BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

NORTHWEST UNITED EDUCATORS

and

BARRON AREA SCHOOL DISTRICT

Case 41
No. 51083
MA-8486

Appearances:
Mr. Michael J. Burke, Executive Director, appearing on behalf of the Union.
Weld, Riley, Prenn & Ricci, S.C., by Ms. Kathryn J. Prenn, appearing on behalf of the District.

ARBITRATION AWARD

The Employer and Union above are parties to a 1992-94 collective bargaining agreement which provides for final and binding arbitration of certain disputes. The parties requested that the Wisconsin Employment Relations Commission appoint an arbitrator to resolve the sick leave pay grievances of three employes.

The undersigned was appointed and held a hearing on September 14, 1994 in Barron, Wisconsin, at which time the parties were given full opportunity to present their evidence and arguments. No transcript was made, both parties filed briefs, and the record was closed on November 11, 1994.

Issues

The Union proposes the following:

1. Did the District violate the collective bargaining agreement when it deducted a sick leave day from the grievants on an inclement weather day that was not made up?

2. Did the District violate the collective bargaining agreement when it deducted a sick leave day from Sandie Simpson on a contractual holiday (Thanksgiving)?

The District proposes the following:

1. Did the District violate the collective bargaining agreement by deducting a day of sick leave for an employe who was on an extended medical leave on Thanksgiving Day during the 1993-94 school year?

2. Did the District violate the collective bargaining agreement by deducting a day of sick leave for employes who were on extended medical leaves on January 19, 1994?

3. If so, what is the appropriate remedy?

Relevant Contractual Provisions:

ARTICLE VI - WORKING CONDITIONS AND PLACEMENT

A. The school year shall be 190 working days with students in attendance 180 days. There shall be 5 days for inservice and/or convention days, 2 parent-teacher conference days, and 3 holidays (Labor Day, Thanksgiving Day and Memorial Day). The calendar for the ensuing school year is described in Appendix D of this agreement. In the event school is cancelled because of snow or other emergency, a make-up day shall be scheduled for the first, third, fifth, seventh and all subsequent emergency days. The second, fourth and sixth emergency days shall be forgiven with a maximum of three days forgiven in any one school year. In the 1992-93 school year, this rotating system shall continue with the first emergency day in 1992-93 treated as if it were a continuation of the odd-even treatment of make-up days in the 1991-92 school year. The parties agree that in 1992-93 a maximum of three (3) snow days will be forgiven. In the 1993-94 school year, this rotating system shall continue with the first emergency day in 1993-94 treated as if it were a continuation of the odd-even treatment of make-up days in the 1992-93 school year. The parties agree that in 1993-94 a maximum of three (3) snow days will be forgiven.

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ARTICLE X - ABSENCE

A. One day per month or fraction of month of total personal sick leave will be granted per year accumulated to 120 days. Part-time teachers shall be granted a pro rata share of sick leave according to the percentage of the contract to full-time equivalency. After using 8 sick days in a year, the Board may require a doctor's statement from the employee.

Discussion:

The facts are largely undisputed. Three teachers, Dan McNeil, John Mosansky, and Sandie Simpson were on extended medical leaves of absence for varying reasons during 1993-94. All three were absent for this reason on January 18 and 19, 1994, when snow prevented the schools from operating. Simpson, in addition, was on extended medical leave during most of November, 1993, as well as most of October and part of December. Part of the period Simpson was absent was the Thanksgiving weekend.

All three teachers were back at work by the time the District elected to make up the January 18th snow day by an inservice conducted on the evening of April 8th, and all three attended the inservice. The District restored a day of sick leave for each of the three following the inservice, but there is no dispute that the District deducted initially a sick leave day for each on January 18 and 19, and also paid Simpson for Thanksgiving Day as sick leave rather than as holiday pay.

All three of the grievants, and also unit director Kathy Duerr, testified that in a number of years' employment with the District, none of them had ever heard of a practice of deduction of sick leave for such days. Duerr also testified that in her second year of teaching, thirteen years ago, she had an instance when she was off sick on a snow day. Duerr testified that when she got back to school she asked the school secretary whether it was deducted, and the school secretary said sick leave was not deducted under this circumstance. Duerr testified that the secretary in question has since retired, and that she was unable to find any record on the matter either way.

Janet Burhop, payroll secretary since 1977, testified that she was unaware of the instance Duerr testified to because building secretaries are responsible for reporting teacher sick leave on a form, and if the form does not reflect the teacher as absent, she would have no way of checking that. Burhop further testified that in her seventeen years of calculating and verifying payroll payments, she has never known a teacher to be paid for a holiday if the teacher was already on an extended sick leave. Burhop stated that since at least ten or twelve years, the payroll stubs attached to paychecks have shown how many days of vacation and sick leave have been used in the month involved, thus providing employes with a ready means of calculating whether the days paid are for sick leave or regular pay. Burhop testified that if an employe is on an extended leave that may be partly unpaid, she counts all days worked including sick and emergency days under the Family Medical Leave Act, but that if a holiday occurs while an employe is still on sick leave, the employe gets paid and a sick leave day is deducted for the day. She stated that if a holiday comes up after the employe is out of paid sick leave days, the holiday is unpaid like the days around it.

Executive Secretary Sue Hanson, who for many years has worked with Burhop and double-checks Burhop's calculations, supported Burhop's testimony. Both testified that they had been unable, in checking back several years, to come up with any evidence from the records

demonstrating that any employe had been on sick leave on a snow day prior to 1994.

Burhop testified in addition that she had made a compilation of several employes' records who had been on extended sick leaves since 1991. This was introduced into evidence as Employer's Exhibit 1, but did not specify whether the holidays that were unpaid as holiday time occurred while the employes involved were still on paid sick leave, or after that employe had run out of sick leave days and switched to unpaid status. (Each of the five employes listed on Employer's Exhibit 1 encountered from 55 to 129 unpaid days in the year in question for that individual.) Upon re-examining the records, Hanson testified that some of these employes had unpaid holidays which occurred after the paid sick leave days had run out, but that in the case of Heather Madison, she was receiving sick leave pay through Labor Day, 1992, but was not paid holiday pay for Labor Day. Hanson reiterated that she believed that if she had gone further into the records, and back a larger number of years, she would have found additional employes who would have received sick leave pay rather than holiday pay for a holiday which occurred during a period of paid sick leave, and that she would not have found any to the contrary.

The Union contends in essence that the contract treats all employes equally, and that equal treatment for the grievants requires that they receive the same benefits as other employes. The Union contends that the Employer's failure to pay the employes for holiday pay on Thanksgiving or to "forgive" the snow day on January 19, 1994 distinguishes them from other employes, and does so without any contractual authorization for giving these employes lesser benefits than others. The Union requests that the Arbitrator order restitution of the days in question to each of the three grievants.

The Employer contends that the grievants were not on the same footing as other employes, because they had removed themselves from availability to work prior to the holiday or snow day in question. The Employer cites arbitration cases in which arbitrators have declined to allow an employe to switch from one type of leave to another, such as from vacation to funeral leave, when the death of a relative interrupts a vacation, as similar to the instant dispute, and contends that the fundamental principle which applies is that the employe, in order to be eligible for holiday pay or a forgiven snow day, must have been available to work in the first place. The Employer further contends that past practice demonstrates that at least in the case of holidays, employes have gone unpaid for holiday pay before. The Employer requests that the grievant be denied.

I find that the statement of the issue makes little difference, but adopt the Employer's version as it is somewhat more precise.

Neither the Employer's argument nor the Union's lacks logic in this case. The Union's contention is grounded in a rational reading of the contract; it is essentially based on the premise that Articles VI and X list benefits which by their nature are cumulative, not alternative to each other. At the same time, the Employer's reading is also a rational construction of this language, and is also consistent with common practice in many collective bargaining agreements -- though

often, at least as to holidays, this is spelled out in language not present in the agreement here. Thus there is little to choose between the parties' positions based on the contract as it stands. On its face, it will support either reading.

That being so, criteria for evaluating the most probable meaning of ambiguous language come into play. Here there is no evidence of bargaining history, and the past practice is less helpful than it often is. What first appeared to be a strong showing of evidence by the Employer indicating that holidays in particular have been deducted from sick leave--the testimony by the two clerks--divides upon closer examination into two different periods. One, consisting of most of the examples, relates to periods when the employee involved had already exhausted sick leave, and was not paid for the holiday. This, however, is clearly distinguishable from the grievants' situation, since an employee who is on such an extended non-compensated leave of absence is clearly being treated differently from working employees for other purposes as well. Thus it is significant that upon review of what first seemed a strong exhibit, the clerks could testify to only a single example--as to which knowledge was denied by the Union--of an employee who was not paid holiday pay for a holiday that occurred in the middle of a period of paid sick leave, and was paid sick pay instead. One instance, as many arbitrators have observed, does not a practice make. Similarly, though, I can attach little significance to the one instance testified to by Duerr when an employee was paid for a snow day even though she would otherwise have used sick leave, because there is no evidence that anyone beyond a non-supervisory school secretary knew of it. I also find no significance in the Employer's stress on the phrase "190 working days" in Article VI, since the same clause explicitly identifies holidays and alternate snow days as counted among the working days; thus the phrase supports the Union's view as easily as the Employer's.

Prior arbitrators' rulings are similarly unhelpful. None of the several cases cited by the Employer specifically involved a holiday or snow day occurring in the middle of a period of paid sick leave, and even a cursory review of the precedents reveals that arbitrators have ruled both ways as to related situations. 1/ In some of these cases, however, the arbitrators involved have based rulings favoring employers on the presence or requirements of specific clauses such as the common type requiring presence at work the day before and/or after a holiday to be eligible for holiday pay. No such requirement exists in this agreement, and in a professional environment it may not be irrelevant that teachers and school boards alike commonly regard the pay for services rendered as being gauged over a longer period of time than in the hourly and blue-collar environment typical of the reported cases.

This consideration seems to me relevant here in particular, in the context of a "close case" and a potential inequity created by the Employer's proposed interpretation of the agreement. The inequity is between an employee who becomes sick the day of a holiday and remains sick for (to

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1/ See, for instance, the various cases cited at footnotes 106 to 114 of How Arbitration Works, Elkouri, F. and Elkouri, E. A. (Fourth Ed., 1985).

pick the simplest example) a week, and another who becomes sick the day *before* the holiday, and also remains sick for a week. One, under the Employer's interpretation of the agreement, ends the school year with a day more in his or her sick leave "bank" than the other. In the absence of the common "work before and after the holiday" language, in the absence of any evidence why one instance represents a greater imposition of inconvenience on the Employer than the other, and in a work environment characterized by a constant salary despite the professional's normal ups and downs in the effective length of the work day and work week, this tilts the balance in favor of the Union's interpretation. The snow day appears to respond to the same logic, as "forgiven" on its face is as easily interpreted in the Union's favor as in the Employer's -- it could be either the employee's drawing pay while absent that is "forgiven" (which would cover the grievants), or the absence of an employee who otherwise was committed to be working (which would not).

For the foregoing reasons, and based on the record as a whole, it is my decision and

AWARD

1. That the District violated the collective bargaining agreement by deducting a day of sick leave for an employee who was on an extended medical leave on Thanksgiving Day during the 1993-94 school year.

2. That the District violated the collective bargaining agreement by deducting a day of sick leave for employees who were on extended medical leaves on January 19, 1994.

3. That as remedy, the District, forthwith upon receipt of a copy of this Award, shall restore one day's sick leave to the accounts of Dan McNeil and John Mosansky and two days' sick leave to the account of Sandie Simpson retroactively.

Dated at Madison, Wisconsin this 3rd day of February, 1995.

By Christopher Honeyman /s/
Christopher Honeyman, Arbitrator