BEFORE THE ARBITRATOR

In the Matter of the Arbitration
of a Dispute Between

BONDUEL EDUCATION ASSOCIATION

and

SCHOOL DISTRICT OF BONDUEL

Case 1
No. 54685
MA-9760

Appearances:

Mr. James A. Blank, Executive Director, United Northeast Educators, appearing on behalf of the Association.

Mr. Peter Behnke, District Administrator, Bonduel School District, appearing on behalf of the District.

ARBITRATION AWARD

The above-captioned parties, hereinafter the Association and the District or Employer, respectively, are signatories to a collective bargaining agreement which provides for final and binding arbitration of grievances. Pursuant to a request for arbitration, the Wisconsin Employment Relations Commission appointed the undersigned to hear a grievance. A hearing, which was not transcribed, was held on February 26, 1997, in Bonduel, Wisconsin. Afterwards, the parties filed briefs which were received by March 31, 1997. Based on the entire record, the undersigned issues the following Award.

ISSUES

The parties were unable to stipulate to the issue(s) to be decided in this case. The Association framed the issue as follows:

> Did the District violate Article VII, Section E, Article XI, Section A and past practice when it deducted one day of sick leave from grievant Robert Koch on a day school was called off due to inclement weather and then required the grievant to make-up a fifth inclement weather day on February 19, 1996? If so, what is the appropriate remedy?

The District framed the issue as follows:

> Did the District violate Article VII, Section E, Article XI, Section A and past practice when it deducted one day of sick leave from

grievant Robert Koch on a day school was called off due to inclement weather while Koch was on extended medical leave and then required the grievant to make-up a fifth inclement weather day on February 19, 1996? If so, what is the appropriate remedy?

Since the parties were unable to agree on the wording of the issue(s), the undersigned has framed it. From a review of the record and the briefs, the undersigned has framed the issues as follows:

1. Did the District violate the collective bargaining agreement when it charged the grievant with a sick day for November 27, 1995 (a snow day)? If so, what is the appropriate remedy?

2. Did the District violate the collective bargaining agreement when it required the grievant to work on February 19, 1996 (the make-up day for the February 2, 1996 snow day)? If so, what is the appropriate remedy?

PERTINENT CONTRACT PROVISIONS

The parties' 1995-97 collective bargaining agreement contains the following pertinent provisions:

ARTICLE VII - TEACHER WORK DAY

. . .

E. In the event schools are closed because of inclement weather, the parties agree that the first three days shall not be made up. If make-up days are necessary, the days will be scheduled on mutually acceptable dates.

. . .

ARTICLE XI - PAID LEAVES

A. Sick Leave: Teachers, upon the beginning of each school year, will be immediately eligible for ten (10) days of paid sick leave (except that teachers new to the District must work at least one day before becoming eligible for any sick leave). This will accumulate to a total of 120 days. It is the responsibility of the teacher to inform the superintendent or his/her office of personal illness. Three or more successive

> days may require a doctor's excuse. If the Board requires a doctor's excuse, the Board will pay the cost of the office call. Teachers contracted for less than one hundred percent (100%) of the normal school day will be eligible for ten (10) partial days (proportionate to their percent of employment) of said sick leave and these may accumulate to a total of 120 partial days.

FACTS

The District operates a K-12 public school system. The Association represents a bargaining unit of certain professional employes of the District. The District and Association have been parties to a series of collective bargaining agreements, including the Agreement which, by its terms, was effective July 1, 1995 through June 30, 1997.

The parties' collective bargaining agreement covering the 1994-95 school year provided in Article VII, Section E, that "in the event schools are closed because of inclement weather, . . . the first four days shall not be made up." When the parties negotiated the current labor agreement covering the 1995-1997 school years, they changed Article VII, Section E to provide "that the first three days shall not be made up." This was the only change made in the provision. Thus, the sole change made to Article VII, Section E was to lower the number of snow days which would not be made up from four to three. The 1995-97 agreement was signed in May, 1996.

In November, 1995, veteran teacher Robert Koch had a heart attack and went on extended sick leave. Koch was on sick leave from November 13 through December 15, 1995. While Koch was on sick leave recuperating from his heart attack, the District cancelled a full day of school due to inclement weather. The school day which was cancelled was November 27, 1995. The District charged Koch a sick day for that day. Thus, it subtracted one day from his sick leave account for November 27, 1995 even though school was not in session on that date. No other District teacher was charged a sick day for that day, nor did any teacher lose any pay for not working that day.

The District cancelled five full days of school during the 1995-96 school year because of inclement weather. The five days which were cancelled were November 27, 1995 (the day referenced above), and January 19, 29, 30 and February 2, 1996. In accordance with the then-existing contract language dealing with snow days, the first four of these snow days were not made up while the fifth day (i.e., February 2, 1996) was made up. The date which the District and Association mutually agreed on for the make up day was February 19, 1996. Koch was back at work by that date. Koch worked on the make up day as did all district teachers. This was the first time teachers were required to make up a snow day.

Koch subsequently grieved being charged a sick day for the November 27, 1995 snow day. The grievance was processed through the grievance procedure and was ultimately appealed to

arbitration.

The record indicates that the District cancelled two school days during the 1992-93 school year and three school days during the 1993-94 school year because of inclement weather. When these snow days occurred, five teachers were on extended sick leave for varying reasons. In each instance when a snow day occurred while these employes were on extended sick leave, the District deducted a sick day from that employe's accumulated sick leave total. This happened once to Carmella Blahnik, three times to Anita Hartman, once to Diane Adkins, three times to Jill Giesler and three times to Theresa Steinbach. Insofar as the record shows, the Association did not know of the foregoing until this grievance arose.

POSITIONS OF THE PARTIES

The Association's position is that the District violated the collective bargaining agreement by charging the grievant a sick day for November 27, 1995, a day school was closed due to inclement weather. In the Association's view, the grievant should not have been charged a sick day for the day. It makes the following arguments to support this contention. First, it notes that no work was done that day since school was cancelled for the full day due to inclement weather. Second, it notes that while all other District teachers were released from working that day (November 27, 1995), without loss of pay or deductions of any kind, the grievant was treated differently. The Association asserts that the contract treats all teachers equally, and that equal treatment requires that the grievant be treated the same as other employes. According to the Association, that did not happen here because only the grievant was charged a sick day for the day. Third, the Association notes that the "practice" which the District relies on to justify its actions here only applies to employes who are on extended sick leave; it does not apply to employes who are on sick leave for just a day. The Association argues this is inconsistent. It submits there is no contractual authority for the District to give teachers who are on extended sick leave any lesser benefits than those teachers who are on sick leave for just a day. As the Association sees it, there is no difference between a teacher being on extended sick leave and one being sick for just a day; both are absent and need a substitute. Fourth, the Association contends it did not know until this grievance arose that the District was charging employes on extended sick leave with a sick day for a day school was cancelled due to inclement weather. Thus, it denies having any knowledge of the previous sick leave deductions which the District relies on to justify its actions here. Finally, the Association contends that the District "double dipped" when it required the grievant to make up the fifth snow day after it had previously deducted a day from his sick leave account for the November 27 snow day. This argument is based on the premise that the grievant did not get the four snow days referenced in Article VII, Section E. In order to remedy this alleged contractual breach, the Association asks the Arbitrator to order the District to either credit the grievant with one additional day of sick leave or pay the grievant his pro rata rate for one additional work day for the 1995-96 school year.

The District's position is that it did not violate the collective bargaining agreement by

charging the grievant a sick day for November 27, 1995. In its view, it had the right to charge the grievant a sick day for that snow day because of a long-standing District practice whereby the District deducts a sick day from an employe when a snow day is declared and the employe is unable to work due to an extended medical leave. The District submits that the grievant was unable to work November 27, 1995, because he was still recuperating from his heart attack. The District addresses the scope and duration of the alleged practice as follows. With regard to its scope, the District acknowledges that if an employe was not on an extended medical leave when a snow day was declared, then the District has not deducted a sick leave day from the employe. The District asserts however that if an employe was on extended medical leave when a snow day was declared, then it has always deducted a sick day from the employe's accumulated sick leave. Said another way, the District maintains that those employes who have been on extended medical leave when an inclement weather day occurred have always been charged a sick day. According to the District, this practice is based on the premise that the employe on extended medical leave is unable to report for work on the inclement weather day. With regard to the duration of the alleged practice, the District contends this has been the District's practice since the 1992-93 school year. The District therefore relies on what happened to Carmella Blahnik in 1992-93 and to Anita Hartman, Diane Adkins, Jill Giesler and Theresa Steinbach in 1993-94 (i.e., that these five teachers were charged a sick day for the snow day(s) which occurred while they were on extended medical leave). The District also relies on what happened to Verna Brusewitz in 1992-93, and to Rodney Hoppe and Louis Boettcher in 1995-96 (i.e., that these three support staff employes were charged a sick day for the snow day(s) which occurred while they were on extended medical leave). The District submits that the Association knew of this practice and never challenged it until the instant situation arose. It notes in this regard that a grievance over the very same factual situation arose in the support staff bargaining unit (which also is represented by a WEAC affiliate) but that grievance, unlike this one, was ultimately dropped. As the District sees it, its actions here in charging the grievant with a sick day for a snow day was entirely consistent with its prior practice because the grievant was likewise on extended medical leave. Next, responding to the Association's contention that the grievant did not get his four inclement weather days because he worked on the make-up day, the District argues that inclement weather days are counted on a District wide basis - not on an individual basis. In the District's view, it is only logical that the grievant be required to make up the fifth inclement weather day along with all the other District teachers. Based on the foregoing then, the District argues that its actions here did not violate the contract. It therefore requests that the grievance be denied.

DISCUSSION

The main issue here is whether the District could contractually charge the grievant with a sick day for a day school was closed due to inclement weather (i.e., a snow day). The District contends that it could while the Association disputes that assertion. If it is found that the District could not contractually charge the grievant with a sick day for that day, then the District violated the contract. On the other hand, if the District could contractually charge the grievant with a sick day for that day, then no contractual violation occurred.

In contract interpretation cases such as this, the undersigned normally focuses attention first on the contract language and then, if necessary, on the evidence external to the agreement such as an alleged past practice. In this case though, I have decided to structure the discussion so that this normal order is reversed. Thus, I will address an alleged past practice first. My reason for doing so is as follows. If I addressed the contract language first and found it to be clear and unambiguous, there would be no need to look at an alleged past practice for guidance in resolving the dispute. Were this to happen, the case could be decided without any reference whatsoever to the alleged past practice. The problem with this is that the District sees this case as a past practice case. I have decided to use this format so that the District's past practice contention is directly addressed.

Past practice is a form of evidence commonly used to fill contractual gaps. The rationale underlying its use is that the manner in which the parties have carried out the terms of their agreement in the past is indicative of the interpretation that should be given where the contract contains gaps or is silent on a particular point. In order to be binding on both sides, an alleged past practice must be the understood and accepted way of doing things over an extended period of time. Additionally, it must be understood by the parties that there is an obligation to continue doing things this way in the future. This means that a "practice" known to just one side and not the other will not normally be considered as the type of mutually agreeable item that is entitled to arbitral enforcement.

The District contends that its practice is that if an employe is on extended sick leave when a snow day occurs, then the employe is charged a sick day for the snow day. The record indicates this has in fact happened 11 times to five different teachers since the 1992-93 school year, and each time the teacher had a day deducted from their accumulated sick leave. 1/ While the District has certainly been consistent in deducting a sick day under the circumstances just noted, there is a fundamental problem with characterizing the District's actions as a past practice. The problem is that the "practice" of deducting a sick day in the situation just referenced was known to just one side - the District. The Association asserts it did not know of the District's past actions until this grievance arose, and the District has not shown otherwise. Since the District has not established that both parties knew and understood that employes on extended sick leave were to be charged a

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1/ In making this statement, the undersigned is relying only on the record evidence concerning the District's teachers, not the District's support staff. Thus, I am referring to Carmella Blahniks being charged a sick day for the snow day which occurred April 15, 1993; Anita Hartman being charged a sick day for the snow days which occurred on January 6, 18 and 19, 1994; Diane Adkins being charged a sick day for the snow day which occurred January 6, 1994; Jill Giesler being charged a sick day for the snow days which occurred on January 6, 18 and 19, 1994; and Theresa Steinbach being charged a sick day for the snow days which occurred on January 6, 18 and 19, 1994.

sick day for a snow day, it is held that there is no binding past practice concerning same which is entitled to contractual enforcement.

Having found there is no binding past practice, attention is now turned to the contract language. Most teacher contracts in Wisconsin contain what is commonly referred to as a "snow day" provision. In this contract, that provision is found in Article VII, Section E. When this grievance arose, the first sentence of that section provided: "In the event schools are closed because of inclement weather, the parties agree that the first four days shall not be made up." This language specified in plain terms that a certain number of snow days (namely the first four) do not have to be made up. The next sentence of that section goes on to provide that snow days over and above that number will be made up on days mutually agreed to by the Association and the District. On its face, this provision does not say anything about how these snow days will be treated for pay purposes. Although the provision does not say so explicitly, it is implicit in the provision that teachers will not lose pay for a snow day. This means that if snow days are called by the District, teachers will be paid for a certain number (namely the first four) without having to make them up.

While no eligibility requirement is expressly specified in Article VII, Section E for this snow day pay, the undersigned concludes that one eligibility requirement is nonetheless implicit. In my view, the eligibility requirement for snow day pay that is implicit is that the employe must be available for work at the time of the snow day. Were it otherwise, someone who was unavailable for work would still have to be paid for the snow day. That result belies common sense. The following example illustrates this. Assume that a teacher is granted an unpaid leave of absence for a school year. Further assume that the teacher does not work a single day throughout the entire year. The undersigned is persuaded that the parties did not intend to give this person, who has not been paid all year, pay for the snow days that happen to be called. I therefore interpret Article VII, Section E as implicitly providing that in order to get snow day pay, the employe must be available for work on the (snow) day in question.

That said, attention is now turned to the question of whether the grievant was available for work on November 27, 1995. The record indicates that particular day was a regularly scheduled student contact day. Thus, it was a regular work day for the District's teachers and all were expected to work that day. Insofar as the record shows, all teachers but the grievant were available to work that day. However, they were prevented from working that day because the District cancelled school due to inclement weather. The grievant though was not in the same boat, so to speak, as the rest of his fellow teachers. This is because he was not prevented from working that day by the weather, as were the rest of the District's teachers. Instead, he was prevented from working that day because he was recuperating at home from his heart attack and on extended medical leave. This point is important because the grievant was not available for work on November 27, 1995, while the rest of the District's teachers were.

Since the grievant was not available to work on November 27, 1995 due to his being on extended medical leave, it follows that he could not satisfy the implicit requirement of Article VII,

Section E that in order to be paid for a snow day, the employe must be available for work. Under these circumstances, the District could treat the grievant differently from the other teachers for snow day pay purposes and contractually charge him with a sick day for the day.

The remaining issue is whether the grievant had to work February 19, 1996. That day was the make-up day for the February 2, 1996 snow day. The grievant worked the make-up day, as did all District teachers. The Association contends the District "double dipped" when it required the grievant to work the make-up day after it had previously charged him a sick day for the first snow day (November 27, 1995). As the Association sees it, this resulted in the grievant not getting four snow days. The undersigned does not find this contention persuasive for the following reason. I read the snow days referenced in Article VII, Section E to be counted on a District-wide basis, not on an individual basis. In my view, uniformity dictates this result. While the grievant did not get four snow days, the teacher bargaining unit as a whole did, and that is what controls. The District was therefore within its contractual rights to direct the grievant to work on February 19, 1996 (the make-up day for the February 2, 1996 snow day). Thus, I find no contract violation occurred.

In light of the above, it is my

AWARD

1. That the District did not violate the collective bargaining agreement when it charged the grievant with a sick day for November 27, 1995 (a snow day); and

2. That the District did not violate the collective bargaining agreement when it required the grievant to work on February 19, 1996 (the make-up day for the February 2, 1996 snow day). Therefore, the grievance is denied.

Dated at Madison, Wisconsin, this 19th day of June, 1997.

By Raleigh Jones /s/
Raleigh Jones, Arbitrator