In the Matter of Arbitration

between

Southwest Airlines Co.

and

Transport Workers Union,
Local 555

SAN-R-0336/17
[redacted]
Termination

before

John B. Barnard
Arbitrator

For the Company — Mr. Kevin Minchey, Esq.
Assistant General Counsel

For the Union — Mr. Cortney Heywood
Vice President

May 4, 2017
Double Tree Dallas
Love Field

The Issue

Was the termination of grievant [redacted] for just cause? If not, what is the proper remedy?

Background

The grievant, [redacted] was a Ramp Agent at the Company's San Diego facility, and was employed effective April 20, 2015. He was terminated approximately 20 months later as he had exceeded the number of attendance infractions as allowed by the CBA.

On January 1, 2017, [redacted] was a no show for his scheduled shift. As a result, he received two attendance points, which brought him to a point total of 5.5, which is ½ point from termination under the Attendance Control Program (ACP).

On January 2, 2017, he did not show up for work and instead reported a protected absence under the CPSL law. As a result he was not issued any attendance points. Per California law, he was paid 13.2 hours he was scheduled to work that day, and debited that many hours from his protected sick bank, which left him with a total of 10.8 hours of protected sick hours for January.

On January 20th, [redacted] again failed to report for work and instead reported another protected absence under CPSL. As [redacted] was scheduled to work 16.7 hours that day, but only had 10.8 hours of CPSL hours available, he could not take advantage of CPSL. Rather he fell under the terms of the ACP, and was assessed one attendance point for a Reported Personal Absence. (RPA) That brought his point total to 6.5.

On January 3, [redacted] was issued a Final Warning for having received a total of 5.5 points under the ACP. He was issued a Termination letter on January 31, 2017, for having exceeded 6 points under the ACP on January 20. At termination, his point total was 6.5.

Company Position

When [redacted] reported absent on January 20 to care for his mother, the Company properly applied the policies of the CBA, and assessed him one point for the absence as he did not have enough CPSL to cover the hours he was scheduled to work that day.

The Union maintains that the Company should have only paid and debited 8 hours from [redacted] protected sick bank when he called out on January 2, even though he was scheduled to work 13.2 hours that day. Such position is contrary to the CPSL laws and the Union's own memo, which clearly states all the time missed from work must be paid to utilize the protection of the law.

With the addition of the CPSL law on July 1, 2015, and the changes to the Kin Care Law on January 1, 2016, the Company needed to modify its processes to comply with the new laws. The Company needed to ensure it was both protecting and fully paying the first 48 hours of its California employees' absences. As such, the Company modified its processes so that an employee who called out sick for himself or a family member would not receive attendance points and would be paid for all hours scheduled to work until the 48 hour maximum protected sick leave threshold was met.

Prior to this change, the Company only paid out a maximum of 8 hours, even if that employee was scheduled to work more than 8 hours. That was consistent with the CBA and Work Rule interpretations for contractual sick leave. California law is clear that the required protections of the law must be complied with and cannot be waived by the

Company's internal attendance policies or CBA requirements. (Co ex 1, Cal Code 219, no provision of this article can in any way be contrived or set aside by a private agreement). In [redacted] case, as he was scheduled to work 13.2 hours on January 2, 2017, the Company both protected him by not giving attendance points for the absence, and paid him 13.2 hours of sick pay and debited that many hours from his CPSL bank. Such change in practice brought the Company into full compliance with the CPSL laws.

The Company's memo, sent to the Union on May 11, 2016, and posted then in stations, stated that the Company would automatically apply sick and Kin Care absences when employees call in sick and when an absence is reported, it will deplete employees' sick leave as well as employees' bank of sick hours. The memo also stated that if an employee did not have enough protected sick hours available to cover the hours scheduled to work, normal attendance rules under the ACP would apply. (Co ex 3). The Union's memo was similar in that it stated the first 48 hours of "absence because of an illness of your own or a protected family member will be protected by California Paid Sick Leave."

On January 1, 2017, the Company made another modification to its processes under CPSL laws. Prior to 2017, the Company provided the full 48 hour allotment of protected sick hours to employees on January 1 of each year. But with the modification, the Company is now providing 24 hours of protected sick leave on January 1 of each year and then allotting 4 additional hours each month thereafter until the maximum 48 hours is reached. The Company provided the Union with notice of this change on November 30, 2016, and notices were posted in the stations thereafter.

In conclusion, the Company fully complied with its obligations under California law and the CBA. [redacted] habitually poor attendance over his short tenure combined

with his lack of sufficient protected sick hours to cover his shift on January 20 resulted in him reaching 6.5 attendance points. The parties have agreed that 6 or more attendance points warrant termination. Thus, there was just cause for the discipline that was rendered here. The Company respectfully asks the arbitrator to deny the grievance in its entirety

Union Position

The notation of a maximum charge of 8 hours is not only a contractual agreement, it was the parties' past practice up until the beginning of 2017. The Company was aware of this when it made a unilateral decision to begin charging more than 8 hours for CPSL days. The decision was not only unilateral, but completely unforeseen by agents in the affected areas.

The Company took more than 8 hours/1 shift from [redacted] in clear violation of the CBA, Article 13, 1B, Charges Against Account. Charges against sick pay credit. .... The maximum for which an Employee will be paid is one shift on any day...

The Company is once again attempting to burn at a rate that exceeds the accumulation. The Company is taking advantage of language mandating they provide three days or 24 hours. The DLSE FAQ clearly shows that where regular shifts exceed eight hours, companies must adjust the 24 hour threshold to reflect three days.

This case must be weighed on its technical legal and contractual merits. If the Company has the right to charge as many hours as are worked within a day, they must Front load three times that amount, or the maximum required, or be in violation of California law. Here, the Company did not meet that burden.

The three days or 24 hours is not a literal pick one scenario, they did not get to choose 3 days or 24 hours. Three days or 24 hours is clearly based on an eight hour per day formula. State position letter clearly spells out that charging more is acceptable

for when an employee's regular shift exceeds eight hours.

Had the Company not played games with [redacted] California Protected Hours he would not have exceeded the allowable point total under the Attendance Program. Had he not received a point for his final call out on 1/20/17, he would be at 5.5 points and would not have been terminated. Had the Company not changed the rules without advising [redacted] he would not have exceeded the allowable point total. Had the Company complied with provision of Kin Care and CPSL, he would not have exceeded the allowable point total. Unfortunately, the Company did do these things and he was harmed. Worst of all, if the Company isn't held accountable for these actions, they will use [redacted] to improperly inflict harm on California employees who are guilty of nothing more than exercising their rights in accordance with their contract and California state law.

For all the foregoing reasons, the Union respectfully requests that this grievance be sustained and that the termination of letter issued on January 31, 2017 and all references to it be purged from [redacted] file.

Discussion and Conclusions

This issue here is whether or not grievant [redacted] was terminated for just cause. With that, it becomes necessary to refer to the applicable California law in this regard and a reference to the parties' CBA.

The Company correctly mentions that with the addition of the CPSL on July 1, 2015, and the Kin Care law changes on January 1, 2016, the Company needed to modify its processes to comply with the new laws. The Company needed to ensure it was both protecting and fully paying the first 48 hours of absences due to personal illnesses or to care for a family member. As such then, an employee who called out sick for himself or for a family member would not receive any attendance points and would be paid for all

hours scheduled to work until the 48 hour maximum protected sick leave threshold was met. Such change was effective May 16, 2016.

Such changes was communicated to employees by a memo from the Company and from the Union. The Company's memo, sent to the Union on May 11, 2016 and then posted in the stations stated in part,

> California stations are required to protect Protected Sick Leave. This is accomplished by automatically applying sick and Kin Care absences through your protected sick leave bank of hours when you call out sick Employees will not accrue attendance points for these absences provided they have the protected sick time available and can be paid from their accrued sick bank. Because all Protected Sick Leaves run concurrent with each other, when an absence is reported, it will deplete your protected sick leave as well as your bank of sick hours...
>
> Q. What happens if I don't have enough sick time to cover my entire absence?
>
> A. The amount of sick time you have available will count toward your absence. Any remaining unpaid time will count toward your attendance record as it currently does, and normal attendance rules will apply.

The Company then mentions that prior to this change, the Company only paid out a maximum of 8 hours when an employee reported absent from work for himself for a family member, even if that employee was scheduled to work more than 8 hours. Such was consistent with the CBA and Work Rule Interpretations for contractual sick leave. Further, California law is clear that the required protections of the law must be complied with and cannot be waived by the Company's internal attendance policies or CBA requirements. Therefore, the Company was compelled to make the "Auto burn" change and without it, the Company could be sued for damages and attorneys' fees if it only paid 8 hours, but the employee was scheduled to work more and had more protected sick leave hours available.

The Company then correctly refers, an argument, to Cal. Code 219 which states in part,

> 219 (a) .. no provision of this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied.

Such was referenced in testimony by Company Senior Attorney Chris Mayberry,

> ...So what Section 219 (a) means for our purposes today is that no one can waive the provisions of that Kin Care law.
> (t p 28)

On January 1, 2017, the Company made another modification to its processes under CPSL laws. Prior to 2017, the Company provided the full 48 hour allotment of protected sick hours to employees on January 1 of each year. With the modification, the Company is now providing 24 hours of protected sick hours on January 1 of each year and then allotting 4 additional hours each month thereafter, until the maximum 48 hours is reached.

Such notice of the change is dated December 1, 2016 and was posted in the stations for all California Ground Contract Employees. Such states in part,

> ...Starting next year, the Company will allocate 24 hours to full and part time Employees on January 1 of each year, and then additional hours will be allocated at the beginning of each month thereafter until the maximum accrual of 48 hours is reached for full time Employees on 36 hours for part time Employees.

This adjustment... is being made to ensure our practices are consistent with California law and the Company's respective collective bargaining agreement.

> Q. Why is Southwest making this change?
>
> ...granting 24 hours of Protected Sick Leave on January 1 is consistent with the Paid Sick Leave Law. The monthly allotment of 4 hours Protected Sick Leave thereafter, representing half of each monthly allotment of Company provided sick leave, until an Employee has been granted 48 hours on July 1 for full time Employees and 36 hours for part time, is consistent with both the Kin Care law and Southwest' CBAs.

Q. Can I take Protected Sick Leave if I have no sick leave accrued and available in my Company provided sick leave bucket?

No. You must have Company provided sick leave accrued and available in order to Use protected Sick Leave.

In [redacted] case, as he was scheduled to work 13.2 hours on January 2, 2017, the Company both protected him by not giving any attendance points for the absence, and paid him 13.2 hours of sick pay, and debited that many hours from his CPSL bank. [redacted] was scheduled to work 16.7 hours on January 20 (the 13 hours for [redacted] that he picked up the night before, and 3.7 additional hours that he picked up on January 2, he did not have 16.7 hours available to have January 20 protected and paid per the requirements of the CPSL laws.

In sum, the testimony and evidence as presented reflects that the Company complied with the obligation under California law and also the CBA. The record correctly reflects that [redacted] did not have sufficient protected sick hours to cover his shift on January 20, thus his attendance points reached 6.5 attendance points. Six or more points warrant termination, which is what occurred in this case.

Also , the record further reflects that proper notice was given by the Company which covered all aspects of this case.

As such, the record demonstrates that there was just cause in the termination of grievant [redacted]

Decision

As described, and as the record reflects, the Company had just cause to terminate grievant [redacted]

The grievance is denied.

September 6 , 2017
Dallas, Texas

John B. Barnard, Arbitrator