BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, and its LOCAL 578, UAW

and

OSHKOSH TRUCK CORPORATION of OSHKOSH, WISCONSIN

Case 22
No. 70698
A-6460

Appearances:

George F. Graf, Gillick, Wicht, Gillick & Graf, Attorneys at Law, 12725 Cardinal Crest Drive, Brookfield, Wisconsin 53005, for International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, and its Local 578, UAW, which is referred to below as the Union.

John A. Haase and **Jonathan T. Smies,** Godfrey & Kahn, S.C., Attorneys at Law, P.O. Box 13067, Green Bay, Wisconsin 54307-3067, for Oshkosh Truck Corporation of Oshkosh, Wisconsin, which is referred to below as the Company or as the Employer.

ARBITRATION AWARD

The Union and the Company are parties to a collective bargaining agreement that provides for final and binding arbitration. The parties jointly requested that the Wisconsin Employment Relations Commission appoint Richard B. McLaughlin, a member of its staff, to resolve Grievance 364-1-10, filed on behalf of Gina Beattie. Hearing on the matter was held on November 9, 2011, in Oshkosh, Wisconsin. Jennifer M. McLeod filed a transcript of the hearing with the Commission on November 9, 2011. The parties filed briefs and reply briefs by January 10, 2012.

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ISSUES

The parties essentially stipulated the issues for decision. The Union states the issues thus:

> Was there just cause for the discharge of Gina Beattie?
>
> If not, what is the appropriate remedy?

The Company states the issue thus:

> Was there just cause for the discharge of the Grievant?
>
> If not, what shall be the remedy?

I adopt the Union's statement of the issues.

RELEVANT CONTRACT PROVISIONS

ARTICLE 5 - GRIEVANCE PROCEDURE

. . .

The arbitrator shall have the authority to interpret and apply this Agreement to the extent necessary to adjudicate the grievance but shall not have the authority to add to, deduct from, or alter the provisions of this Agreement. The decision of the arbitrator, if within the scope of his/her authority, shall be final and binding on the parties . . .

. . .

ARTICLE 8 – SENIORITY

. . .

Section 2: An employee shall forfeit all of his/her seniority rights for any one of the following reasons:

. . .

b. When he/she is discharged for just cause.

. . .

ARTICLE 10 – LEAVE OF ABSENCE

. . .

2. Medical Leave of Absence

An employee with established seniority who is known to be ill, or suffers an occupational or non-occupational injury supported by satisfactory evidence will be granted leaves of absence for a continuing period not to exceed his/her seniority, or three (3) years, whichever is less. Before granting or continuing a medical leave, the Company may require the employee to provide complete medical information which substantiates the need for the leave, including all authorizations to doctors or hospitals having information regarding the employee's condition and the prognosis for recovery. The Company may require the employee to undertake a physical examination by a doctor selected by the Company. If there is a disagreement the two doctors are to attempt to agree on a third doctor, whose determination will be final and binding. If no agreement as to the third doctor is reached within ten (10) days after the written request is made to the doctors to attempt to agree on a third doctor, the third doctor shall be appointed by the President of the Winnebago County Medical Society. If the employee is a patient of the said President, the third doctor shall be appointed by the Secretary of the Winnebago County Medical Society. . . .

ARTICLE 13 - TERMINATION OF SERVICE

Section 1:

a. The Company may discharge or otherwise discipline an employee, without prior warnings, for willful or negligent misconduct of a serious nature. In all other disciplinary cases, before the Company discharges . . . the employee, the employee shall be given at least two (2) written warning notices for similar offenses (absence and tardiness are expressly included as examples of similar offenses) or three (3) written warning notices where there may be different types of offenses. Warning notices which are more than one (1) year old may not be used as one (1) of the two (2) or one of the three (3) warning notices required above, but are part of the employee's record and appropriately considered in the exercise of discretion in determining discipline. They may not be used as a step in the progressive discipline process. . . .

b. Where an employee has not been absent for all or any part of a day for a period of ninety (90) consecutive calendar days, his/her most recent absence is to be stricken from his/her record for disciplinary purposes.

. . .

ARTICLE 22 - MANAGEMENT RIGHTS

Section 1: It is agreed that the management of the Employer and its business and the direction of its working forces is vested exclusively in the Employer, and that this includes but is not limited to the following: to . . . discharge employees for cause . . . and to make, modify and enforce reasonable rules and regulations . . .

CODE OF CONDUCT
OSHKOSH TRUCK CORPORATION

. . .

SPECIFIC REQUIREMENTS

. . .

7. Adhere to Attendance Policy and notification requirements (see below).

NOTIFICATION POLICY

Notification Policy: When it is necessary to miss work employees must call into Oshkosh Truck Security prior to the start of their shift. . . . Failure to meet the notification policy requirement will result in disciplinary action as follows:

In a twelve (12) month period
First occurrence: Written warning
Second occurrence: Final written warning
Third occurrence: Termination

ATTENDANCE POLICY

Introduction: As with any company, Oshkosh Truck expects employees to be reliable and have regular attendance. However, Oshkosh Truck also understands that there are circumstances beyond an employee's control that can create the need to miss work. For this reason we have developed an attendance policy that allows employees to take time off for legitimate reasons when necessary. This policy is also designed to address employees whose absence become excessive.

This policy is a no-fault attendance policy with a point system. When an employee misses work, points will be accumulated. Employees should understand that having a small number of points on their record is not detrimental. In fact, Oshkosh Truck expects employees may miss work occasionally for legitimate reasons. However, when the points become excessive, the matter will be addressed.

Points Assessment: (exemptions are listed below)

. . .

Exemptions to the assessment of points: Qualifying family or medical leave, bereavement leave, military leave, scheduled vacation, jury duty, paid leave, A&S, and worker's compensation.

Discipline:

- Points are accumulated for a consecutive / rolling 12-month period. (Example: an employee receives a point on March 14, 2007. That point will be removed from their record after March 14, 2008)

7 points = Written warning
8 points = Final written warning
9 points = Termination

- Where an employee has not been absent for all or any part of a day for a period of ninety (90) consecutive calendar days, his/her most recent absence will be stricken from his/her record for disciplinary purposes. . . .

- Accumulation of four (4) attendance written warnings in a 12-month period will result in termination.

PROGRESSIVE DISCIPLINE

Adherence to the behavior standards is required of all employees as a condition of employment. In case of violation, progressive discipline will be used to provide the employee with the opportunity to correct behavior. For similar or dissimilar code violations within a 12-month period (excluding attendance), the following procedures will be used:

1. Acknowledged verbal warning;
2. First written warning;
3. Second written warning;
4. Final written warning (which may, but is not required to, include suspension) places the employee on disciplinary probation for the remainder of the 12-month period.
5. Discharge . . .

BACKGROUND

The grievance, dated April 19, 2010, alleges a violation of “Articles 5, 10, Attendance Policy, and all that apply" to the discharge. The form states the basis for the grievance thus:

> . . . On 2-25-10 and 2-26-10 Gina had a sinus and ear infection which she went to see the doctor. Her doctor told her to stay home for those 2 days. She did bring in the excuse to work. Art. 10.
>
> Also 12-9-10 Gina was given a point for A State of Emergency, snow day. This point should not have been given to anyone on this day.

As the appropriate remedy, the form states,

> Remove those 3 pts from Gina's file. Remove the letter from her file. Bring her back to work. Pay her for all back pay due to this wrongful termination. Make whole . . .

Hannah Cain, the Company's Human Resource Manager, issued the discharge letter, dated May 17, 2010, and headed "**Meeting Summary / Suspension / Termination**". **It states:**

> On April 16, 2010 we met to discuss your suspension. Present at this meeting were Mike Koprivnak, Melissa Hager, Perry Graves, you and I.
>
> Back on December 14, 2009, you were put on one year probation for violating the Attendance Policy. The terms of your probation outlined that "any violation of the Labor Agreement resulting in formal discipline will be cause for termination". On February 26, 2010 you accrued your 7th unexcused absence, which is a violation of your probation and according to the attendance policy you are to be terminated.
>
> After we took a break, I explained to you that as a result of violating your probation, you will be terminated, effective immediately, in accordance with the Labor Agreement. . . .

The April 16 meeting was held in response to a letter dated April 13, 2010. That letter is headed "**WRITTEN WARNING -- PROBATION VIOLATION" and states:**

> You are receiving this written warning because you recently accumulated your 7th unexcused absence on 2/26/2010. In addition, this is a violation of your probation, which you were placed on 12/14/2009 for twelve months, ending 12/14/2010. Per the Attendance Policy outlined in the Labor Agreement, you are subject to further discipline (up to and including discharge). Effective immediately, you are hereby suspended pending a disciplinary review with Human Resources. . . .
>
> The days that you have missed are as follows:

EMPLOYEE NAME	DATE	NO. OF OCCURENCES
BEATTIE, GINA	02/25/2010 - 02/26/2010	1
BEATTIE, GINA	12/09/2009	1

BEATTIE, GINA	11/13/2009	1

BEATTIE, GINA	10/13/2009	1
BEATTIE, GINA	10/12/2009	1
BEATTIE, GINA	10/05/2009	1
BEATTIE, GINA	07/30/2009	1

> Should days in your record become approved absences, the copy of this notification will be removed from your file, the absences will be converted accordingly in your attendance record and the related discipline will be appropriately modified.

The documentation underscores a tension between the documentation of the discharge and the underlying sequence of events. The **BACKGROUND** reflects this tension by separately covering the documentation of Beattie's disciplinary history and then the underlying sequence of events.

Documentation Of The Grievant's Discipline

The Company hired the Grievant on August 19, 2002. She has received no discipline except for Attendance Policy violations. The documentation relevant to her discharge starts with a written warning, dated March 26, 2009, which states:

> You are receiving this written warning because you recently accumulated your 7th unexcused absence on 3/13/09.
>
> The days you have missed are as follows:

EMPLOYEE NAME	DATE	NO. OF OCCURENCES
BEATTIE, GINA	03/13/2009	1
BEATTIE, GINA	02/25/2009	1
BEATTIE, GINA	02/12/2009	1
BEATTIE, GINA	02/05/2009	1
BEATTIE, GINA	01/07/2009	1
BEATTIE, GINA	12/11/2008	1
BEATTIE, GINA	11/07/2008	1

> Regular attendance is one of the conditions of your employment at Oshkosh Corporation. Excessive absenteeism is a serious offense and cannot be accepted. Absenteeism results in production delays and causes scheduling and planning problems. In addition, absenteeism affects quality and team morale.

> Should days in your record become approved absences, the copy of this notification will be removed from your file, the absences will be converted accordingly in your attendance record and the related discipline will be appropriately modified.
>
> I urge you to improve your attendance so you avoid making further disciplinary action necessary.

In a letter dated August 10, 2009, Beattie received a written warning which states:

> You are receiving this written warning because you recently accumulated your 7th unexcused absence on 7/30/09.
>
> The days you have missed are as follows:

EMPLOYEE NAME	DATE	NO. OF OCCURENCES
BEATTIE, GINA	07/30/2009	1
BEATTIE, GINA	03/13/2009	1
BEATTIE, GINA	03/13/2009	-1(90-Day Rule)
BEATTIE, GINA	02/25/2009	1
BEATTIE, GINA	02/12/2009	1
BEATTIE, GINA	02/05/2009	1
BEATTIE, GINA	01/07/2009	1
BEATTIE, GINA	12/11/2008	1
BEATTIE, GINA	11/07/2008	1

> Regular attendance is one of the conditions of your employment at Oshkosh Corporation. Excessive absenteeism is a serious offense and cannot be accepted. Absenteeism results in production delays and causes scheduling and planning problems. In addition, absenteeism affects quality and team morale.
>
> Should days in your record become approved absences, the copy of this notification will be removed from your file, the absences will be converted accordingly in your attendance record and the related discipline will be appropriately modified.

> I urge you to improve your attendance so you avoid making further disciplinary action necessary.

Katie Hess, the Company's Human Resources Representative, issued a letter dated January 8, 2010, headed "**Meeting Summary / Suspension / Probation**", which states:

> On December 14, 2009 we met to discuss your suspension. Present at this meeting were Michael Koprivnak, Andy Schaller, you and I.
>
> The reason for your suspension is accumulating 10 attendance policy points. As a result of your absences and in accordance with the Attendance Policy and Labor Agreement, you are to be terminated.
>
> Gina, regular and consistent attendance is a requirement of your position. Your unexcused absences not only affect you but directly impact your co-workers that have to cover for your absences. Employees are expected to be at work and we do not staff extra people to cover absences. Every employee's circumstances are different and it is your responsibility to maintain a good work record.
>
> During the meeting you stated the reason for missing work for a series of the days was as a result of personal illness. We are not disputing the reason for your absences as the Attendance Policy is a no-fault policy that allows for absences. It only becomes a problem when your absenteeism becomes excessive, which is clear by your record that it has.
>
> During the meeting, I explained that in lieu of termination, we will give you one last chance. You will, however, be on a disciplinary probation for one year ending December 14, 2010. Any violation of the Labor Agreement resulting in formal discipline during this timeframe will be cause for termination. You were instructed to return back to work on December 15, 2009 at the start of your shift.
>
> This decision is non-precedent setting.

The December 14 meeting focused on three letters, each dated November 30, 2009. The Grievant received the letters on December 10. Each follows the format of the warning letters detailed above. The first of the letters is headed "**WRITTEN WARNING**", and focuses on "your 7th unexcused absence on 10/5/09." It adds that date to the nine date entries from the

August 10, 2009 warning, and deletes the entry from the August 10 letter for "11/07/2008". The second of the three November 30 letters is headed "**FINAL WRITTEN WARNING**", and focuses on "your 8th unexcused absence". It includes the nine entries from the November 30 written warning and adds a single occurrence for "10/12/09." The third of the three November 30 letters is headed "**SUSPENSION LETTER**" and focuses on "your 10th unexcused absence". It includes the ten entries from the November 30 final written warning, adding one occurrence for "10/13/2009" and one occurrence for "11/13/2009". The suspension letter also notes, "Effective immediately, you are hereby suspended pending a disciplinary review with Human Resources." It further notes, "You are required to contact Katie Hess . . . in order to schedule your review." The Union received copies of the discipline documentation, but the record is unclear on date of receipt.

The Underlying Sequence of Events

There is no dispute that the Grievant missed work on the days covered in the documentation set forth above. There is no dispute that she complied with the Company's Notification Policy. The evidence at hearing focused on the absences starting in October, 2009.

Harold Hansen was the Company's Claims Manager through February of 2011 and oversaw Company compliance with the Wisconsin and the Federal Family and Medical Leave Acts (WFMLA and FMLA respectively), as well as the operation of the Medical Leave provisions of Article 10. Under Company policy, an employee can formally submit a claim or an informal inquiry regarding eligibility for leave under the statutes or the contract. Hansen then supplies the employee with relevant forms, including a notice informing employees of their rights and responsibilities regarding statutory leaves. Also included in the forms is a certification for the employee's physician to complete to document the basis for the leave. Beattie had secured FMLA leave on several occasions before October of 2009.

On October 6, 2009, Beattie submitted a claim for October 5, stating the reason thus, "Sick w/flu makes sleep disorder (chronic) meds not work." On October 14, she submitted another form for absences on October 12 and 13. She stated the reason thus, "Sleep disorder medication does not work when sick with flu." Hansen responded in a memo dated October 12, that,

> We will tentatively classify this request as leave protected under the Family and Medical Leave Act ("FMLA"), pending the company's receipt of your completed Health Care Provider Certification form (form attached). After the company receives the completed Certification form (which must be within 15

> calendar days of this memorandum and completed to the company's satisfaction), the company will re-evaluate and assign your leave to a final classification.
>
> While your absence is currently being classified as FMLA protected, the final determination on the classification of your absence will be made once all of the information about the absence has been provided to the Company. If your leave is not FMLA protected, the absence will be considered in the operation of the attendance policy of the Company. Unapproved absences may subject you to discipline up to and including termination from employment.

The form noted that Beattie "must" return the medical certification form by October 27, 2009.

Beattie did not see a doctor for the October 12 and 13 absences. She did, however, present the FMLA forms to her doctor's secretary, who informed Beattie that she would present the forms to the doctor and fax them to the Company upon completion. Sometime after this, Hansen issued a memo to Beattie, entitled "Non-receipt of Information and Tentative Denial of Leave Request." The memo, dated November 2, 2009, states:

> The due date October 27, 2009 for providing a completed Healthcare Provider Certification has passed. Therefore we are tentatively denying your FMLA leave request for your absence October 5, 12-13, 2009 related to your health condition. If for some reason you were unable to provide the information to me on a timely basis, please contact me immediately and we will consider extending your compliance period. However, if we do not hear from you as to the need for an extension by November 9, 2009, the denial of your FMLA request will become final and the dates of absences will be considered under the Attendance Policy of the Company.
>
> Please call me to further discuss this matter. I can be reached at . . .

Beattie again approached her doctor's nurse, receiving the same response. She did not make any further inquiry of her doctor. Her doctor's office did not fax any material to the Company concerning October or November absences.

Throughout the Fall of 2009, the H1N1 flu virus was spreading through the Company. In response to epidemic concerns regarding the virus, the Company created a temporary form

entitled "Employee Verification of H1N1/Flu Symptoms", which was available at the Harrison Street Plant where Beattie worked. The form contained a number of entries to permit the employee to document symptoms and physician contacts. The entries included a series of questions to document whether the employee contacted their doctor and was told an office visit was not necessary. The form was to be completed "within 3 days of returning to work for consideration of reduced absences." It also included the admonition, "If you believe that your absence qualifies for FMLA leave, you must also submit a completed medical leave of absence form." The Grievant submitted a verification form, dated October 29, 2009, for an absence on Thursday and Friday, October 22 and 23, 2009. The form checked the following symptoms: "Fever greater than 100 degrees"; "Body Aches"; "Sore Throat"; "Cough"; and "Headache". Beattie noted in handwriting that she also experienced "Extreme Tiredness" as well as vomiting and diarrhea. She did not see her doctor and did not submit an FMLA claim for these absences. Instead, she used vacation.

On November 13, Beattie called in sick. She reported that she had the H1N1 flu virus. She did not see her doctor and did not submit an leave application form for this absence. Hansen issued the final denial of Beattie's October 6 leave request on November 18, 2009.

The Grievant lives about four miles from the Harrison Street Plant, and her shift started at 6:00 a.m. During the late afternoon of December 8, it began to snow. The snow continued through the evening into December 9. She attempted, without success, to clear her driveway. At 3:45 a.m., after a snowplow deposited snow in the front of her driveway, she called in to report she could not report for work. She did not report for work. Enough employees reported to the plant to maintain some production on that date.

During her shift on December 10, two supervisory personnel approached Beattie at her work station. They presented her with the three letters dated November 30, 2009, told her that she was in violation of the Attendance Policy, and that she had to leave. She asked for a Union representative, but the supervisory personnel responded only that she had to leave the plant. They did not question her regarding the letters or any other matter and escorted her from the plant.

On December 14, 2009, the parties met regarding Beattie's suspension. As noted in Hess' letter of January 8, 2010, the Company imposed a probation period through December 14, 2010. Beattie reported back to work on December 15, 2009. After receipt of Hess' letter, the Union grieved the Grievant 's suspension as well as the Company's imposition of a probation period.

The Grievant missed work on February 25 and 26, 2010. She submitted a leave

application on March 1. The form states the reason for the absence thus, "Severe Sinus

Infection/Ear Infection/Stomach Flu - Dr. Excused." Hansen responded by memo dated March 3, which required the submission of a certification form by March 17. Beattie's physician responded in documentation dated March 11. His form notes that he saw Beattie on February 25, and diagnosed her symptoms as, "Sinusitis, bilateral eustachian dysfunction, epistaxis." The form notes that he placed her on prescription medication and recommended she take February 25 and 26 off from work. The form states the "health condition commenced on 2-25" and "has a probable duration through 2-26." Hansen responded to this submission in a memo dated March 23, which sought the answer to a series of questions concerning the illness by March 30. At Beattie's request, the due date for the answers was extended to April 5. On April 1, the Grievant's physician responded "No" to the following question from the Company: "Was Gina seen for any treatment following or prior to, and related to her February 25, 2010 appointment?" In an April 6 memo, Hansen denied Beattie's request for "Family Medical Leave" thus:

> We have reviewed the information recently provided to us concerning a condition, which you allege as qualifying you for an absence from employment protected under the Family and Medical Leave Law. Based upon the information that has been provided to us, you are ineligible for the classification of your absence as FMLA protected leave. Family and Medical Leave is available to employees and their family who experience a "serious health condition. While we are not disputing your allegation that you may have a health condition, it does not appear that your health condition was deemed serious. Therefore, you are ineligible for FMLA protected leave on February 25 and 26, 2010. This absence from employment will be administered under the attendance Policy of the Company.
>
> Your absences for February 25 and 26, 2010 will be administered as doctor verified absences reducing your points from 2 to 1.
>
> If your condition/care does change so that you do experience a qualifying condition under the FMLA, you should apply for Family & Medical leave at that time.
>
> If you have questions, please call me . . .

This denial triggered the April 13 warning and the discharge meeting of April 16.

Union and Company representatives discussed the basis for the suspension at the April 16 meeting. The Union took the position that the February, 2010 and October, 2009 absences were

for legitimate reasons and should be excused. The Union also asserted the December 9, 2009 absence was for a weather emergency and should be excused. The Union and Beattie also took the position that Beattie's leave claims were subject to pending grievances, and that the submission of medical verification would affirm those grievances. Cain responded negatively to the need for further inquiry into the medical basis of the claims, viewing the Company's rejection of FMLA leave as final. Cain consulted with her supervisor during the meeting, and ultimately concluded that Beattie's absences represented a chronic problem which could not be expected to change. She confirmed the termination at the close of the meeting.

The balance of the BACKGROUND is best set forth as an overview of witness testimony on disputed points.

Hannah Cain

Cain has human relations experience preceding her employment by the Company in January of 2010. Her first direct role in Beattie's discipline was the April 16 meeting. The Union did not dispute that Beattie had missed enough work to be discharged, but asserted that some of the missed work should have been excused by the Company, including the absences of February 25 and 26 of 2010; the October absences; and the December 9 absence. Hansen, not Cain, determines eligibility for medical leave. Cain reviewed Beattie's personnel file and concluded her absences were a chronic problem. She was not aware of any instance in which Article 10 had been applied to a short-term absence. She understood the provision to require the exhaustion of all other forms of leave. She did not know how many employees were able to work at the Harrison Street Plant on December 9, and could not recall if she independently investigated the point. Her review of Beattie's personnel file was sufficient to her, reflecting that the Attendance Policy built in sufficient excused absences to permit reliable application of the no fault aspect of the point system.

Harold Hansen

Hansen, who currently oversees corporate fleet safety and DOT compliance, was Claims Manager for the Company's defense and corporate divisions at all times relevant to the grievance. As Claims Manager, he oversaw leave systems for both production and salaried employees. He held the ultimate authority to approve or disapprove leave requests. His role in the approval of statutory leave requests turned initially on verifying employee eligibility under time of service and hours worked requirements. Once those thresholds were met, Hansen would review medical certifications to determine if a request constituted a "Serious Health Condition." He based his review of this point on documentation supplied with the certification which he believed fairly stated the governing analysis under both the WFMLA and the FMLA. The documentation reads thus:

> A "serious health condition" is an illness, injury or physical or mental condition that prevents an employee from performing the functions of his or her job . . . In addition, the condition must involve an overnight stay at a health care facility or continuing treatment by a health care provider. Subject to certain conditions, continuing treatment may be met by a period of incapacity of more than 3 consecutive calendar days *and* at least two visits to a health care provider, or one visit and a regimen of continuing treatment, or incapacity due to pregnancy or incapacity due to a chronic condition. Other situations may meet the definition of continuing treatment.

This "boilerplate" summary was the foundation of his analysis, and he did not independently review the terms of the underlying statutes, administrative rules or case law on the point.

Beattie never sought an extension to supply medical verification for her October 6, 2009 leave request. Hansen never approved an Article 10 leave request for a short term absence. In his view, absences of a few days or less could not constitute a "continuing period" of absence. While Claims Manager, Hansen would process between 2,500 and 3,000 leave requests annually. He never approved an Article 10 leave request for an absence of less than three days. In fact, he never approved an Article 10 leave request of any duration.

<u>Gina Beattie</u>

Beattie started work for the Company as an Entry Level Prep Tech for a Painter, and successfully posted into a Material Coordinator position in December of 2007. Her attendance problems essentially began in 2007. She experienced carpal tunnel pain in that year, but problematic levels of absenteeism followed her breaking two bones in her foot in February of 2008, when she slipped on ice in a Company parking lot.

She noted she received a diagnosis of chronic hypersomnia, a sleep disorder, in late December of 2002. The difficulty she experienced was complicated by pain medications such as those she took for her broken foot and carpal tunnel difficulties. Pain medication could conflict with her hypersomnia medications, causing her difficulty with drowsiness and excessive sleeping. She did not, however, make any FMLA request for hypersomnia prior to the absences of October, 2009.

The October absences relate to the H1N1 flu virus. Because she could not keep food in her stomach, she could not retain her hypersomnia medication and had "a hard time staying awake" (Transcript [TR] at 135).

Beattie acknowledged that she called in all the 2009 and 2010 absences, and that none involved her oversleeping. On December 8 and 9, she and her son attempted to clear her driveway of snow, but the storm dropped at least ten inches of snow. She started to shovel her driveway again at around 2:00 a.m. on December 9, but a "snowplow deposited six feet of packed snow in front of my car" (TR. at 164). She called in her absence after that. She had no one she could call for a ride. When asked if she called for a cab, she responded, "I didn't see any of their vehicles on the road" (TR. at 162). She did not report for work late.

She knew at the December 14 meeting that the Company had denied her leave requests. She did not present any medical verification for the October or November absences at that meeting or at any other. Rather, she relied on the assertion of her doctor's secretary that the doctor would fax the forms to the Company when they were completed.

At the suspension meeting of April 16, 2010, she and the Union again argued that her absences due to the flu should be excused. Beyond this, they challenged the propriety of the Company treating the February 25 and 26 absences as unexcused. Union representatives assured her that she could supply medical verification to the Company regarding those absences, but Cain told her "don't bother" (TR. at 172), since the documentation would make no difference.

John Becker

Becker has served the Union as Chief Steward since June of 2011. In that capacity, he has participated in meetings in which the Company has agreed to withdraw untimely warning notices from consideration for progressive discipline. In two instances, the Company agreed to withdraw three of four warning notices for Attendance Policy violations issued on the same day for violations that had spanned a considerable period of time. Both of these cases involved suspension meetings. Neither involved requests for medical leave.

Joe Preisler

Preisler has served the Union in a variety of positions, and is currently the Local's Vice President. In October of 2010, Preisler was involved in a suspension meeting in which the Company agreed to reconvene the meeting to permit the employee to acquire medical certification relevant to an FMLA request. At the reconvened meeting, the Company reviewed the certification and excused a number of absences. In January of 2011, Cain followed a similar procedure regarding another employee, who ultimately submitted documentation that resulted in Cain's excusing a number of absences. He has heard from other Union representatives with similar experiences.

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

THE PARTIES' POSITIONS

The Company's Brief

After an extensive review of the evidence, the Company contends that it has established just cause for the discharge, since the evidence meets "the two fundamental issues in any discharge case." More specifically, the Company contends that arbitral precedent establishes that an employer proves just cause by demonstrating that "there has been a violation of its reasonable work rules" and that "the penalty . . . must be appropriate given all of the relevant circumstances." Applied specifically to the record, the absences are undisputed and cumulate to far more than required to warrant discharge under the Attendance Policy.

The terms of the Attendance Policy "are reasonable and clear." The allotted number of unexcused absences prior to the invocation of discipline is reasonable. Beyond this, the Attendance Policy works on a rolling one-year period, thus permitting points to drop from an employee's record. Additionally, ninety consecutive days without an unexcused absence removes a point. The Attendance Policy also permits a significant number of excused absences based on various leave benefits. The nature of the Company's defense work underscores the need for reliable attendance and arbitral precedent confirms "an employer's right to insist on a dependable and productive workforce." It follows that there can be "no serious challenge to the reasonableness" of the Attendance Policy.

The evidence confirms that Beattie was aware of the policy, had read the policy, and had been counseled and disciplined repeatedly under its terms. Her accumulation of ten unexcused absences in November of 2009 resulted in her placement on a one-year probation beginning December 14, 2009. In spite of this, she was absent on December 9, 2009 and on February 25 and 26 of 2010.

These absences cannot be excused. Although Beattie requested FMLA leave, the "request was properly denied because the medical information supplied by Beattie's doctor established that she was not subject to continuing care and thus did not have a serious health condition under the FMLA."

The attempt to invoke Article 10 is also unpersuasive. The unambiguous language of that provision demands something beyond an isolated short-term illness. To conclude otherwise would lead to harsh and absurd results, since a medical leave of absence can last up

to three years. To bring isolated, short-term illnesses into this provision would gut it, permitting indefinite absences without consequence. This stands in contrast to "the parties' intent and past practice." There is no example of Company provision of a medical leave of absence "under Article 10 . . . for a brief absence such as Beattie's." Arbitral precedent generally underscores the reasonableness of the Company's practice and OSHKOSH CORP., GRIEVANCE NO. 29-1-10, (VERNON, 12/11) specifically confirms it.

That Oshkosh experienced a significant snow storm on December 9, 2009 cannot obscure her accumulation of a significant number of absences prior to the storm; the absence of an excuse for inclement weather under the no-fault provisions of the Attendance Policy; and the ability of other employees to report for work to maintain production on that date.

Nor will the evidence support an allegation that the Company acted inappropriately to use discharge. The final absences cannot be viewed in isolation, but as part of a pattern of chronic absenteeism. From January of 2007 through her termination, Beattie received "at least seven warning letters and two suspensions . . . all related to poor attendance." Her disciplinary history supported discharge in December of 2009. Instead, the Company imposed a one-year probation period. There is no doubt that she understood the gravity of her situation. In spite of this, she "missed two days of work and accumulated her seventh unexcused absence." Viewing her record as a whole, the Company's decision to discharge was entirely appropriate. Her conduct afforded the Company no reasonable basis to believe she could conform her future conduct to its reasonable expectations. Under arbitral precedent, the discharge decision cannot reasonably be viewed as inappropriate.

Nor can the discharge be faulted as a matter of due process. She received three separate disciplinary notices on November 30, 2009. The fact that these notices came together and well after the underlying events reflects no more than "the Company's need to evaluate Beattie's applications for medical leaves of absence. Arbitral precedent, and specifically, MEDCO HEALTH SOLUTIONS OF NETPARK, 128 LA 1734 (WATKINS, 2010), confirms that technical difficulties in providing notice cannot overcome clear evidence that the employee knew their ongoing attendance problems put their job at risk. The Company could have discharged Beattie without the probation period and cannot reasonably be required to ignore the subsequent violation of the terms of the probation period. She received ample progressive discipline.

Against this background, it follows that "Oshkosh had just cause for Beattie's termination, and her Grievance must be denied."

The Union's Brief

The Union summarizes its review of the evidence succinctly, "As the Company sees this case, the only facts they need to present to justify the employee's discharge is that she was absent a certain number of days and thus, under the non-negotiated point system, subject to discharge." This view cannot be squared with the negotiated provisions of the labor agreement or with the facts. A more reasoned analysis establishes that "the Company representatives failed to recognize legitimate reasons for absences and failed to intelligently and correctly apply the recognized Exemptions set forth in the Attendance Policy (i.e., FMLA and Medical Leave)." More specifically, the Union notes that Hansen's rejection of Beattie's FMLA claim regarding the 2009 and 2010 absences is subject to a grievance, and is unreasonable. The November, 2009 absence is traceable to the H1N1 virus and reflects no more than her reasoned decision to stay home. The December 9 absence was neither investigated nor within her control.

More specifically, the Union argues that neither Cain nor Hansen ever "properly evaluated" Beattie's claims. Cain declined to review medical documentation for the October, 2009 absences. Hansen's conclusion to deny Beattie's FMLA claim for the February absences rests on his unsupported conclusion that "there was no continuous treatment involved" and that Beattie had only seen the doctor once. His inability to cite FMLA authority for his conclusion is noteworthy. More specifically, Subsections (a) and (c) of 29 CFR 825.13 establish that "Beattie should have been granted FMLA for the February 25/26 absence." She saw a physician for a serious sinus infection and was ordered to take antibiotics for ten days. Neither Hansen nor Cain seriously evaluated these facts. Hansen's inability to cite authority for his conclusion as well as his being questioned regarding his medical expertise in an administrative hearing caution against deferring to his opinion.

Beyond this, the "uncontroverted evidence also establishes that at least two other medical absences . . . were for legitimate reasons and therefore should have been excused as FMLA or Medical Leave." Specifically, the October and November absences should have been excused under the Attendance Policy or treated as a medical leave of absence under Article 10. Beyond this, the December, 2009 absence "was due to the simple fact it was impossible for her to get to work because of a devastating snow storm." The Company overlooked the provisions of its own Attendance Policy by ignoring that "on some occasions employees will have legitimate reasons for missing work." None is more legitimate than "an act of God" making it impossible for an employee to get to work.

Against this background, it is evident that the Company applied its Attendance Policy unreasonably and that "Beattie was not treated fairly." The Company "never bothered to check out the validity of her FMLA claims and did not investigate the circumstances of her absence due to weather (snow storm) and medical emergencies (H1N1 epidemic)."

Beyond this, the discharge suffers from due process irregularities, since "it is undisputed that the Company did not timely supply her with warning letters now being used as the basis for her discharge." When she left the plant on December 10, 2009, she received three distinguishable warning letters. Beyond this, the Company failed to show appropriate notice to the Union. The Company's conduct shows it "stored up" discipline and issued notices in a fashion that made it impossible for the Grievant to modify her behavior.

It follows from this that "the Arbitrator should set aside the discharge" and should "order the Grievant to be reinstated and made whole."

The Company's Reply Brief

In spite of the Union's contentions, "none of Beattie's absences qualified for leave under the . . . FMLA . . . or Article 10." Union concerns with Cain's analysis of the absences ignores that Hansen, not Cain, is "responsible for granting leave under the FMLA or Article 10." Beyond this, Hansen's conclusions were appropriate. Hansen's vast experience in his position establishes that the Company "*never* granted a Medical Leave of Absence under Article 10 for a brief illness such as Beattie's." In any event, Company policy is to require employee exhaustion of all forms of leave prior to granting an Article 10 Medical Leave of Absence.

The grievance procedure "is not the appropriate forum to challenge" Company FMLA compliance. The "Arbitrator's jurisdiction is limited to resolving alleged violations of the labor agreement." Even if the statutory issue was in issue, "it is clear that Hansen's decision to deny Beattie's request for FMLA leave was correct." 29 CFR Sec. 825.115(a), read in light of relevant case law, demands that a "serious health condition" requiring "continuing treatment" must "include a period of incapacitation for 'more than three consecutive, full calendar days.'" No view of the facts meets this standard. Nor does Beattie's February, 2010 absence meet this standard. Even if a single visit to the doctor could establish eligibility for FMLA leave, it is evident by the doctor's excuse that Beattie did not meet the three day threshold. Nor can Beattie be considered to meet the standards set by Wisconsin's statute (WFMLA). Since nothing in the evidence suggests Beattie "had any continuous and firsthand contact with her healthcare provider after her one and only visit regarding the illness for which she missed work on February 25-26, 2010, Beattie was not subject to 'continuing treatment' and therefore did not have a 'serious health condition' under the WFMLA."

Even ignoring inconsistencies in the Union's citation of unexcused absences that the Company should have considered excused, the Union ignores that Beattie "never actually submitted any medical information confirming that she was ill with the H1N1 flu virus on November 13, 2009". What information she did provide points to symptoms of October 22, 2009. Her documentation of this virus is "dizzying." She signed a verification form dated October 29 alleging she missed work between October 22 and 26 for a flu virus she first felt symptoms of on October 21. At hearing, she testified that she missed work on November 13 due to the virus, yet there is nothing in the record to indicate she suffered the "flu virus twice within this short time frame."

The Union mischaracterizes the basis of Cain's decision to recommend discharge. Cain did not rest this decision solely on a few absences. Rather, she based the decision on her review of all of Beattie's personnel file, including the violations within the probation period. Beyond this, the Union unpersuasively asserts Hansen was vague on the basis of his refusal to grant FMLA leave, and unpersuasively asserts that the Company "regularly" accepts "late medical documentation to support applications for FMLA leave."

Nor can the Union's portrayal of Beattie's conduct on December 9 be considered accurate. The Attendance Policy is a no-fault policy, with no exemption for inclement weather. Arbitral precedent confirms the reasonableness of the Company's approach. Even ignoring that "the whole point of a no-fault policy is to avoid . . . individualized determinations of whether an absence was reasonable", Union arguments misstate the record. The assertion that Beattie could not get into work is belied by the conduct of the employees who maintained production at Harrison Street on that day. She did not attempt to look into any way of getting into work other than driving her own vehicle. Her conduct flies in the face of the jeopardy her attendance problems had placed her in prior to December 9.

The Company's discharge decision rests on Beattie's "entire record, which included a history of chronic absenteeism." Her failure to amend her misconduct gave the Company no effective recourse through progressive discipline. The discharge was reasonable and the grievance should be denied.

The Union's Reply Brief

The Company's approach to Beattie was mechanical, resting entirely on "its non-negotiated attendance policy." There was no "proper investigation". Had there been, the Company would have uncovered evidence that Beattie missed work on a series of occasions for legitimate reasons. Rather, the Company's lead personnel could not be "bothered" to check the facts and "simply erred" in applying the FMLA and Article 10.

Nor should the due process irregularities be ignored. The Company "was extremely tardy in failing to supply Beattie with copies of her disciplines until she was being discharged." This not only denied her due process, but denied the negotiated benefits of "the progressive discipline principle promulgated by the Company."

Against this background, it cannot be reasonably concluded that the Company met the requirements of just cause. It necessarily follows that the Arbitrator should "set aside the discharge and fashion an appropriate remedy."

DISCUSSION

The parties stipulated a just cause analysis, which is rooted in Articles 8 and 22. I have adopted the Union's statement of the issues to have a single statement of the issues to address.

Without a stipulation of the standards defining cause, I view a just cause analysis to consist of two elements. The first is that the Employer must establish conduct by the Grievant in which it has a disciplinary interest. The second is that the Employer must establish its discipline reasonably reflects its disciplinary interest.

Application of the two elements requires some clarification. There is no dispute that the nature of the Company's work means it has a disciplinary interest in reliable attendance and that chronic absenteeism triggers that interest. The dispute on the first element is more specific, questioning whether the Company has proven conduct constituting chronic absenteeism. The Union questions whether much of the pattern the Company asserts rests on legitimate illness.

The arguments pose broad disputes. The Company asserts application of the Attendance Policy precludes a need to exhaustively examine any individual absence because the no fault point system defines chronic absenteeism. The Union notes the Policy is not negotiated and could overturn the negotiated cause standard. These broad disputes are academic on this grievance. Article 13 governs discharge and recognizes "the exercise of discretion in determining discipline." The Company has not strictly applied the Attendance Policy. Rather, it exercised discretion. Strict application of the Attendance Policy meant discharge in 2009. Grounded by Article 13, the two-element test establishes a reasonableness review of the Company's exercise of discretion.

Although the Union advances forceful arguments regarding the implications of the Attendance Policy, the evidence establishes the Company reasonably viewed Beattie's 2009/2010 absences as chronic. The force of the Union's general arguments is undercut by Beattie's testimony, and specifically by her inability to offer a consistent account for the absences.

Although the grievance questions only three points assessed by the Company, the Union asserts the October and November 2009 absences are all traceable to the H1N1 flu virus and should have been excused. The Grievant sought FMLA leave only for the October 5, 12 and 13 absences. In spite of the fact that Hansen held his consideration of the request open until mid-November, the Grievant never supplied documentation for her claim. Beattie spoke with her physician's secretary twice, never securing any documentation. Her verification form for the October 22 and 23 absences highlights weakness in her claims. Inexplicably, she made no FMLA claim for these absences, even though her form would have been timely. Rather, she took vacation to cover the absences.

Evidence at hearing further weakens the Union's attempt to have the absences treated as excused. Her October 29 employee verification form for the October 22 and 23 absences asserts her symptoms, listed on the form as extreme, first occurred on October 21. It is not clear how this significant onset of the flu virus is compatible to her report of symptoms on October 5, then repeated on October 12 and 13. Her own testimony will not support an inference that this was a continuing illness. She had submitted FMLA claims for the early October absences, and described her not submitting a similar claim for the late October absences thus,

> This was just the flu. Three days I was sick with the flu. (TR. at 177).

Assuming that the early October absences were not flu-based will not clarify this point. Her October 6 and 14 claim forms assert the flu complicated her medication regimen for hypersomnia. However, if she experienced vomiting and diarrhea, the claim is identical to the October 26 verification form and makes her unwillingness to file another FMLA form inexplicable. That she missed work again on November 13 without submitting a leave or a verification form for her flu symptoms is inexplicable.

Her testimony regarding hypersomnia affords no clarity on this point. She testified she was initially diagnosed with a chronic condition in December of 2002, yet made no contact with any Company official prior to filing the early October FMLA forms. There is no evidence that she missed work due to this condition between 2002 and 2009, even though she testified she experienced conflict between pain and hypersomnia medications between 2006 and early 2008. Nor does her testimony afford any clarity on the point. She consistently met the Company's call-in requirement, yet asserted she suffered from severe drowsiness. Assuming this is reconcilable, her testimony that none of her 2009 absences involved oversleeping makes it impossible to understand what prompted her missing work. Standing alone, her testimony fails to establish a consistent account of why she missed work in October and November of 2009.

The Union's assertion that she should not be held accountable for the December 9 snowstorm is similarly undercut by her testimony. The record is unclear on the point, but it is evident some production continued at the Harrison Street Plant on that date. Her testimony on her shoveling difficulties, though understandable, is inconsistent. It is evident she made no attempt to secure alternate transportation or to report to work late.

Against this background, by December 10, 2009, the Grievant had received five warning letters for absenteeism problems. None of the FMLA claims had been supported by medical certification. Even assuming the December 9 absence is excused as a weather emergency, the Company has shown a pattern of chronic absenteeism within the meaning of Article 13. That the Company subsequently placed Beattie on a one-year probation has no direct impact on this conclusion. Company denial of FMLA for the February, 2010 absences meant that the April 13, 2010 warning again brought her to five warning notices within a one-year period. No view of the facts establishes how the Company's disciplinary interest in April of 2010 was less than in December of 2009.

Against this background, the application of the second element requires little discussion. Article 13 requires three written notices within a one year period to support discharge. The pattern noted above can make the Company's imposition of discharge a reasonable reflection of its disciplinary interest in her absences.

The use of "can make" highlights that the application of the two-element test has, to this point, skirted the Union's strongest arguments. This requires that the application be more tightly woven to the parties' arguments. The Union's challenge to the discharge is three-fold. The first component is that the points generating the warning leading to the discharge rest on factors beyond Beattie's control. The second is that the Company's conduct violates due process. The third is that the Company erred in not extending statutory or Article 10 leave to Beattie for proven illnesses.

Each of these lines of argument has persuasive force. However, as application of the two-element test prefaces, that force is undermined by the evidence and particularly by Beattie's testimony. The assertion that the illnesses were significant events, beyond her control, is essential to the Union's case. As noted above, however, her conduct regarding the October and November illnesses gave the Company no evidence, beyond a bare assertion, that she had experienced a level of illness preventing her from working. Her testimony at hearing regarding the 2009 illnesses offered little more. This factual basis makes it impossible to view the Company's rejection of her claim unreasonable.

The Union's case is factually stronger regarding the post November, 2009 occurrences. She timely documented the illnesses of February, 2010 and there is no doubt that the December 9 snowstorm was a significant weather event. The difficulty with the evidence is that the cause review is ultimately a reasonableness review of the Company's actions. Hansen held his consideration of her claim open until her physician had fully documented her condition and treatment. He reduced the point accumulation from 2 to 1 based on that documentation, but did not approve excusing the leave. This conclusion is reasonable. The physician documentation and Beattie's testimony highlight the occurrence of a sinus infection which responded to two days without work coupled with antibiotic treatment. The physician's documentation highlights that the one-time visit and prescription were sufficient to the symptoms. The strength of the Union's position is that treating this illness as a no-fault issue is unreasonable. The strength of the Company's position is that this occurrence does not stand alone, but reflects an ongoing course of behavior spanning a full year. As noted above, the Company had reason to question that course of behavior. It is not necessary to conclude that the Company's point system can be applied by rote to find that it reasonably concluded Beattie's attendance issues continued to be chronic.

Beattie's inability to provide a consistent account of the absences undercuts the Union's arguments. The March 1 claim form makes no mention of hypersomnia. This highlights the difficulty of assessing the severity of her symptoms, particularly in light of her documentation of her 2009 flu symptoms. As noted above, her testimony regarding the snowstorm underscores this. The strength of the Union's position is that the storm was beyond her control. This can be granted, but begs the question whether reaching the Harrison Street Plan also was. Her testimony affords little assistance. The snow fell over an extended period and she testified that she and her son kept up with it until a snowplow dammed her driveway. That she called in a few hours before her shift makes the assertion tenuous. Her testimony does little to solidify her effort to get to work. When asked if she called a cab, she initially responded, "I don't even think the cab company was running that day" (TR. at 134). When asked again, she responded, "I didn't see any of their vehicles on the road" (TR. at 162). She did not call. This does not make her incredible as a witness. She did testify with some candor. However, it underscores that the Company had a reasonable basis to question her ongoing efforts to reliably report for work. In sum, the evidence falls short of establishing the Company's determination that she could not conform her conduct to the requirements of its Attendance Policy can be considered unreasonable. It is not necessary to affirm the rote application of the Policy to affirm that the Company's exercise of discretion in April of 2010 was reasonable under the requirements of Article 13.

The Union also questions whether the discharge reflects due process consistent with the agreement. Priesler's and Becker's testimony offers significant support for doubting the propriety of the simultaneous issuance of multiple warning notices for disciplinary conduct on separate incidents spanning a considerable period of time. Beyond the issue of notice, the principle of progressive discipline demands that an employee have time to modify improper conduct.

The persuasive force of these arguments is, however, stronger than the factual basis provided by the grievance. Lack of sufficient time to modify inappropriate behavior is not posed here. Warnings regarding compliance with the Attendance Policy date from January of 2007. More significantly, the Grievant received five warning notices regarding attendance within the space of a rolling one year period preceding her discharge. This is sufficient to meet the requirements of Article 13. She acknowledged she understood the Attendance Policy and her use of vacation to cover the late October, 2009 absences highlights that she understood the jeopardy her attendance problems caused.

More significantly, the facts of this grievance are distinguishable from the situations highlighted by Priesler and Becker. Those situations involved delay traceable to Company inaction. Here, the delay is traceable to Beattie's conduct and not to Company inaction. She filed multiple claims in October of 2009 and could reasonably have been expected to file another claim in November. Hansen held the determination whether to excuse the claims until it was evident that he would receive no certification forms. This occurred on November 18, 2009. The issuance of multiple warning letters dated November 30 and delivered simultaneously on December 10 can be questioned, but not characterized as unreasonable on this evidence. Hansen received physician documentation of the February, 2010 absences on April 1 and acted on that documentation April 6. The Grievant received her final warning within a week. This cannot be characterized as unreasonable. The Union viewed the underlying propriety of the leave denial as open at the December 14, 2009 and April 16, 2010 meetings. This can be questioned, but cannot be characterized as unreasonable. Obtaining documentation from a physician can be an adventure.

More to the point, the parties' conduct is a significant guide to what constitutes due process. Hansen and the Union confront thousands of leave requests per year. As Priesler and Becker's testimony highlights, the parties respond to this bulk on a case-by-case basis. In this grievance, neither the delay in issuing disciplinary notices nor the simultaneous issuance of a series of disciplinary notices can persuasively be labeled unreasonable. Beattie was aware of her ongoing attendance problem and the need to address it. The delay traceable to processing leave requests was necessary to determine the extent, if any, of the Company's disciplinary interest in her absences.

The Union poses significant concerns regarding Hansen's view of the WFMLA and the FMLA in refusing to excuse Beattie's October, 2009 and February, 2010 absences. The Company contends statutory issues are not posed for determination here.

The reasonableness review stated above is sufficient to this record. The parties each note the existence of federal and state authority, but neither enters extensive argument. With this as background, I believe an arbitral foray into Wisconsin or Federal law is as likely to create an additional level of dispute than to resolve it. On this record, the evidence supports the reasonableness of Hansen's determination that neither the October, 2009 nor the February, 2010 absences constitute a serious health condition. This does not apply state or federal statute, but highlights that there is no evident basis to see a conflict between the application of the labor agreement and the existence of governing state and federal statutes.

The remaining contention concerns Article 10. While recognizing this provision has potential applicability to the grievance, the facts are insufficient to warrant its specific application to Beattie. The provision is not unambiguous, since it requires the exercise of Company discretion. The use of "will be granted" supports the Union's view that Beattie can claim it if she is "known to be ill". This falls short of demonstrating that its application to the grievance is mandatory. The "will be granted" reference is preceded by "supported by satisfactory evidence" which necessarily introduces an element of discretion into its application. The balance of the provision details how disputes regarding "satisfactory evidence" of illness or injury can be resolved. As Company arguments highlight, the structure of the provision points to something other than a two day absence traceable to a temporary sinus condition. It would be impossible to require a single physical examination, much less a number of physical examinations, to verify a one-time, short term sinus condition. This underscores that Article 10 cannot be used to overturn Company use of the February, 2010 absence to issue a warning notice.

This conclusion should not, however, be viewed as a broadly binding interpretation of the inapplicability of Article 10. That the Company has not applied it in the past falls short of establishing a binding past practice that the Union agreed to its inapplicability. On its face, Article 10 points to longer-term conditions than to passing illnesses. Against this background, it would appear more applicable to the October and November, 2009 absences than to the February, 2010 absences, since the earlier absences at least alleged a diagnosable, longer term condition amenable to meaningful examination(s). This does not make it applicable to this record. As noted above, there is no reasonable basis to conclude that hypersomnia or the H1N1 flu virus excused the October and November, 2009 absences. In sum, Article 10 is not specifically applicable to this grievance. Whether it can be invoked to avoid the operation of the no fault aspects of the Attendance Policy must turn on the facts of a specific case. This grievance does not pose an appropriate factual basis for such a conclusion.

AWARD

There was just cause for the discharge of Gina Beattie.

The grievance is, therefore, denied.

Dated at Madison, Wisconsin, this 6th day of February, 2012.

Richard B. McLaughlin /s/
Richard B. McLaughlin, Arbitrator

RBM/gjc
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