IN THE MATTER OF ARBITRATION	)	
	)	
	)	
SOUTHWEST AIRLINES CO.	)	
	)	
	)	
and	)	Case SMF-O-2015-13
	)	
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 555	)	

Kevin Minchey, Esq.,for the Employer
Brian Smith, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the discharge of Grievan[redacted]

A hearing was held on January 10, 2014, at Dallas Texas. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Both parties filed briefs. The record closed with the receipt of briefs on February 21, 2014.

Contract Provisions Involved

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.

B. Representation Requirements. The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

* * *

L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of a disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

* * *

14. Arbitration/Function and Jurisdiction. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

The Facts

Grievant [redacted] was terminated on October 16, 2013. The termination memorandum, issued by Manager of Ramp and Operations Shawn Englehart, states:

A fact-finding meeting was held on 10/16/2013 to discuss a possible violation of the Southwest Airlines Drug-Free Workplace and Alcohol Misuse Policy. Present at this meeting were you, TWU Representative [redacted] TWU Representative [redacted] TWU Representative [redacted] Station Manager David La Plante, MRO Pedro Teixeira, and myself.

As you know, Southwest Airlines is required under the rules promulgated by the Federal Aviation Association to conduct random testing for the use of unlawful drugs by certain Employees who perform safety-sensitive functions.

Federal law forbids Southwest Airlines from allowing any person who test positive for unlawful drug use to perform a safety-sensitive function. Southwest Airlines Policies on Drug-Free Workplace and Alcohol Misuse and Policies Implementing the DOT/FAA Anti-Drug and Alcohol Misuse Prevention Programs for Covered Employees provides that

the employment of any person who tests positive for certain unlawful drugs will be terminated.

Southwest Airlines was notified on 10/14/2013 by the Medical Review Officer that the result of your test for unlawful drug use was verified as positive. After a thorough and complete investigation of this matter, and after considering the issues discussed at the fact-finding, we have determined that the results of your drug test taken on 10/07/2013 were in violation of Southwest Airlines Policies on a Drug-Free Workplace. In addition, your conduct was a violation of the following Ground Operations Basic Principles of Conduct, including, but not limited to:

10. Any violation of the Drug-Free Workplace Policy.

Based on the above, your employment is terminated effective immediately.

Southwest has implemented "Southwest Airlines' Policies on a Drug-free Workplace and Alcohol Misuse and Policies Implementing the DOT/FAA Drug and Alcohol Testing Programs for Covered Employees." The policies provide for pre-employment, random, reasonable cause, post-accident, and return to duty drug testing for safety sensitive employees. They provide for urine testing for specific classes of drugs or metabolites, including marijuana. The policies state that for a verified positive drug test result, "Employee will be terminated."

Unlike the attendance policy, which is included in the collective bargaining agreement (see Article Twenty Three), the drug and alcohol policies were not agreed to by the Parties but implemented unilaterally by the Employer.

Grievant [redacted] was selected for a random drug test, which was conducted on October 7, 2013.

The collector obtained a urine specimen from the Grievant in a rest room, where no one else was present. The collector tested the sample temperature. He split the sample into two containers in the Grievant's presence, and placed both in a pouch held by the Grievant. He completed the chain of custody paperwork, and sent the sample to the lab for testing.

[redacted] signed a statement indicating "yes" answers to 26 questions about test validity (e.g., "Was the collection container unsealed in the donor's presence?" "Were the labels placed on the specimen bottles by the collector?").

The testing was conducted first by a screen at a cutoff level of 50 ng/ml for marijuana metabolites. The screen was positive, although apparently no record was kept of the specific level. A confirmatory gas chromatography mass spectroscopy (GCMS) test was positive for Delta 9 tetrahydrocannabinol-9-carboxylic acid (THCA) at a level of 37 ng/ml. The cutoff level for a confirmatory test is 15 ng/ml.

Medical Review Officer James Cooper, D.O. contacted Grievant [redacted] by telephone on October 14, 2013. He informed [redacted] of the positive test result. [redacted] denied having used or having been exposed to marijuana. Dr. Cooper inquired about [redacted] medications, none of which would explain a positive test result. He informed [redacted] that he could have a second test performed on the split sample. [redacted] did so request, and the second test also produced a positive result.

Dr. Cooper stated that a positive test result does not indicate that the subject was under the influence at the time the sample was collected.

A fact finding was conducted on October 16, 2013 at 10:00 a.m. The fact finding lasted less than a half hour, and by around 11:00 a.m. Southwest had decided to terminate Grievant [redacted] Although the decision makers reviewed [redacted] employment record, they concluded that under Southwest policy, termination was required, despite his exemplary record.

Grievant [redacted] was a freight agent at Sacramento. Freight agents serve as ground security coordinators, and the position is a safety sensitive one.

[redacted] was employed by Southwest since April 6, 1988. He has no record of any discipline.

At the time of his termination he had accumulated 2061 hours of sick leave. By my arithmetic, the amounts to over 257 days. Sick leave is accumulated at the rate of 8 hours per month, so that it would have taken more than 21 years to accrue this much sick leave. His point accumulation under the attendance program was -5, the best possible.

[redacted] has received numerous commendation letters from the Company and appreciation letters from customers. His evaluations almost exclusively rate him "Superior." [redacted] mmediate supervisor, Manager of Ramp and Operations Pedro Teixeira, characterized him as an exceptional employee.

Issue

The issue, as agreed to by the parties, is whether the Grievant was terminated for just cause and if not what should the remedy be.

Position of Management

The Company stresses that its policy states that employees who test positive for drugs "will" be terminated. It observes that the Grievant did not testify and therefore did not dispute that he was aware he could be terminated for a positive test.

It submits that the policy is necessary to achieve the highest safety standard. It insists that it was permitted to implement the policy unilaterally pursuant to its authority to make rules under Article Two. It maintains that the policy is reasonable, for drug usage is detrimental to its ability to function safely and to its reputation as a safe carrier. It opines that the unequivocal threat of job loss is the most effective way to impress employees with the serious safety risks of drug use, and that discharge is the penalty best calculated to eliminate drug use among employees.

The Employer argues that it has satisfied its burden by showing that the Grievant tested positive, that the rule is reasonable, and that the penalty is appropriate.

It deems immaterial that the initial screen "reading" was not indicated, since the initial screen registers many metabolites, while the confirmatory test registers only THCA. It disputes that it is required to provide a

detailed history of the sample, and contends that it need only show documentation of confirmed test results, and it observes that two labs confirmed the positive result.

The Company claims that since the Grievant did not testify, the evidence of drug usage is unrefuted. It maintains that an obligation to negotiate the policy is not at issue.

It insists that termination for violation of the policy is the past practice and an implied term of the agreement. It avers that the policy has been in effect for over 20 years and has been the basis for termination of multiple employees.

Citing prior arbitrations involving Southwest, it contends that arbitrators have held that the policy was fairly issued and that the company may terminate based upon a single positive test result. It notes that several of these cases involve discharges of long term employees.

It urges that mitigation is not appropriate. It submits that there is no evidence the Grievant was treated differently from other employees, and that there is evidence that the Company has terminated other employees who tested positive for drugs. It rejects any claim that the Grievant should have been offered the opportunity to enter a rehabilitation program. It distinguishes an employee who self-discloses from one who tests positive. It likewise rejects any assertion that the Grievant "deserves a second chance" or that its investigation was defective.

It disputes that the Grievant's long service, and good attendance and work record do not militate against termination because of the strict language in the policy and the severity of the violation. In this regard, it argues "To find otherwise would destroy the essence of the Policy and create an unmanageable standard. More importantly, if the Company made exceptions to the Policy on a case-by-case basis, the Policy would no longer be the strong deterrent against unsafe operations that it is today."

It asks that the grievance be denied.

Position of the Union

The Union argues that just cause is a negotiated contractual right. It calculates that the collective bargaining agreement uses the phrase "just cause" six times. It observes that the agreement does not define just cause, but leaves it to arbitrators to determine.

It stresses that the policy involved in this case was not a negotiated one. It compares the negotiated Attendance Control Policy. Acknowledging the company's right to implement reasonable rules, it regards automatic termination for a positive drug test as subject to the contractual requirement of just cause. It points to decisions reinstating employees who have failed drug or alcohol tests.

The Union insists that the Company has not shown the results of the initial test or that it exceeded 50 ng/ml. It also contends that there was no proof that Grievant received a copy of the drug and alcohol policy. While the Basic Principles of Conduct refers to violation of the drug free workplace policy, the Union notes that the Grievant signed for the Basic Principles a year before the drug policy was promulgated.

It urges that the Company should have taken into account mitigating factors, and it specifically cites outstanding attendance, a large accumulation of sick time, and 26 year discipline free history, and more than 90 pages of commendations. It depicts the Company as treating termination as "preordained" even for an outstanding employee. If the termination was predetermined, it asks why have a factfinding at all. It regards the Company as following "just because" rather than just cause.

It cites a Court opinion for the proposition that public policy does not mandate the termination of an employee who fails a drug test. In the same vein, it asserts that Department of Transportation regulations provide for an employee who has failed a drug test to return to work, thereby implicitly indicating that discharge from employment is not mandatory.

It notes the lack of evidence of impairment, and that the test involved was a random test, not a reasonable suspicion test. It disputes the Company's safety contentions, and recalls that other employees who failed a test have been reinstated, apparently with no indication of any relapse.

It asks that the grievance be sustained and that the Grievant be reinstated and made whole.

Analysis and Conclusions

I find that the Company has satisfied its burden of proving that the Grievant tested positive for marijuana metabolites, under a properly conducted test. The evidence indicates that all precautionary procedures were followed to insure that the right sample was tested, For example, the tester observed the chain of custody and split sample procedures to be sure that the sample tested was actually Grievan[redacted] specimen. There is no basis in the record to question the accuracy of the GCMS test result, that the sample was in fact positive for marijuana metabolites at a level of 37 ng/ml. The MRO found no factors that would suggest a false positive. In summary, the evidence is sufficient to convince me that on the day of the test, the Grievant did in fact have marijuana metabolites in his body, at the level of 37 ng/ml, which is above the cutoff level.

The Union stresses that while the GCMS test was over the GCMS cutoff level of 15 ng/ml, it was below the screening cutoff of 50 ng/ml. As I understand the argument, the Union contends that if the initial screen had determined that there were marijuana metabolites at 37 ng/ml, it would have returned a negative result, there would have been no GCMS test, and the Grievant would not have been discharged.

The initial screening test is just that, a screen. Its purpose is to end the process for most employees, and determine which employees, presumably a small fraction, should be subjected to further testing. The point of the screen is to determine which employees might have drugs or drug metabolites in their systems; the point of the confirmatory GCMS test is to determine which employees do have drugs or drug metabolites in their systems. The screening test is apparently a simpler and less expensive test, to eliminate most employees from further testing. It may well be that some "dirty" employees escape detection because of this two step process. Thus if the Company applied the GCMS test to all employees, some of those who had passed the initial screen would fail the GCMS test. The fact that some employees can escape detection is no basis for excusing employees who do test positive under the GCMS test. If the Company had skipped the screening and administered only the GCMS test to Grievant[redacted] his result would have been the same, positive at a level of 37 ng/ml. It is unclear whether the initial screen yields a quantitative number for drug presence, or simply a yes / no determination. In any case, the screen is not regarded as sufficiently accurate in itself to form the basis for a conclusion that the employee has drugs in his or her body. This system fails to detect

some employees, but this does not mean that those who ultimately test positive under the GCMS should be regarded as false positives.

Although the Union questions whether the Grievant was adequately informed of the policies and the possible consequences of a positive test result, the Grievant is a long term employee who had been tested multiple times in the past. Surely he was aware of the Basic Principles of Conduct and that an employee who tested positive for drugs was liable to termination.

U.S. Department of Transportation regulations require drug testing, but do not require the termination of employees who test positive for marijuana. Instead, they leave to the employer the discretion to determine what action to take in the result of a positive test. The gist of the DOT regulations in this respect is that some employees who test positive for marijuana may return to their jobs. The regulations do not mandate termination of every safety sensitive employee who tests positive.

The contractual standard for discharge is "just cause" as the Parties have acknowledged in their stipulation of the issue. The agreement does not specify what "just cause" means in the context of drug testing. The collective bargaining agreement is the "law" of any arbitration case. So if the Parties had negotiated a provision that an employee who tests positive for drugs will be discharged, an arbitrator would have no discretion, and would be bound to uphold the discharge of an employee whose valid test result was positive.

That is not the case here. Unlike attendance, which is the topic of specific contractual provisions in Article Twenty Three, there is no contractual provision dealing with drugs. This means that the contractual law applicable to this case is simply, "just cause." The Company's unilateral drug policy does not have the standing of contract "law" in this case.

Of course, a Company policy is entitled to great deference, for at least two reasons. First, a clear policy tells employees where they stand, and what consequences they may expect from misconduct. Second, the Company is necessarily more knowledgeable about its operations than any arbitrator could be, and its estimation of which forms of misconduct are more or less detrimental to the operation should be respected. Still, this does not raise a Company policy to the binding effect that must be given to policies enshrined in the collective bargaining agreement itself. For example, I doubt that any arbitrator would uphold the termination of an employee who was late to work for the first time in 20 years, even if a Company policy provided that an employee was to be terminated for a single instance of tardiness. Conversely, if the contract said so, the arbitrator would have no choice but to uphold the discharge. As Arbitrator William H. Lemons said in Case No. JAN-O-0886/11 (2011), "The enforcement of the Policy in this manner, however, unlike a contractually-negotiated 'no-fault' attendance policy, does not remove Arbitral discretion." (Page 15)

Customarily under just clause provisions, arbitrators consider that they have the authority to examine the reasonableness of an employer policy, either in general as written, or in its application to a specific case. The latter situation encompasses the notion that the peculiar circumstances of a specific employee may call out for a different result than the standard one.

It would seem that if any case commended itself for mitigation, this is such a one. The Grievant was, in the Company's own words, an exceptional employee. In over a quarter century of service, he had incurred no discipline whatsoever. To the contrary, he was the subject of dozens of commendations and accolades from customers and from Management. His attendance record is exemplary. If one attempted to draw a picture of an ideal employee, that employee would look very much like [redacted] Further, he had always tested

negative in the past, and the current positive test was only slightly over the cutoff level. There was no evidence of any behavior suggesting impairment.

There is no question that some kinds of misconduct are intolerable by any employee, even one with a previously exemplary record. Is this such a case, or is it appropriate for me to balance the offense against the Grievant's record as an outstanding employee?

The Parties have cited a number of arbitral decisions in this regard. I will not discuss them all, for while they may be instructive and influential, most involve other parties and are clearly not of binding effect. It may seem illogical, but the exact same term "just cause" may mean different things in different industries, or between different employers in the same industry, or even between different bargaining units at the same employer. Just cause may mean one thing in one Southwest bargaining unit, but something else in a different Southwest bargaining unit, just as the law in Ohio may be different from the law in Missouri. This is so not only because of the different considerations applicable to different classifications of employees (for example Pilots versus Ramp Agents), but also because of history. Arbitration decisions are to be final and binding, but only between the Parties to that arbitration.

The Company cites a number of arbitral decisions involving Southwest, but most of these are in different bargaining units, including some in different bargaining units represented by other locals of TWU. As persuasive as these awards my be with regard to safety, they are not binding outside the bargaining units in which they issued.

Three arbitration cases involving Southwest and TWU Local 555 have been brought to my attention.

In Case No. SAN-O-0602/11 (Randall M. Kelly, 2011), an Operations Agent with 28 years service who tested just above the cutoff level for cocaine was reinstated. Arbitrator Kelly said (Page 13):

> Mitigation and the other elements of just cause are applicable. In this regard, I would distinguish my award cited by the Company as stating that mitigation cannot excuse a serious offense. In that matter, the grievant's only defense was that the Company failed to give her timely notice of her fact finding. In that situation, mitigation had nothing to do with the matter.
>
> Given the Grievant's long and excellent career without any discipline and the DOT's regulatory scheme including strict return to duty requirements and a ban from the industry upon a second failed drug test, I find that the Grievant's discharge was not for just cause. He is to be reinstated to his prior position with no loss of seniority upon completion of the return to duty requirements of the DOT Regulations and subject to its terms thereafter.

In an earlier case, LAS-O-0039/05 (2005), Arbitrator Kelly reinstated without backpay an employee who had tested positive for alcohol in a reasonable suspicion Breathalyzer test. Arbitrator Kelly noted the absence of evidence about the testing procedures and stated "Accordingly, I find that the Company has failed to establish by persuasive evidence that the Grievant should be terminated pursuant to the Company's Alcohol Misuse Policy." (Page 17) While Kelly did not use the word "mitigation, since he directed the reinstatement of the Grievant without, rather than with, backpay, as he presumably would have if he had found the test result invalid, mitigation would seem to be the essence of the decision.

The third case involving the current Parties is No. JAN-O-0886/11 (William H. Lemons, 2011). In that case Arbitrator Lemons denied the grievance of an Operations Agent who had tested positive for marijuana at 50 ng/ml. He stated "I conclude based upon the entire record in this matter that termination of Grievant for testing positive for marijuana was not 'unreasonable.' even taking into consideration those mitigating factors that were raised and that an Arbitrator has the inherent right to weigh." (Page 13)

The language of the collective bargaining agreement, although it does not use the word "mitigation" likewise recognizes that in a particular case the standard penalty may be inappropriate. See Article Twenty Section One (L) (14): "If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty."

All three cases as well as the quoted sentence from the collective bargaining agreement stand for the proposition that, despite the statement in the Policy, termination for a positive drug or alcohol test does not automatically satisfy the contractual standard of just cause, and the policy cannot be applied in a mechanical fashion. Instead it is still necessary to consider all the facts and circumstances of the specific case. In the vast majority of cases, the safety consideration will outweigh the others. But this is not necessarily so in every case. As I indicated earlier, if ever there was a person whose personal excellence as an employee militated against the imposition of the ultimate penalty of discharge, the current Grievant is such an employee.

Accordingly, I shall sustain the grievance to the extent of directing the reinstatement of the Grievant. As I understand the law, he is not eligible for reinstatement until he passes a return to work drug test, and since this has not occurred, no backpay is in order until such test can be arranged. Since this is in effect a partial victory for each Party, pursuant to Article Twenty Section One (C) the arbitrator's fee and expenses will be split between the Parties.

Award

The grievance is sustained in part. The Grievant shall be reinstated to his position, with no loss of seniority, contingent on his passing a return to work drug test. Jurisdiction is retained for the limited purpose of resolving any disputes that may arise in connection with the implementation of this remedy. Pursuant to Article Twenty Section One (C) of the collective bargaining agreement, the arbitrator's fee and expenses are split by the Parties.

Issued March 7, 2014