SYSTEM BOARD OF ADJUSTMENT

****

IN THE MATTER OF ARBITRATION

between

SOUTHWEST AIRLINES

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 555

OPINION AND AWARD

Case DEN-P-0576/12
(Termination of [redacted]
[redacted])

Gil Vernon, Arbitrator

****

APPEARANCES:

On Behalf of the Union: Curtis Clevenger and Jerry McCrummen – Local 555

On Behalf of the Company: Christina Bennett, Senior Attorney – Southwest Airlines

I. ISSUE

The issue presented by the grievance before the Arbitrator can be framed as follows:

> "Did the Company have just cause to discharge the Grievant and, if not, what shall the remedy be?"

II. BACKGROUND AND FACTS

The Company had assigned mandatory overtime to Grievant and others for March 20, 2012. The assignment was issued the day before. The morning of the assignment, Grievant called in indicating he was sick and unable to work the mandatory overtime time assignment. The Company initiated an investigation because it did not believe Grievant was sick.

Subsequent to the investigation, the Company issued the following letter of termination:

> A Fact-Finding meeting was held on Monday, March 26, 2012, to discuss your possible misuse/abuse of sick leave on mandatory overtime that occurred on March 20, 2012. In attendance at the meeting were you, TWU Representatives: [redacted] and [redacted] Assistant Provisioning Manager Tim Jeter, and me.
>
> During the meeting, you repeatedly denied that you told multiple fellow Agents of your intention not to work a mandatory overtime assignment on March 19th. The mandatory overtime assignment in question was to be worked on March 20th. Furthermore, you denied that your March 20th sick call was planned.
>
> My investigation revealed that you told multiple Agents, on March 19th, that you were sure that you would not work the March 20th assignment. In fact, two Agents heard you state your specific intention not to work said assignment while you spoke to them at the break room. Both Agents provided signed/written statements which substantiate their accounts of the incident. Additionally, multiple Agents; who were present with you in the break room, notified me that you made such statements. I spoke with you about these statements, in the presence of a Union representative, during a conversation that took place in my office; directly after the break room incident. At that time, I asked you if you planned to call out for the March 20th assignment; you did not answer.
>
> On March 20th, you called out sick for your assigned mandatory overtime. Clearly, your actions indicate that you already knew, on March 19th, that you would not work your assigned mandatory overtime on March 20th. You planned to use sick leave for a purpose other than that intended; then you used sick leave for same. Ultimately, the March 20th sick call constitutes sick leave abuse.

After a review of everything brought forward in the Fact-Finding meeting, I have determined that you violated the Basic Principles of Conduct; including, but not limited to the following:

13. Act of theft or dishonesty, including knowingly presenting to the Company falsified documents.

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 or reduced transportation rates or a false insurance claim.

Additionally, your actions violated The Agreement By and Between Southwest Airlines and Transport Workers Union of America Local 555; Including, but not limited to the following:

- Article Twenty Three, Paragraph A – Abuse of sick leave or sick pay shall warrant immediate termination.

Therefore, as a result of your actions and the above-mentioned policy violations, your employment with Southwest Airlines Co. is terminated immediately.

Subsequently, a grievance was filed protesting the termination. It could not be resolved and was ultimately appealed to arbitration. A hearing was held June 12, 2012. Following receipt of the proceedings, post-hearing briefs were filed July 27, 2012.

III. RELEVANT CONTRACT LANGUAGE

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.

IV. POSITION OF THE PARTIES (SUMMARY)

A. The Company

The Company contends that it has met its burden to show there was just cause for the Grievant's termination. They stress the seriousness of the charge noting that sick leave abuse is one of three cardinal offenses for which the collective bargaining agreement mandates immediate termination. There is good reason for this, especially in these circumstances. When an Employee places a fraudulent sick call it hurts other employees, it jeopardizes the work schedule, and it creates unnecessary overtime, it creates morale problems within the work group, it erodes the level of Customer Service provided to valued customers.

The fact Grievant was not sick on March 20 is demonstrated by Grievant's own actions and words, including the following: (1) Grievant announced to his co-workers in the break room that he was going to call out on the following day's mandatory overtime, (2) he approached a supervisor and asked that his name be taken out of the voluntary overtime book so that he would not be assigned voluntary overtime, (3) in the two months preceding this incident, the Grievant received a discussion log entry and a separate letter of instruction associated with four other incidents of calling in sick on mandatory overtime, and (4) when he was asked by his supervisor on March 19 if he was calling in sick the next day he merely said he didn't have to answer that question.

The Company also urges the Arbitrator to reject the Union's argument that Grievant somehow wasn't afforded due process. Quite the opposite is true in that the supervisor went out of his way to help the Grievant avoid the fraudulent sick call by alerting him of the allegations in advance and giving him the opportunity to provide his side of the story. The investigation also provided Grievant this chance. As for Grievant's attempt to justify his absence by weeks later offering uninformative doctor excuses, this should be rejected as the Company never had the opportunity to review them prior to its decision to discharge him. Moreover, the documents also fail to reference the dates in question. They are also inconsistent with Greivant's stated reason for absence at the time. When he called in he said he was fatigued and mentioned nothing about hives and allergies. This, among other things, undermine his credibility.

On the other hand, the Company maintains its witnesses were credible. In particular, the employee witness who testified—contrary to Grievant's denial of any such statement that Grievant announced his intention in the break room the day before that he was calling—had no reason to shade the truth. Grievant, in contrast, did have a reason to lie. Moreover, his appeals for leniency are beyond the Arbitrator's authority.

B. The Union

It is the position of the Union that the Company failed to prove Grievant's use of sick leave constituted abuse. Indeed, it failed to investigate and asked Grievant no questions regarding his sick call. Instead, it based its decision on break room banter that was taken out of context. It also relied on hearsay to prove the truth of the matter.

More specifically, as for the matter of proof, the Union argues the Company never produced any evidence that the Grievant was not sick on March 20, 2012. Nor was there any evidence presented that the Grievant participated in any activities inconsistent with being sick on March 20, 2012. On the contrary, Grievant had medical documentation substantiating his condition. He had been receiving medical attention for a chronic debilitating condition (hypersensitivity to allergens causing painful allergic reactions since February 17, 2011).

The Company did not prove its suspicions. Instead, it acted on a bias and prejudice because Grievant had called in sick on mandatory assignments in the past. Coupled with the statement taken out of context by another employee, in the break room banter exchange between himself and [redacted] the Company had a preconceived notion that he was abusing sick leave. The Company never even asked if he was sick during the whole process.

Grievant had worked a double shift in voluntary overtime on the 19th. He removed himself for consideration for a voluntary overtime assignment due to his fatigue and worsening condition. By doing this he prevented himself from being able to use sick leave pay because sick leave pay is not available for missing mandatory overtime. Thus, there was no advantage to be gained by accepting a mandatory assignment and then calling in sick. If he wanted to abuse sick pay he would have accepted voluntary overtime and then called in.

As for locker room banter, Grievant was just responding to something initiated by [redacted] The Company failed to call [redacted] as a witness and cannot rely on his written statement. The same is true with regard to a statement attributed by Supervisor Hurt.

Concerning Grievant's medical documentation, it doesn't contradict Grievant's stated reason for calling in sick. Having a medically acknowledged and proven allergy condition does not mean that he couldn't also have been fatigued. Nor is the medical documentation new or surprise evidence as it was presented to the Company prior to the System Board.

As for Grievant's alleged pattern of calling in sick for mandatory overtime, the Union believes this is countered by the fact Grievant works a considerable amount of overtime. He worked 373.5 hours of overtime between the months of

December, 2011 and March 26, 2012 which equates to 54% more than a normal schedule.

V. OPINION AND AWARD

There are a number of factors that distinguish this case from the usual sick leave abuse case. The typical case of this general nature involves an employee who allegedly violated an employer policy by calling in sick, collecting sick pay and then is alleged not to have been sick. Thus, a typical case has an element of fraud in that an employee is, through misrepresentation, collecting money or a benefit for which he doesn't qualify.

The three most distinguishing facets of this case are: (1) the rule that sick leave should only be used for its purpose (a wage substitute when illness or injury materially impairs an employee's ability to work) isn't just a Company policy, it is instead a contractual requirement, (2) the contractual prohibition isn't just limited to circumstances that involve the collection of sick pay but also extend to the simple use of sick leave as distinguished from fraudulent collection of sick pay, and (3) the contract authorizes termination without progressive discipline as the penalty.

The significance of these factors, particularly the second one, are important to keep in mind because under the rules it is undisputed the Grievant did not and could not collect sick pay for calling in sick for mandatory overtime. Grievant, if

he had volunteered for overtime and called in sick, would have qualified for sick pay. However, he took himself off the volunteer list. Thus, when he did this he foreclosed the ability to collect sick pay for the shift in question. Clearly, if he wasn't sick his motive in calling in sick before the start of his mandatory over-time shift couldn't have been financial.

If he wasn't sick his motive must have been simply to avoid working that day. While this is not sick leave abuse in the sense of fraud, it is sick leave abuse as defined by the Parties' mutual agreement. The use of sick leave or pay for purposes other than being sick is sick leave abuse according to Article 23. Sick leave naturally can be paid or unpaid. The Arbitrator is bound by the Parties' agreement to treat both circumstances as a terminating offense if the Company satisfies its burden of demonstrating such misconduct occurred.

The Company has no direct evidence that Grievant wasn't sick. For example, no one witnessed Grievant engaged in activity March 20 inconsistent with an inability to work and there is no medical evidence that establishes that he was able to work. In short, the Company case is circumstantial. However, this isn't fatal as circumstantial evidence can be very convincing in some cases.

The centerpiece of the Company's case is their assertion that Grievant announced in the break room that he wasn't going to work mandatory overtime and that he was going to call in sick. The problem with this assertion is that the

Company didn't convince the Arbitrator that both elements of their central argument were true.

Certainly, [redacted] statement and testimony can be accepted for the proposition that Grievant said in the break room that he wasn't going to work mandatory overtime. However, after carefully scrutinizing [redacted] testimony and statement, they are void of any direct assertion that Grievant said he was not going to work mandatory overtime because he was going to call <u>in sick</u>. The statement read:

> On Monday, March 19, I was sitting in the breakroom around 1230 eating. [redacted] walked in and [redacted] asked him if he was "going to have a fact finder tomorrow?" [redacted] answered, "probably, cause I'm not coming in for mando, that's for sure." And, then laughed about it.
>
> I have heard [redacted] several times, tell agents that he was not going to come in for a mandatory shift right after he was assigned to it by a supervisor and do it as though he were bragging about it.
>
> I, totally, understand and have myself denied MOT when agents have plans set in stone and are unable to work, but, when an agent consistently calls in and brags about not working MOT in front of other union members, I feel that I can no longer stand back and not say something about it. Hence, this letter.
>
> This is not good for our morale and I know, for fact, that I speak for many of my fellow provisioners, when I say we are tired of it!

This lack of any assertion Grievant said he was not going to work "mando" because he was going to be sick is significant in combination with other undisputed facts.

There are other ways an employee can avoid working mandatory overtime without calling in sick. The record—including [redacted] own statement hints at it—

shows an employee can simply and plainly refuse mandatory overtime and it will be treated not as insubordination but as an attendance matter with points assessed.

Thus, Grievant's only possible motive for calling in sick is to have avoided the assessment of points under the attendance program. The assessment of points would not have necessarily resulted in discipline and there is no evidence it would have in Grievant's case. Had he been at the brink of discipline with the assessment of another point, the Company's circumstantial case would be stronger.

It might be that Grievant called in sick because he was cavalier or in another word "stupid". [redacted] did claim Grievant was bragging about calling in. However, [redacted] testimony fell short also on the notion Grievant was "bragging" about not working overtime. First, he didn't initiate the conversation. His statement about not coming in for mandatory was in response to a question (jokingly said the Grievant) as to whether he was going to be subject to another investigation (fact finding) sometime. He had had three concerning mandatory overtime in the last months. Certainly this is an unenviable record and might subject him to peer criticism. The Union called [redacted] comments locker room banter. Indeed, it is not inconceivable in the Arbitrator's opinion that Grievant mentioned calling in in response to this kidding. It could be he was planning on calling on. Yet, both positions are subject to equally worthy speculation.

As for being stupid, that is always possible. However, the fact Supervisor Martin confronted Grievant the day before asking him if he planned on calling in sick makes it less likely, it seems, that he would take such a risk as to call in sick when he wasn't. Again, he could have simply refused the overtime. As for his failure to respond, the Grievant's explanation is plausible. He said he hesitated because mandatory overtime had yet to be assigned. Thus, he wasn't sure how to answer. Beyond this he isn't to be faulted for his Union Steward jumping in and saying Grievant didn't have to answer the question. It might have been bad advice but the circumstances don't support the brazenness attributed Grievant by the Company.

There were other aspects of the Company's circumstantial case against the Grievant, but in the Arbitrator's opinion there is enough countervailing circumstantial evidence to make the Company's case less than convincing. While Grievant may have had a history of calling in sick for overtime, it is equally true he worked lots of it.

The picture the Company tried to paint that he had a habit of evading overtime responsibilities simply isn't as clear as the Company tried to paint. The Union presented data to show how much overtime he worked. Indeed, on the 19th when the locker room conversation occurred about overtime for the next day (the

20th) he was starting the second of a double shift. He also worked overtime on the 21st.

The Arbitrator agrees that Grievant's medical evidence was tardy and not persuasive. However, until the Company's evidence adds up to a prima facie case, he has no burden to prove himself innocent. Moreover, it is difficult to make a case for inconsistent defenses when Grievant wasn't even asked in the fact finding whether he was sick on the 20th or what the malady was.

In summary, the Company failed to demonstrate sick leave abuse occurred in this instance. Thus, no just cause existed and as a remedy Grievant is entitled to reinstatement and lost earnings minus offsets for other interim earnings.

AWARD

The grievance is sustained.

____

Gil Vernon
Arbitrator

ated this ___ day of September, 2012.