Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration	§	
between	§	**Grievant: [redacted] (Time Frames)**
Transport Workers Union of America, AFL-CIO Local 555	§	
and	§	**Case No.: LAX-O-1865/2011**
Southwest Airlines Co.	§	

Before: Kathy Fragnoli, J.D.

Appearances:

For the Company:	**Kevin Minchey, Attorney**
For the Union:	**Brian Smith, Grievance Specialist**

Place of Hearing	**Dallas, TX**
Date of Hearing:	**January 27, 2012**
Close of Record	**March 2, 2012**
Date of Award:	**March 14, 2012**
Type of Grievance:	**Time Frames Violation/Article 20**

Award Summary

The grievance is denied. The Company timely issued a fact-finding notice to the Grievant on September 23, 2011.

Kathy Fragnoli, J.D.
Arbitrator

Issue

The parties stipulated that the issue to be decided in this case is whether the fact-finding notice issued to the Grievant on September 23, 2011 was within the proper time frames as set forth in Article 20 of the Contract.

Background

The Contract

The Company and the Union are parties to a Collective Bargaining Agreement dated July 1, 2008 (the "Contract").

Article 20 of the Contract sets forth procedures that must be followed before employees can be disciplined with loss of pay or discharge, including the requirement of having a fact-finding. When an employee is not suspended pending the fact-finding, Article 20 Section G.1.a requires that:

> The employee shall be advised, in writing, with a copy to the local representative of the Union, of the nature of the fact-finding not later than ten (10) calendar days from the time the Company becomes aware of the incident concerning which the fact-finding shall be convened.

Article 20 Section F sets forth circumstances under which the time frames stated in the Article may be extended, including in relevant part:

> If an employee makes himself unavailable (other than on his regularly scheduled days off) to work his full shift on his last scheduled workday within the time frames under the fact finding procedures…of this article, the Company may issue the notice/letter to the Employee upon his first full day returned to work.

Otherwise, Section E of the same Article requires strict compliance with the time frames set forth in the Article and states that if the Company violates the time frames, the Employee shall be awarded the desired settlement without precedent.

Facts

The Grievant, [redacted], has worked for the Company since 2001. At the time this incident arose she worked as a Cargo Agent at LAX.

On March 31, 2010, the Grievant took a Personal Day, which brought her accumulated attendance points to termination level. This triggered the Company's obligation to notify [redacted]. [redacted] of a fact-finding. The Company did not suspend the Grievant at the time, thus it had 10 calendar days to issue her a notice of fact-finding pursuant to Article 20, Section G.1.a.

On April 5, 2010, the Grievant sustained an on-the-job injury that required surgery. She was out on OJI for almost 18 months. As of the date she went out on OJI, the Grievant had not received a fact-finding notice related to her March 31, 2010 absence.

On September 21, 2011, the Grievant saw her treating physician and obtained a release to return to work. She immediately went to work to notify a supervisor in the Cargo department that she was ready to return to work. She spoke to supervisor Leon Munroe.

There is a dispute as to what Mr. Munroe told [redacted] on September 21. The Grievant testified that Mr. Munroe took her cell phone number and told her he would call her to give her further instructions. Mr. Munroe testified that he directed [redacted] to come in the following morning, September 22. The Grievant's normal shift was 3:30 p.m. to midnight but Mr. Munroe testified that she needed to come in at a time when the person who deals with badging would be available, as [redacted] security badges had expired while she was out.

The Grievant did not go to work the following day. Someone from the Company called her cell phone in the afternoon on September 22. Mr. Munroe testified that he called her to see why she had not come in and that she told him she could not come to work because her granddaughter was sick. The Grievant testified that it was supervisor Shawn Scarberry who called her on the 22nd, that her granddaughter was not sick and that she did not report on the 22nd because she had not been told to come in.

Whoever spoke to [redacted] on September 22 told her to come in on the morning of September 23. The Grievant reported on September 23 and was handed a notice of fact-finding upon her arrival.

Position of the Union

The Union argues that the Company violated the time frame requirements set forth in Article 20. It concedes that [redacted] made herself unavailable to work her last scheduled shift within the 10-day time provided in Section G.1.a and that the Company was thus permitted to issue the notice of fact-finding to her upon her "first full day returned to work."

The Union contends, however, that September 22, 2011 was the Grievant's first full day returned to work, based on her doctor's release and her reporting to her supervisor that she was ready to come back to work on September 22 (which would have been a regularly scheduled workday for her according to the schedule she worked prior to going on OJI).

The Union urges that the fact that [redacted] did not work on September, 22, 2011 was the Company's decision, not the Grievant's. Thus, the Contract did not allow the Company any additional extension of time to issue the fact-finding notice.

Position of the Company

The Company's position is two-fold. First, it argues that September 22, 2011 was not the Grievant's "first full day returned to work." At best, it maintains, [redacted] could have spent September 22 getting her security badges reissued but she would not have worked a full shift. Therefore, it contends, the Company was not required to issue the fact-finding notice to her on September 22.

Second, the Company urges its version of the facts—that Leon Munroe instructed the Grievant to come to work on September 22 and she did not show up because, as she told Mr. Munroe that afternoon, her granddaughter was sick. Accordingly, it argues, even if September 22 was the Grievant's first full day returned to work, she made herself unavailable thus extending the time frame for the Company to issue the notice.

Discussion

This case is a matter of contract interpretation. As such, the Union carries the burden of proof to show that the Company did not issue a notice of fact-finding to the Grievant within the time frames set forth in Article 20 of the Contract.

It is undisputed that the Grievant went out on OJI—and thus "made herself unavailable" before the Company's 10 calendar days to issue a fact-finding notice had expired. This fact triggered Article 20 Section F and the requirement that the Company issue the notice to [redacted] on her "first full day returned to work."

The question is whether September 22, 2011 was the Grievant's "first full day returned to work," as anticipated by Article 20 Section F. The Union's position is that the phrase "first full day returned to work" should be interpreted in accordance with the idea that an employee on OJI is "returned to work" immediately as of the release date specified by a physician. Here, [redacted] physician released her to return to work on the afternoon of September 21, so the Union urges that September 22 was the first full day of her return. Because, it contends, the Company chose not to have the Grievant work her shift on the 22nd, it waived the extension of time it was permitted under Section F and the notice issued to [redacted] on September 23 was untimely.

The Contract is ambiguous with regard to the meaning of "first full day returned to work." Therefore, it is the Union's burden to persuade the Arbitrator that the intent of the parties was the interpretation now posited by the Union. The Union may make such a showing by pointing to other language within the Contract or by extraneous evidence, such as past practice.

Here, the Union has not pointed to other language contained in the contract as a basis for interpretation of the provision in question. Instead, the Union's own witness testified that the past practice between the parties regarding application and interpretation of "first full day returned to work" under Article 20 Section F is that the employee has to come in and *actually work* a full eight-hour shift in order to trigger the Company's obligation to issue the fact-finding notic. The Company can issue the fact-finding notice at any time during the eight-hour shift.

It is likely that the vast majority of situations where Section F is invoked after an employee makes himself unavailable are distinguishable from this case. Certainly, most instances of making oneself unavailable likely involve calling in sick for a day or two or taking a personal day. Under those circumstances, the employee simply returns to work as regularly scheduled. Any impediments to the employee's resuming his regular schedule can likely be attributed to the Company rather than the employee.

An employee's return to work following an 18-month OJI absence, however, is extraordinary. In addition to the issue of expired security badges, which was raised in this case, there are a number of other considerations that go into the Company's ability to restore the employee to actual shift-working. It may be necessary for the employee to undergo training if systems or policies/procedures have changed during her absence. In certain instances, the Company may elect to have the employee examined by its own medical staff prior to returning him to work. There are other employees, who have been covering for the employee during his leave, who must be notified and rescheduled.

The Grievant's medical release and representation to a supervisor that she was available for work may have triggered a statutory or contractual obligation that the Company *pay her* according to the schedule she worked prior to being injured. However, whether or not she was on the payroll is not the issue in this case. It cannot be demonstrated that the Company was required to actually *put her to work* as of September 22, 2011[1]. Also, according to the Union's own witness, the past practice between the parties requires that an employee actually be *working a full shift* in order to trigger the Company's last chance to issue the notice of fact-finding.

Accordingly, I find that the Company was not required to issue a notice of fact-finding to the Grievant on September 22, 2011. The notice that it issued to [redacted] on September 23, 2011 was timely pursuant to Article 20 Section F.

Award

The grievance is denied. The Company timely issued a fact-finding notice to the Grievant on September 23, 2011.

[1] Noted is testimony of Union witnesses, that some employees in other facilities have been permitted to return to work in spite of their security badges being expired, so long as their work did not require them to go into secured areas (as was the case for this Grievant). However, that evidence did not established that the Company is *required* to put such employees back to work without valid security passes in every case.