BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between	:	
TEAMSTERS LOCAL 662	:	Case 7 No. 48668 A-5030
and	:	
THE CLAIREMONT NURSING FACILITY	:	

Appearances:
Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by Ms. Naomi E. Eisman, on behalf of the Union.
Weld, Riley, Prenn & Ricci, S.C., by Mr. Stevens L. Riley, on behalf of the Employer.

ARBITRATION AWARD

The above-entitled parties, herein "Union" and "Employer", are privy to a collective bargaining agreement providing for final and binding arbitration. Pursuant thereto, hearing was held in Eau Claire, Wisconsin, on April 27, 1993. The hearing was not transcribed and the parties filed briefs which were received by July 20, 1993.

Based upon the entire record, I issue the following Award.

ISSUE:

> Did the Employer violate the contract by failing to pay grievant Kathleen A. Lukes holiday pay for the December 25, 1992, Christmas holiday and, if so, what is the appropriate remedy?

DISCUSSION:

The Employer operates a nursing facility which requires around-the-clock care, including holidays.

Grievant Lukes, a cook, was scheduled to work and did work on December 22, 23, 24, and 25, 1992. 1/ She then was scheduled to be off work on December 26 and 27 and scheduled to work on December 28. On Sunday, December 27, she telephoned Dietary Department Supervisor Lynn Lunderville at about 7:30 p.m. to say that she had flu symptoms and that she would be missing work on December 28. Lunderville replied that that would be all right and that she would

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1/ Unless otherwise noted, all dates hereinafter refer to 1992.

get a replacement for Lukes. At no time during that call did the subject come up of whether Lukes would receive holiday pay for December 25 if she did not come to work on December 28. Lunderville subsequently relayed Luke's message to Dietary Director Diane Burger, her supervisor. Lukes, in turn, received sick leave pay for December 28 when she missed work that day.

The Employer subsequently failed to pay Lukes for the December 25 holiday on the ground that she did not work on her first scheduled day of work after the holiday - i.e., December 28. Lukes then filed the instant grievance on January 12, 1993, claiming that the Employer's failure to do so violated Article 15, Section 1, of the contract.

In support thereof, the Union maintains that the Employer violated the contract because the Employer excused Lukes' absence when she telephoned Lunderville on December 27, thereby in the Union's words rescinding "its directive for her to work on December 28, 1992. . ." The Union also contends that Lukes had a valid excuse for her December 28 absence because she was sick that day and that, furthermore, the "forfeiture provision does not apply because Lukes worked on the Christmas holiday." It therefore requests that Lukes be made whole by paying her the holiday pay in dispute.

The Employer, in turn, argues that the general language contained in Article 15, Section 1, "is overridden by the specific forfeiture language contained in Article 15, Section 3"; that Lukes forfeited her right to holiday pay by calling in sick and not working her first scheduled work day after the Christmas holiday; that the Employer's excuse of Lukes' December 28 absence "did not excuse the subsequent forfeiture of holiday pay"; and that past practice and bargaining history support its position.

The resolution of this issue turns upon Article 15 which provides:

> Section 1. Eligibility. . . .Employees who work on a holiday shall receive their straight time rate in addition to holiday pay.
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> . . .
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> Section 3. Forfeiture. Holiday benefits will be forfeited if any one of the following occurs:
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> . . .
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> (b) An employee is absent from work on his/her last scheduled day prior to the recognized holiday or is absent

> from work his/her first scheduled work day following the recognized holiday, without valid medical documentation unless otherwise excused by the Employer.
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> . . .

Standing alone, Section 15.1 supports the grievance because Lukes under this language "did work on a holiday", thereby allowing her to "receive [her] straight time rate in addition to holiday pay." However, Section 15.3(b) standing alone dictates that the grievance be denied because Lukes under this language "was absent from work his/her first scheduled work day following the recognized holiday. . ." The real problem here therefore centers on how these two apparently conflicting clauses are to be read together and whether they can be harmonized with each other. 2/

Bargaining history is not much help because there was a missing of the minds in negotiations on the narrow issue posed herein - i.e., whether holiday pay is to be paid after an employe works on a holiday and thereafter reports in sick on his/her first scheduled work day after that holiday.

Thus, Union Business Agent Michael Thoms testified that the phrase "unless otherwise excused by the Employer" found in Section 15.3(b) was proposed by the Union because the Union thought it unrealistic for an employe to always get a doctor's note when sick and that that there was no discussion as to whether the forfeiture itself would be excused by the Employer. Thoms added that it therefore was his understanding that if an employe calls in sick, he/she gets paid unless the Employer insists on medical documentation.

Administrator Bonnie Ackley, formerly Director of Nursing, testified that the parties in negotiations discussed the language in Sections 15.1 and 15.3(b) together and that the Employer worked "very hard" to have the contract reflect the Employer's then existing personnel policies which preclude the payment of holiday pay when an employe does not work on the first scheduled day before or after a holiday without providing medical verification. Ackley also said that Thoms was concerned in negotiations with the cost of a doctor's excuse; that the Employer was concerned

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2/ See John Deere Tractor Co., 5 LA 631, 632 (Updegraff, 1946); Kaiser Permanente, 76 LA 635, 638 (Ridman, 1981); American Federation of Government Employees, 75 LA, 1288, 1292 (Ordman, 1980); Kansas City Power and Light Co., 71 LA, 381, 385 (Elkouri, 1978); and School District of West Allis, 70 LA 387, 394 (Gratz, 1978).

about employes not showing up for work by stretching their holiday; that "I believe in negotiations it was discussed they would get paid if they had a physician's excuse"; and that Lukes would have received holiday pay for the Christmas holiday if she had a doctor's note verifying her illness.

A review of this bargaining history reveals that there was no discussion as to what would happen when, like here, an employe worked a holiday and missed either the first scheduled work day before or after that holiday. This explains why there is no express reference in the contract to such a situation and why the language in Section 15.1 appears to conflict with Section 15.3 (b).

The parties therefore are really arguing about a gap in the contract and the missing of the minds occurring in negotiations regarding whether an employe needs a doctor's note when reporting an absence occurring either before or after a scheduled holiday and whether the Employer can forfeit the penalty otherwise provided for in Section 15.3 (b) when that occurs. 3/

This gap can be filled by recognizing that the forfeiture language is aimed at preventing employes from "stretching" their holidays by calling in sick on work days either preceding or following those holidays. This is a legitimate concern for the Employer because it needs around-the-clock coverage for its nursing facility at holiday time. Here, however, there was no long weekend to stretch since Lukes worked on the Christmas holiday.

But, the Employer still can ensure that employes who work on a holiday and who thereafter call in sick either before or after the holiday are actually sick. It thus is free on a case-to-case basis to decide whether such employes must secure medical documentation before "excusing" their absence. The Employer therefore can designate whomever it wants to make such determinations since front-line supervisors such as Lunderville may lack the authority to do so on their own.

That is what should have happened here. For if the Employer doubted that Lukes was sick, it need only have insisted that she obtain a doctor's note pursuant to Section 15.3(b) which expressly refers to "valid medical documentation. . ." 4/ But Lukes was not

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3/ Absent any such agreement, there is no basis for finding that the supposedly more specific language of Section 15.3 (b) takes precedence over Section 15.1.

4/ In this connection, the Employer cites Electric Repair Service Co., 69 LA 604 (Johnson, 1977); Tarkett, Inc., 81 LA, 943 (Seltzer, 1983), and Georgia-Pacific Corp., 95 LA 1110 (Cromwell, 1990) for the proposition that arbitrators have

offered that choice because no one at that time told her that one was needed.

Hence, it would be unfair to deprive her of her contractually-mandated holiday pay when there is no evidence that she in fact was not sick on December 28. For while the Employer's pre-existing personnel policies stated that employes would not be paid holiday pay if they missed work either before or after a holiday, those policies were superceded by Section 15.1 which, standing alone, can be construed to mean that employes working on a holiday are to be paid holiday pay irrespective of whether they work either before or after the holiday.

Furthermore, by granting Lukes paid sick leave for that day pursuant to Article 16, Section 6(g), of the contract, the Employer itself has tacitly acknowledged that Lukes was ill that day. Viewed in that light, we see that the Employer has penalized Lukes for merely availing herself of contractually provided-for sick leave, which is something it cannot do.

This is not to say that Lunderville excused Lukes from providing a doctor's note, as the record establishes that Lunderville lacks the authority to do so and that the question of holiday pay did not come up in her discussion with Lukes. However, under the unique facts of this case I find that the burden was on the Employer to insist upon a doctor's note because it is the party trying to impose a forfeiture and because the conflicting language in Section 15.1 and Section 15.3(b) raised a good faith doubt as to whether medical verification is needed in the face of the facts herein. For, as stated in Mode O' Day Corp., 1 LA 490, 494 (Cheney, 1946):

> A party claiming a forfeiture or penalty under a written instrument has the burden of proving that such is the unmistakable intention of the parties to the document. In addition, the courts have ruled that a contract is not to be construed to provide a forfeiture or penalty unless no other construction or interpretation is reasonably possible. Since forfeitures are not favored either in law or in equity, courts are reluctant to declare and enforce a forfeiture if by reasonable interpretation it

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upheld the denial of holiday pay "despite employee claims that they were absent through no fault of their own." These cases are not really on point because the parties here have agreed that holiday pay will not be paid to employes unless they either provide medical verification or the Employer excuses them from providing same.

can be avoided. 5/

Ditto here. The Employer therefore shall pay Lukes the holiday pay in issue.

In so finding, however, the very narrow holding of this case must be noted. Lukes' grievance is being sustained only because she was never expressly told ahead of time that she would lose holiday pay if she did not provide a doctor's excuse for her December 28 absence. As a result, nothing herein should be misconstrued to mean that the Employer cannot insist on medical verification if situations such as the one herein reoccur. 6/ The only restriction on its freedom of action is that it clearly communicate to employes ahead of time what its policy is so that they do not needlessly forfeit their holiday pay.

In light of the above, it is my

5/ While the record shows that the Employer in the past has docked holiday pay for employes who miss work either before or after working a holiday, Thoms credibly testified that he was unaware of that practice.

6/ This need for medical verification - which the Employer itself controls -differentiates the facts herein from those found in Armour Food Co., 85 LA, 640 (Thornell, 1985) which is cited by the Company for the proposition that merely calling in sick does not represent an "excuse" of the absence.

AWARD

1. That the Employer violated Article 15 of the contract by failing to pay grievant Kathleen A. Lukes holiday pay for the December 25, 1992, Christmas holiday.

2. As a remedy, it shall pay her said holiday pay.

Dated at Madison, Wisconsin this 13th day of August, 1993.

By Amedeo Greco /s/
Amedeo Greco, Arbitrator