BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

GENERAL TEAMSTERS UNION LOCAL 662

and

SCHOOL DISTRICT OF WINTER

Case 38
No. 59023
MA-11154

Appearances:

Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., by **Attorney Jill M. Hartley**, appearing on behalf of the Union.

Weld, Riley, Prenn & Ricci, S.C., by **Attorney Brian K. Oppeneer**, appearing on behalf of the District.

ARBITRATION AWARD

General Teamsters Union Local 662, hereinafter referred to as the Union, and the School District of Winter, hereinafter referred to as the District, are parties to a collective bargaining agreement which provides for the arbitration of disputes arising thereunder. The undersigned was selected from a panel of Wisconsin Employment Relations Commission employees to act as an arbitrator to hear and decide a grievance over the meaning and application of the terms of the agreement. Hearing was held in Winter, Wisconsin on October 25, 2000. The hearing was not transcribed and the parties filed post-hearing briefs which were exchanged on November 27, 2000.

BACKGROUND

The facts underlying the grievance are not in dispute. The grievant was employed by the District as a bus driver since 1991. On March 7, 2000, the grievant resigned his employment effective March 17, 2000 to take other employment. At the time his resignation

became effective, the grievant had accumulated 64 days of sick leave. The grievant asked to be paid for these days and for continued health insurance coverage and the request was denied. The grievant filed a grievance over the failure to pay him his accumulated sick leave and insurance coverage which was denied and appealed to the instant arbitration.

ISSUE

The parties stipulated to the following:

Did the District violate Article 26 of the 1998-2000 agreement by failing to pay the grievant for unused sick leave and for failing to pay for continued health insurance after his resignation?

If so, what is the appropriate remedy?

PERTINENT CONTRACTUAL PROVISIONS

ARTICLE 25

ENTIRE MEMORANDUM OF AGREEMENT

A. The parties understand and agree that this Agreement constitutes the entire Agreement by the parties, and no practices in existence prior to its ratification are incorporated within the Agreement unless expressly done so by the Agreement. No oral understandings or agreement shall amend, expand upon, or supersede any of the provisions of this Agreement, or any written amendment must be ratified and executed in the same manner as this Agreement in order to be effective.

. . .

ARTICLE 26

MAINTENANCE OF EXISTING FORMAL POLICIES

Unless otherwise indicated in this Agreement, all policies formally adopted by the School Board affecting wages, hours, and conditions of employment, shall not be changed during the term of this Agreement.

POSITIONS OF THE PARTIES

Union's Position

The Union contends that the District violated Article 26 of the parties' agreement by refusing to pay the grievant his accrued sick leave and continue his health insurance upon separation from the District. It takes the position that contrary to the District's argument that there is no formal policy, the testimony of the Union witnesses established otherwise. It refers to two former employees, Stanley Sward and Sylvester Wisnefski, who were paid for their unused, accumulated sick days at the conclusion of their employment and the decision to pay them was a "formal policy" adopted by the District as specified under Article 26. It submits that the agreement does not require the formal policy to be in writing but that all formal policies will continue and not be changed during the term of the agreement. It argues that a formal policy was adopted by the pay out to Sward and Wisnefski and the District is bound to that policy and must honor it for the grievant as well.

The Union claims that the District has a past practice of paying out employees accrued sick days upon termination of employment. It states that the criteria for a practice are longevity and repetition, clarity and consistency, mutuality and acceptance and consistent underlying circumstances. It argues that a benefit granted as a consistent response to a given set of circumstances constitutes a past practice. It maintains the District's past payment of employees' accrued sick days upon their severance from the District constitutes a binding past practice and required the payment of the grievant's accrued sick days and continuation of his insurance coverage. It states that Sward was let go because he could not pass the physical necessary to keep his job but received his accumulated sick leave every two weeks until his sick leave was exhausted and he received insurance coverage during this period of time. As to Wisnefski, the Union observes that he too was paid for his accrued sick leave after reaching agreement with the District and had insurance coverage until the final payment of his sick leave. It insists the grievant is entitled to the same benefits as Sward and Wisnefski.

It points out that the District presented evidence that other bus drivers resigned their employment and did not receive pay for their unused, accrued sick leave, however it maintains that the District was obligated to pay them and as they did not protest the District's failure to pay them, the Union could not grieve something of which it had no knowledge or notice. It concludes that in light of the Union's lack of knowledge, the District's failure to pay others accrued sick leave is neither fatal nor pertinent to the Union's position.

The Union also rejects the District's assertion that the Union understood there was no policy or practice of paying out sick leave because the Union proposed to include a provision in the agreement for a successor collective bargaining agreement. The Union asserts that it

wanted to solidify its understanding of the parties' practice of paying out sick days by including that practice in formal language in the Agreement. It states the Union's conduct in no way diminishes the past practice or the language of Article 26.

It concludes that the District violated the agreement and it asks that the grievant be paid for his sixty-four hours of sick leave and he be reimbursed for the insurance coverage he should have received.

District's Position

The District contends that it did not violate Article 26 or any other provision of the collective bargaining agreement in denying the grievant's request for sick leave and continued health insurance benefits. It submits that no provision in the agreement provides for either of these benefits. It refers to Article 25 which states that no practices in existence prior to the Agreement are incorporated in it unless expressly done so and as no practice with regard to sick leave and insurance is expressed in the Agreement, none exists. It argues that, contrary to the Union, Article 26 does not require the payout of sick leave or health insurance because it requires that all policies be formally adopted to continue to have effect. It insists that the record demonstrates that no formally-adopted policy requires sick leave payout or the continuation of paid health insurance. It states that as there was no formal policy adopted, there is no violation of Article 26.

The District maintains there is no past practice of such payments and Article 25 prevents their continuation. It asserts that even if Article 25 did not exist, no past practice entitles the grievant to sick leave payments or continued health insurance. It states that a past practice requires it be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties, citing CELANESE CORP. OF AMERICA, 24 LA 168 (Justin, 1954). It states there have been only two cases in the last 14 years where sick leave was paid and one was when an employee was in the hospital terminally ill and the other case involved a release and resignation of a bus driver. In the latter case, the District concedes that Wisnefski was not sick but was paid as a resolution of a termination proceeding. It notes that settlements are on a non-precedent setting basis. It insists that the elements required for a past practice do not exist.

With respect to whether there was an inappropriate deduction taken for health insurance, the District contends this issue was not substantiated and was raised for the first time at the hearing. It contends that there was not a mistake, and if the District is shown that one occurred, it would correct it. According to the District, the issue in contention is that the grievant was looking for insurance coverage from the time of his resignation until his new employer's coverage began and this does not compare to the cases of Sward and Wisnefski who received health insurance contributions only while on sick leave.

In conclusion, the District denies violating the collective bargaining agreement as there is no contractual provision, no established policy, and no established past practice entitling the grievant to a sick leave payout and continued insurance benefits. It asks that the grievance be denied.

DISCUSSION

There is no specific provision in the parties' collective bargaining agreement which provides that upon resignation employees are entitled to be paid for unused accumulated sick leave and to receive continued health insurance coverage. The Union relies on Article 26 which is sort of a modified Maintenance of Standards clause which provides that formally adopted policies will continue during the term of the contract. The phrase "formally adopted" implies some affirmative action on the part of the District's Board to establish or recognize an expressed policy. There was no evidence of any "formally adopted" policy that applies to this case.

The Union essentially relies on two factual situations to either be considered a "formally adopted" policy or/and a past practice. The first case involves a former bus driver named Stanley Sward. The District's Bookkeeper, Madeline Smith, testified credibly that Mr. Sward was ill and she visited him in the hospital. Sward used sick leave because he was sick (Ex. 10). Sward was entitled to use sick leave because under Article 19 he was sick. After Sward exhausted his sick leave, he apparently did not return to work and was terminated (Ex. 8), and died shortly thereafter. Sward's situation does not establish any past practice as he came within the express terms of the collective bargaining agreement. While Sward was receiving sick leave, he continued to receive health insurance coverage the same as if he was working. Sward never resigned to take another job and never got a lump sum payment. Thus, the use of sick leave by Sward proves no past practice.

The second case involves a former bus driver named Sylvester Wisnefski. Union Steward Dave Rudi testified that Mr. Wisnefski was let go because of age. Inasmuch as this might be illegal age discrimination, it does not make sense that he would be terminated because of his age. The more credible testimony was that complaints were made about Wisnefski's driving and Wisnefski testified credibly that he denied any failure to properly perform his duties and he had not been warned or disciplined about any such conduct or he would have challenged it. Apparently, there was some difference of opinion about these matters and the District and the Union met and reached an agreement that the grievant would resign and he would be paid his accrued sick leave.

Apparently, Mr. Wisnefski was on leave with pay from March 11 through March 28, 1996, then went on sick leave until May 31, 1996 (Ex. 11). The evidence clearly establishes that the parties entered into an agreement satisfactory to both sides that Wisnefski would resign effective after his sick leave ended. This creates no past practice. Mr. Wisnefski never quit to

take another job and got health insurance coverage while on sick leave because he was being paid during that time. Even if this is considered as precedent-setting, one case does not establish a past practice under either of the definitions proffered by the Union or the District.

It is concluded that there is no past practice of the District paying out sick leave when an employee resigns to take other employment as in the grievant's case. Thus, the two cases do not establish any formally-adopted policy and/or past practice.

There was no proof that the grievant was entitled to any continuing health insurance coverage beyond the end of March, 2000. Ms. Smith testified credibly that employees were charged an amount to cover 25% of the insurance premium over the year during the months they worked and were paid. As the District pays 75% of the monthly premium, once an employee quits, the District is not obligated to pay 75% beyond the month in which they quit as they are no longer employees and are not entitled to such payment. Employees who have paid more than the required 25% amount for that month are reimbursed the difference. No proof was offered that the grievant was not properly reimbursed. Inasmuch as there was no past practice and no formally-adopted policy proven by the Union with respect to unused accrued sick leave payment on resignation and continuing health insurance payments, the grievance must be denied.

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

AWARD

The District did not violate Article 26 of the 1998-2000 Agreement by failing to pay the grievant for unused sick leave or for failing to pay for continued health insurance after his resignation, and therefore, the grievance is denied in all respects.

Dated at Madison, Wisconsin this 5th day of December, 2000.

Lionel L. Crowley /s/

Lionel L. Crowley, Arbitrator

LLC/gjc
6161.doc