BEFORE

WILLIAM H. LEMONS

ARBITRATOR

In the Matter of the Arbitration between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	**Case No. OKC-R-1660/10**
	)	
And	)	
	)	
Transport Workers Union of America, AFL-CIO	)	**Termination –** [redacted]
Air Transport Division, Local 555	)	
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	

OPINION AND AWARD OF THE ARBITRATOR

May 25, 2011

ARBITRATION AWARD

In the Matter of:

Southwest Airlines Company
Dallas, Texas

and

Termination of [redacted]

Transport Workers Union of
America, Local 555

APPEARANCES:

For the Company: Kevin Minchey
Attorney – General Counsel Department

For the Union: Jerry McCrummen
Vice President – TWU Local 555

IMPARTIAL ARBITRATOR: William H. Lemons
WILLIAM H. LEMONS, P.C.
4040 Broadway, Suite 616
San Antonio, Texas 78209

By the terms of the collective bargaining agreement (Jt.Ex. 1) between Southwest Airlines Company, hereinafter referred to as the "Company," and TWU Local 555, Transport Workers Union of America, AFL-CIO, hereinafter referred to as the "Union," William H. Lemons of San Antonio, Texas, was selected by the parties to serve as impartial arbitrator (Jt.Ex. 2). A hearing was held at the Wyndham Dallas Love Field, 3300 W. Mockingbird Road, Dallas, Texas, on March 16, 2011. In addition to the appearances noted above, several other party representatives attended the arbitration, as noted in the Official Record. The "Rule" was invoked and witnesses excluded during other witness testimony. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments,

and did so very ably. In all, the Company introduced sixteen exhibits and the Union twenty-one. I have examined each carefully. Post-hearing briefs were filed and cross-exchanged on April 29, 2011. These proceedings were declared closed on the date the Arbitrator received the post-hearing briefs.

ISSUE

Did the Company, Southwest Airlines, have just cause to terminate [redacted] on November 16, 2010? If not, what is the appropriate remedy? The parties stipulated to this issue, and stipulated that there were no time-frame or process issues, and that this matter was properly before me.

PROVISIONS OF THE LABOR AGREEMENT

Article 2 –Scope of Agreement

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

Article 20 – 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.

301.040.20 – Basic Principles of Conduct (revised 11-15-2009)

Any violation of the following will be grounds for disciplinary action. Discipline may range from a reprimand to discharge, depending on the particular violation and the circumstances.

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

STATEMENT OF FACTS

Much of the testimony at the hearing in this matter was hotly disputed, but at least the following facts were presented during the hearing which are not in dispute. Prior to November 16, 2010, Grievant [redacted] had been employed for nine years as a senior tenure Ramp Agent, last working at Oklahoma City (OKC) loading and unloading aircraft. There is no indication in the record of any previous discipline, or that Grievant's work record was not satisfactory. On October 5, 2010, a day when Grievant was not scheduled to work, Grievant's common-law wife, [redacted] gave birth to a child. It was the couple's third child together. Her name is [redacted]

On that same day, Grievant completed (by that I mean filled out the portion of the FMLA request form that the employee fills out) paperwork to be able to take time off under the Family Medical Leave Act ("FMLA") [redacted] signed the bottom of the first page, and he filled out the rest of that page. Apparently on October 6, 2010, also a day when he was not scheduled to work, indications are that Grievant took the FMLA application to his wife's doctor, [redacted] M.D. It was most likely contemplated that OBGYN Associates, LLC would fax the completed forms to Aetna that day, and it may have, but the fax header indicates the fax went on October 8, 2010, at 9:45 that morning.

On October 8, 2010, and for several months prior thereto, there was rattling around in the Oklahoma City Police Department's computer an old (from September 7 or 8, 2010) arrest warrant/charge for assault with a deadly weapon and burglary. Testimony from Grievant and [redacted] was that although neither the State of Oklahoma nor the District Attorney would let her drop the charges, they eventually were dismissed on or about January 12, 2011, and as late as March 14, 2011, [redacted] was trying to get the Protective Order dismissed, which would cost $224.00. She testified that the day before our hearing, a bailiff left a voicemail indicating the VPO had been

dropped. Unfortunately, in the early morning hours of October 8, 2010, the Oklahoma City Police Department computer was not aware of that, and when Grievant was apprehended for a minor traffic violation, he was put in jail for the old outstanding criminal charges. This Arbitrator is intimately familiar with this issue in Texas and Colorado, having been involved with friends or clients who experienced similar atrocities. Grievant was in jail from October 8 to October 29.

At the time, the Company had personnel to make an initial determination of eligibility for FMLA leave, but the actual "nuts and bolts" determination was made by a third-party administrator, Aetna. Indications are that Grievant's FMLA leave had been preliminarily approved insofar as his basic eligibility was concerned, but that Aetna was involved from October 8 to perhaps as late as November 3. 2010 in making a decision on his ultimate entitlement. Apparently, on or about November 1, 2010, Aetna received a fax from OBGYN Associates that completed the application process (i.e. filled in certain blanks and added more information)(compare Co. Ex. 12 to Union Ex. 6) such that Grievant's FMLA request was finally approved. As of January 1, 2011, the Company no longer used Aetna as a third-party administrator for FMLA purposes. I think I understand why that is.

Grievant was first administratively discharged due to "no show-no call" by letter dated October 29, 2010, but that letter was later rescinded and Grievant reinstated. Ultimately, Grievant was terminated effective on November 16, 2010 (Jt.Ex.2, page 10). Kent Green, Station Manager, OKC, found as a result of his fact finding meeting, that

> ". . . . I have determined that you [Grievant] submitted documentation requesting intermittent FMLA approval. Subsequently, you [Grievant] were incarcerated. While incarcerated, you [Grievant] contacted Southwest and utilized intermittent FMLA to excuse yourself from your assigned work schedule for baby bonding. Given that you could not have worked due to your incarceration, your use of FMLA to excuse those absences constitutes abuse and is not acceptable." Mr. Green then adds that such violates BPC principle 13, set forth above.

POSITION OF THE COMPANY

It is my practice to not set forth in detail the contentions of the parties, as they are very completely and ably set forth in their post-hearing briefs and to re-state such in an Award is expensive, time-consuming and unnecessary. I summarize the Company's position (Company Brief, pages 1-2) when I say that it feels this is a case about dishonesty, plain and simple. That Grievant repeatedly informed the Company of his need to take FMLA leave, to bond with his new child and assist in parental duties, when in fact he was not precluded from working by that because he was in jail. That he mislead Ronda Patterson, and later station management on three occasions and then Aetna by submitting a revised and now totally false FMLA application by fax dated November 1, 2010. That on many occasions, Grievant could have "come clean" and informed the Company that, in fact, he was in jail and not able to take care of his new baby or wife.

The Company concludes by quoting Arbitrator Norman Brand:

> "Among the most serious forms of employee misconduct are acts of dishonesty. Intent is a critical component when employees are disciplined for such actions. When there is clear intent to steal or defraud, many arbitrators take an unwaveringly strict approach, concluding that if the employer-employee bond of trust has been breached, no mitigating factors can or should lessen the penalty."

Brand, N., *Discipline and Discharge in Arbitration*, at p. 225 (ABA, 1998 – First Edition).

In conclusion, the Company maintains that it has met its burden of proof to show that the Grievant was discharged for "just cause." Therefore, the discharge decision should be sustained and the grievance denied in its entirety.

POSITION OF THE UNION

The Union explains that the Company and its third-party FMLA administrator are partially at fault here. According to the Union, the Company trounced on Grievant's federally-protected

FMLA rights, and it was its own failure to follow FMLA regulations that put in place this disastrous scenario that ultimately entrapped Grievant. Local Vice President McCummen adamantly insists that all this was a set-up to terminate Grievant for theft, dishonesty and submitting false documents, but there is no proof that Grievant did any of these alleged acts. Specifically, he says Grievant did not present any falsified documents to the Company, he had already been approved for FMLA leave and thus had no intent to deceive anyone, he made no calls while incarcerated, the Company was out to get him and there was no damage to the Company anyway – the leave was approved and it was without pay. The Union then carefully compares each Company exhibit categorically with each Union exhibit (Union Brief at pages 15-23), and says that its exhibits were on point, persuasive and far more powerful than the Company's.

The Union vehemently asks that Grievant be reinstated immediately, with full back pay, overtime, seniority and benefits.

OPINION OF THE ARBITRATOR

Both parties were well represented in this dispute and presented persuasive arguments. The excellent briefs submitted by each party were most helpful in fashioning my decision. In the final analysis, my determination is based upon a careful and meticulous analysis of what the Company's witnesses could testify they knew about the alleged actions of [redacted] and their admissions as to what, in fact, they did not know and could not prove. As described hereinafter, this Arbitrator has determined that the Company did not have just cause in discharging the Grievant. Hence the grievance will be sustained. The essence of this case is whether the Company had just cause to discharge the Grievant, and to demonstrate just cause, it must first prove the guilt of wrongdoing, prove that it observed basic due process in administering discipline and then show the imposed penalty was appropriate. Let me explain why it cannot do this.

First, let me thank Company Attorney Minchey for directing my attention to the writings of Norman Brand as pertain to theft, dishonesty and breach of the bond between employer and employee. More recently, Arbitrators Brand and Melissa H. Biren add to that foundation, by stating:

> a) " . . . when discipline relates to innocent or inadvertent misrepresentations that are not intended to deceive and cause no loss to the employer, arbitrators tend to view discharge or other severe discipline unfavorably." *Straits Steel & Wire Co.,* 91 LA 1058, 1061 (Elkin, 1988);
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> b) Intent to deceive or falsify "was not found where the grievant unwittingly submitted a record that had been falsified by another person; where grievant lacked the mental capacity to understand the company procedure that he falsified; where the grievant was innocently confused and where the grievant made a minor clerical error due to carelessness or inattentiveness." Cases cited at pages 303-304;
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> c) Arbitrators often will consider the effect of the falsification on the employer's business or on the grievant's fellow workers, and may consider the clarity of the policy at issue;
>
> d) Finally, there are conflicting opinions whether the appropriate burden of proof in a case such as this should be higher – as would be involved with a crime. So some arbitrators speak in terms of *proof beyond a reasonable doubt,* or at times by *clear and convincing evidence.* On at least one airline property, "an arbitrator held that since discharge for falsification [dishonesty, breach of trust] could make it difficult for the employee to find employment elsewhere, the standard of proof for falsification is 'to convince the Arbitrator in no uncertain terms that its decision to discharge the Grievant was reasonable, just and proper.'" *United Airlines,* 122 LA 232, 235 (Briggs, 2005).

Brand, N. and Biren, M, *Discipline and Discharge in Arbitration,* at p. 225 (ABA, 2008 – Second Edition).

Fortunately, this Arbitrator does not have to struggle with whether an enhanced burden of proof is appropriate in this case, because it is my heartfelt conclusion that the Company did not sustain its burden of proof under even the traditional task of showing by a preponderance of the evidence just cause for the termination and that the penalty fits the offense. Let me explain.

Evidence of Guilt. There is really no dispute that when the original paperwork requesting FMLA leave was filled out, completed and submitted (Union Ex. 6), it was accurate and I find that as of that time, there was no intent to deceive anyone. So far as Grievant knew, he would be approved for FMLA leave, as he was routinely before, would work what hours he could, then go on FMLA leave. After this point, it gets a little fuzzy.

The Company contends that one count of deceit or dishonesty was that Greivant had contacted Ronda Patrick on October 13, 2010, to discuss his need for FMLA leave, but that he never told her he was in jail. The Company contends that Ms. Patrick recalls Grievant may have checked with her on a couple of occasions between then and October 26, 2010, to follow up on the status of his request. The problem is that Ms. Patrick testified that she really doesn't know if the caller on October 13 was Grievant (TR. P. 50, ll. 14016 and TR. P. 95, ll. 8-15). I find her "log" (Co. Ex. 4) not very helpful in this regard, and I find it more likely than not that the Grievant did not call in on this or on other occasions. Even had Grievant called in on October 13 as alleged, I do not find the conversation (as reported by Ms. Patrick) to have been deceitful or dishonest. Grievant had applied for leave for a newborn child, and he was checking on that. Nobody asked him if he was then in jail. Based upon the record as a whole, I do not find that Grievant was able to call Ms. Patrick the morning of October 13 from jail, for reasons stated below.

The Company next says that, well, Grievant certainly called the OKC station on October 8, and again on October 13 and October 14, 2010, to report either that "I'm taking FMLA leave," or "I'm still on FMLA," and the witnesses even listened to a recording of one of the calls. There exists no log and no tape recording (TR. 133, ll. 16-25), and Kent Green testified that he first heard the message on October 11, and he was not sure when it might have actually come in. His testimony was "it was something along those lines – it was kinda garbled – kind of a hard-to-

listen-to message" (TR 106, ll. 8-14) and he couldn't really identify the voice as being Grievant's (TR. 134, ll. 9-11). It might be a closer case had there been a recording of the conversation, and that Mr. Green had asked Grievant where he was, and was told he was home bonding with [redacted] when he actually was in jail. But we do not have that here.

The third strike, says the Company, was when Grievant somehow altered some information on the original FMLA request form, adding employee number and dates and the like, and faxed it to Aetna, the third-party administrator. The problem is that neither Bill Venckus nor anyone else could say with certainty that the Grievant had any part in faxing the revised form (Co. Ex. 12) to Aetna (TR. P 201, ll. 11-17), that nobody knew actually who added the information and that, in any event, such was not submitted to the Company in order to lie about where Grievant was. The testimony about Telmate was interesting, but it does not establish that Grievant had an account or was able to speak from his jail cell to the outside world freely.

So, let me explain the dots that I would have to connect in order to uphold this termination. First, that early the morning of October 8, after being jailed, Grievant either had his cell phone or had an account at Telmate such that he could call in and deceive Ronda Patterson, Kent Green and/or Mike McGill. Next, that during those phone conversations he made an affirmative misrepresentation or untruth as to the reason for the leave, rather than asking what the status of his request might be. Next that he received the Aetna letter which was sent to the wrong address, and was able to somehow slip into OBGYN Associates, supply the missing information and fax the revised form to Aetna. On this record, I am not willing to make those assumptions and connect the dots against an employee of nine year's tenure who is accused of dishonesty – breaking the bond of trust with his employer – and thus moral turpitude. I must conclude that the Company has not shown evidence of guilt in this case by a preponderance of the credible evidence.

Due Process. The Union complains that the Company did not play fair in this case, and has suspicions about the investigation and entire process leading up to Grievant's termination. I share some of those concerns. It would seem that if a major part of one's case was verification of phone calls and what was said, some sort of record or verification (other than handwritten notes in a spiral notebook) might be helpful. Similarly, the entire process between the Company's internal approvals and the third-party administrator is fraught with opportunities for mistake or mischief, but that hopefully has been fixed. I have misgivings whether the typed notes of the fact-finding should have been shared at System Board. Lastly, Employee Resources might need to counsel Ground Operations personnel about the sensitivity of the courts and administrative agencies to what we call *temporal proximity.* Taking adverse action against an employee who just returned (or tried to return) from FMLA leave is dangerous. Here, my remedy removes that danger, and most likely the Company had a good faith (but mistaken) belief in support of its action.

So while I have some concerns about fundamental fairness, such do not rise to the level where they would affect my decision about guilt or the appropriateness of the penalty. Because I have found on this record that there was insufficient evidence of guilt, I need not go there.

Appropriate Penalty. Nothing in this decision should be read as my condoning theft, dishonesty or the like. That is not the culture on this property. The Grievant's situation may easily be distinguished from an employee who applied for and benefitted from occupational injury leave, and started a lawn maintenance business on the side or became a tennis star. It is different from an employee who called in sick, and was pay protected as sick, while spending the afternoon at his favorite bar. Had Grievant known that he was going to have to serve time, and after that arranged for some type of leave, we would have a different situation. [redacted] *v. Northwest Ohio Development Center,* 33 F.Supp.2d 635 (N.D.Ohio 1999). Thus, had Grievant presented with a

slightly different set of facts, and had the record been a little more concrete, the result might well have been different. My decision is limited to these facts and this particular circumstance.

Because I have found inadequate evidence of guilt, I cannot simply impose another lesser or different penalty on Grievant. I am concerned with the level of proof in a case where a person, after nine years of employment, is terminated for dishonesty – because that becomes his scarlet letter. In applying for work in the future, he must disclose his having been fired for lying, and if given the chance to explain what happened, will no doubt have to also talk about being jailed for assault with a deadly weapon which was the real reason he had to lie, etc., etc., etc.

In my Award below, I direct that Grievant be made whole insofar as seniority, benefits and back pay. The Union seeks an amount of overtime that Grievant might have missed in this period. I urge moderation in setting the amount of such missed overtime, if any, because the Company has already had to pay someone for working those hours, and because as the record indicates, Grievant had a "come to Jesus" meeting with his common-law wife and pledged to be home, present and more supportive for his three children. We can only speculate what level of overtime he might have worked from November to now, but I doubt it would be the level as before [redacted] was born.

AWARD

The grievance is sustained. The Company did not have just cause to discharge the Grievant, [redacted] on November 16, 2010. The Grievant's discharge shall be rescinded and all references to his discharge on November 16, 2010 shall be purged from his personnel file and other records. The Grievant shall be reinstated to his former position effective five (5) days of receipt of this Award, and he shall be made whole with respect to seniority and benefits as if he had not been terminated. The Grievant shall receive full back pay from the date of his discharge to

the date of his reinstatement. The undersigned retains jurisdiction for a period of ninety days to resolve and determine any differences regarding interpretation or application of this Award, including the amount of back pay that is appropriate, upon written request of the parties.

WILLIAM H. LEMONS
Impartial Arbitrator

DATED: May 25, 2011, in San Antonio, Texas.