still lose their jobs even when the Company cannot successfully challenge that claim. Had the Grievant's absence occurred on a workday preceding or following a holiday and the Company required his illness to be substantiated by a doctor's statement, the Company would have been required, under the Agreement, to pay him for the holiday and for the cost of the doctor's statement, but under the "no fault" policy, could still discharge him for that same absence. The "no fault" policy and the Agreement are in conflict, and it is the policy that must yield to the Agreement, not vice-versa.

The Union also asserts that the "no fault" policy is in conflict with the Wisconsin Family and Medical Leave Act (FMLA), Sec. 103.10, Stats. The Company specifically agreed to follow the FMLA in Section 42, and, more generally, in Section 45 of the Agreement. Under the FMLA, the Grievant was entitled to substitute for portions of his medical leave, "paid or unpaid leave of any type provided by the Employer." Thus, prior to the adoption of the "no fault" policy, the Grievant could substitute the leave without pay he was entitled to under the old policy. Under the "no fault" policy, he was entitled to 14 days' "medical leave as medically necessary" in calendar year 1993. At hearing, the Company took the erroneous position that the Grievant had to invoke the FMLA to be covered by that Act. In Jicha v. State, 164 Wis. 2d. 94 (Ct.App. 1991), the Court of Appeals held, "FMLA, however, does not require that the employe utter magic words, or make a formal application to invoke FMLA's protection." (At 100) In this case, the medical reports and the Company's knowledge as a result of the worker's compensation dispute were more than enough to alert the Company that the Grievant had "a serious health condition (and his) health condition was affecting (his) ability to perform (his) duties". In Sieger v. Wisconsin Personnel Commission, 181 Wis. 2d. 845, 512 N.W. 2d. 220 (Ct.App. 1994), the Court held:

> "[R]equiring the employee to demonstrate, at the time medical leave is requested, that the employee (1) has a serious health condition (2) that renders the employee unable to perform the employee's work duties during a specific time period and (3) that a leave during that time period is medically necessary, removes the responsibility placed on employers by sub. sec. 103.10(7), Stats., to request clarification of these facts if the employer desires more information. The plain language of sub. sec. 103.10(7) demonstrates the legislature's intent to place the burden on employers to determine, at the time an employee requests sick leave, whether the employee (1) has a serious health condition (2) that renders the employee unable to perform the employee's work duties and (3) that a leave is medically necessary. . ." (At 859).

Therefore, the Grievant fulfilled his obligations under the FMLA. However, the issue in this case is just cause, and even if the Grievant, rather than the Company, has the obligation to assert he was taking leave under the FMLA, his failure to do so would not justify his discharge. Lack of legal sophistication is not grounds for discharge, and the FMLA is a new statute not fully understood even by those trained in law. Since the "no fault" policy violates the FMLA, it violates Sections 42 and 45 of the Agreement and is void.

The Union also asserts that the "no fault" policy has a disparate impact on women, and therefore, violates the Wisconsin Fair Employment Act, Sec. 111.31, et. seq., Stats., and Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000 E., et. seq. The "no fault" policy penalizes employes as single parents for providing short-term but necessary care for their children, as

shown by the Company's treatment of Coenen. Since the illness of her child was not the result of a serious health condition, Coenen's absence to care for the child was not covered by the FMLA, nor would it be covered by the federal FMLA of 1993. However, the reason the term "serious health condition" is not intended to cover short-term conditions such as those afflicting Coenen's child, is demonstrated by the report of Congress indicating that "such conditions would generally be covered by employer's sick leave policies". In adopting the federal act, Congress made certain findings about families and the role of women, noting that they, more than men, are the parents in single-parent households and they, more than men, assume the primary responsibility for child care in two-parent households. The following findings establish the disparate impact a "no fault" absenteeism policy has on women:

> ". . .(5) due to the nature of the roles of men and women in our society, the primary responsibility for family caretaking often falls on women, and such responsibility affects the working lives of women more than it affects the working lives of men; and
> (6) employment standards that apply to one gender only have serious potential for encouraging employers to discriminate against employees and applicants for employment who are of that gender. . ."

Therefore, because the "no fault" policy has a disparate impact on women, it is void.

The Union asserts that yet another way the "no fault" absenteeism policy violates the Agreement is that employes taking a vacation day without calling in 16 hours beforehand are penalized under the policy for doing so. Thus, the exercise of a contractual right subjects the employe to a penalty. Such a penalty acts to deprive employes of the contractual right and reduces its value. The Company's "no fault" policy imposes a penalty on all employes that conflicts with their right to take their own vacation days without giving the Company 16 hours' advance notice and deters employes who are single parents or who have health problems from exercising this contractual right. The Union concludes that the grievance should be sustained, the Grievant made whole, and the Company's leave of absence "no fault" policy declared void and the Arbitrator should retain jurisdiction to resolve disputes over implementation of the Award.

DISCUSSION

It is initially noted that there is no dispute regarding the Grievant's absences and the Grievant concedes that he was aware of the Company's "no fault" absenteeism policy and the consequences of accumulating points under that policy. The Grievant did not grieve the oral and written warnings and the one-day suspension he received under the "no fault" policy. The Union attacks the Grievant's discharge on the basis that the "no fault" policy conflicts with provisions of the parties' Agreement and that it violates state and federal laws.

Section 3, of the Agreement, Management Functions, at paragraph (d), in relevant part, expressly reserves to the Company, "The right to establish reasonable rules. . ." When the Company implemented the "no fault" absenteeism policy on June 2, 1993, the Union immediately grieved that action, asserting that the Company must bargain any changes in its absenteeism policy. The testimony establishes that there were several meetings between the parties, within and outside of the grievance procedure, to discuss the new absenteeism policy and that there were a number of significant changes made in the policy as a result. Following the Company's third step response on the grievance, the Union withdrew it. It can reasonably be inferred from the Union's withdrawal of its grievance following the discussions resulting in the changes to the

policy, that the Union, at a minimum, tacitly acknowledged the reasonableness of the revised "no fault" policy. That inference is further underscored by the Grievant's failure to grieve the warnings and one-day suspension he received under the new policy. It must be remembered in that regard, that the Grievant is the President of the Union and, in that capacity, he was involved in the discussions with the Company on the new policy. His knowledge and awareness of the provisions of the parties' Agreement and their interplay with the policy may be presumed. His failure to grieve the first three steps of the progressive discipline under the policy therefore takes on added significance. Thus, the Union's actions and the Grievant's actions, establish a rebuttable presumption that the "no fault" policy is not in conflict with the parties' Agreement.

The Union contends that the policy conflicts with several provisions of the Agreement. The Union first asserts that the policy conflicts with the clear language of Section 42, Leave of Absence. That assertion is not supported by the evidence. Contrary to the Union's claim, the wording of Section 42 is not clear and unambiguous as to the point in dispute in this case. While the wording does not set a minimum duration, it speaks in terms of an employe being granted sick leave "until physically able to return to work" and the entire provision appears oriented toward an absence of substantial duration. The Grievant testified that both before and after the implementation of the "no fault" absenteeism policy he did not consider himself to be on a leave of absence when he was absent for a day or left work early. The Union's previous President, Tom Peterson, testified that he was not aware of any agreement that a leave of absence has to be for a minimum of two weeks, as claimed by the Company. However, Peterson also testified that he felt compelled to go to management about his personal health situation at the time to discuss whether he would be able to take a leave of absence for a day, or several days, or whatever was needed, while he was receiving chemotherapy treatments. He further testified that there was a concern on the part of the Union and the Company that the other employes would feel that he was being treated differently, and that as a result, approximately a year or so later the Company and the Union signed a waiver agreement stating that Peterson was covered by the federal Americans with Disabilities Act.

Also, contrary to the Union's argument, the express denial of holiday pay to employes on a leave of absence in Section 38, and the exception to that for employes absent the day before or after the holiday due to illness substantiated by a doctor's statement if the Company requests it, demonstrates that the parties distinguish between leaves of absence and a short-term absence. Under Section 42, employes must provide satisfactory evidence of their claim of illness or injury in order to be granted a sick leave of absence. If a leave of absence under Section 42 was the same as that absence due to illness before or after a holiday, there would be no reason to provide for the Company's right to require a doctor's statement. The evidence is therefore sufficient to establish that there was an existing practice, of which both parties were aware, that a leave of absence under Section 42 was not intended to include short-term absences of a day or so or partial days.

The Union also asserts that the "no fault" policy violates the Vacations provision of the Agreement (Sections 36 and 37). That provision is silent as to when requests for vacation must be submitted after the initial sign-up for vacation and gives the Company some discretion in granting such requests in light of its production needs. Most importantly, however, is the fact that the provision in the "no fault" absenteeism policy regarding such call-ins to take vacation was the result of the parties' discussions and revisions of the policy. The Company's Production Superintendent, Randy Blasczyk, testified that the Company has required 16 hours advance notice for such requests and that the provision is in regard to those instances where such advance notice is not given by the employe. Blasczyk's unrebutted testimony was that the provision was the result of the parties' discussions, and that it was the Union

that raised the matter.

With regard to the Union's allegation that the "no fault" policy violates the Wisconsin Family and Medical Leave Act, 2/ it is noted that Section 42, Leave of Absence, in the Agreement, expressly provides that:

> Leaves of absence shall be granted to employees for family leave or medical leave subject to the terms and conditions provided for in Section 103.10 of the Wisconsin Statutes. Notice of the right to family leave and medical leave shall be posted on the Company's bulletin boards in a conspicuous place.
>
> All requests for leave of absence must be made in writing to the Personnel Department.

The "no fault" policy excludes from points, "[A]pplied for and approved leave of absences (as defined by the labor contract). . ." Further, as the Company points out, Sec. 103.10(4), Stats., provides that employes are limited to two weeks of medical leave in a twelve-month period. IND. 86.01(M), Wis. Adm. Code, defines a "twelve month period" as the calendar year. A review of Joint Exhibit No. 4 indicates that between 1/1/93 and 6/2/93, the Grievant was absent 13 separate days and left early 17 other days, worked half-shifts (four hours per day) all of March and through April 20, 1993 and was on a leave of absence from April 21st through May 31st. Thus, he had expended all of the two weeks of medical leave he was entitled to under the Act, and more, prior to the implementation of the "no fault" absenteeism policy on June 2nd. The testimony also indicates that when the Grievant was disciplined under the "no fault" policy, his supervisor met with him and discussed such alternatives as taking a medical leave of absence under Section 42 or getting into a work hardening program, both of which the Grievant declined to do. Further, the Grievant was placed on a leave of absence again in September when his doctor said he could not work a full shift. Later, in October, the Grievant was permitted to work six-hour shifts based on his doctor's statement and the understanding he was going to go into a work hardening program. What it appears the Grievant really wanted to do was work partial days at times, and outside of the provision in Section 42 incorporating the Wisconsin Family and Medical Leave Act, there is nothing in the Agreement that the Union has pointed out, that requires the Company to accommodate that arrangement. The Grievant had alternatives available to him to avoid accumulating points under the policy, but did not pursue them until it was too late.

Despite the Union's invitation to do so, the Arbitrator is not going to review the "no fault" absenteeism policy in light of state and federal laws based on its alleged disparate impact on female employes. Besides such a review being beyond the scope of this grievance, the Union concedes that the examples offered by its witness, Coenen, are not covered by either the State or the Federal FMLA. The Union suggests that the Arbitrator should take guidance in that regard from Congress' express findings in passing the federal act, however, that question is best left to the courts and the agencies responsible for administering those laws. The Arbitrator is not going to speculate as to possible situations that would result in violations of those acts or other laws.

It is concluded that the "no fault" absenteeism policy does not, on its face, and as applied to the Grievant, violate the parties' Agreement. Nor does the policy, based on the record and as applied to the Grievant, violate the State or federal FMLA. The Company has a legitimate concern to maintain its production capabilities and it has met its obligation to accommodate the Grievant's physical condition, at least to the extent required by the

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2/ It is noted that although it had been passed by that time, the federal Family and Medical Leave Act was not in effect during the time the Grievant was disciplined under the "no fault" policy.

Agreement. Thus, it is concluded that the Company did not violate the parties' Agreement when it discharged the Grievant.

Based on the above, the evidence, and the arguments of the parties, the undersigned makes and issues the following

AWARD

The grievance is denied.

Dated at Madison, Wisconsin this 10th day of August, 1994.

By David E. Shaw /s/
David E. Shaw, Arbitrator