

IN THE MATTER OF ARBITRATION BETWEEN

_____)
SOUTHWEST AIRLINES CO.,)
)
Employer,)
)
and) **DISCHARGE**
) **GRIEVANCE**
)
TRANSPORT WORKERS UNION,)
LOCAL 555,)
)
Union.)
_____)

Arbitrator: Stephen F. Befort
Hearing Date: February 7, 2019
Post-hearing briefs received: March 22, 2019
Date of Decision: April 19, 2019
APPEARANCES
For the Union: Brian Smith
For the Employer: Vance R. Foster

INTRODUCTION

Transport Workers Union, Local 555 (TWU Local 555 or Union), as exclusive representative, brings this grievance claiming that Southwest Airlines (Southwest or Employer) violated the parties' collective bargaining agreement by discharging [REDACTED] without just cause. The Employer maintains that it had just cause to terminate the grievant for violating the Attendance Control Policy set out in the parties' collective bargaining agreement. The

grievance proceeded to an arbitration hearing at which the parties were afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE TWO SCOPE OF AGREEMENT

- C. **Reasonable Work Rules.** Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.
- 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 THIRTEEN

SECTION TWO OCCUPATIONAL INJURY PAY

- A. **Verification.** Occupational injury pay and required time off will be granted on account of occupational injury upon written verification of disability from a qualified medical doctor.
- B. **Continuation.** The Company will make up no less than the difference between the amount paid by Worker's Compensation and the amount the Employee would have earned (after tax withholding) if he worked a regular shift. . . .
- C. **Company/Examination.** The Company may, at its expense, require the injured Employee to submit to a physical examination by a qualified medical doctor of the Company's choosing at any time. Using OJI leave or OJI pay for a purpose other than that intended constitutes abuse and will warrant immediate termination.

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.

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.

1. **Reporting Procedure.** In all cases of absences or tardiness, the Employee shall call his supervisor. If the Employee is unable to call, he shall cause someone to call in his stead. Answering machines at the stations can be utilized.
2. **Requirements of Reporting.** Call-ins must be made at least one-half (1/2) hour before the start of the Employee's shift on every day that the Employee shall be absent. Failure to report an absence at least one-half (1/2) hour prior to the start of the Employee's shift shall be treated as unreported. Failure to report a tardy before the beginning of a shift shall be treated as an Unreported Tardy. . . If no valid reason [for failing to report a tardy within the required time frame] is furnished, the penalty for an unreported occurrence shall be assigned.

ARTICLE TWENTY-THREE
ATTENDANCE

SECTION ONE
ATTENDANCE PROGRAM

- A. **No Show.** (Unreported Absence). Any Employee who is scheduled for regular work, overtime, training, trades, or holidays and does not report his absence as outlined in the "Requirements of Reporting" section of this program shall be charged with a No Show (Unreported Absence). Failure to report an absence, whether or not verified by a doctor's statement, shall be chargeable as a No-Show (Unreported Absence). The Employee shall not be allowed to work.

**SECTION TWO
CONTROL PROCEDURES**

- A. **Recorded Occurrences.** Absences and tardiness on scheduled workdays, overtime, training, trades, or holidays shall be recorded in the following manner:
- B. **Point Accumulation.** The Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:

Less than 1 point	No action taken
1-2 1/2	Letter of Instruction
3-4 1/2	Warning letter
5-5 1/2	Final warning
6 or more	Termination

- C. **Excused Time Off.** No points will be recorded for approved absences, i.e., personal leave, medical leave, OJI leave, military leave, bereavement leave, jury duty, Union leave, and shift giveaways.
- D. **Record Improvement.** For each non-cumulative ninety-day (90) period during which an Employee works without any chargeable occurrence, two (2) points shall be deleted from the Employee's accumulation until the total reaches a maximum of minus 7 (-7).

FACTUAL BACKGROUND

██████████ has been employed by Southwest Airlines for almost eleven years. At the time of his discharge, he worked as a Provisioning Agent at the Chicago Midway Airport.

TWU Local 555 represents a unit of Ramp, Operations, Provisioning, and Freight Agents employed by Southwest Airlines. The collective bargaining agreement negotiated by those parties includes an Attendance Control Policy set out in Article 23. Pursuant to that policy, an

employee accumulates points for unexcused absences and tardiness. On September 18, 2018, [REDACTED] signed a point adjustment letter acknowledging that he had accumulated 6.5 points under the policy which triggered the issuance of a Final Letter of Warning. Two “no shows” on October 13 and 14, 2018, increased his point total to 10.5 points which is well above the termination threshold specified in Article 23.

The principal point of dispute in this matter concerns whether [REDACTED] absences on October 13 and 14 should be treated as unexcused absences or as excused occupational injury leave (OJI). During his tenure with the Employer, [REDACTED] had been on OJI leave on numerous occasions, including the period from October 1 to October 10, 2018. On October 10, a doctor at Concentra Clinic, which is the Employer’s designated third-party medical provider, cleared [REDACTED] to return to full time duty as of October 12, 2018.

While working a regular shift on October 12, [REDACTED] complained of chest pains. His supervisor, Provisioning Supervisor Kevin O’Donnell, decided to summon an ambulance, and paramedics transported [REDACTED] to a nearby hospital. Prior to leaving for the hospital, O’Donnell collected [REDACTED] security badges. O’Donnell drove separately to the hospital and stayed until [REDACTED] was treated and released. O’Donnell then gave [REDACTED] and his girlfriend, [REDACTED] a ride to the MDW Provisioning Station

The respective versions of events urged by the parties diverge at this point. The Union’s version is that Supervisor O’Donnell gave permission to [REDACTED] for the October 13 and 14 absences. In this regard, [REDACTED] testified that when he and O’Donnell returned to the Provisioning Station, O’Donnell asked [REDACTED] how he wanted to handle the situation. [REDACTED] testified that he told O’Donnell that since he had made a doctor’s appointment for Tuesday, April 16, it was his preference to be on OJI until after the doctor’s appointment. According to [REDACTED]

O'Donnell approved that plan by responding, "Okay, I will see you after Tuesday." [REDACTED] testimony at the arbitration hearing corroborated this version of events.

The Employer, in contrast, contends that [REDACTED] was scheduled to work on October 13 and 14, but that he failed either to show up for work or to call in his absence. The Employer relies on O'Donnell's testimony that he never approved [REDACTED] October 13 and 14 absences. O'Donnell testified that when they arrived back at the Provisioning Station, he told [REDACTED] that he should go inside and pick up the appropriate paperwork and then visit the Concentra Clinic for an examination. It is undisputed that [REDACTED] did not take either of these steps.

The Union also claims that James Story, the Provisioning Manager at MDW, stated at the post-discharge Systems Board proceeding that a supervisor would take an employee's identity badges only if the employee is being placed on OJI or medical leave. [REDACTED] a Union appointee to the Systems Board, testified that he overheard Story make this comment. At the arbitration hearing, Story denied making such a statement. He also testified that an employee without a security badge still has the authority to show up for work.

Following the missed shifts on October 13 and 14, a fact-finding meeting was held with [REDACTED] on October 18. The Employer terminated [REDACTED] four days later on October 22, 2018. On December 20, a Systems Board of Adjustment convened to hear the grievance. After the Board deadlocked, the grievance advanced to arbitration.

POSITIONS OF THE PARTIES

Employer

The Employer contends that it had just cause to discharge the grievant based upon the terms of the Attendance Control Policy (ACP) set out in the collective bargaining agreement. The parties have stipulated that as of September 18, 2018, [REDACTED] had accumulated 6.5

points on the ACP scale and was subject to a Final Letter of Warning. The Employer maintains that [REDACTED] no show, no call for his scheduled October 13 and 14 shifts puts him over the discharge threshold of the ACP. The Employer argues that [REDACTED] was not on OJI leave for these two shifts and that his supervisor did not give him permission to miss these shifts.

Union

The Union claims that [REDACTED] absences on October 13 and 14 were excused because he had been approved for OJI leave. This approval was provided explicitly by supervisor O'Donnell and implicitly by the fact that [REDACTED] security badges were confiscated. In addition, [REDACTED] treating physician verified his need for OJI leave in accordance with Article 13, Section 2 of the collective bargaining agreement. Finally, the Union maintains that O'Donnell never instructed [REDACTED] to visit the Concentra Clinic prior to the October 13 and 14 absences.

DISCUSSION AND OPINION

The Attendance Control Policy

At the arbitration hearing, the parties orally stipulated that as of September 18, 2018, Mr. [REDACTED] had accumulated 6.5 points under the ACP. If [REDACTED] absences on October 13 and 14 were unexcused, that point total rose to 10.5 which, according to Article 23 of the collective bargaining agreement, exceeded the threshold requiring termination. On the other hand, if those absences were excused, termination would not have been appropriate. Accordingly, the resolution of this grievance turns on whether those two absences were excused or unexcused.

Excused or Not Excused

The Employer argues that [REDACTED] absences on October 13 and 14 were unexcused because he was scheduled to work on those days, but he did not show up for work or call in his absences. The Employer maintains that [REDACTED] could not have been on OJI leave because only

Concentra, the Employer's designated health care provider, can place an employee on OJI leave. Supervisor O'Donnell testified that he instructed ██████ on October 12 to visit the Concentra Clinic, but that ██████ failed to do so.

The Union counters that ██████ was on OJI leave, meaning that the October 13 and 14 absences were excused. The Union relies on three pieces of evidence to support this claim.

First, the Union contends that O'Donnell, ██████ direct supervisor, authorized the October 13 and 14 absences. The record shows that after returning from the hospital to the Midway Provisioning Center on October 12, O'Donnell and ██████ discussed next steps. ██████ contends that he stated that since he had made an appointment to see his treating physician for Tuesday, October 16, his preference was to be on OJI leave until after that appointment. According to the testimony of both ██████ and ██████ O'Donnell approved that plan by responding, "Okay, I will see you after Tuesday."

Second, the Union argues that the fact that Supervisor O'Donnell confiscated ██████ security badges on October 12 illustrates that the Employer was treating him as on OJI leave. In this regard, the Union relies on the testimony of ██████ a Union appointee to the Systems Board, to the effect that James Story, the Provisioning Manager at MDW, stated at the Systems Board proceeding that a supervisor would take an employee's identity badges only if the employee is being placed on OJI or medical leave.

Third, ██████ treating physician, after examining ██████ on October 16, 2018 provided a doctor's note that stated that ██████ should be excused from work on October 13 and 14. The Union contends that this satisfies Article 13, Section 2(A) of the parties' agreement which states: "Occupational injury pay and required time off will be granted on account of occupational injury upon written verification of disability from a qualified medical doctor."

While the Union's arguments are plausible, I do not think that they carry the day for several reasons. What follows is an analysis of the Union's contentions in reverse order.

In terms of the argument that [REDACTED] treating physician placed him on OJI leave, Senior Labor Manager Dan Kusek testified that only a Company-designated doctor can place an employee on OJI leave. While acknowledging that Article 13, Section 2(A) states that a "qualified medical doctor" may authorize the placement of an employees on OJI leave, that provision is qualified by the more specific provisions of Article 13 Section 2(C) which states that "The Company may, at its expense, require the injured Employee to submit to a physical examination by a qualified medical doctor of the Company's choosing at any time."

In this instance, the Employer designated Concentra as its official medical provider. [REDACTED] was obviously aware of the fact that he needed to visit a Concentra doctor in order to be placed on OJI leave since he has followed that protocol on numerous prior occasions, including as recently as October 10, 2018 when he was cleared to return to work. In this case, however it is undisputed in that [REDACTED] did not visit the Concentra Clinic on October 12, 2018.

With respect to the Union's argument about the security badges, Provisioning Manager Story denied ever making the statement to the effect that the confiscation of badges must mean that the employee is being place on either OJI or medical leave. Story also testified at the arbitration hearing that an employee may show up for work even not being in the possession of his or her security badges.

The remaining issue is whether Supervisor O'Donnell gave permission to [REDACTED] for his absences on October 13 and 14. O'Donnell testified at the arbitration hearing that he did not give [REDACTED] permission to be out on OJI leave. He testified, instead, that he told [REDACTED] after

returning from the hospital on October 12 that [REDACTED] should go into the office, pick up his OJI paperwork, and visit the Concentra Clinic.

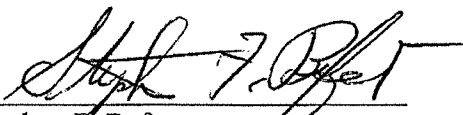
To an extent, this leaves us with a “he said, she said” type of situation. On balance, however, I find O’Donnell’s testimony to be the more credible for three reasons. First, O’Donnell is the person who allegedly provided the oral assurance of an excused absence. I believe that the person who actually uttered the questionable statement has a greater knowledge of what was stated than a listener who was hoping for a different message. Second, the record contains no evidence that O’Donnell bore any animosity toward [REDACTED]. To the contrary, O’Donnell voluntarily accompanied and stayed with [REDACTED] during the October 12 hospital visit. Finally, O’Donnell has less of an incentive to bend the truth. His job is not at stake, but [REDACTED] is.

The Employer’s position is also supported by the arbitration decision in the [REDACTED] [REDACTED] termination grievance which involved a remarkably similar set of facts. In that case, the grievant stood at 6.5 points on the ACP scale before missing two additional work shifts. Arbitrator Barnard upheld the Employer’s termination decision in that case as the natural outcome of the mutually negotiated attendance policy. A similar outcome is warranted in this matter.

AWARD

The grievance is denied.

Dated: April 19, 2019



Stephen F. Befort
Arbitrator