In the Matter of Arbitration

between

Southwest Airlines Co.

and

Transport Workers Union
Local 555

TWU All 5000/17
Application of auto burn

before

John B. Barnard

<u>For the Company</u> — Mr. Chris Maberry, Esq.
Senior Attorney

<u>For the Union</u> — Mr. Cortney Heywood
Union Vice President

May 31, 2017
Doubletree, Love Field

The Issue

Is the Company in violation of the CBA or California law by applying its automatic burn policy in regard to California Protected Sick Leave?

Background

In this respect, the Union, in post hearing brief, mentions that,

1. Southwest Airlines has thousands of employees within the State of California.

2. Since 1999, the employees residing in California have had an additional benefit of Kin Care (California Code 233)

3. In 2014, the State of California extended the protections of Kin Care to California Protected Sick Leave (Otherwise known as CPSL or Healthy Workplaces Healthy Families Act of 2014)

4. Prior to 2016, the Company would simply allow for an agent to use half of their allotted sick time for each year to be used for their family members as well.

5. In 2016, the Company began frontloading 3 days or 24 hours of Kin Care for the employees to use.

6. The Company began charging for CPSL for any absence in California regardless of employee intention or request for other protection.

7. As the Union began getting swarmed with grievances from members in California, it continued to push back against the Company in the form of support for the grievances filed.

8. In an effort to consolidate the grievances, the Union filed a group grievance over the forced usage of CPSL.

9. The Company has agreed to hold many grievances in abeyance of the case.

10. A System Board of Adjustment was filed on April 4, 2017, and resulted in a deadlock.

11. The TWU Local 555 Executive Board voted to send the case to Arbitration.

12. Arbitration was held at the Doubletree Dallas Love Field before Arbitrator John Barnard on May 31, 2017.

In turn, as background, the Company mentions that one California law, originally enacted in 1999, states that if an employer provides sick leave, it must allow employees to use one half of their annual allotment of sick leave for the illness or injury of the employee or specified family members. This law is located in Sections 233 and 234 of the California Labor Code Sections 233 and 234 will be referred to as Kin Care.

Section 234 of the Labor Code provides that an employer absence control policy that counts sick leave taken pursuant to Section 233 as an absence that may lead to or result in discipline discharge, demotion or suspension is a per se violation of Section 233. The Paid Sick Leave Law has similar provisions requiring that Southwest automatically protect sick leave (Sections 246.5 (C) (1), (Union ex. 1 to 11).

In May, 2016, the Company changed the way it applied the Protected Absence bank due to changes in the Kin Care Law that occurred on January 1, 2016. Previously, the Company provided two banks of protected sick leave, one for Kin Care and one for Paid Sick leave, because Kin Care used to be only for family members.

However, after the Kin Care law was amended to make the reasons for leave and covered family members consistent with the Paid Sick Leave Law, including that Kin Care now covered an employee's own illness, the Company combined the two banks into one and began automatically protecting sick leave until an employee exhausted their Protected Absence Bank. Because the reasons for leave and covered individuals were now exactly the same, there was no need to obtain any more information from an employer to determine if the leave was protected by one or both laws.

In essence, the Company now knew that any time an employee called out sick and had not exhausted their Protected Absence bank, that leave had to be protected. Therefore, staring on May 16, 2016, the Company combined the two banks into the current single Protected Absence bank, and began automatically protecting people who called out sick.

Union Position

If the Company's position is upheld, there will be significant harm to the employees in California. The employees' contractual rights will have been violated, the intent of the State of California will have been violated and the employees may not have that protected leave when they used it most. The employees will lose the option of saving their state mandated family time for its intended purpose in order to allow the Company to automatically burn their state benefit.

The Union provided documents which quite clearly stated the "Employee may determine" how much CPSL to use,

> Union ex. 1 California Code 246 (k) "An employee may determine how much sick leave he or she needs to use, provided that an employer may set a reasonable minimum increment, not to exceed two hours, for the use of paid sick leave.

The employee may choose. That's the essence of this argument. The option of California protected leave is a choice for the employee to make just as the option of Kin Care is a choice for the employee to make.

The Union feels this is a real form of retaliation against employees who have benefits that exceed those that are covered within the CBA. The Company would have the Arbitrator believe that they mean no harm, insisting that they simply don't understand

how else to apply the law. The Union asks the Arbitrator to help correct course.

The Union respectfully requests that this grievance be sustained and that the Company be ordered to cease their practice of automatically burning employees' California Protected Leave unless the employee specifically request it and needs the protection of the law.

Company Position

At hearing, there was testimony from Company witness attorney [redacted] [redacted] from the California based law firm of O'Melveny Myers.

[redacted] understood the Union's position to be that its members should have the choice whether to accept the provisions of the Kin Care and Paid Sick Leave laws, or waive them as they see fit rather than having sick leave automatically protected by the Company. In his expert opinion, he stated that the "element of choice" does not exist under either law. He further stated that "as a matter of California law, the Company is definitely correct here" by automatically protecting sick leave under these two leave laws.

The California Labor Code provides that the protections of the Kin Care Law are not waivable. Specifically, Section 219 (a) of the Labor Code states that "no provision of this Article (Article 1) of the Labor Code can in any way be contravened or set aside by a private agreement. ... Union ex 1, p 1). Article 1 of the Labor Code consists of Sections 200-244, meaning the non waiver provision in Section 219 (a) applies to the Kin Care Law, confined at Section 233.

The Union has absolutely no support for its position that employees should be

allowed to choose when they want to waive the protections of the Kin Care and Paid Sick Leave Laws. Nothing in either statute supports such a position. In fact, the Union's own Leave Specialist testified there is nothing in either law that specifically states employees may forego the protections of those laws.

The Company violates neither the CBA nor the law by automatically protecting sick leave taken by Union members in California. Allowing employees the choice of whether to accept the protections of the Kin Care and Paid Sick Leave Laws, or alternatively, to use a doctor's note or take an attendance point would violate these laws which specifically prohibit counting sick leave against employees, and are non waivable. Southwest therefore respectfully requests that the Arbitrator deny the grievance and find that the Company may contractively and lawfully automatically protect state mandated sick leave until it is exhausted.

Discussion and Conclusions

In regard to the issue as presented here, there was testimony from expert witness Attorney [redacted] who testified that he is familiar with the paid sick leave laws that are applicable in California on a state level,

> …So there are two basically. There's what was originally called the Kin Care Statute which was passed in 1999. And there's what is technically called the Healthy Workplaces, Healthy Family Act. It's commonly referred to as just paid sick leave that became effective July, 2015…
> (t p 81)

[redacted]

> Q. …are you familiar with the Union's position on auto burning in this arbitration?

A. I think so, generally, yes. ... I believe the Union's position is that the employee should have the ability to choose not to use the protected leave and take discipline under the CBA such that it would be a situation that even if the employer is aware that it's a qualifying reason, that they would not decrement the time from the protected reason back.

Q. In your opinion as a California practitioner, as a matter of California law, who's correct on the auto burn issue?

A. As a matter of California law, the employer is definitely correct here... the statute sets forth minimum protections that the employer has to provide, and if the employer does not provide those, it doesn't matter that the employee acquiesces. The employer is still in violation of the statute...

Q. Do either of these laws say anything about whether an employee can agree to waive the provisions of the laws?

A. So there is a specific section that applies to the Kin Care statute... it's the first page of Exhibit 1.

Q. Section 219?

A. Section 219. That says, No provision of this article, I'm about halfway through sub A, no provision of this Article can in any way be contravened or set aside by private agreement, whether written, oral or implied...

...And again, 219 and 233 are part of the same article.

Q. So back to page 1, 219 (a), how do you think that provision of the labor code is applicable to the auto burn issue?

A. ...it's specifically saying that you can't contravene a provision of the Kin Care statute or any other section of that article by private agreement...
(t pp 92, 5)

In testimony, there was a reference to Co ex. 3, an e-mail dated April 3, 2017, from Michelle Jordan to Greg Puriski, and copied to Cortney Heywood. On page 2, DIRDLSE states in part,

...An employee may elect to use their sick leave to cover a full shift or may elect to use fewer hours...

On page 1, Jordan states in part to Greg Puriski,

> I appreciate that you provided me the e-mail exchange with a DLSE Rep and as you mentioned, this is not an opinion letter. I'm not sure who this Representative is and what authority they have to speak on DLSE's behalf, however, this is my understanding from reading the exchange,
>
> The statement that an "employee may elect to use their sick leave to cover a full shift or may elect to use fewer hours" also confirms that Southwest is properly applying the protection. If the protection and sick hours are available, they are equal to the Employee's absence which could be more or less than 8 hours.
>
> Again, none of the laws have a provision allowing employees to choose whether or not to protect a given absence. In addition, there are provisions stating that employees may not waive the provisions of the law.

In testimony, [redacted] addresses the specifics of Co. ex. 3,

> ... DLSE is making a point here that's fairly important to the DLSE... The employee can elect to use the sick leave for a full shift or less than a full shift, but notably absent is the idea that you could say I'm going to go out on sick, but I don't want you to burn my time. That's not an option they're providing here...
> (t p 103, 4)

[redacted] further,

> ...Does the Company violate Kin care and paid sick leave by not allowing employees to designate California Protected Sick Leave being used?
> Well of course. Again, that's what I'm saying. If the employee is out for a qualifying reason, the Company is under an absolute obligation to treat that as California Protected Sick Leave...
> (t p 105, 6)

The Company is correct by asserting that by automatically protecting state mandated sick leave, the Company does not violate the CBA. Further, the Company notes that the Union appears to argue that the Company is taking away members' contractual rights to use doctor's notes and take attendance points.

Senior Manager, Labor Relations, Dan Kusek testified on point that none of these benefits are taken away by automatically protecting sick leave in California. These benefits are put on hold until that employee has exhausted their Protected Absence bank of state mandated sick leave. At that point, an employee would still have all four

doctor's notes remaining, along with having an attendance record not impacted by absences.

In sum, Section 219 (a) of California's Labor Code is specific by stating in part,

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

If the Company would allow employees to choose when they want to use the protection of the Kin Care Law, such would violate the non waiver provision as contained in Section 219 (a). Allowing Union members to choose to waive the protection of the laws by accepting attendance points or using doctor's notes to protect absences violate the statutory language and would be contrary to the intent to protect employees from the discipline.

To the point, [redacted] was asked,

> Q. ...Does the Company violate Kin Care and paid sick leave by not allowing employees to designate California Protected Sick Leave being used?
>
> A. Well of course. Again, that's what I'm saying. If the employee is out for a qualifying reason, the Company is under an absolute obligation to treat that as California Protected Sick Leave...
> (t p 105, 6)

Finally, Co ex 3, a comment from DIRDLSE, on page 2, states in part,

> ...An employee may elect to use their sick leave to cover a full shift or may elect to use fewer hours...

In her comment to Greg Puriski, Local 555, Michelle Jordan in regard to the statement from DIRDLSE correctly mentions,

> ...The statement that an "employee may elect to use their sick leave to cover a full shift or may elect to use fewer hours" also confirms that Southwest is properly applying the protection. If the protection and sick hours are available, they are equal to the Employee's absence which could be more or less than 8 hours...

In that regard, [redacted] testified,

> ...the employee can elect to use the sick leave for a full shift or less than a full shift, but notably absent is the idea that you could say I'm going to go out on sick, but I don't want you to burn my time. That's not an option they're providing here...
> (t p 103, 4)

There was no testimony or evidence offered at hearing that would confirm that the Company violated the Kin Care and Paid Sick Leave Laws in this regard.

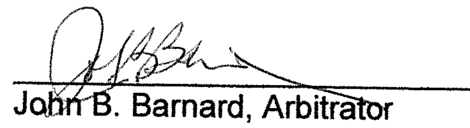
Allowing employees the choice of whether to accept the provision of the laws, or alternatively, to use a doctor's note or take an attendance point would violate these laws, which specifically prohibit counting sick leave against employees, and are non waivable.

Decision

Based upon the entire record as presented, the Company is not in violation of the CBA or California law by applying its automatic burn policy in regard to California Protected Sick Leave.

The grievance is denied.

September 19, 2017
Dallas, Texas



John B. Barnard, Arbitrator