Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration	§	
between	§	**Grievant:** [redacted]
Transport Workers Union – Local 555	§	
and	§	**Case No.: OMA-R-1788/11**
Southwest Airlines, Co.	§	

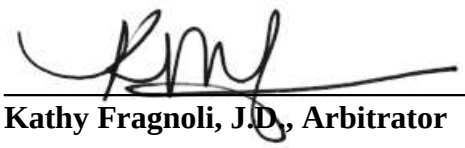
BEFORE: Kathy Fragnoli, J.D.

APPEARANCES:

For the Company:	**Kerry Forbes, Esq.**
For the Union:	**Mark Waters**
Place of Hearing	**Dallas, TX**
Date of Hearing:	**December 14, 2011**
Date Record Closed	**January 06, 2012**
Date of Award:	**January 11, 2012**
Contract Year:	**07/01/2008 – 06/30/2011**
Type of Grievance:	**Discipline/Discharge**

Award Summary

In view of the testimony provided by the Union's witnesses and the absence of any documentary evidence or additional corroborating witness testimony to support the Company's allegations, this arbitrator finds insufficient evidence on the record to establish just cause for the issuance of the subject Letter of Termination dated September 16, 2011. Therefore, the grievance is granted. The Grievant is reinstated to his employment effective September 16, 2011 with full back pay, including overtime pay for any *mandatory* overtime assigned within the work unit that would have also been assigned to the Grievant if he had remained on the active payroll. In addition, all seniority and benefits, including attendance service time credit, shall be fully restored to the Grievant.



Kathy Fragnoli, J.D., Arbitrator

Issue

The issue to be decided in the case is whether the Letter of Termination dated September 16, 2011 was issued to the Grievant for just cause and if not, what should the remedy be?

Background

[redacted] ("Grievant") began his employment with Southwest Airlines ("Company") as a Ramp Agent on November 20, 2006 and at the time of the events leading to this arbitration, he was assigned to work as a Ramp Agent at the Omaha International Airport in Omaha, Nebraska.

On Saturday August 27, 2011, the Grievant notified the Company that he was sick and would not be able to report for his regular shift that day. Later that day, the Grievant's supervisor observed a man he believed to be the Grievant playing golf at a local golf course during the Grievant's regular working hours. The Company conducted an investigation and on September 16, 2011, a letter titled *Fact-Finding Results: Termination* ("Letter of Termination") was issued to the Grievant which states in pertinent part:

> A fact-finding meeting was held on Friday September 9, 2011 at 1:30 P.M. in the conference room. The purpose of this Fact-Finding Meeting was to discuss your calling out sick for Saturday, August 27, 2011, and you were seen at a golf course during your scheduled work hours.
>
> Present at the meeting were Station Manager Paul Jensen, Operations Supervisor Tim Wald, Ramp Supervisor Ben Eberly, TWU Representatives [redacted], [redacted], and you.
>
> After a thorough and complete investigation into this matter, and after considering the evidence and testimony presented at the Fact-Finding, it has been determined that you reported sick for work on Saturday, August 27, 2011, and were witnessed playing golf during your scheduled work hours at Fontenelle Park Golf Course in Omaha, NE.
>
> This behavior is in violation of Southwest Airlines Ground Operations Basic Principles of Conduct, including, but not limited to:
>
> #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 and or reduced transportation rates, or a false insurance claim.
>
> In addition, this matter violates the Collective Bargaining Agreement, specifically Article Twenty-Three, Paragraph A (Purpose) which states:

> Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick pay shall warrant immediate termination.
>
> As a result of this matter, your employment with Southwest Airlines Company is terminated effective immediately.

A timely grievance was filed protesting the Letter of Termination and having been unable to resolve the matter during earlier steps of the grievance procedure, the dispute was advanced to arbitration for final and binding resolution. The Grievant was fully and fairly represented by Transport Workers Union, Local 555 ("Union"), he was present during the arbitration hearing and he testified on his own behalf. Both the Union and the Company presented documentary evidence and sworn testimony in support of their respective positions and at the conclusion of the arbitration hearing, the parties agreed to the submission of post-hearing briefs not later than January 06, 2012; after which the record was closed.

Relevant Contract Provisions

Article 1 - Purpose of Agreement

A. The purpose of this Agreement is, in the mutual interest of the Company, the Union, and the Employees, to provide for the operations of the Company under methods which shall further, to the fullest extent possible, the well-being of Southwest's Customers, the efficiency of operations, and the continuation of employment under reasonable working conditions. It is recognized to be the duty of the Company, the Union, and the Employees to cooperate fully to attain these purposes.

Article 2 - Scope of Agreement

B. Covered Employees

This Agreement extends to and covers all Employees in the classifications described in Article Five who normally and regularly spend the majority of their work time in the performance of duties described in Article Five.

C. Reasonable Work Rules. Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

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 Boards/Arbitration, Discharge and Discipline

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.

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.

Article 23 – Attendance

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 measures. 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.** (Emphasis added)

Position of the Company

The Company argued that the Grievant had been terminated for sick leave abuse when his supervisor observed him playing golf during his assigned shift after he had called out sick for that shift. The Company pointed out that the Grievant is an avid golfer who talked often in the workplace to his coworkers and supervisors about his love of golf. The Company also pointed out that the golf course where the Grievant was observed playing golf on the date in question is very close to his home and is the same golf course at which he plays regularly.

The Company asserted that the weather was clear and sunny on the date in question and that the Grievant's direct supervisor had observed him playing golf at the Fontenelle Golf Course while driving by the course on his motorcycle that day. The Company argued that the road ran very close to the course where the Grievant was playing golf and insisted that it was the Grievant, and

not someone else, who was observed playing golf that day. The Company argued that the supervisor did not realize until August 28 that the Grievant had called out sick on August 27 and was playing golf during his normal shift. The Company also argued that the supervisor had worked with the Grievant for about 18 months, that he knew the Grievant well and that he and the Grievant had a friendly relationship.

The Company maintained that employee absenteeism represents a significant expense to the Company which has an adverse impact on its ability to compete in the industry. The Company also maintained that it has strict policies concerning the prohibition of sick leave abuse and it pointed out that under the terms of Article 23 of the Collective Bargaining Agreement, the parties have agreed that abuse of sick leave warrants immediate termination. The Company also maintained that the Company regularly terminates Employees when it is determined that they have engaged in sick leave abuse. Thus, according to the Company, it has been made very clear to employees that they will be terminated if caught abusing sick leave.

In view of the above, the Company insisted that the Grievant had been terminated for just cause and it urged that the grievance be denied in its entirety.

Position of the Union

The Union did not dispute that the Grievant is an avid golfer who loves the game or that he plays golf regularly at Fontenelle. The Union also did not dispute that the Grievant had called out sick for his assigned shift on August 27, 2011 and that he did not work his assigned shift that day. However, the Union argued that the Grievant was too sick to work on the date in question and it insisted that he had not played golf that day.

The Union pointed out that Fontenelle is surrounded by a tall fence and that all players must first check-in and pay their green-fee to the golf attendant before they are allowed on the course. However, according to the Union, the Fontenelle golf attendant who was on duty on the date in question had clearly established that the Grievant had not played golf at Fontenelle on the date in question. The Union pointed out that it had conducted an independent investigation and that, unfortunately, the City of Omaha does not keep records of individuals who play golf nor was any video surveillance equipment installed at Fontenelle. Thus, the Union maintained that it was not

possible to obtain any documentary or video evidence to prove or disprove who had played golf that day.

The Union asserted that the Grievant's wife had been at home during the time that the Grievant had allegedly been observed on the golf course and that she too had established that he had been sick and that he had not played golf that day.

The Union did not dispute that sick leave should only be used when an employee is too sick to work. At the same time, however, the Union argued that the burden of proving the Grievant had abused his sick leave rested with the Company and it insisted that the Company had insufficient evidence to substantiate the charges. Therefore, in the Union's view, the Company had not fulfilled its burden.

For those reasons, the Union insisted that just cause did not exist to issue the Letter of Termination dated September 16, 2011. Therefore, the Union urged that the grievance be granted, that the subject Letter of Termination be removed from the Grievant's file and that he be reinstated to his employment with full back pay with overtime pay and benefits restored.

Discussion

There was no dispute during the arbitration hearing that the Grievant was assigned to work during the hours of 2:00 p.m. to 10:30 p.m. on August 27, 2011. There was also no dispute that he had called out sick and did not report for his regular shift that day.

Testimony supplied during the arbitration hearing established that the Grievant's supervisor, Ben Eberly and Mr. Eberly's wife were riding on their motorcycle near Fontenelle between 6:00 p.m. and 6:30 p.m. on Saturday, August 27, 2011. The road passed very close to the eighth tee of the course and while riding by, Mr. Eberly observed a man playing golf near the eighth tee, whom he believed to be the Grievant. Mr. Eberly slowed down, waved at the golfer and continued on without stopping or speaking to the man.

According to his testimony, Mr. Eberly did not know the Grievant was scheduled to be at work on August 27 until he came to work on August 28 and saw the Grievant's name highlighted with his job status listed as "ill" for August 27. Mr. Eberly spoke to the Grievant on August 28 about

having seen him on the golf course the previous day and the Grievant immediately responded that he was sick on August 27 and that he had not played golf that day.

After speaking with the Grievant about the incident, Mr. Eberly discussed the matter with another Company supervisor and, during that discussion, both Mr. Eberly and the other supervisor agreed that because the Grievant had played golf during his assigned shift after calling out sick, he had abused his sick leave.

During the arbitration hearing, Supervisor Eberly stated that he had observed the Grievant playing golf at Fontenelle between 6:00 PM and 6:30 PM on the evening of August 27. Mr. Eberly stated that he observed the Grievant standing near the tee approximately 20 to 25 yards from the road. According to Mr. Eberly, when he slowed his motorcycle and waved at the Grievant, the Grievant looked at him and returned the wave. Mr. Eberly stated that he was convinced it was the Grievant because he recognized the Grievant's goatee, black Tiger Woods baseball cap and dark rimmed glasses that the Grievant normally wears at work. Mr. Eberly acknowledged that he did not stop and talk to the Grievant but he emphasized that he had a clear view of the Grievant's face and that he was positive it was the Grievant.

Station Manager Paul Jensen testified that he had spoken to Mr. Eberly about his observation of the Grievant playing golf on August 27, 2011. Mr. Jensen stated that Mr. Eberly was positive it was the Grievant who was playing golf that day and that he had subsequently met with the Grievant on September 9, 2011 to hear his side of the story. According to Mr. Jensen, the Grievant claimed he was sick on August 27 and that he emphatically denied playing golf that day.

During his testimony, the Grievant acknowledged that he enjoys playing golf and that he frequently plays at Fontenelle on his days off during the week. At the same time, he emphatically denied that he had played golf on August 27, 2011. According to the Grievant, he always pays his golf green fee with his Wachovia/Wells Fargo debit card and that he never pays cash. The Union submitted the Grievant's Wells Fargo bank spending statement for the month of August 2011 which clearly showed that although green fee charges for Fontenelle were made on August 10, August 24, and August 29, no debit card charges were made for Fontenelle on August 27.

The Grievant stated that he had called out sick on August 27 because he had a stomach ache and could not hold anything down. He made no claim that he had sought medical treatment for his stomach ache but he provided a receipt from Walgreens pharmacy to show that he had purchased Pepto-Bismol, ibuprofen and Sprite at 2:07 p.m. that day to treat his stomach ache.

The Grievant's wife, [redacted], appeared during the arbitration hearing and testified that the Grievant had been sick at home that day. She also testified emphatically that the Grievant had not played golf that day.

The Grievant, who is African American, acknowledged that he frequently wears a black Tiger Woods baseball cap at work and while playing golf. However, he stated that many African Americans play golf at Fontenelle and that Tiger Woods baseball caps are popular among that group. As for the dark rimmed glasses that Mr. Eberly had reported seeing the Grievant wearing on the golf course, the Grievant stated that he did not own a pair of dark rimmed glasses until he had purchased a pair on October 14, 2011; approximately three weeks after Mr. Eberly reported seeing him wearing dark rimmed glasses while playing golf at Fontenelle.

[redacted] also testified during the arbitration hearing on the Grievant's behalf. [redacted] stated that he is the golf attendant at Fontenelle and that while he is working, he is solely responsible for collecting green fees from all players who play golf at Fontenelle. [redacted] stated that prior to his employment at Fontenelle, he had been a high school teacher and football coach for 34 years.

[redacted] testified all players must check in with the golf attendant before playing golf at Fontenelle. He also testified that although it could be possible for a person to sneak onto the golf course without paying, it would be difficult because the golf course is fenced at those areas which are easily accessible.

The Union submitted a typed statement signed by [redacted] which states as follows:

> I, [redacted], hereby declare as follows:
>
> 1. I, [redacted], am an employee of the City of Omaha, and my place of employment is the Club House at Fontenelle Park Golf Course at 4575 Ames Avenue in Omaha, NE. My work number is (402) 444-5019.

2. On September 20, 2011, I was approached by [redacted] regarding my knowledge of Fontenelle Park Golf Course and my employment schedule. I authorized him to record a verbal statement.

3. I have worked all weekend's since April 2011 at Fontenelle Park Golf Course.

4. I was scheduled to work from 1:00 p.m. to 8:00 p.m. on Saturday, August 27, 2011.

5. I have never seen [redacted] playing golf on the weekends at Fontenelle Park Golf Course.

6. I first recall meeting [redacted] on September 20, 2011.

7. Fifty Percent (50%) of the golfers at Fontenelle Park Golf Course are African American.

8. Fontenelle Park Golf Course is in a predominantly African American area of the Omaha metropolitan area.

I believe that the facts and the foregoing witness statement to be true.

Signed by [redacted] on September 29, 2011.

During cross-examination, [redacted] acknowledged that he had not prepared his written statement; however, he emphasized that it was a true statement and that he had signed it willingly. [redacted] also acknowledged during cross-examination that he had not formally met the Grievant until September 20, 2011, as indicated in his statement. At the same time, though, he insisted that he had seen and talked to the Grievant several times before that date when the Grievant had played golf at Fontenelle. [redacted] stated that he was the only attendant on duty on August 27, 2011 and he repeatedly and convincingly stated that he had not seen the Grievant play golf at Fontenelle that day.

During his testimony, Station Manager Jensen acknowledged that he had been unable to locate any witnesses or obtain any documentary evidence to substantiate that the Grievant had played golf on the day in question. He also acknowledged that he had based his decision to terminate the Grievant's employment based solely on Mr. Eberly's eyewitness report and he candidly acknowledged that absent Mr. Eberly's firm belief that he had observed the Grievant playing golf on August 27, he would not have terminated the Grievant.

Director of Employee Resources for Ground Operations, Bill Venckus, testified that employee absenteeism is harmful to the Company because it puts an undue hardship on other employees

who are at work and it costs the Company a great deal of money. According to Mr. Venckus, the level of employee absenteeism at Southwest Airlines is higher than the other airlines with which Southwest competes and he estimated that Southwest carries an additional 2,700 employees to compensate for employee absenteeism on the property. He also estimated that the Company could reduce its costs by at least $100 million per year if employee absenteeism at Southwest could be reduced to the level of its competitors.

Based on the testimony of Mr. Venckus, there can be no doubt that absenteeism costs the Company a large amount of money in lost productivity and that the Company is justified in vigorously enforcing attendance control. There can also be no doubt that sick leave abuse is prohibited by Principles of Conduct #13 and #17 and by Article 23 of the CBA. Further, sick leave abuse constitutes theft of a valuable employee benefit which warrants termination.

The testimony of Supervisor Eberly was credible and there was absolutely no indication that any part of his testimony was deliberately untruthful. However, the testimony provided by the Grievant, the Grievant's wife and [redacted] was also credible and none of them gave any indication that they were being untruthful. Thus, the arbitrator is faced with the task of examining the available evidence and reviewing the sworn testimony to determine what is likely to have occurred.

Based on his testimony, it was clearly apparent that Mr. Eberly takes his job seriously and to his credit, he reported what he believed to be a case of employee misconduct. Also, based on his demeanor during the arbitration hearing, it was clear that he sincerely believed that it was the Grievant whom he had seen playing golf that day. However, based on the distance between the road and the person standing on the eighth tee that day, coupled with the fact that Mr. Eberly had only a quick glimpse of the person while he was driving his motorcycle at approximately 25 miles per hour and while wearing a full-face helmet, we are left to conclude that he could easily have been mistaken. Had he stopped and engaged the Grievant in conversation, he could have removed any doubt about his observation. However, that didn't happen.

In the instant case, the Company is the moving party and as such, it bears the burden of providing evidence to support the Grievant's termination. In view of the credible testimony provided by the Union's witnesses (particularly [redacted] and the absence of any documentary

evidence or additional corroborating witness testimony to support the Company's allegations, this arbitrator finds insufficient evidence on the record to establish just cause for the issuance of the subject Letter of Termination dated September 16, 2011.

Award

The grievance is granted. The Grievant is reinstated to his employment effective September 16, 2011 with full back pay, including overtime pay for any *mandatory* overtime assigned within the work unit which would have also been assigned to the Grievant if he had remained on the active payroll. In addition, all seniority and benefits, including attendance service time credit, shall be fully restored to the Grievant.