Arbitrator's Opinion and Award

In the Matter of Arbitration	§		
Between	§	**Grievant:**	[redacted]
Southwest Airlines Co. ("Company")	§	**Case Number:**	**OAK-R-0329/18**
And	§		
Transport Workers Union of America, AFL-CIO, Local 555 ("Union")	§	**Issue:**	**Termination**

Before: **Paul Chapdelaine**
Appearances
For the Company: **Cynthia S. Fox**
For the Union: **Abilio Villaverde**
Location of Hearing: **Dallas, Texas**
Date of Hearing: **May 17, 2018**
Date Record Closed: **July 2, 2018**
Date of Award: **July 28, 2018**

Summary of Award

The record clearly established that when the Grievant, by his own admission, called in sick on January 2, 2018 in order to attend his college classes, he was in violation of those provisions of the Company's *Basic Principles of Conduct* which prohibit a false claim for sick leave and those provisions of the parties' Collective Bargaining Agreement which prohibit sick leave abuse. Furthermore, I find no evidence that the Company's decision to terminate his employment was arbitrary, capricious, discriminatory, or that it constituted disparate treatment. Thus, I find that the Company did have just cause to terminate his employment effective January 31, 2018. Accordingly, the grievance is denied in its entirety.

Paul Chapdelaine
Arbitrator
July 28, 2018

Issue

Did the Company have just cause to terminate the employment of [redacted] ("Grievant") effective January 31, 2018, and if not, what is the appropriate remedy?

Background

At the time of his termination the Grievant had worked for the Company for two and one-half years and was assigned as a ramp agent at the Company's Oakland ("OAK") station. While working full time for the Company, the Grievant was also attending college at California State University, East Bay, majoring in Communications. Beginning in January of 2018 the Grievant was enrolled in classes which were scheduled to meet every Tuesday.

On Monday, January 1, 2018, due to heavy holiday traffic and a higher than normal volume of sick calls, the Company declared a State of Operational Emergency ("SOE"). The impact of the SOE declaration was that all employees who called in sick would be required to provide a doctor's statement on their first day back to work.

On Tuesday, January 2, 2018, the Grievant was scheduled to work from 1:15 p.m. to 9:45 p.m., and he was also scheduled to attend classes which were in conflict with his work schedule. At 12:54 p.m. on January 2 he called the Company and said that he could not report for work because he was sick. As he did not provide a doctor's statement when he returned to work, the Company scheduled him for a fact-finding meeting to be held on January 17.

At the fact-finding meeting the Grievant acknowledged that on January 2, 2018, he did not comply with the requirement to call in at least 30 minutes prior to the beginning of his shift. Moreover, he stated that he was not ill that day, but had called in sick in order to attend his scheduled classes.

On January 31, 2018, the Company terminated the Grievant's employment by issuance of a memorandum, the body of which reads as follows:

> A fact-finding meeting was held on January 17, 2018 to discuss your call out during the State of Operational Emergency issued by Anthony Gregory on January 1st, 2018. Present at this meeting were you, TWU Representative [redacted] SSO Coordinator Nikita Lal, and SSO Team Lead Chris Vizcaino.

During the fact-finding, you admitted that you used your sick leave, not because you were sick, but rather because you had school. This is a violation of the Basic Principles of Conduct including, but not limited to:

> 17. Falsification of any Company records including, but not limited to, your application for employment, claim for sick leave or sick pay, requests for free and or reduced transportation rates, or a false insurance claim.

This is a violation of the TWU 555 Collective Bargaining Agreement, which states:

- 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.

As a result of your actions, your employment with Southwest Airlines is terminated effective immediately.

Following the Grievant's termination a timely grievance was filed protesting the Company's action. When the parties were unable to resolve the dispute at earlier steps in the grievance procedure, the matter was advanced to arbitration for final and binding resolution. This Arbitrator was selected to hear the case in accordance with the provisions of Article 20 of the parties' Collective Bargaining Agreement ("CBA").

During the arbitration hearing conducted on May 17, 2018, both the Company and the Union presented sworn testimony and documentary evidence in support of their respective positions. The Grievant was fully and fairly represented by the Union, and he was present and testified on his own behalf. A transcript of the proceeding was taken and copies were provided to each of the parties and the Arbitrator. At the conclusion of the hearing the parties agreed to submit post-hearing briefs. Upon timely receipt of said briefs, the record was closed on July 2, 2018.

Positions of the Parties

Both parties submitted detailed, comprehensive post-hearing briefs addressing all of the issues which arose in the instant case. Their arguments concerning the issues are summarized below. The summaries are just that – condensed statements of the principal arguments made by the parties on the salient points of the issues to be considered. All points made in the briefs have been thoroughly studied and considered, even though all elements of each argument may not be set forth herein.

The Company's Position

The Company made the following assertions:

- The Company's *Basic Principles of Conduct* ("BPOCs") are published and available to all employees; the Grievant received training on the BPOCs; further, he acknowledged that the BPOCs applied to him. Thus, he was aware of his responsibilities under the BPOCs.

- When the SOE was declared on January 1, 2018, the Grievant was at work. In addition, when he called in sick on January 2, Station Services Office ("SSO") Team Lead Chris Vizcaino informed him that he would be required to provide a doctor's statement when he returned to work. Ergo, he was aware that the declared SOE required him to provide a doctor's statement on his first day back to work.

- There is no credibility to the claim that when the Grievant called in sick he was simply mistaken or confused about how to report his absence. When he called in on January 2, 2018, he clearly stated that he was sick – even after he was told that a doctor's statement would be required. Further, he made no mention of having to attend classes.

- There is no validity to the argument that the Grievant's false sick call should somehow be excused simply because he was honest during his fact-finding meeting. To excuse conduct which warrants termination because an employee is honest during a fact-finding meeting would render meaningless those provisions of the BPOCs and CBA which prohibit sick leave abuse.

- The argument that the Grievant thought he had a shift trade for January 2, 2018 is without foundation. There is no credible evidence of such a trade and further, he admitted that he was on the schedule to work that day.

- The contention that because the Grievant did not receive or intend to receive sick pay for January 2, 2018, does not excuse his false sick call for that day. Sick pay and sick leave are not one and the same – which is made clear by the fact that the relevant provisions of the BPOCs and CBA prohibit abuse of either sick pay **or** sick leave.

- The Grievant was terminated for sick leave abuse – not for a "No Show" reporting violation (i.e., calling in less than 30 minutes before the beginning of his shift). Thus, the Union's argument that he should **only** receive two attendance points for a reporting violation is

irrelevant, and if imposed in lieu of termination would nullify the BPOCs and CBA provisions which prohibit sick leave abuse.

- The Union is mistaken when it claims that Article 23 of the CBA does not require termination in a case involving a false claim for sick leave. On the contrary, Article 23 specifically provides that sick leave abuse "shall warrant immediate termination."

- The Company's decision to terminate the Grievant was consistent with the termination of other employees for the same or similar misconduct involving dishonesty.

- None of the cases cited by the Union involved a situation similar to the Grievant's; therefore, they are not evidence of disparate treatment.

Based on the foregoing, the Company insisted that there was just cause for the termination of the Grievant. Accordingly, the Company requested that the grievance be denied in its entirety.

The Union's Position

The Union made the following assertions:

- When the Grievant called in sick less than 30 minutes before his shift on January 2, 2018, the Company properly charged his absence as a No Show or Unreported Absence in accordance with the parties' agreed-upon Attendance Program which is detailed in Article 23 of the CBA.

- Although the Attendance Program does not require a doctor's statement for a No Show or Unreported Absence, Article 23 of the CBA provides that if a doctor's statement is required it must be presented to the Company on the employee's **first** day back to work. Therefore, even if the Grievant had been sick, a doctor's statement would not have "counted" because he did not submit it to the Company on his first day back to work.

- The Grievant had never used a Reported Personal Absence ("RPA"), which would have been the appropriate reason for his failure to report to work on January 2, 2018. Thus, he did not know the correct terminology to use when he called in that day.

- At his fact-finding meeting the Grievant was honest about the reason he called in on January 2, 2018. He even provided the Company with a copy of his school records showing that he was scheduled to attend classes that day.

- The Grievant was not trying to deceive the Company, nor was he attempting to receive sick pay for the day in question. Further, he was not trying to avoid being charged with attendance points.

- In accordance with the Control Procedures in the Attendance Program found in Article 23, an employee charged with a No Show or Unreported Absence shall receive two attendance points. Therefore, two attendance points was the appropriate penalty for the Grievant's No Show or Unreported Absence on January 2, 2018 – not termination.

Based on the foregoing, the Union asserted that the Company did not have just cause to terminate the Grievant's employment. Accordingly, the Union requested that the Grievant be reinstated and that all references to his termination be purged from his file.

Discussion and Opinion

The following are my observations, opinions, and findings based on a careful review and thorough study and evaluation of all the evidence in the record including the testimony provided at the arbitration hearing, as well as the extremely well-prepared post-hearing briefs submitted by counsel for each of the parties, and the previous arbitration decisions and System Board cases which were made part of the record.

There was no dispute between the parties concerning the essential facts of the case. At 6:15 p.m. on January 1, 2018 while the Grievant was on duty, the Company declared an SOE which required that all employees who called in sick would be required to provide a doctor's statement on their first day back to work. At 12:54 p.m. on January 2 the Grievant called in sick for his shift which was scheduled to start at 1:15 p.m. On January 17 the Company conducted a fact-finding meeting with the Grievant because he failed to provide a doctor's statement for his absence on January 2. Following the fact-finding meeting, the Company terminated the Grievant's employment effective January 31 for violating those provisions of the BPOCs and the CBA which prohibit abuse of sick leave.

Furthermore, at the Grievant's fact-finding meeting conducted on January 17, 2018, he told Team Lead Chris Vizcaino that he was not ill on January 2, but had called in sick so that he could attend his scheduled college classes. In addition, he stated that he thought he had his work schedule covered with a shift trade but realized minutes before his start time that it was not covered. He also told Vizcaino that when he called in, he meant to ask for an RPA but he was not familiar with the terminology.

On behalf of the Grievant the Union argued that when he called in on January 2, 2018, he was simply mistaken or confused because he was not familiar with the term RPA or Reported Personal Absence. The Union pointed out that he had never before used an RPA. Further, it asserted that the only way he knew how to advise the Company that he would be absent was to call in sick.

Notwithstanding the Union's arguments on this point, I am not persuaded. The Grievant was on duty on January 1, 2018 when the SOE was declared. Furthermore, when the Grievant called in on January 2, he actually spoke to Vizcaino twice because his first call was "dropped." During both calls Vizcaino read him a prepared script which stated the conditions set forth in the SOE declaration. The script read by Vizcaino and the notices of the SOE which were posted and disseminated on January 1 included a statement to the effect that any employee who called in sick would be required to provide a doctor's statement upon returning to work. In addition, both the script and the posted notices stated that failure to provide a doctor's statement would result in a fact-finding meeting and possible disciplinary action up to and including termination. But in spite of those warnings, the Grievant still advised Vizcaino that he was sick – and he did so twice.

While it may be true that the Grievant had never before used an RPA or Reported Personal Absence, and he may not have been familiar with the term – even though it is specified in Article 23 of the CBA – calling in sick was certainly not his only alternative. Keeping in mind that he is nearing graduation from college, and that he is a Communications major, to avoid being dishonest with the Company all he had to do was explain his situation to Vizcaino. In other words, he could have said that he thought he had his work schedule covered with a shift trade, but he was mistaken, and he could not come to work because he had to attend his college classes. Instead, he chose to deceive the Company by telling Vizcaino that he was too sick to come to work.

The Union also argued that because the Grievant told the truth at his fact-finding meeting it was evident that he had no intention of being dishonest with the Company. Further, the Union contended that his honesty at the meeting demonstrated that it was not his intention to be paid for January 2, 2018, or to try to avoid the assessment of any attendance points. The Union pointed out that at the fact-finding meeting, he even provided copies of his class schedule to demonstrate his honesty.

Unfortunately for the Grievant, the Company found his belated attempt at candor to be nothing more than a feeble effort to excuse his deceit. After considering all of the facts, I find that I agree with the Company. Specifically, I find that the Grievant had more than one opportunity to provide the Company with a truthful account of the reason for his absence on January 2, 2018. Further, I find that if he had taken advantage of any one of those opportunities it might have resulted in the

Company deciding that action short of termination was appropriate. With regard to those missed opportunities, I note the following:

First, if the Grievant, as he claimed, was truly in a panic when he called in sick on January 2, 2018, once Vizcaino read him the SOE script the Grievant had a chance to reconsider and he could have then told Vizcaino the truth – but he did not. Next, when his initial call was disconnected he called Vizcaino back and heard the SOE script a second time. Here again he could have stated the actual reason for his absence – but he did not. Although not in the record, the Grievant presumably returned to work sometime during the week of January 2. In accordance with the SOE, on his first day back to work he was required to provide a doctor's statement given that he had called in sick. However, not only did he not provide a doctor's statement – which was not surprising since he was not sick – but he also made no attempt to advise Vizcaino or any other member of Management of the actual reason for his absence. On January 10, more than a week after he had called in sick, he received and signed for a memorandum from Vizcaino directing him to attend a fact-finding meeting on January 17 concerning his sick call. This contact with Vizcaino on January 10 presented the Grievant with another obvious opportunity where he could have provided the Company with the real reason for his absence – but he did not. Thus, from January 2 through January 17 – fifteen days – the Grievant had numerous opportunities to inform the Company of the actual reason for his absence – but he chose not to do so until he was formally confronted at his fact-finding meeting.

Concerning shift trades between agents, the record established that they are documented on a Company form, and that once approved, a copy of the form is retained by Management and a copy is provided to each of the agents involved. I find it worth noting that the Grievant claimed that he initially had the agreement of another agent to work for him on January 2, 2018. Further, he stated that because their shift trade for that day was included with trades for later dates, there was confusion surrounding its submission and, therefore, it was never approved. While all of this may have been true, the question remains as to why he was not aware that he was still scheduled to work on January 2 – at least, as he claimed, he was not aware until 21 minutes before the start of his shift. For this late realization that he was still scheduled to work, not only was no plausible explanation offered – there was no explanation at all.

As was noted above, the Union argued that the Grievant was confused about how to call in when he was **not** sick, and it contended that he should have been excused because he was honest at his fact-finding meeting. However, the Union's main argument in defense of the Grievant was that instead of termination, he should have **only** been charged with attendance points for his absence on January 2, 2018.

Article 23 of the parties' CBA is titled "Attendance" and it includes a formal "Attendance Program" which involves charging "points" for various absenteeism or lateness events. As it relates to the Union's contention that the Grievant should have only been charged with attendance points, Article 23 provides as follows:

> 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.
>
> 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).

Further, the Attendance Program provides that an employee shall be charged with two attendance points for each No Show or Unreported Absence. In addition, the Program specifies various levels of disciplinary action to be imposed as an employee accumulates points. The levels of disciplinary action range from a Letter of Instruction for the accumulation of one to 2½ points up to termination for an employee who has accumulated six or more points.

The Union pointed out that on January 2, 2018, the Grievant called in at 12:54 p.m. – only 21 minutes before his 1:15 p.m. shift. Thus, because his call-in was less than one-half hour before the beginning of his shift, the Attendance Program required that it be charged as a No Show. Furthermore, the Company, specifically Team Lead Chris Vizcaino correctly recorded the Grievant's absence as a No Show. Therefore, in accordance with the Attendance Program the Grievant was properly assessed two attendance points. Because his attendance point total was still less than zero[1] after the two points were charged, the No Show and the resulting points did not trigger any disciplinary action under the Attendance Program. Ergo, the Union argued, his absence on January 2 was dealt with appropriately when he was charged with two attendance points and therefore, no further action (i.e., termination) was warranted.

While I find this argument by the Union to be resourceful and skillfully presented, I do not find it to be persuasive. Essentially, the Union argued that the Grievant's absence on January 2, 2018 could not be considered as **both** a No Show and a sick call. Further, the Union contended that because his absence was correctly treated as a No Show it could not also be considered abuse of sick leave.

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[1] The Attendance Program includes a "Record Improvement" provision whereby points are subtracted from an employee's accumulation down to a total of negative or minus seven.

During cross-examination at the arbitration hearing, Company witnesses testified that under the Attendance Program there is more than one type of No Show. However, because none of the witnesses cited a specific CBA provision to support their testimony, the Union contended that they were mistaken. The Union then surmised that there is only one type of No Show recognized under the Attendance Program, and because the Program does not specifically list a No Show combined with a sick call, the Grievant's absence could only be dealt with as a No Show. Thus, the Union argued that the Grievant's absence could not be considered a sick call but, instead, it constituted a No Show and, as such, it was dealt with appropriately when he was assessed two attendance points.

Notwithstanding the Union's assertions on this point, I find that under the Attendance Program there can actually be two different circumstances where an employee is charged with a No Show. The first is when an employee does not call in at all and does not report for work. The second is when an employee calls in less than 30 minutes before his scheduled start time and does not report for work. The first situation is obviously a No Show. In the second situation the employee is **charged** with a No Show because, in accordance with the specific provisions of Article 23 quoted above, he did not meet the specified reporting requirements. The Grievant's absence obviously falls into the second category – his call-in was less than one-half hour before his shift start time and he did not report for work.

The Union referred to the Attendance Program found in Article 23 of the CBA as the "no tolerance" attendance policy. After reviewing the Program, I find that to be an apt description. It might also be characterized as a "mechanical" or "automatic" program, where a specific action triggers a specific outcome, without exception. In other words, it is a program which requires that if A occurs, then B shall follow (e.g., if an employee does not call in and does not report for work, he is considered a No Show and is assessed two points). Thus, the parties' agreed-to, contractual Attendance Program **required** that the Grievant's absence be charged as a No Show and that he be assessed two attendance points.

However, just because the Grievant's absence was properly charged as a No Show as required by the provisions of the Attendance Program, does not preclude it from also being treated as sick leave abuse. While the Grievant may not have been intent on receiving sick pay for his absence, there is no question that when he called in on January 2, 2018, he stated that he was sick. Obviously, his intent was that the Company should consider him absent because he was ill rather than because he had decided to attend his college classes instead of coming to work. In other words, even if he was not seeking sick pay for the day, he wanted his absence to be considered and treated as sick leave.

Paraphrasing those provisions of the BPOCs and the CBA which were cited in the Grievant's termination letter, falsification of a claim for sick leave is prohibited, using sick leave for other than its intended purpose constitutes abuse, and abuse of sick leave shall warrant immediate termination. Thus, considering all of the facts, including the Grievant's own admissions, I find that the Grievant's call-in on January 2, 2018, was clearly in violation of the provisions cited in his termination letter. Specifically, given his admission that he was not sick, his call-in on January 2, albeit charged as a No Show since it was less than 30 minutes before his shift, was obviously a false "claim for sick leave" which is prohibited by the BPOCs. Furthermore, the fact that he called in sick when he was not, was clearly an abuse of sick leave warranting termination in accordance with the CBA.

As was noted earlier in this award, the Grievant contended that he was not familiar with the terminology RPA or Reported Personal Absence. However, he did acknowledge that he was aware of and had received training on the Company's BPOCs. Further, he conceded that the BPOCs applied to him while he was employed by the Company. In addition, at the arbitration hearing he stated that given the conflict between going to work and attending classes, he should have gone to work on the day in question. Thus, there can be no doubt that the Grievant knew exactly what he was doing, and was aware of the potential consequences when he falsely claimed that he was sick and did not report for work on January 2, 2018.

I also note that the Union made the argument that if the Grievant had presented a doctor's statement it would not have "counted", because he did not provide it on his **first** day back to work. This, the Union argued, made the instant case similar to the [redacted] case in which, the Union contended, the System Board's decision should be considered as a precedent. However, I find that the facts in evidence concerning the [redacted] case are substantially different from those in the instant case. In addition, although the Union asserted that the [redacted] decision established a precedent, I find the record before me concerning the rationale for the Board's decision to be incomplete, as well as contradictory. Thus, based on the evidence before me, I find that the precedent value, if any, of the [redacted] decision remains unclear.

With regard to the other cases tendered by the Union, I find none of them to be on point with the instant case. Thus, I find no precedent value in any of the Union's cases, nor do I find that any of them established that the Grievant's termination constituted disparate treatment. On the other hand, I find that the cases submitted by the Company demonstrated that it has in the past terminated employees on a number of occasions for dishonesty, including false claims for sick leave.

Finding

The record clearly established that when the Grievant, by his own admission, called in sick on January 2, 2018 in order to attend his college classes, he was in violation of those provisions of the Company's *Basic Principles of Conduct* which prohibit a false claim for sick leave and those provisions of the parties' Collective Bargaining Agreement which prohibit sick leave abuse. Furthermore, I find no evidence that the Company's decision to terminate his employment was arbitrary, capricious, discriminatory, or that it constituted disparate treatment. Thus, I find that the Company did have just cause to terminate his employment effective January 31, 2018.

Award

The grievance is denied in its entirety.