SYSTEM BOARD OF ADJUSTMENT

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IN THE MATTER OF ARBITRATION **OPINION AND AWARD**

between

SOUTHWEST AIRLINES **Case No. MDW-R-1325/12**
(Termination of [redacted])

and

TRANSPORT WORKERS OF AMERICA LOCAL 555 **Gil Vernon, Arbitrator**

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APPEARANCES:

On Behalf of the Union: Jerry McCrummen, Vice-President – Local 555

On Behalf of the Company: [redacted]

I. ISSUE

The Parties stipulated that the issue before the Arbitrator should be framed as follows:

> "Was the Grievant terminated for just cause and, if not, what shall the remedy be?"

II. BACKGROUND

The grievance before the Arbitrator protests the termination of the Grievant from his position as a Ramp Agent at the Employer's Chicago Midway Airport

(MDW) operation. The reason for the termination was set forth in a July 18, 2012 letter which read as follows:

> TO: [redacted]
> FROM: [redacted]/MDW
> DATE: July 18, 2012
> SUBJ: Results of Fact Finding – Termination
>
> A fact-finding meeting was held on July 12, 2012 to discuss your possible insubordination, possible abuse of sick leave or sick pay, and your poor attitude towards your Leader on June 30 and July 1. Present at this meeting were you, TWU Representatives Denver Worker and Troy La Mont, [redacted] Supervisor [redacted], and myself.
>
> Beginning on June 29, the MDW Station received a significant increase in sick calls from its Ramp Agents. These absences negatively impacted the Company's operations and placed increased burdens upon those employees that did come to work. As such, Southwest implemented its rights under Article 17 of the collective-bargaining agreement and instructed those employees who were absent due to illness to report to a Company doctor to verify that they were in fact too ill to be at work. On June 30, 2012 and July 1 you reported ill and Southwest directed you to see a Company doctor. Even after your Leader advised you that failure to go to a Company doctor could be considered insubordination, you failed to go.
>
> After a thorough and compete investigation into this matter, and after considering the evidence and testimony presented at the fact-finding, it has been determined that your failure to report to the Company doctor on June 30 and July 1 constituted insubordination. Your behavior as in direct violation of the Southwest Airlines Ground Operations Basic Principles of Conduct, including, but not limited to, the following:
>
> 4. Complete coordination with Coworkers and Supervisors is required in order to provide harmonious working conditions.
>
> 15. Insubordinate conduct or refusing to follow a work order or any act of insubordination.
>
> Based on the above and because of your actions, your employment with Southwest Airlines is terminated effective immediately.

The matter could not be resolved and was ultimately appealed to arbitration. The hearing was held September 26, 2012. Following receipt of a transcript, briefs were filed October 27, 2012.

III. RELEVANT CONTRACT LANGUAGE AND WORK RULES

(1) The Contract

ARTICLE ONE
PURPOSE OF AGREEMENT

A. The purpose of this Agreement is, in the mutual interest of the Company, the Union, and the Employees, to provide for the operation of the Company under methods which shall further, to the fullest extent possible, the well-being of Southwest's Customers, the efficiency of operations, and the continuation of employment under reasonable working conditions. It is recognized to be the duty of the Company, the Union, and the Employees to cooperate fully to attain these purposes.

ARTICLE TWO
SCOPE OF AGREEMENT

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

ARTICLE SEVENTEEN
SAFETY AND HEALTH

A. Scope. Safety and health of the Employees shall be protected. The Company shall provide the necessary training for Employees to safely perform their duties. The Company and the Employee shall maintain safe, sanitary, and healthful conditions at all stations. The Company and Employee shall comply with all applicable Federal, State, and Municipal safety and sanitary regulations.

B. Safety Committee. A Safety Committee composed of Union and Company Representatives shall be established at each station. Committee members shall be afforded reasonable and necessary time during working hours without loss of pay to:

1. Meet once a month and maintain a written record thereof. The minutes will be signed and reviewed by designees from both parties for accuracy. Prior to the monthly meeting, Management and TWU Local Safety Representative will perform a station walk around to evaluate and focus on current areas of concern. In the spirit of cooperation, the purpose of such walk around is to identify safety issues,

2. Review all job related accidents, injuries, complaints, and safety recommendation reports regarding unsafe conditions. Prior to the monthly safety meeting, the Union Safety designee will be provided with a written review of all job related accident and injury reports.

3. Recommend corrective action to reduce injuries and safety concerns. All recommendations will be considered by the company.

4. Observe OSHA inspections when feasible.

C. Work Area Requirements. Buildings, offices, and other work areas used by Employees shall be kept in good repair. Suitable lunch rooms, rest rooms, and individual lockers shall be provided for Employees, where possible.

D. First Aid Equipment Requirements. The Company shall provide adequate and accessible first aid equipment to meet the needs of Employees in case of minor accidents. The Employees recognize their duty and responsibility to assist the Company in maintaining the equipment and supplies.

E. Safety Reporting Requirement. The Company and the Union agree that the safe operation and condition of equipment shall be maintained. Employees shall promptly report malfunctioning and/or inoperative tools or equipment to the Company, who shall cause such tools or equipment to be inspected and, if appropriate, withdrawn from service until the necessary repairs are made and documented by the Company.

F. Company Provided Equipment. The Company shall furnish, without cost to the Employees, all safety equipment such as, rain gear, ear protectors, gloves, knee pads, high visibility garments and headsets. The Employees shall use or wear such devices in performing their work.

G. Investigation Rights Pertaining to Safety and Health. An Employee who believes that a condition exists that puts the Employee's safety or health in jeopardy shall promptly notify his Supervisor/Manager and have the matter promptly investigated by the Manager and when available, a Local Union Safety Committee member. All accident/injury investigations will also include a Union Safety Committee member, when available. No Committee member will suffer any loss of pay due to the above investigations.

H. Outside Consultant. In the event the Company and the Union agree to have an outside expert on safety and health perform a survey or a study of a particular health or safety hazard, the cost shall be borne equally by both parties.

I. Company Required Physical. The Company may, at its expense, require an Employee to submit to a physical examination at any time by a doctor of the Company's choosing.

ARTICLE TWENTY
GRIEVANCE / SYSTEM BOARD / ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE – PROCEDURES

A. Purpose. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

ARTICLE TWENTY-THREE
ATTENDANCE

A. Purpose. The Company and the Union recognize that habitual absenteeism and tardiness adversely affect operations and morale. The purpose of this program is to control the attendance of Employees in a constructive manner and within the framework of progressive disciplinary procedures. In order to avoid the accumulation of occurrences, it is recommended that, in the event Employees require time off, they should, to the degree possible, secure trades with other Employees, request vacation time, or, where appropriate, request a leave of absence. Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick leave or sick pay shall warrant immediate termination. (Emphasis Added)

(2) Work Rules

SOUTHWEST AIRLINES GROUND OPERATIONS
BASIC PRINCIPLES OF CONDUCT

4. Complete coordination with Coworkers and Supervisors is required in order to provide harmonious working conditions.

15. Insubordinate conduct or refusing to following a work order or any act of insubordination [are prohibited].

IV. OPINION AND DISCUSSION

The context of Grievant's termination is noted in the termination letter. The Company believes that a large group of employees at MDW were frustrated at the status of contract negotiations between the Parties and as a result allegedly planned a sick-out in the days surrounding and including June 29 and 30. Having heard rumors to this effect and believing there had been a significant increase in absences, the Company had supervisors answer the sick-call line that ordinarily was hooked up to an answering machine. The usual procedure was for employees just to leave a voicemail message when reporting an absence.

When Grievant called in on June 30, in advance of his shift, to report he was too sick to work, a supervisor answered the phone. The supervisor instructed him that he was required to report to one of four different medical facilities (designated by the Company) during the hours of his shift so his illness could be verified. Grievant was also warned that failure to do so would be considered insubordination and could result in his discharge. Grievant gave the supervisor the impression that he would do so but instead he went to a facility of his own choosing.

The Grievant also called in in advance of his shift Sunday, July 1, 2012. However, he found and called a phone number that was answered by voicemail.

The Company's position, succinctly stated, is that it had the contractual authority under Article 17.I. to direct the Grievant to get an examination by a Company-designated doctor. Given that he refused to comply, Grievant's insubordination is clear. The penalty for such serious conduct is (as is well established) termination.

The Union's position is the Company is misapplying Article 17 and the supervisor's instructions were not a legitimate work order. Therefore, no insubordination occurred. Moreover, even if there had been insubordination to some degree this is not one of the offenses for which summary discharge is a negotiated result.

After considering the arguments of the Parties, it is the conclusion of the Arbitrator—based strictly on the evidence of this record—that just cause did not exist for the termination of Grievant because he was not 'insubordinate' as that term is commonly applied in such matters. This conclusion is based on general considerations and based on the Arbitrator's interpretation (in the context of this case only) of Article 17.I.

Generally speaking, insubordination is the repeated resistance and/or refusal by an employee to comply with a "work order" issued pursuant to management's authority to operate its enterprise. Discipline will be upheld when the following conditions are shown to exist:

1. The person giving the order had authority to do so;
2. The order was work-related;
3. The order was clear and was understood by the employee;
4. The consequences of disobedience were known to the employee;
5. The employee had sufficient time to comply.

See Chapter 16-17 Section 16.04[2] "common causes of discipline" by Steven J. Goldsmith and Louis Shuman in Labor and Employment Arbitration (2nd edition, Bornstein, Gosline and Greenbaum – General Editors, Matthew Bender).

On the basis of this record, the Arbitrator is yet to be convinced that the Company had the authority to expect immediate compliance with the order in question. Nor is he convinced the order was "work related" in that non-compliance with the order had no impact on the operation of the business. The Employer is entitled to run its business and has the right to expect compliance with

its orders so the flow of the operation is unimpaired. This is the 'obey now and grieve later' rule. It has often been said the 'shop floor' is not a debating society where production or the enterprise can be impeded or stopped while disputes are resolved. (Ibid. Chapter 16-19 Section 16.04[3].) There are limited exceptions.

While requirements to be compliant (obey) and later process disputes through the grievance procedure is sacred, the Arbitrator questions its applicability in this set of circumstances. Grievant was at his home and his compliance had nothing to do with the "work" of running of the airline. If he complied or didn't the airline didn't run any different.

More specific to the question of management's authority to issue orders, such as the one in question, to an employee at home and expect contemporaneous compliance is Article 17.I. and Article 23. Without evidence such as bargaining history and past practice, I am not convinced Article 17.I., read in the context of the whole of Article 17, applies. Article 17 relates to health and safety in the workplace. In short, the Company, the Union and employees all have responsibilities to make the work place safe. Certainly, if there is sufficient cause to question an employee's ability to work safely, the Employer can require an employee to undergo a Company medical exam. The Employer's directive in such a case can even be issued when an employee is off-duty. Whether the Company can expect immediate compliance is another question.

In this case, the directive had nothing to do with a question of safety in the workplace. Clearly, it had to do with what the Employer believed to be an improper, if not illegal, concerted activity. More to the point, the Employer believed employees were using sick leave for purposes other than its purpose (income protection when illness or injury prevents reporting for duty).

In this regard, the Parties have negotiated language far better suited to these circumstances in Article 23.A. They stated it simply:

> "Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick leave or sick pay shall warrant immediate termination."

Certainly this leaves the burden on the Employer to prove, in accordance with applicable just cause standards, that sick leave abuse occurred in any particular case.

In this case, the Employer in its fact-finding notice indicates that along with insubordination it was investigating sick leave and sick pay abuse. However, it did not rely on sick abuse as a reason for termination. Thus, the Board cannot pursue evidence in this regard.

Even though sick leave abuse was not pursued in this case, and even though the Board makes no finding in this regard, the Grievant should take note of several things. First, when sick leave abuse occurs, the Employer is clearly entitled under Article 23.A. to terminate as the Parties have contractually agreed that it is a warranted penalty. Second, the Grievant should realize that while it is possible he

was ill and while he was not obligated to report to a Company doctor immediately within the hours of his shift, there is also some evidence to suggest he was playing a very dangerous game. If he 'plays' in the future, he should realize that abuse of sick leave doesn't necessarily require a physical exam but can be demonstrated circumstantially if that evidence is convincing. Not only does he risk termination, he puts at risk the great institution of collective bargaining whose hallmark is the orderly resolution of disputes concerning wages, hours and conditions of employment. When employees skirt this orderly process, it hurts rather than helps the parties' mutual interests.

In summary, just cause did not exist for the Grievant's termination. He is entitled to reinstatement and lost earnings.

AWARD

The grievance is sustained.

(Signature on Original)

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Gil Vernon
Arbitrator

Dated this 4th day of December 2012.