BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

TEAMSTERS LOCAL 563

and

FOREMOST FARMS USA

Case 9
No. 56462
A-5679

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller and Brueggman, S.C., by **Attorney Scott D. Soldon,** appearing on behalf of the Union.

Quarles & Brady, by **Attorney Fred Gants,** appearing on behalf of the Company.

ARBITRATION AWARD

Teamsters Local 563, hereinafter referred to as the Union, and Foremost Farms USA, hereinafter referred to as the Company, are parties to a collective bargaining agreement which provides for the final and binding arbitration of disputes arising thereunder. The Union made a request, with the concurrence of the Company, that the Wisconsin Employment Relations Commission designate a member of its staff to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. The undersigned was so designated. Hearing was held in Appleton, Wisconsin on July 17, 1998. The parties waived that portion of the grievance procedure requiring a written award within five days after the completion of the hearing. (TR-4 & 5). The hearing was transcribed and the parties filed post hearing briefs which were exchanged on October 5, 1998.

BACKGROUND

The facts underlying the grievance are not in dispute. The three grievants, Jerry Unmuth, Michael Zielinski and Chuck Ullman were each denied pay for Thanksgiving Day, November 27, 1997. Each were notified in writing on December 1, 1997 that holiday pay was denied them because each failed to work his last scheduled work day before the holiday

and because it was the beginning of the deer gun season. Unmuth requested and was granted vacation starting on November 22, 1997 through November 29, 1997. Unmuth requested a personal holiday for Friday, November 21, 1997 which was denied because the schedule was already posted. Unmuth's wife called in and reported that he was sick on November 21, 1997. Ullman requested and was granted vacation from November 23, 1997 through November 29, 1997. Ullman called in sick on November 22, 1997. Zielinski requested and was granted vacation for November 23 through November 25, 1997. He too called in sick on November 22, 1997.

Each of the grievants was paid sick leave for the day he called in sick. The Company did not request verification of the grievants' illnesses, and after the holiday was denied him, none of the grievants provided any proof that he was ill on the day he called in sick. On December 4, 1997, the grievants grieved the denial of holiday pay which grievance was denied and appealed to the instant arbitration.

ISSUE

The parties were unable to agree on a statement of the issue. The Union frames the issue as:

> Did the employer violate the collective bargaining agreement by refusing to pay holiday pay to the three grievants?
>
> If so, what is the appropriate remedy?

The Company frames the issue as:

> Did the employer violate Article 14 – Holidays, Section 14.1 of the collective bargaining agreement when it denied the grievants holiday pay for the 1997 Thanksgiving holiday?
>
> If so, what is the appropriate remedy?

The undersigned frames the issue as follows:

> Did the Company violate the parties' collective bargaining agreement when it denied the grievants holiday pay for Thanksgiving Day, 1997?
>
> If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 11 – VACATIONS

. . .

SECTION 11.10 In the event a holiday falls during an employee's vacation, he/she shall receive holiday pay for that day in addition to vacation pay.

. . .

ARTICLE 14 – HOLIDAYS

SECTION 14.1 The Employer agrees that each regular employee shall receive eight (8) hours pay at his/her current hourly rate for the following holidays: New Year's Day, Presidents' Day, Memorial Day, Fourth of July, Labor Day, Veterans Day, Thanksgiving Day and Christmas Day, provided the employee works his/her last scheduled work day preceding, and his/her first scheduled work day following the holiday, unless excused by the Employer. Employees who work on any of the above mentioned holidays shall receive an amount equal to one-half (1/2) of his or her straight time rate for each hour worked on said holidays, which compensation shall be considered as overtime and paid in addition to any and all overtime compensation which may be due under the provisions contained in Article 18 of this Agreement dealing with the payment of overtime. Hours worked on a holiday shall also be used in the computation of weekly overtime. Employer agrees to minimize work as much as possible on Sundays and holidays.

Union's Position

The Union contends that the Company violated the agreement by refusing to pay holiday pay to the grievants for Thanksgiving Day, 1997. It relies on Article 11, Section 11.10 which provides that if a holiday falls during an employe's vacation, he/she shall receive holiday pay in addition to vacation pay and it asserts that this is the only applicable provision in the agreement. It observes that each of the grievants was on vacation when the Thanksgiving holiday occurred and the sick days coincided with the last day prior to their vacations. It points out that Sec. 11.10 contains no qualifiers. It argues that the Company's reference to Article 14 and the requirement to work the last preceding and first scheduled workday following does not modify Sec. 11.10. It cites the following arbitration cases, MIAMI COPPER CO., 16 LA 191 (PRASOW, 1950), STREITMAN SUPREME BAKERY OF CINCINNATI, 41 LA 621 (SAUGEE, 1961) AND GEORGE E. FAILING CO., 93 LA 598 (FOX, 1989), in support of its position that the "surrounding days" requirement is completely independent and does not qualify the "holiday pay during a vacation" provision. It contends

that the parties could have put language in the contract that disqualified an employe from receiving holiday pay in addition to vacation pay but they chose not to do so and the arbitrator should not insert intent or language the parties failed to include.

The Union also asserts that a vacation day is an excused absence under Article 14, Sec. 14.1. It states that assuming arguendo that Sec. 14.1 is applicable, it provides that the "surrounding days" may be excused by the Company and when an employe is on vacation, he is absolutely excused as the Plant Superintendent testified. It submits that the "surrounding days" requirement is to prevent employes from stretching holidays into mini-vacations and to assure a full work force before and after a holiday and as the grievants were on vacation, they were not expected to work and did not disrupt production but were excused from working and thus they qualify for holiday pay.

The Union also asserts that as the grievants called in sick and were granted sick pay and not questioned further about their absences, their absences were excused. It points to the testimony of the former Vice President for Human Resources who admitted that by paying an employe sick pay for an absence, the Company has excused the absence. It cites CITY OF TRIPP CITY, 88 LA 315 (IMUNDO, 1987) in support of its argument that an employe excused for sick leave purposes cannot be denied holiday pay based on the same absence which was excused and for which employes were paid sick pay without question.

The Union submits that the Company failed to establish a past practice of denying an employe holiday pay for not working the scheduled workday in a work week prior to the holiday. The Union observes that the Company cited John Collins and Mark Warning as examples but could not even pinpoint the decade involved and this hearsay was not substantiated by any records. It notes that another example cited by the Company was Mike Ziegert but he received holiday pay and never had to file a grievance. The Company, according to the Union, failed to prove any established past practice and the Company's argument is meritless.

In conclusion, the Union takes the position that the Company violated the contract by refusing to grant the grievants holiday pay and it seeks eight hours of pay for each grievant.

Company's Position

The Company contends that the grievance must be denied as it did not excuse the grievants' individual absences which coincided with their vacations and the deer gun hunting season. It cites Sec. 14.1 which conditions holiday pay on employes working their last scheduled workday preceding the holiday unless excused and each grievant failed to work on his last scheduled workday but called in sick so they failed to fulfill the contractual requirements and the grievants are not entitled to pay for Thanksgiving 1997. It points out that Unmuth called in sick after being denied a personal holiday for his last scheduled workday preceding Thanksgiving, 1997.

The Company argues that it is significant that none of the grievants came forth to seek to establish that they were indeed sick and unable to report and they did not contact their supervisor to object to denial of holiday pay or to offer to document the illness. The Company insists that these employes exhibited a lack of respect for the Company and their fellow employes. It points out that the Company had to go through the process of locating employes willing to work and to pay them overtime and co-workers were inconvenienced by having to work on short notice during the holiday season. The Company maintains that its concern about employes stretching their Thanksgiving holiday is precisely why it bargained the qualifying language in the contract and it was correct in denying holiday pay to the grievants in accordance with this agreement.

The Company claims that the Union's reliance on Article 11, Sec. 11.10 ignores the express language of Article 14. It asserts that Sec. 11.10 does not eliminate the express language of Sec. 14.1 and the specific language of Sec. 14.1 governs the more general language of Sec. 11.10. It also rejects the Union's argument that the grievants were excused because they were on vacation the day preceding the Thanksgiving holiday because the language of Sec. 14.1 does not state the day preceding the holiday but requires the employe to work his/her last scheduled workday preceding the holiday whether it is one day or ten days and as each called in sick on his last scheduled workday, not one worked his last scheduled workday and thus failed to meet the eligibility requirements for holiday pay.

The Company submits that merely because employes call in sick does not mean the absence is excused, particularly under circumstances as suspicious as these. According to the Company, the fact that the employes were paid sick leave does not mean their absences were excused. It alleges that payment of sick leave does not equate with excusing the absence and besides, it argues that they were paid in error and in any event would have been paid under the agreement for all unused sick leave by mid-December, so at most they were paid four or five days early. It denies that this payment meant that the Company excused their absences in the face of the letter to each employe refusing to excuse the absence and denying holiday pay.

In conclusion, the Company seeks dismissal of the grievance in its entirety because the grievants failed to work their last scheduled workday preceding the Thanksgiving holiday which were too coincidental to be ignored. It contends that its actions were in accord with past practice that only employes who qualify, or whose absences are excused, receive holiday pay.

DISCUSSION

The determination of whether the grievants are eligible for holiday pay depends on the exact language of the parties' agreement. As noted by Arbitrator Klein in NATIONAL UNIFORM SERVICE, 104 LA 901 (1995), "holiday pay eligibility provisions should be read in an aura of common sense and fundamental logic and in light of all the relevant circumstances." Applying this to the instant case results in the following conclusions.

The Union claims that Article 11, Section 11.10 controls the instant case and the undersigned need look no further. Sec. 11.10 provides that if a holiday falls during an employe's vacation, he/she receives holiday pay in addition to vacation pay. This language requires a holiday to fall during an employe's vacation so he/she won't lose holiday pay when the employe is already being paid for the day through the use of vacation. See PENNWALT CORPORATION, 88 LA 769 (MCDONALD, 1987). A review of the weekly work schedule (Ex.4) demonstrates that Zielinski took vacation on Sunday, Monday and Tuesday and that Wednesday and Thursday were his off days and he returned to work on Friday, so the holiday never fell during his vacation. Thus, in the case of Zielinski, it would appear that Sec. 11.10 is not applicable to him. Both Unmuth and Ullman were on vacation for the entire week and the issue is whether Sec. 11.10 applies such that the eligibility requirements of Sec. 14.1 are not applicable. Some arbitrators hold that eligibility requirements do not apply as in the cases cited by the Union, whereas other arbitrators hold that the eligibility requirements for the holiday are applicable. See PENNWALT, SUPRA. Nothing in Sec. 11.10 provides that the eligibility requirements of Sec. 14.1 are to be ignored and not given effect. Sec. 11.10 is merely a monetary provision so that an employe would not lose a holiday simply because he is on vacation. It does not negate the qualifying provisions of Sec. 14.1 to be eligible for a holiday.

Generally, holiday eligibility requirements are meant to prevent employes stretching a holiday into a mini-vacation and the usual language requires the employe to work the last scheduled workday preceding and the first scheduled workday following the holiday. Here, the language of Sec. 14.1 states the employe is to work his/her last scheduled workday preceding and his/her first scheduled workday following the holiday. Thus, it is the employe's last scheduled workday preceding the holiday, and not the Company's last scheduled workday, that must be worked to satisfy the eligibility requirement. The parties agreed to more than the mere holiday stretching. They agreed to prevent stretching of a holiday and surrounding vacation and/or personal holidays. The language of Sec. 14.1 is very specific as opposed to the more general language of Sec. 11.10, thus the undersigned finds that Sec. 14.1 applies even when a holiday occurs during an employe's vacation. The Union's argument that the Company's granting the employe's vacation meant the employes met the qualifying requirements of Sec. 14.1 is not persuasive because the language of Sec. 14.1 requires work on the employe's last and first scheduled workdays preceding and following the holiday. In CWC KALAMAZOO, INC., 105 LA 555 (ROUMELL, 1995), the grievants, who were on vacation the day after a holiday and took sick leave the day after their vacation, were not entitled to holiday pay under language interpreted to be the employe's last regularly scheduled workday after the holiday.

The Union's final argument is that the grievants were excused from the qualifying requirement because they were paid sick leave for the day they called in sick. Sec. 14.1 requires the employe to work his/her first and last scheduled workdays "unless excused by the Employer." The letters of December 1, 1997 to the grievants denying them holiday pay clearly indicate that they were not excused from this work requirement. (Ex. 3) Additionally, the circumstances of Unmuth's wife calling in that he was sick the day before the deer gun

season, a day the grievant had requested off, leads to the very strong conclusion that he was not sick. Also, Ullman and Zielinski calling in sick the first day of the deer gun hunting season is too suspicious to believe that they were in fact really sick especially when Ullman had changed shifts to work the earlier shift on Friday, November 21, 1997. (Ex. 4) None of the grievants presented any documentation that they were in fact sick and none of them testified at the hearing. It is concluded that the absences were not excused even though they were paid sick leave. The Company could have denied the sick pay but it would have had to pay it anyway on or before December 15 under Sec. 17.5 of the contract. The evidence simply failed to prove that the Company excused the grievants' failure to work the days they called in sick. The grievants failed to meet the qualifying requirements for holiday pay for Thanksgiving Day, 1997 under Sec. 14.1 of the agreement and are not entitled to holiday pay.

Based on the above and foregoing, the record as a whole, and the arguments of counsel, the undersigned issues the following

AWARD

The Company did not violate the parties' collective bargaining agreement when it denied the grievants' holiday pay for Thanksgiving Day, 1997, and therefore, the grievance is denied.

Dated at Madison, Wisconsin this 3rd day of November, 1998.

Lionel L. Crowley /s/
Lionel L. Crowley, Arbitrator

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