BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

OFFICE & PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, LOCAL NO. 9, AFL-CIO-CLC

and

BUILDING TRADES UNITED PENSION TRUST FUND

Case 3
No. 63252
A-6100

Appearances:

Andrew D. Schauer, Jeffrey Hynes & Associates, S.C., Attorneys at Law, Mayfair Tower, 2401 North Mayfair Road, Suite 308, Wauwatosa, Wisconsin 53226, appearing on behalf of the Office & Professional Employees International Union, Local No. 9, AFL-CIO-CLC, which is referred to below as the Union.

Mitchell W. Quick, Michael, Best & Friedrich, LLP, Attorneys at Law, 100 East Wisconsin Avenue, Suite 3300, Milwaukee, Wisconsin 53202-4108, appearing on behalf of the Building Trades United Pension Fund, which is referred to below as the Employer.

ARBITRATION AWARD

The Union and the Employer are parties to collective bargaining agreements covering a unit of office employees and a unit of payroll auditors. Each unit is covered by a collective bargaining agreement. Each agreement was in effect at all times relevant to this proceeding and each provides for the final and binding arbitration of certain disputes. The Union requested, and the Employer agreed, that the Wisconsin Employment Relations Commission appoint an Arbitrator to resolve a grievance filed as a "Class Action for all members of OPEIU Local #9." With the agreement of the parties, the Commission appointed Richard B. McLaughlin, a member of its staff, to serve as Arbitrator. Hearing on the matter was conducted on May 12, 2004, in Elm Grove, Wisconsin. At the hearing, the parties stipulated that the language of the two agreements could be treated as identical for the purposes of this proceeding and that the grievance covered the employees of both units. On May 26, 2004, Amy L. Schneider filed a transcript of

the hearing with the Commission. The parties filed briefs by June 28, 2004. By August 5, 2004, each party had filed a "Notice to Arbitrator" from the National Labor Relations Board, stating that "the Acting Regional Director of Region 30" had determined "to administratively defer to arbitration the further processing of the NLRB charge in the above-noted matter." The Notice adds "both parties to the NLRB case have agreed to proceed to arbitration before you in order to resolve the dispute underlying the NLRB charge."

In a letter to the parties dated September 23, 2004, I stated:

> I hope to soon complete my review of the record in the above-noted matter, and write to clarify an issue. As I read the briefs, the Union takes the position that I should consider the impact of Sections 8(a)(5) and 8(d) of the National Labor Relations Act on the record. The Employer takes the position that I should restrict my analysis to the labor agreement(s). I do not take your separate submissions of the NLRB's "Notice to Arbitrator" to establish a stipulation that I address statutory issues.
>
> As discussed at hearing, the presence of a stipulation to consider an issue of statutory interpretation has been, in past cases, a significant consideration for me. I stress that in past cases I have not addressed issues of statutory interpretation unless contract language demands it or the parties to the agreement stipulate that I do so. If I understand your arguments correctly, there is no such stipulation in this matter. Please let me know if my statement of your respective positions is correct.

In a facsimile and letter filed on September 27, 2004, the Union affirmed the accuracy of my statement of its position. In a facsimile and letter filed on October 1, 2004, the Employer stated it "will now agree to stipulate to allow the arbitrator to address the impact of Section 8(a)(5) and 8(d) on the grievance only if the Fund is given the opportunity to brief this issue specifically." By e-mail dated October 1, 2004, the Union agreed to a briefing schedule proposed by the Employer. In a letter to the parties dated October 4, 2004, I stated:

> I send this letter, by fax and mail, to confirm receipt of your responses to my September 23, 2004 letter. That letter sought to clarify the state of the record, not necessarily to supplement it. As noted before, I have stated in past cases that I do not consider an issue of statutory interpretation before me unless contract language demands it or the parties to the agreement stipulate to it. My September 23 letter sought to clarify that I did not read your positions to establish such a stipulation. Thus, if the Employer chooses not to file a brief, I will not address the statutory issues. . . .

In a facsimile and letter filed on October 6, 2004, the Employer stated its desire to file a brief, and filed the brief, via facsimile and letter, by October 13, 2004.

ISSUES

The parties stipulated the following issues for decision:

Does the Employer's implementation of the attendance control policy effective 1/04 violate Articles VII and XVII of the applicable bargaining agreements?

If so, what should be the remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE VII - SICK LEAVE - EXCUSED LEAVES OF ABSENCE

Section 7.1. (A) Employees shall receive paid sick leave on the following basis and such sick leave shall be referred to as current sick leave during the period in which it is first earned:

1) During the first six (6) months of continuous employment - none;
2) Beginning with the seventh (7th) and continuing through the twelfth (12th) month of continuous employment, sick leave is earned with a maximum of six (6) days;
3) After one (1) year of continuous employment, an employee shall earn twelve (12) days of sick leave in each year.
4) Effective January 1, 1998, an employee shall earn twelve (12) days of sick leave in each calendar year. Sick leave shall be prorated during the partial calendar year based on the number of months from an employee' anniversary date to calendar year end and in accordance with Section 7.1 (A) 1) and 2) above.

(B) All sick leave earned under **Paragraphs 1), 2) or 3)** of **Subsection (A)** of this section and not used during the year earned shall be referred to as unused sick leave and shall be allowed to accumulate up to fifty-five (55) working days. An employee using unused sick leave must return to work before she/he becomes eligible for further sick leave benefits. Unused

sick leave is available only for absences if the duration of the sickness exceeds two (2) continuous days. i.e., it may not he used for one (1), or two (2) days at a time. However, an employee may use unused (banked) sick leave in daily increments for illnesses for which a treatment plan has been prescribed by a licensed physician.

Section 7.2. Excused Absences With Pay:

(A) Employees having seniority shall be entitled to three (3) days' bereavement leave with pay on the occurrence of death for the following . . .

Section 7.3. Excused Absences Without Pay:

. . .

ARTICLE IX - DISCIPLINE AND DISCHARGE

Section 9.1. Except for misappropriation of funds and other flagrant violations of policy. discipline shall be progressive in nature and shall follow these steps:

STEP 1 - Oral reprimand;
STEP 2 - Written warning;
STEP 3 - Second (2nd) written warning
STEP 4 - Suspension up to five (5) days:
STEP 5 - Termination.

It is understood that progressive discipline is a tool to help employees correct their mistakes and become better employees. At each step of the progressive discipline, the supervisor must point out the problem that led to the discipline and point out ways for improvement.

Each step of the discipline and discharge procedure must be documented in writing with a copy to the employee, the union, and the employee's personnel file.

Section 9.2. No employee having seniority shall be disciplined or discharged without just cause. With the exception of misappropriation of funds or a security violation, any employee discharged shall be given two (2) weeks' pay. A

security violation shall occur when an employee fails to maintain and protect the confidentiality of the fund information and records.

Section 9.3. Disciplinary action imposed under the terms of the "Alcohol and other Drug Policy" will be imposed starting with **Step 4** in **Section 9.1** of this Agreement.

Section 9.4. An employee who has received discipline under this Article and does not have any continuing infractions of a similar nature in the following twenty-four (24) months shall have such disciplinary notice removed from her/his file.

. . .

ARTICLE X – GRIEVANCE PROCEDURE – ARBITRATION

Section 10.1. A grievance shall be any dispute over the interpretation or application of this Agreement.

. . .

Section 10.2. Any grievance which arises shall be processed in the following manner:

. . .

Step 6. The arbitrator shall have no authority to add to, subtract from or modify the terms of this Agreement, but shall only have authority to interpret this Agreement and apply it in the specific case presented to it. . . .

ARTICLE XVII – MANAGEMENT

Section 17.1. The Union recognizes that the management of the office and facilities and the direction of the working force, including the right to direct, plan and control operations and establish and enforce reasonable work rules, the right to . . . suspend or discharge employees for lack of work or other legitimate reason . . . are vested exclusively in the Employer. . . . The Employer, in the exercise of its rights hereunder, shall not violate or fail to comply with the express purpose of a specific provision or provisions of this Agreement.

BACKGROUND

Dawn Martin, the Union's Business Manager, filed a "Grievance Report" form, dated January 2, 2004, which states the "Issue Involved" thus:

> Unilateral implementation midterm of an Attendance Control Policy . . . by . . . management that changes the terms and conditions of employment, a mandatory subject to bargaining. In addition and in the alternative, the Policy is not "reasonable work rule" allowed for under the management rights clause of the CBA.

The form states the following as the "Statement of Grievance":

> In a July 2, 2003 memo, BTUPTF management unilaterally implemented "Disciplinary Procedures for Absenteeism" upon Local 9 employees. This matter was grieved on July 9 and 16, 2003, and was set for arbitration on November 20, 2003. On November 19, 2003, BTUPTF management backed down and withdrew the policy, and the arbitration was cancelled.
>
> Now on December 19, 2003, BTUPTF Management posted and handed out the Policy to all employees. Under its own terms, it took effect January 1, 2004. The provisions of the Policy are similar to the July 2, 2003 memo, and are likewise in direct conflict with provisions bargained for under the CBA. . . .

The form states Articles VII and XVII as the governing contract provisions, and seeks the following "Proposed Remedy":

1. BTUPTF will immediately rescind the Policy.
2. BTUPTF will recognize that the subject of the Policy is a mandatory subject to bargaining.
3. BTUPTF, if they still perceive a problem with attendance, will address this matter during the bargaining window before the end of the CBA, approximately four months from now in May, 2004, and not before.

The Policy Established In the July 2, 2003 Memo

The Employer stated this policy in a memo from Michael Gantert, the Employer's Fund Director, which reads thus:

DISCIPLINARY PROCEDURES FOR ABSENTEEISM

If an employee misses more than 6 (six) days in each of two consecutive calendar years, they will receive a verbal warning upon more than 6 days of the second year. If that employee has more than 10 (ten) absences in that second year, they will receive a written warning.
If, for a third consecutive year, an employee has more than 6 (six) sick days in the calendar year, they will receive a second written warning.
If, in that same third year, the employee has more than 10 (ten) absences, they will be suspended for 5 (five) days without pay.
If that employee has more than 11 (eleven) absences in that third consecutive year, they will be terminated.
[Note: All steps of the disciplinary procedures must be confirmed in writing with a copy to the employee's personnel file]

The memo is referred to below as the Old Policy.

The Policy Implemented On January 1, 2004

This policy, referred to below as the Policy, reads thus:

ATTENDANCE CONTROL POLICY

Regular and punctual attendance is an extremely important contributor to the efficient performance of Fund operations. It is also an essential function of every employee's job. Employee absenteeism creates unfair burdens on those employees with dependable attendance. Fund business and work cannot get done if employees are not around to do it.

The Fund has observed an unacceptable level of absenteeism. In fact, Fund employees have raised concerns about the burdens placed on them by the absenteeism of others. As a response to these concerns, and in an effort to reduce absenteeism and improve the efficient performance of Fund operations, the Fund is implementing an Attendance Control Policy ("Policy").

The Policy will take effect January 1, 2004. It is designed to provide clear and reasonable expectations for attendance, and describes the consequences for not meeting such expectations. The Policy's use of a point system, with specific types of absences and exceptions, will ensure that it will be administered in a fair and uniform manner.

Nothing in the Policy is intended to, nor actually does, contravene the terms of the Collective Bargaining Agreements ("CBAs") between the Fund and OPEIU Local No. 9. Specifically, nothing in this Policy is intended to alter an employee's ability to earn sick time in accordance with Section 7.1(A) of the CBAs, or bank sick time under Section 7.1(B).

For purposes of this Policy, an unexcused absence (hereafter "Unexcused Absence") is defined as any partial (at least one (1) hour) or full day absence occurring on an employee's scheduled work day that does not fall into one of the following exceptions:

(1) Approved vacation days taken under Article IV.
(2) Approved holidays taken under Article VI.
(3) Approved bereavement leave taken under Section 7.2.
(4) Approved leaves of absence taken under Section 7.3.
(5) Approved leaves of absence under the Federal Family and Medical Leave Act if supported by required medical certification.
(6) Absences caused by occupational injuries that are supported by medical certification.
(7) Approved absences for Union business under Article VIII.
(8) Approved jury and witness duty absences under Article XII.
(9) Approved military leave.
(10) Any absence that is supported by the employee's submission of a written medical certification excusing such time off, if the certification is presented to the Fund within three (3) calendar days of the absence.* This medical certification must be signed by a physician, physician's assistant ("PA"), psychiatrist, osteopath, dentist, chiropractor or podiatrist.

Each partial or full day of absence, unless falling into one of the exceptions identified above, will be considered a separate Unexcused Absence. When an employee has incurred four (4) Unexcused Absences in any rolling twelve (12) month period, the Fund will follow the progressive discipline steps outlined below:

Number of Unexcused Absences	Progressive Discipline Step
4th absence	Oral reprimand (with documentation to file)
5th absence	Written warning
6th absence	Second written warning
7th absence	Suspension of up to three (3) days
8th absence	Termination

> In accordance with Section 9.5 of the CBAs, if, after receiving a progressive discipline step the employee does not incur another Unexcused Absence for twenty-four (24) months thereafter, the progressive discipline step notice will be removed from his or her file.
>
> *However, any no call, no show absence of three (3) or more consecutive workdays will be considered a voluntary resignation.

Events Preceding the January 1, 2004 Implementation

> The Union formally grieved the Old Policy, requesting the following "Proposed Remedy":
>
> We request that the July 2, 2003 memo . . . be entirely withdrawn and all action taken under it be reversed, as it is inconsistent with the previously bargained for rights under the Collective Bargaining Agreement.

The parties were unable to resolve the grievance in the grievance procedure, and an arbitration hearing was set for November 20, 2003. On November 19, 2003, the Employer's counsel sent a facsimile, with an accompanying letter, to the Union and the Arbitrator, stating:

> Please be advised that the Building Trades United Pension Trust Fund will not be appearing at the hearing set . . . for November 20, 2003. There is no need for the hearing and the hearing should be canceled. The Fund has decided to withdraw the "disciplinary procedure for absenteeism" that is the subject of the Union grievance. In addition, it will remove all warnings issued thereunder after July 2, 2003 from the files of the affected employees. Please note that the Fund admits no wrongdoing or violation of the collective bargaining agreements by taking this action, and expressly denies the same. In addition, this action is taken on a non-precedent setting basis. . . .

The hearing was cancelled, and the Union's counsel responded in a letter dated November 20, 2003, which states:

> I am in receipt of your letter dated November 19, 2003. In that letter you indicate that the . . . Fund . . . has withdrawn the disciplinary procedure for absenteeism that was the subject of OPEIU Local #9's grievances. You also made reference to removal of all disciplinary warnings dated after July 2, 2003. In our conversation after my receipt your letter, you agreed that the Fund will remove all such disciplinary references (including all written and documented verbal reprimands) from the employees' personnel files by the end of next week.

> As your disciplinary policy for absenteeism has now been rescinded, and the discipline issued to employees under it has been extinguished, we believe we are in agreement that this matter has been resolved.
>
> This letter shall constitute the parties' letter of agreement concerning the terms on which our previous grievances have been resolved. . . .

The Employer did not respond to this letter.

In an e-mail to the Union's counsel dated December 8, 2003, the Employer's counsel stated:

> . . . attached is a draft of the . . . Attendance Control Policy. This Policy will be issued next week . . . pursuant to the Fund's management rights under Article 17 of the CBAs. This is a hard deadline. The Policy will be effective January 1, 2004. Although the Fund has no obligation to bargain over its terms, I am sending it to you . . . as a courtesy notice, and to provide the Union an opportunity to offer any comments on it that it wishes. The Fund may or may not modify the Policy based on any comments or suggestions the Union may make.

The attachment was a copy of the Policy, dated December 15, 2003, labeled as a "Draft". Counsel for the Union responded in a letter dated December 15, 2003, which states:

> . . . You . . . indicate that the Fund is going to unilaterally implement this attendance control policy on January 1, which is less than three weeks from today. This approach is not only disturbing but counterproductive. It will also create yet another contentious legal dispute that never had to be.
>
> As you are well aware, we just went through an arbitration proceeding litigating this exact same issue. The Fund attempted to unilaterally implement an attendance control policy during the term of the collective bargaining agreement, and further implemented and imposed discipline under the unilaterally implemented policy. The union resisted this effort, and through counsel pointed out to you that the conduct involved an illegal breach and/or unilateral midterm modification of the collective bargaining agreement, and further indicated that we believe we would prevail in arbitration. We also directly informed you that we believe the approach is counterproductive and unnecessary in view of the fact that the union would be willing to discuss this matter at the appropriate time provided for under the National Labor Relations Act, i.e., the window period preceding the expiration of the collective

> bargaining agreement. The window period for negotiation would commence in June 2004. We even indicated that, assuming good faith on the part of management, we would be willing to discuss this matter earlier than the window period. . . .
>
> We are respectfully asking that the Building Trades United Pension Trust Fund reconsider its position. . . .
>
> . . . We are not against the concept of a reasonable attendance policy. However, the way we get there matters for us no less than it matters for every organized worker in any workplace, anywhere in this country. Like any union, we will take all legal action necessary to ensure that the law is upheld and that our members are not pummeled into submission through unilateral midterm edicts and decrees.
>
> Assuming you will withdraw this policy pending further discussions, we are prepared to meet with you with reasonable notice to address these issues. . . .

In a letter and a facsimile to Martin dated December 19, 2003, Gantert stated:

> Please be advised the attached Attendance Control Policy is being implemented effective January 1, 2004.
>
> OPEIU Local 9 members have been provided a copy of said policy on the date of this letter, and a copy has been posted in the employee lounge.
>
> This policy is being implemented in accordance with Article XVII, Section 17.1 of the CBAs . . . for the auditing and clerical staff.

In an e-mail to auditing and clerical staff dated December 22, 2003, Gantert offered to meet "in the conference room at 2:00 to address your concerns" regarding the Policy. No staff came.

An Overview Of Witness Testimony

Dawn Martin

Martin has served as the Business Representative for auditing and clerical units since January 1, 2003. She stated that the Union opposed the implementation of the Policy for it regulated the used of sick leave in a manner not contemplated by the labor agreement. Section 7.1(A), unlike Section 7.1(B), does not mention sickness or expressly limit the use of accrued leave. The significance of this is reflected in the Employee Manual, which states:

> From time to time it may be necessary for you to be absent from work. BTUPTF is aware that emergencies, illnesses, or pressing personal business that cannot be scheduled outside your work hours may arise. Sick days and personal days have been provided for this purpose as specified in the Labor Contract.

She acknowledged that the Employee Manual also states:

> The policies in this Manual are intended to be guidelines. The terms of the labor contract . . . supersedes this Manual. Policies in this Manual, not governed by the labor contract, may be changed, deleted, suspended or discontinued, at any time without prior notice.

She was not present for the negotiation of the contracts governing the grievance. The labor agreements governing each unit do not provide personal leave, and Martin stated that the Employer has permitted the use of sick leave for personal business for at least ten years even though the labor agreement does not expressly authorize it. The Union does not, however, encourage employees to use sick leave for personal recreation.

Martin stated that the Policy was unreasonable because it violated other agreement provisions including its creation of a progressive discipline system in spite of the provisions of Section 9.1. That one of the purposes of sick leave is to provide income protection did not alter her view of the Policy's impact. Even if the Policy could be seen as a reasonable work rule, she viewed bargaining over it as a common courtesy, and did not see how it could be reasonably created without Union input. She acknowledged that the Union did not make any substantive proposal to modify the Policy prior to its implementation.

The Employer maintains a very good health plan, which will cover an employee's visit to a physician, including a visit to obtain a work release. She acknowledged that the Union has complained that the Employer has inconsistently disciplined employees regarding attendance problems. She was aware that employees had received oral and written warnings for excessive absenteeism even though they had received sick pay for the absences. Such discipline preceded the implementation of the Old Policy. She acknowledged that the Employer had implemented a Technology Policy, which the Union did not grieve and considers a reasonable work rule. The Technology Policy states in several places that an employee violating the policy "will be subject to discipline, up to and including termination." She was aware that the Employer had terminated one employee for a violation of this policy.

Judy Burkhalter

Burkhalter has worked for the Employer for roughly thirteen years, and served as a Union Steward from 1993 until 2003, participating in collective bargaining in 2000 and for the 2003-2004 contract that governs the grievance. The Employer did not, during those negotiations, propose limiting the use of sick leave days. She acknowledged that the Employer did not bargain with the Union concerning the Technology Policy, which the Union has neither grieved nor challenged as an unfair labor practice. Unit employees were virtually unanimously concerned about the Employer's conduct in implementing the Policy after having rescinded the Old Policy. She, and fellow workers, regarded the Policy as an ongoing threat to their jobs.

Bob Bodus

Bodus has worked for the Employer for roughly seven years. He turned in a "Loss Of Time Report" on March 16, 2004, which states:

> Being the primary individual responsible for my well being and health, I decided that on Monday morning March 15, 2004 I was too unwell to manage a day in the office.
>
> In the interest of my recovery from a head and body cold, as well as containing germs and the annoyance of hacking coughs, sneezes, and moaning I remained in bed.
>
> After recent conversations with my primary care physician and specialists, it was concluded that I know when I am well or not and must act accordingly when it comes to remaining home from work or other activities.

Bodus did not try to get a medical excuse for the absence. He already had an appointment to see his physician on March 19, and on that date received a "Verification of Medical Care" form executed by his physician's nurse practitioner. He turned the form in to the Employer. It states:

> Mr. Bodus is treated for a chronic condition with flares and exacerbations of treatment. In my estimation he is qualified to determine his ability to work daily. Thank you.

The Employer did not accept this form as an excuse for the March 15 absence. Bodus responded in a March 19, 2004 letter to Gantert, which states:

> . . . If there is an issue of honesty, integrity, or trust you may have with your employees, it surprises me that this is not voiced directly and dealt with in an open dialogue. Instituting a policy that appears to require third party verification of illness and time to recover, in my estimation breaks down any semblance of trust . . . and leaves me feeling harassed.

Bodus took April 14 and 15, 2004 off, turning in a "Loss Of Time Report" stating "cold/flu" as the reason. In his view, his March 19 "Verification of Medical Care" should have excused the absence. He had an already scheduled appointment to see his physician on April 20, 2004, and saw no reason to call the physician prior to that to obtain an excuse satisfactory to the Employer. The Employer treated the absences as unexcused. Bodus acknowledged that he has complained about excessive absenteeism on the part of other unit members.

Michael Gantert

Gantert oversees the day-to-day operations of the Building Trades United Pension Trust Fund, which is a capped benefit plan that accepts and processes contributions made on behalf of employees of eleven different craft unions. The Employer issues over seven thousand pension checks per month. Gantert reports directly to the Fund's Board of Directors.

Section 17.1 has been in effect since at least July of 1997. The Employer has implemented, without prior bargaining, a number of work rules under that section, including the Technology Policy. The Technology Policy governs employee use of the Employer's systems and equipment, has been in effect since March of 1999, and prompted the termination of an employee in 2001.

Gantert informed his department heads that they should distribute the Policy to employees and make themselves available to answer employee questions. He set the implementation date as January 1, 2004 to permit these discussions. The Policy was also posted in the employee lunchroom.

In Gantert's view, the Policy flowed from problems securing regular attendance from at least certain employees. In May of 2000, Gantert and Union representatives discussed absenteeism problems in some detail during negotiations. The discussions were prompted by a Union proposal "that employees could have their unused sick leave paid into their pension plan at one half of their salary" (Tr. at 156). The Employer, under then in force regulations could not have complied with the proposal. The Employer made a counter-proposal, but the proposal did not produce any change in the agreement. After the negotiations closed, Gantert voiced his disappointment with the then-incumbent Union representative, who acknowledged that the abuse of sick leave was concerning unit members who did not abuse the benefit. Gantert understood the Union's position to be that an attendance control policy should be done as a function of the Employer's right to implement policy.

That the Employer has a small work force heightens the need to address excessive absenteeism. The work force, thirteen in the clerical unit and two in the auditor unit, is not sufficiently large to permit the sort of overlap in job duties that permits easy coverage of unanticipated absences. Gantert stated that the Employer, prior to the Policy, experienced sick leave usage that averaged more than seven days annually, and included evident increased usage on Mondays and Fridays and "the day following their bowling night" (Tr. At 162). Gantert was also concerned by the use of partial days at the end of a work day by the auditor staff. The patterns were sufficiently pronounced that Gantert heard reports of employee complaints about the abuse of sick leave. Gantert was particularly troubled by Cindy Lade-Paquin's use of sick leave to travel to a casino in Michigan, and by Tami Haluzak's use of a sick day "to go to Cicero to pick out her granite countertop" (Tr. At 170). Particularly troubling was that these examples occurred in the hiatus between the rescission of the Old Policy and the implementation of the Policy.

Gantert stated that the point system would make the administration of the Policy uniform. The Policy did not deny the use of sick leave, and even permitted employees to use more than twelve days annually. All it required was a doctor's certification, and that certification costs the employee nothing, provided the employee uses a doctor from the United Healthcare panel.

He confirmed that the Employer had, prior to the Old Policy, disciplined employees for excessive use of sick leave.

Charles Baranowski

Baranowski has served as the Employer's Financial Manager for seven of his ten years of employment. In that position, he oversees the audit program and serves as pension fund administrator. He directly supervises seven employees, including Eva and Lade-Paquin. On December 19, he distributed the Policy to the employees he supervises, and offered to address any questions they had. In his view, absenteeism rates have dropped noticeably since January 1, 2004.

He stated that absenteeism was a problem prior to the Policy. His 2002-2003 evaluations of Eva and Lade-Paquin, for example, include specific note of their use of sick leave during the evaluation year. Eva used nineteen days and Lade-Paquin used 12.86. Beyond this, he stated he has confronted specific abuse of sick leave. Lade-Paquin, for example, called in sick for the afternoon of Friday, December 5, 2003, and for the full day the following Monday. Baranowski learned from a co-worker that Lade-Paquin had been at a casino in Michigan throughout the intervening weekend. He also overheard an employee, Debbie Williams, explain when she reported for work on a Tuesday how she had done bowling the previous evening, which followed a work day for which she claimed sick leave. She is the

fourth employee whom he has heard relate a similar story. He has also had trouble with his audit staff using sick leave after reporting for work. This is particularly troublesome if the sickness prevents the completion of an on-site audit, which is a difficult project for the Employer to coordinate with contractors. He has attempted to discuss the matter with Burkhalter, who has acknowledged the problem but has noted to him that the Union must protect its own.

Cindy Lade-Paquin

Lade-Paquin stated that she left work on December 5, 2003, with "a major headache" (Tr.at 209) at 3:15 p.m., forty-five minutes before the scheduled end of her shift. She left on a trip to a casino the following day, at 7:00 a.m. She returned the following Sunday at 8:00 p.m. She booked the trip two to three months prior to December. She testified she got ill while at the casino, and felt worse on the return trip. She felt even worse on Monday morning and called in sick. She made the trip with a number of people, including Sharon Price, who is Baranowski's Secretary. She acknowledged she has "probably" used sick leave when not ill, and that sick leave is meant to be taken only when an employee is sick.

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

THE PARTIES' POSITIONS

The Union's Brief

The Union contends that the ultimate issue is whether the Policy "is enforceable under the Contract." This issue has a number of aspects, including the stipulated dispute regarding Articles VII and XVII, the "precedential value" of the Employer's withdrawal of the Old Policy, and the application of "Sections 8(a)(5) and 8(d) of the National Labor Relations Act." Because the possibility of Board "deferring to the Arbitrator in this matter is high", the statutory issues need to be resolved or else "a legitimate question of law will have gone unconsidered."

A "fair, common-sense interpretation of the Contract will not allow the Fund to implement and enforce the Policy." Because Article VII "lays out the sum total of the agreed-upon restrictions on sick leave for the Union's members" it follows that unbargained "restrictions put on the members' use of normal sick time cannot be sustained." More specifically, the Union notes that Article VII addresses "normal" and "banked" sick time. That the contract treats these categories differently is key to its interpretation. Section 7.1(A) "lists **no** restrictions" on the use of twelve days of sick leave. Rather, the contract contains express restrictions in Section 7.1(B), which governs banked sick leave. This should "lead an interpreter to believe that unilateral additions to the restrictions on normal sick leave would be contrary to the intent of the drafters."

The employee handbook states, "sick days and personal days have been provided . . . as specified in the Labor Contract." Since the Agreement is silent on personal days, it follows that the absence of restrictions on normal sick leave contemplates their use for personal reasons. Employee testimony to the contrary has no weight. The Employer's legitimate right to "run a solid business" cannot trump "collectively bargained-for rights". The Employer should not be awarded in arbitration a right it never secured in collective bargaining. Thus, "normal sick leave with no restrictions . . . cannot be taken away through a unilateral work rule."

Nor is the Policy reasonable under Article XVII. Ignoring the provisions of Article VII, the judgment of when to consult a doctor is a matter subject to a variety of interpretations. Under the policy, however, it can be required for any illness, no matter the severity or length. This can not be considered reasonable, since it "is a waste of time and resources, as well as a demeaning shot to one's dignity, to be made to (provide a) sick note from a doctor for . . . a temporary condition." In fact, the Policy may do no more than prod employees to procure a meaningless slip from their physician. This cannot be considered reasonable.

The Employer's November 19 letter "conceded to each of the remedial demands of the Union" and the Union "decided to accept the same as a settlement offer in full." Thus, the resolution of the earlier grievance "must carry a precedent in those areas that are similar to the current grievance." Any other conclusion undermines the bargaining process, for no agreement can ever be final. The grievance regarding the Old Policy, as the grievance regarding the Policy, questioned "whether the (Employer) could restrict the use of bargained-for sick leave." The Employer's unilateral withdrawal from that process should not be rewarded. More specifically, the Union argues that the Old Policy, like the Policy, creates a new progressive discipline system in violation of Article IX. The creation of a medical excuse distinguishes the Old Policy from the Policy, but this is a distinction without a difference.

More significantly both policies "were implemented unilaterally, and they both restrict and punish the use of bargained-for sick time." Since sick time is a mandatory subject of bargaining under the National Labor Relations Act, the Employer's refusal to bargain violates the Act. The Union, on December 15, 2003, offered to discuss the Policy. The Employer, "without any consultation", in violation of the Act, "continued to implement . . . the Policy on January 1, 2004, as it had planned all along."

The Union concludes that the Arbitrator should "invalidate the Policy, rescind any discipline issues under the policy, recognize that this is a mandatory subject of bargaining, and order that any similar future unilaterally-imposed policy is null and void." Any other conclusion would allow the Employer to "escape its obligations under the Collective Bargaining Agreement and the National Labor Relations Act."

The Employer's Brief

The Employer contends that the grievance is "a challenge to an employer's inherent management authority to implement a reasonable work rule requiring regular attendance from its employees." Arbitration commentary and specific awards underscore that an employer has this authority. The Employer's authority to unilaterally implement the Policy "is bolstered by the language contained in Section 17.1". Under that section the Employer has the "exclusive right" to "establish and enforce reasonable work rules." No other agreement provision restricts this right, and the Union's conduct regarding the Technology Policy underscores this. It follows that the Employer had the authority to implement the Policy without prior bargaining.

The Employer's withdrawal of the Old Policy is irrelevant to this conclusion. There is no evidence that the withdrawal of the Old Policy in any way implied the Employer would not establish another one. The Union's grievance regarding the Old Policy did not seek "that the Fund be ordered to bargain over any future attendance policy, or be precluded from ever implementing another one." The November 19, 2003 letter withdrew all discipline issued under it, but noted the Employer acted "on a non-precedent setting basis." The issuance of "the completely different" Policy is not affected by the Employer's actions regarding the Old Policy. The two policies have "significant differences" including how discipline is imposed, what discipline can be imposed, what absences are excused, and the level of detail. Thus, the Employer did not re-issue the Old Policy, but created a new and more comprehensive one.

Because the Policy is reasonably related to a legitimate business objective of management, it is reasonable. Arbitral precedent supports the reasonableness of no-fault type attendance policies to secure the legitimate expectation of regular employee attendance. The Policy is "fair on its face." It does distinguish between excused and unexcused absences, taking into account "many of the absences that an employee is entitled to take under the CBAs". It "counts absences on a rolling 12-month period" and incorporates the protection of Section 9.4. It "tracks, virtually verbatim, the disciplinary steps outlined in Section 9.1". It is "extremely lenient", allowing employees "to take and utilize all of their contractually entitled days off under the CBAs without discipline, including sick days." It permits "numerous opportunities for an employee to avoid being charged with an unexcused absence under it". It is, in sum, reasonable.

The Union's arguments do not undercut this conclusion. There is no evidence the requirement of a medical certificate of illness will cost an employee anything. In fact, the Policy permits an employee three days to obtain a certificate. Because the Employer has proven employee abuse of sick leave, the reasonableness of the medical certificate cannot be doubted. Arbitral precedent confirms this. That employees may fear the Policy may cost them their job cannot be used a basis to find it unreasonable. Employees with regular attendance and who document absences have nothing to fear from the Policy in fact, and treating an employee's subjective reaction to a work rule as determinative of reasonableness would void any conceivable

regulation of the workplace. That employees, such as Bodus, find the Policy paternalistic cannot void the rule. His concerns, if well founded, ignore employee abuse of sick leave "necessitates implementation of this rule." Nor can Union arguments concerning the Policy's impact on minor illnesses such as a cold be considered persuasive. A cold significant enough to prevent work should be treated. An excuse demands no more than a phone call. The "Union's 'cold scenario' should be given a frosty reception by the Arbitrator."

Since the Policy "does not violate any CBA provision or law" it should be upheld. Union concerns regarding Article IX did not arise until the hearing and thus "should be rejected as beyond the scope of the grievance" and as untimely. Even if considered an appropriate subject for interpretation, the Policy does not violate Article IX. That the Policy "is slightly more lenient on offending employees" means only that it falls within the discretion granted the Employer in Section 9.1. Beyond this, the longer suspensions authorized in Article IX are ill-suited to the purpose of the Policy, which is to secure regular attendance. Beyond this, the Technology policy has different disciplinary provisions than Article IX, and the Union accepted its implementation as a work rule.

Nor does the Policy violate Article VII. The Policy permits the use of twelve sick days without discipline, provided appropriate medical certification is given. Section 7.1 does not shield an employee from discipline, without regard to the Policy. This is established by past practice and by arbitral precedent. Beyond this, Section 7.1 has no heading, and the only express treatment of excused absences is found in Sections 7.2 and 7.3, and in the heading of Article VII. Thus, the contract indicates "the parties drew a distinction between the unexcused sick leave absences under Section 7.1, and the 'excused absences' under Sections 7.2 and 7.3." Ultimately, the purpose of sick leave "is to provide 'income protection' to an employee who is off work because of illness." The Policy does nothing to detract from this.

That the employee manual refers to absences for personal reasons has no bearing on the grievance. The manual is subject to the terms of the labor agreement. Not even the Union's witnesses believe that sick leave is synonymous with personal leave. Beyond this, the language of Article VII focuses on "sick" leave, without any mention of the term "personal". Nor does Section 7.1 contain any language prohibiting the Employer from seeking a written medical excuse. That Section 7.1(B) contains restrictions on the use of sick leave has no bearing on this, since the silence of Section 7.1(A) cannot persuasively be read as a limitation on the Employer's authority.

Since the Union cannot show that the Policy violates any part of the labor agreement, it follows that the Policy conforms to the requirements of Article XVII. Since the Policy is a reasonable work rule, the grievance must be denied.

The Employer's Brief On The Impact Of Secs. 8(a)(5) And 8(d)

The Employer notes that "it is important to identify what the Union is not claiming with respect to Section 8(a)(5) and 8(d)." The Union's arguments challenge the Employer's implementation of the Policy effective January 1, 2004, and do not contend that the Employer's withdrawal of the Old Policy violates the NLRA.

The implementation of the Policy did not violate the NLRA. The Union's arguments ignore that Section 17.1 establishes that it fully exercised its right to bargain, or waived it for the duration of the agreement. This was confirmed in testimony at hearing. More significantly, CHICAGO TRIBUNE CO. V. NLRB, 974 F.2d 933 (7th Cir., 1992) establishes the legal basis of this conclusion, as does NLRB V. UNITED STATES POSTAL SERVICE, 8 F.3d 832 (D.C. Cir., 1993). Section 17.1 thus establishes either that the Union "already exercised its bargaining right" giving the Employer "the power to implement the reasonable work rule in question", or that it "clearly and unmistakably waived its right to bargain over the implementation of the Policy". Testimony at hearing confirms this, and "the alleged violations of Section 8(a)(5) and 8(d) should be rejected."

DISCUSSION

The stipulated issue questions whether the Policy violates Articles VII and XVII, and appears tightly focused. Given the arguments, however, it must be given some breadth. As noted above, the issue has contractual and statutory ramifications. My analysis of the issue will first address the parties' arguments as if they were purely contractual.

The contractual dimensions of the stipulated issue spread beyond Articles VII and XVII, since Section 17.1 demands that Employer exercise of its rights shall not violate other agreement provisions. The Union's concerns regarding Article IX fall within this reference, as do the provisions of Article X, since the grievance procedure is the vehicle through which conflicts between agreement provisions are addressed.

The Union asserts the grievance demands separate consideration of the Employer's withdrawal of the Old Policy. This issue does not pose a matter beyond the stipulated issue, since the Policy cannot be considered a "reasonable work rule" under Section 17.1 if the withdrawal of the Old Policy had binding force.

The Union's case starts with Article VII, arguing that the Policy is unreasonable because it restricts sick leave beyond its bargained purpose. Article VII distinguishes between "current sick leave", which is established by Section 7.1(A), and "unused (banked) sick leave", which is established by Section 7.1(B). The Union contends that current sick leave is unrestricted, while banked is tied to "sickness" or to "illnesses", thus establishing that since

the parties established no restrictions on current sick leave, an arbitrator should not imply them.

The Union's reading of Section 7.1 is unpersuasive. The language of the two subsections does not support the Union's inference. Section 7.1(A) does not address sick leave usage. Rather, it establishes how "(e)mployees shall receive paid sick leave". Section 7.1(B) impacts how current and unused sick leave can be used. Its restrictions cannot, however, be limited to one form of sick leave. Under Section 7.1(B), banked sick leave is available only for a "sickness" greater than two continuous days. It is available for use in daily increments only for "illnesses" that produce a physician-prescribed treatment plan. It does not follow from this that "sickness" and "illnesses" refer only to banked sick leave. Rather, the terms apply to both types of sick leave. For example, since Section 7.1(B) makes banked leave available only for a "sickness" exceeding two continuous days, a "sickness" of two consecutive days demands the use of current sick leave. Thus, the terms "sickness" and "illnesses", although stated in Section 7.1(B), apply to both subsections of Section 7.1.

This falls short of establishing that use of sick leave must be tied to "sickness" or "illnesses" under Section 7.1(B), but establishes that the Union's inference has no support in the terms of either subsection of Section 7.1. Nor does the evidence supply support outside of contract language for the Union's inference. Past practice and bargaining history are the most persuasive guides to address contractual ambiguity, since each focuses on the conduct of the bargaining parties whose intent is the source and goal of contract interpretation. Here, however, neither guide is available. Martin's testimony indicates the Employer has permitted sick leave use for reasons other than illnesses. Gantert's and Baranowski's testimony indicates the Employer has disciplined and has adversely evaluated employees for the excessive use of sick leave. This testimony falls short of establishing the shared understanding that makes past practice binding. Nor is evidence of bargaining history helpful. In past bargains, the parties either ignored the issue or failed to reach common ground on it. This begs the contractual issue.

The Manual will not support the Union's inference. By its terms, it is subordinate to the labor agreement. Ignoring the implications on the bargaining process cannot warrant its application to this dispute. The Manual refers to "sick days" and to "personal days", asserting each "have been provided . . . as specified in the Labor Contract." Does the absence of a contractual provision for personal leave mean there is no such thing, or that sick leave fills the void? If the latter, why does the Manual mention them separately? Focusing on the bargaining implications further complicates the matter. The Manual makes its provisions subject to change without notice, a process the Union asserts makes the Policy facially unreasonable.

In sum, the absence of clear contractual limitation of the usage of sick leave does not support the Union's inference. Reading Section 7.1 as a whole, Subsection (A) does not

address sick leave usage, but specifies an accrual system. Subsection (B) caps the accumulation of accrued sick leave, limits the accrual system regarding an employee "using unused sick leave" and specifies limits in two specifically identified contingencies regarding the use of banked sick leave. The subsections are thus largely silent on the limits of sick leave usage.

This silence does not support the Union's interpretation, while the title of Article VII supports the Employer's. Presumably, "Sick leave" means leave attributable to sickness. In any event, the absence of clear contractual language limitation leaves sick leave governed by other agreement provisions, including Articles IX and XVII.

Section 17.1 authorizes the Employer to "suspend or discharge employees for . . . legitimate reason". Sick leave abuse can constitute "legitimate reason", since attendance at work is crucial to employment relationship. Arbitral precedent affirms this:

> Provision for sick leave may be negotiated into the contract, or a sick leave plan or policy may be instituted unilaterally by management. In any event, management has a legitimate concern in preventing abuse of sick leave . . . *How Arbitration Works*, Elkouri & Elkouri (Sixth Edition, BNA) at 1085-1086, citations omitted.

Commentators have noted this can be the case even regarding "repeated absences, no matter how medically justified", *Labor and Employment Arbitration*, Bornstein, Gosline & Greenbaum, (Second Edition, Matthew Bender) at Sec. 14.03[2][a], pp. 14-12. In sum, the Union's contention that the Policy is irreconcilable with Section 7.1, because that section authorizes unrestricted use of current sick leave, is unpersuasive. The Employer's assertion that other agreement provisions permit the regulation of sick leave is persuasive.

This poses the Union's assertion that the Policy is unreasonable because it conflicts with other agreement provisions. This assertion poses the significant interpretive issue. Section 17.1 grants the Employer authority to create and enforce "reasonable work rules", but specifies that exercise of the authority must not conflict with other agreement provisions.

A reasonableness review of a work rule has two potential avenues. One focuses on the rule on its face and the other on the rule as applied. Even with witness testimony, the Policy's application is speculative. Thus, this review must be a "facial" review of Policy provisions.

As preface, it is appropriate to highlight what does not bear on this review. The Union's attempt to grant precedential force to the Employer's withdrawal of the Old Policy is not persuasive. A cursory review of the documents establishes that the Old Policy and the Policy are distinguishable. For example, the Policy states in greater detail what constitutes an

unexcused absence and what discipline will follow. There is no evident contractual basis under

Section 17.1 for the Union's assertion that a work rule cannot be amended. Nor is there a factual basis for the assertion. The Union's November 20 letter will not provide it. It addresses only the Old Policy, including the withdrawal of discipline issued under it. The Union's reading of the letter as a "settlement agreement" with precedential value ignores that the Employer issued the letter of November 19 on "a non-precedent setting basis", and that the Employer did not respond to the Union's letter of November 20. At most, the Union's letter was an offer to give the withdrawal precedential value. The Employer never accepted.

The Policy rests on a proven need. The scope of the proven need should not be overstated, but is unmistakable. Employee absence was proving divisive, as evident in Bogus' and Gantert's testimony. Gantert's testimony establishes that the Employer identified the need to address sick leave abuse to the Union in past bargaining, as well as during contract administration, and that the Union did not doubt the existence of a problem. Gantert testified, without contradiction, that the Employer has noted a pattern of increased sick leave usage on Mondays and Fridays. The casino incident was perhaps less egregious than Gantert and Baranowski originally thought, but it and other uncontroverted examples establish that at least some employees regard sick leave as a form of vacation. As noted above, this view is indefensible.

Thus, review of the Policy's reasonableness turns on whether it constitutes a reasonable means to control the abuse of sick leave. The force of the Employer's position can be underscored by noting that if the Policy reflected a statement of consistent, unchallenged administrative practice over time, it could have binding force as a past practice. The determinative distinction, however, is that past practice, to be binding, must reflect a shared understanding. The Policy is unilaterally imposed, and cannot be considered reasonable as applied, because it has no history of administration. To be reasonable on its face, it must be reconcilable to other agreement provisions.

As written, the Policy cannot be reconciled to the provisions of Articles IX and X. On the most general level, this reflects that the rule attempts to make the exercise of Employer discretion under Article XVII something other than a case-by-case exercise of discretion reviewable on its facts through Articles IX and X. More specifically, the Policy asserts that its point system "will ensure that it will be administered in a fair and uniform manner." This reference implies that nothing beyond a point system is required to authorize or to review the exercise of authority concerning an absence. The following sentence makes this implication unmistakable and fixed: "Nothing in this Policy . . . actually does . . . contravene the terms of the Collective Bargaining Agreements". The absence of any reference to the grievance procedure underscores that the Policy does not contemplate a case-by-case review of its application. The presence of a system of progressive discipline other than that stated in Section 9.1 underscores that the Policy is written as a stand-alone supplement to agreement provisions.

These references pose a burden the provisions of the Policy cannot support. The

conflicts range from minor to significant. A minor conflict arises in the Policy's reference to the removal of discipline from an employee's file under "Section 9.5 of the CBAs". Joint Exhibits 1 and 2 place the governing section as 9.4. This minor conflict prefaces, however, potentially larger contractual issues. Under Section 9.4, an employee who had received a second written warning concerning excessive absenteeism would have "such disciplinary notice removed from his/her file" if the employee did not commit "any continuing infractions of a similar nature for the next twenty-four months." This could mean the expungement of the second written notice or could mean the preceding oral and written warning also, if the Employer determined to treat the absenteeism as a discrete problem. The Policy states, however, that such an employee could not wipe the record clean through twenty-four months without an absence, but could wipe out only the notice of the second written warning. In the absence of the Policy, however the Employer chose to apply Section 9.4 would be subject initially to the Employer's discretion and then to Union challenge, potentially leading to review of Employer discretion under Article X. Potential conflict with the application of Article IX and X is evident.

Other conflicts can arise from a technical reading of Policy provisions. For example, does the use of "Approved" in Exception (2) mean that the Policy permits the Employer to deny holiday pay to an employee otherwise qualifying for a paid holiday under Section 6.1?

A technical reading of the Policy may not fatally flaw its provisions, but as noted above regarding Section 9.4, prefaces more significant issues regarding the application of Section 17.1. Eight of the Exceptions use the term "Approved". This reference states the exercise of Employer discretion on a case-by-case basis, but the Policy makes no allowance for case-by-case discretion by stating, prior any specific exercise of discretion, that nothing in the Policy contravenes the agreement. Does this mean Exception (3) could grant the Employer the discretion to grant bereavement leave to one employee due to the death of a grandchild, but deny bereavement leave to another employee because "Children" does not include a grandchild?

Similar considerations turn on references such as "required medical certification" in Exception (5), "medical certification" under Exception (6), or "written medical certification" under Exception (10). The record indicates "medical certification" will not pose an out-of-pocket expense for unit members. This cannot obscure the impossibility of attempting to apply the requirement by rote. The Employer asserts that the type of "written medical certification" supplied by Bodus on March 19 is insufficient to meet the demands of Exception (10). That I agree cannot obscure that the Employer exercised its discretion rather than applying a point system by rote. Even if the Employer accepts all medical certifications, an employee whose physician will issue a certification based on an after-the-fact or over-the-phone description of symptoms is put at a noteworthy advantage to an employee whose physician will not. Beyond

this, does Exception (10) preclude the Employer from questioning a physician's excuse that it

believes was procured by employee misrepresentation or through a joint effort to secure a paid and excused "mental health day"?

The conflict between rote application of the point system and other agreement provisions becomes more evident when the application of just cause is considered. The Agreement underscores that just cause is a case-by-case determination. Section 9.1 excepts "flagrant violations" of policy from progressive discipline. "Flagrant" demands a case-by-case evaluation of a policy violation, unlike the provisions of Section 9.3. That Section 9.3 specifies a type of conduct excepted from a five-step progressive discipline system presumes the exercise of discretion regarding other types of conduct. Arbitral precedent confirms that just cause demands a case-by-case review, see for example *Labor and Employment Arbitration*, *supra*. at Sec. 14.03[2][a], at pp. 14-6; GENERAL TIRE, 93 LA 771 (Groshong, 1989); or HARMON HOUSE CONVALESCENT CENTER, 109 LA 477 (Felice, 1997).

The implications on the Policy can be exemplified through its final sentence. If this sentence is stated in the labor agreement, neither party cited it. That the Employer may consider a three consecutive day absence without a call as a "voluntary resignation" is not unreasonable. However, under a just cause analysis, an employee who is incapacitated out of reach of a phone for three days beyond a vacation's approved length is presumably on a different footing than an employee who takes three days off to conduct a job search in the Milwaukee area without calling in. This is not to highlight the probability of either occurrence, but to highlight that the Employer, in the first instance, is expected to apply its authority after a review of the facts, and to have its discretion reviewed, as necessary, through the grievance procedure and potentially the application of the just cause provision. The Policy's final sentence is not unreasonable as a statement of management policy. However, to be reconcilable to the agreement, it must be applied on a case-by-case basis, then be subject to review under Article X, and potentially under Article IX.

None of this means the Employer can be faulted for failing to draft a Policy that encompasses any potential twist of fate. Rather, the Policy's failing is that it makes no reference to those provisions of the agreement, such as Articles IX and X, which can be flexibly applied to the Employer's exercise of discretion regarding the use of contractual benefits including sick leave. This failing becomes crucial as an interpretive matter because the Policy refers to rote application of a point system, including an express statement of a progressive discipline system not stated in Section 9.1, which the Policy states does not contravene the agreement. On a prospective basis, these references cannot, on their face, be reconciled to contractual provisions that demand the exercise of Employer discretion and its review on a case-by-case basis.

As I read the grievance in light of Section 17.1, the determination that the Policy as

written cannot be reconciled with other agreement provisions demands the conclusion that it cannot be enforced as a reasonable work rule. In light of the parties' arguments, it is appropriate to clarify the scope of this conclusion. I do not view the existence of the Policy's point system as an unreasonable statement of management policy, and it is at least conceivable that a point system can be reconciled with Articles IX and X. However, because there is no history of administration regarding the Policy, it must be reconcilable to Articles IX and X on its face. It is not. The Policy's express assertion that it "will be administered in a fair and uniform manner" is troublesome, arguably reading out of existence the case-by-case exercise of Employer rights under Article XVII, which is in turn reviewable under the provisions of a number of agreement provisions including those of Articles IX and X. The following sentence that states that nothing in the Policy "actually does" contravene the agreement is on its face irreconcilable to Articles IX and X. The assertion that future application of the point system is an inherently reasonable application of the Employer's authority under Article XVII reads the case-by-case analysis demanded by Articles IX and X out of existence.

These provisions stand in contrast to the technology policy, which the Union concedes is a reasonable work rule. The Technology Policy does not reduce the exercise of Employer discretion to the rote administration of a point system. Rather, it states a series of behavioral expectations coupled with a general admonition that employee failure to meet them will result in discipline. The policy's relationship to the agreement would be clearer if it noted the exercise of the Employer's disciplinary authority is subject to the case-by-case review of Articles IX and X, but the parties' arguments make it clear that the point is understood. This stands in contrast to the Policy, which purports on its face to establish the prospective application of the Employer's disciplinary authority and to do so based on the rote application of a point system that has no evident means of case-by-case review. The general reference to the authority to discipline contained in the Technology Policy also avoids the inherent difficulties posed by specifying by rule a progressive discipline system beyond that stated in Section 9.1. Contrary to the Employer, I do not read the general incorporation of the right to discipline in the Technology Policy to conflict with Article IX. Rather, the broad reference incorporates its more specific provisions.

Since the Policy is irreconcilable with Articles IX and X, it cannot be considered a reasonable work rule under Section 17.1, as stated in the Award below. The record contains no evidence of discipline and thus the Award does not address any. The Union seeks a determination that the Policy, as a mandatory subject of bargaining, is "null and void" under the National Labor Relations Act. No such relief is granted below, and would, in my opinion, conflict with Section 10.2, Step 6. The conclusions reached above reflect my view that a point-based attendance policy is theoretically reconcilable with Articles IX and X. This has no impact on the Award stated below. What may be theoretically possible has no bearing on the Policy before me. The Employer may choose to amend the Policy, may choose to bargain with

the Union prior to the expiration of the labor agreement, or may choose to address sick leave abuse through its authority to discipline without regard to the implementation of a work rule. The Award entered below does not attempt to address speculative issues, but calls on the Employer to cease and desist from enforcing the Policy. Going beyond this would strain the provisions of Section 10.2, Step 6.

This prefaces the parties' dispute on the interpretation of the National Labor Relations Act. Because the parties have stipulated that I should address the statutory issues, I will do so.

The statutory analysis concerns whether the Employer's unilateral implementation of the Policy violated the duty to bargain defined by Section 8(d) and enforced by Sections 8(a)(1) and 8(a)(5) of the NLRA. The Policy impacts sick leave and Employer's authority to discipline for just cause. Neither party questions whether the Policy reflects a mandatory subject of bargaining, and I assume for this grievance that it does, see RYDER/ATE, INC., 331 NLRB 889 (2000).

The statutory dispute concerns whether the Union has waived, through conduct or contract, its right to bargain on the subject. This potentially poses a split in authority. Certain Courts of Appeal, including the Seventh, have determined that whether the Union "clearly and unmistakably" waived its right to bargain is inapposite where "the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining". In such cases, the contract controls and the "'clear and unmistakable'" intent standard is irrelevant" CHICAGO TRIBUNE CO. V. NLRB, 141 LRRM 2209, 2212 (7th Cir., 1992), citing LOCAL UNION NO. 47 V. NLRB, 137 LRRM 2723, 2727 (D.C. Cir., 1991). The Board has not shared the willingness of these courts to find a waiver of bargaining on broadly written management rights clauses, and has proven reluctant to abandon the "clear and unmistakable" intent standard, see, for example, RYDER/ATE, INC., *supra.*, and REGAL CINEMAS, INC., 334 NLRB 304 (2001). Under the Board's approach, the assessment of waiver turns on "a variety of factors, including the contract language and bargaining history" RESTHAVEN CORPORATION, 154 LRRM 1024, 1027 (1996). The Board's approach has judicial approval, see *The Developing Labor Law*, (BNA, 2003 Cumulative Supplement at 247, n. 151). Arbitrators have expressed skepticism on the point, see, for example, RUSSELL, 114 LA 107, (Solomon, 2000), questioning whether the "contract coverage" approach can be reconciled with METROPOLITAN EDISON CO. V. NLRB, 112 LRRM 3265 (1983).

This record is not an appropriate vehicle to resolve this split in authority. Neither standard supports the asserted violation of the duty to bargain. The silence of Section 7.1 on issues of sick leave abuse, coupled with the provisions of Article IX and particularly Section 17.1, brings the grievance within the scope of the "contract coverage" analysis set forth in CHICAGO TRIBUNE. Beyond this, evidence of Union waiver is sufficiently strong to conclude the Union has waived bargaining on the attendance policy. The evidence of waiver is an

amalgam of the language of the agreement as well as Union conduct during bargaining and during contract administration. Gantert's unrebutted testimony establishes that the parties discussed excessive use of sick leave during collective bargaining in May of 2000. The discussions focused on whether employees who did not use sick leave could be rewarded, but the parties could not reach agreement. Gantert expressed his disappointment to the then-incumbent Union negotiator, who agreed that the problem was divisive within the unit. Gantert understood the Union's position to be that the Employer should implement as policy some means of curbing excessive use, a result that the negotiator thought might not be possible to achieve in bargaining. Sporadic discussions of the problem have continued since then, but have not risen to the level of contract proposals.

This sets the background to the Union's understanding of what the Employer can regulate as a work rule under Section 17.1. More specifically, the record establishes that the Employer implemented the Technology Policy without first bargaining it with the Union. The Union points to the Technology Policy as a reasonable work rule. The Technology Policy establishes behavioral expectations regarding the use of Employer technology, and states that violations are subject to discipline. The Employer has discharged a unit member who violated it.

The Employer's attempt to address sick leave abuse by work rule stretches Section 17.1 no further than did the Technology Policy, and no further than Gantert and at least one Union negotiator had already discussed. The Union's assertion that the policies are distinguishable subjects under a waiver analysis is, then, less than persuasive. The core of the Union's position is that the Policy, unlike the Technology Policy, conflicts with other agreement provisions, in violation of Section 17.1. The strength of the evidence supporting waiver should not be overstated, but establishes that the Union understood that sick leave abuse, like employee use of Employer technology, could be regulated by work rule, provided the work rule was reasonable.

Against this background, I do not believe the record before me supports a conclusion that the Employer violated Sections 8(a)(1) or 8(a)(5) of the NLRA by implementing the Policy. As noted above, this conclusion has no impact on the contractual determination whether the Policy is a reasonable work rule within the meaning of Section 17.1.

AWARD

The Employer's implementation of the Attendance Control Policy effective 1/04 does violate Article XVII of the applicable bargaining agreements.

As the remedy appropriate to the Employer's violation of Section 17.1, the Employer shall cease and desist from implementing the Policy.

Dated at Madison, Wisconsin, this 16th day of November, 2004.

Richard B. McLaughlin /s/

Richard B. McLaughlin, Arbitrator

RBM/gjc
6748