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IN THE MATTER OF ARBITRATION **OPINION AND AWARD**

between

SOUTHWEST AIRLINES, INC. **Case No. SFO-R-0788/14 (Termination of [redacted])**

and

TRANSPORT WORKERS OF AMERICA LOCAL 555 **Gil Vernon, Arbitrator**

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APPEARANCES:

On Behalf of the Company: Cynthia S. Fox, Senior Attorney – Labor & Management, General Counsel Department

On Behalf of the Union: Amye Thompson-Hollins, Leave Specialist – Local 555

I. ISSUE

The issue presented by the Grievance before the Board is:

"Was there just cause for Southwest Airlines to discipline the Grievant? If not, what is the remedy?"

II. BACKGROUND

The grievance protests the Company's termination of [redacted] employment from his position of Ramp Agent at its San Francisco Airport (SFO) operation on March 28, 2014, for the accumulation of excessive absenteeism points

(7 or more points). The absence that put the Grievant over the contractual limit occurred on March 21 2014 when he undisputedly failed to appear for work and failed to notify the Company of his absence.

Absenteeism and related discipline is addressed in Article Twenty-Three of the Collective Bargaining Agreement (CBA). More specifically, Section A.2. states:

> **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...If an unusual condition exists that would make it impossible for the Employee to report an absence...within the required time frames before his shift, a valid reason must be furnished. If no valid reason is furnished, the penalty for an unreported occurrence shall be assigned. If an Employee can provide doctor's verification in advance of a specific duration of absence, the requirement to call in each day shall be waived by the appropriate manager.

Article Twenty-Three Section A.2. provides that such a failure (referred to as a "no show" or "unreported absence") shall be assessed 2 points.

The Parties' positions cannot be understood without reviewing Grievant's entire disciplinary record as it relates to absenteeism and Article 23. Although it should be noted that the Company argues that none of the prior points, for various reasons, can now be contested. It is sufficient to start at August of 2013.

On August 21, 2013, Grievant was 2 points for a "no show" bringing his total to 3.5 points that caused a letter of warning to be issued on August 23, 2013.

Grievant was then absent on September 30, October 1 and October 2. He had days off scheduled on October 3 and 4. He was absent again on October 5,

2013. The September 30 absence was originally treated as a reported personal absence and he was assessed 1 point for that date. He did not, however, report his absence for October 1 and it was treated as a "no call" and he was assessed 2 points bringing his total to 6.5 points. He presented a doctor note for October 2 and 5 and was not assessed a point for those dates. For the chargeable absences he was issued a final warning letter issued on October 4, 2013.

Under the provisions of Article 23, an employee who maintains a record free of chargeable occurrences for three months can have their points reduced. On January 2, 2014, he got a 2-point reduction bringing his total to 4.5.

Then on January 26, as the result of a discussion between Grievant and his Ramp Manager, Christopher Whelan, there was a one-point reduction. Grievant, even though he did not grieve the final warning or the associated points (in particular the point assessed for a personal absence on September 30), approached Whelan and stated the point total was wrong. He presented a doctor's excuse dated October 4, 2013 that said:

> To Whom It May Concern:
>
> [redacted] is a patient under our medical care. Please excuse him for 9/30/13-10/04/13 and can return back to work on 10/05/13 if back pain has significantly improved. If still has pain please excuse from work on 10/05/13.
>
> If you require any further information, please call the office at the above number.

Whelan then agreed that because there was a doctor's excuse covering September 30 and because the absence was reported the personal absence for 1 point should

be removed. Nothing was discussed about the "no show" on October 2. Whelan drafted the following memo to Grievant on January 26, 2014 and its receipt was acknowledged by separate signatures by Grievant and a Local Union Representative:

> After review of your attendance record, some discrepancies were discovered. Your attendance record has been corrected to reflect a new point total.
>
> As a result of this correction to your Attendance Record, it is understood and Agreed that you are at Warning Letter status as defined by Article Twenty-Three of the contract between Southwest Airlines and the Transport Workers Union Local 555.
>
> Your new point total is 3.5 and there is no dispute with regard to this point Total and letter status.

Whelan also processed an internal document that asked that Grievant's attendance record be changed as follows:

> "On 9/30/2013 Nathan was charged with an RPA. This should have been recorded as SCK-NOTE. Please make this change and remove the associated point."

Accordingly, the Company treated the Grievant from January 26 forward as having 3.5 points. Then five days later he failed to appear at work and failed to give notice of his absence. This was treated as a "no-show" and he was assessed 2 points and being at 5.5 points a final letter of warning was issued that stated:

> "SUBJECT: FINAL WARNING LETTER – ARTICLE TWENTY-THREE – ATTENDANCE"
>
> As you are aware, Article Twenty-Three of the contract between Southwest Airlines and the Transport Workers Union Local 555 provides in Section II, Paragraph B: <u>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:</u>

Less than 1 Point	No action taken
1 – 2 ½	Letter of Instruction
3 – 4 ½	Warning Letter
5 – 6 ½	Final Warning
7 or more	Termination

Your current point accumulation if 5.5 points, and this letter will serve as your **Final Warning Letter**.

The next relevant event relates to the undisputed fact Grievant was scheduled for March 21 and failed to show as well as give advance notice prior his shift that he would be absent. This put Grievant over the contractual threshold of 7 points for which termination is prescribed. On March 28, 2014, after a required fact finding meeting, Grievant was sent the following termination notice:

> "As you are aware, Article Twenty-Three of the contract between Southwest Airlines and the Transport Workers Union Local 555 provides in Section II, Paragraph B: 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:
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> | | |
> |---|---|
> | Less than 1 Point | No action taken |
> | 1 – 2 ½ | Letter of Instruction |
> | 3 – 4 ½ | Warning Letter |
> | 5 – 6 ½ | Final Warning |
> | 7 or more | Termination |
>
> "In accordance with Article Twenty, because of your total point accumulate of seven or more points, you have been given the benefit of a factfinding meeting. Due to your point occurrence on 3/21/2014, your current point accumulation is 7.5 points. As a result of the factfinding meeting, your employment is hereby terminated."

A grievance was filed reading as follows:

> "The grievant was terminated without just cause and should be reinstated immediately and made whole in every way including full back pay, and no loss of seniority. The FLOW for the occurrence on 10/1/2013 was issued with the wrong point total. That letter and the 2 points are associated with it should be taken away. The agent should be at no less than 6.5 points."

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 . .

1. **Reporting Procedure.** In all cases of absence 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 also 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 startof the Employee's shift shall be treated as unreported...If an unusual condition exists that would make it impossible for the Employee to report an absence...within the required time frames before his shift, a valid reason must be furnished. If no valid reason is furnished, the penalty for an unreported occurrence shall be assigned. If an Employee can provide doctor's verification in advance of a specific duration of absence, the requirement to call in each day shall be waived by the appropriate manager.

SECTION 1 ATTENDANCE PROGRAM DEFINITIONS

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 . . . Failure to report an absence, whether or not verified by a doctor's statement, shall be chargeable as a No-Show...The Employee shall not be allowed to work.

SECTION II CONTROL PROCEDURES

A. Recorded Occurrences. Absences and tardiness on scheduled workdays, overtime, training, trades, or holidays shall be recorded in the following manner:

No-Show (Unreported Absence)	2
Reported Personal Absence (Personal Business)	1

Reported Illness (Non Chargeable)	0	
Four (4) doctor's statements per calendar year, but no more than one (1) November 1 – January 3		
Reported Illness (Chargeable) (No doctor's statement or after utilizing allowable number of doctor's statements for Non Chargeable Reported Illness…	1	on the first day and ½ for the third consecutive day, to a maximum of 1 ½ per single continuous illness

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 ½	Letter of Instruction
3-4 ½	Warning letter
5-6 ½	Final warning
7 or more	Termination….

(Jt. Ex. 1, at pp. 46-49).

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.
(Jt. Ex. 1 at p. 40).

IV. OPINION AND AWARD

Preliminarily, it is the conclusion of the Arbitrator that the Employer has made a prima facie case that its actions were consistent with Article Twenty Three. Clearly, Grievant did not report his March 21 absence within the required time. Moreover, there is no convincing evidence of an "unusual condition" which would

have made it impossible for Grievant to have reported this absence within the contractual time frame. That Grievant took medication that allegedly made him sleep through his alarm is not exculpatory in these circumstances. The effects of the medication were clearly known to the Grievant. He should have anticipated the effects as the evidence shows he had had this experience with the medication twice before. The Grievant admitted under direct examination that when he took the medication the afternoon of March 20, 2014, it was not the first time but the third time. Thus, he had previously experienced side effects from the medication and knew how it affected him. (See transcript page 175-176.) The Grievant dug himself a deeper hole on this point later when he said the first time he took the medication he had slept through the report period and "no-showed" on January 31st. He later also acknowledged the medication was a factor in three of the four no shows that contributed to his excessive point total.

Knowing how the medication affected him and that could lead to "no shows" he might have anticipated the absence or made other arrangements for notice. Accordingly, Grievant was not prevented from reporting an absence on March 21. He had plenty of time to do so or have someone do it for him as he took the medication the prior afternoon.

There is also other evidence, only slightly equivocal, that he had made a doctor's appointment for March 21 on the morning of March 20. This, of course,

suggests he knew well in advance of report-off time on March 21 that he would not be able to work. The Union did its best to set Grievant up to claim he didn't report off when he made the doctor appointment because he was going to work the first part of his shift and then go to the doctor. Yet Grievant wasn't very credible and none of this relieves him of the fact he knew the effects of the medication and did nothing in regards to his reporting responsibilities. Given he was at the doorstep of the termination point level, it is reasonable to expect he would have made arrangements to report his absence especially since a single no-call/no-show would put him over 7 points.

The rest of the Grievant's defense relates to the Family Medical Leave Act ("FMLA") in one way or another. In particular, the Union focused on the points asserted for the absences on September 30, October 1, October 2 and October 5. Grievant presented to his supervisor, upon his return, a doctor's note explaining the medical reason for the absence and it covered the entire period and obviously included his day off October 3 and 4. The Union stresses that this is a period of six days which exceeds the four consecutive days of illness that usually "triggers" the Company to advise an employee that the absence might be covered by FMLA and therefore insulated from a point assessment(s). In this case, the Union also stresses that Grievant had two qualifying illnesses and that the Company did not advise him of his FMLA rights.

This is significant the Union says because the Company has a history and is permitted to backdate FMLA leave when missed triggers are discovered. The Union presented evidence of this history of waiving reporting requirements. Indeed, Section 825.304(d) provides that the unforeseeable leave would have allowed the Company to 'delay' approval of FMLA but not necessarily 'deny' it and speaks to the Company being able to waive reporting requirements. This, the Union contends, lines up with Article 23 A.2. The history of granting retroactive adjustments because of doctors' excuses is shown by the Company's adjustment of the point assessed for September 30. This was corrected in January but the Company didn't go far enough. Had the Company properly treated the September 30 through October 5 period as FMLA Grievant would not have been at the tipping point going into March 20. Treated correctly, the no-show would not put him over the termination threshold of 7 points. The Union applies this kind of analysis to the absence on March 20, 21 and 24. He has a doctor's note covering the period.

It is the Arbitrator's opinion that it is not necessary in this case to consider whether an FMLA "trigger" was missed and/or if it was what this implies as far as discipline goes. It is certainly true (1) that a failure to present a Doctor's note can delay the denial of a leave, and (2) that the subsequent submission of a doctor note can be used retroactively to revise point assessment. However, this case does not

fit those simple circumstances. This case involves several failures to give notice of an absence. The failure to give notice is a separate issue.

There is nothing in the contract or past cases that prohibits the Company from imposing the contractually proscribed assessment of two points for an employee who fails to notify the Company of an absence. Such a failure is the worst kind of absence as it impacts the normal operation and inhibits the Company's ability to adjust the operation for such an unplanned event.

The Union draws a connection between Article Twenty Three A.2. which excuses an employee from the reporting requirement in unusual circumstance and Section 825.303(c) of the Federal FMLA rules. However, Section (825.303(a) through (c) read as a whole does not help Grievant and indeed underlines the Company's contractual and legal authority. As to the timing of the notice of an unforeseeable leave, the regulations seem to contemplate that it is a circumstance beyond the employee's control that relieves the employee of the usual reporting requirements. 825.303 raises the notion of emergencies and suggests that those are the kinds of circumstances that flex the normal reporting-off requirements. It states:

> (a) *Timing of notice*. When the approximate timing of the need for leave is not foreseeable, an employee must provide notice to the employer as soon as practicable under the facts and circumstances of the particular case. It generally should be practicable for the employee to provide notice of leave that is unforeseeable within the time prescribed by the employer's usual and customary notice requirements applicable to such leave. *See* SS 825.303(c). Notice may be given by the employee's spokesperson (e.g., spouse, adult family member, or other responsible party) if the

> employee is unable to do so personally. For example, if an employee's child has a severe asthma attach and the employee takes the child to the emergency room, the employee would not be required to leave his or her child in order to report the absence while the child is receiving emergency treatment. However, if the child's asthma attack required only the use of an inhaler at home followed by a period of rest, the employee would be expected to call the employer promptly after ensuring the child has used the inhaler.

Subsection C also raises the emergency element.

Indeed, it could be argued in this case that Grievant's need for leave on March 20 could have been foreseen at least on the basis of the fact given his medication had already, by his own claim, caused two no-shows. Then, there again, it is the doctor's appointment he knew about the day before. In any event, even under the law a convincing case for "unusual circumstances" has not been made. The FMLA is clear in 825.303(c) that in such cases leave can be denied:

> "IF an employee does not comply with the employer's usual notice and procedural requirements, and no unusual circumstances justify the failure to comply, FMLA-protected leave may be delayed or denied." (Emphasis added)

Grievant has other hurdles to the argument that the October points should have been reversed. This relates to his agreement in January that only a one-point reduction should have been made. Thus, as a matter of contract and estoppel he cannot validly claim later the other points weren't proper. The other hurdle has already been hinted at. That a serious illness may have otherwise qualified for protected leave does not relieve the employee from notice requirements. He was a no-show no-call for October 1 and the failure to call was not justified. Nor is the Arbitrator convinced the Grievant's waiver signed on January 26, 2014 was

uninformed. Moreover, Grievant's claim that he never received notice of his FMLA right just isn't credible.

As for the cases cited by the Union, only a few involved the reversal of failure-to-notify points. Indeed, only one of the four involved an employee who claimed she was in the emergency room. The record suggests the points were later reversed when documentation of this assertion was provided. The other records don't show enough to be certain they involved circumstances identical or essentially similar to Grievant's.

In conclusion the Grievant's point total was valid. His no shows (4 in 7 months) were not protected. Accordingly, it cannot be said that the Company misapplied Article 23.

AWARD

There was just cause for the discharge.

Gil Vernon
Arbitrator

Dated this 29th day of September 2014.