IN THE MATTER OF ARBITRATION BETWEEN	)	
	)	
TRANSPORT WORKERS UNION LOCAL 555, AFL-CIO (Union)	)	**Grievant:** [redacted]
	)	
-and-	)	**Discipline (Termination)**
	)	
SOUTHWEST AIRLINES COMPANY (Company)	)	
	)	

Arbitrator: Diane Dunham Massey, selected from the Parties' Permanent Panel of Arbitrators.

HEARING

Hearings were held in the above matter on October 28, 2008 and November 6, 2008 at the Holiday Inn Love Field in Dallas, Texas. The witnesses were sworn and excluded from the Hearing. Post-hearing briefs were received by the Arbitrator by December 15, 2008. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

For the Union

Mark Waters	Advocate for the Union
Robert Bettinger	Second
[redacted]	Grievant, witness
Curtis Clevenger	Observer
Jerry McCrummen	Local Vice President, witness

For the Company

Kerrie Forbes	Counsel for the Company
Lisa Smith	Paralegal
Jeff Cox	Dir. Emp. Resources, Ground Ops., witness
Mike Lovett	St. Louis Manager, Ramps & Ops, witness
Terri Bellinger	Occupational Benefits Rep., witness
Patti Calwell	Occupational Benefits Mgr., witness
Dr. Shelby Kopp	Physician, witness

ISSUE

The Parties agreed to the following statement of the issue:

> When the Company issued the Grievant, [redacted] the Notice of Fact-Finding dated July 25, 2008, did it violate Article 20, Section 1, G, 1 (a) of the Collective Bargaining Agreement with regards to time frames? If so, what is the appropriate remedy?

The Parties also agreed:

> If a violation is found, the matter of remedy will be remanded to the Parties with the Arbitrator retaining jurisdiction in the event the Parties cannot agree to the remedy.

The Parties also stipulated to the following issue which will be considered if this Arbitrator finds that there has been no violation of the CBA with regard to time frames:

> Was the Grievant, [redacted] discharged effective August 1, 2008 for just cause? If not, what is the appropriate remedy?

As to this issue, the Parties also agreed:

> If just cause is not found, the matter of remedy will be remanded to the Parties with the Arbitrator retaining jurisdiction in the event the Parties cannot agree to the remedy.

BACKGROUND

The Grievant, a Ramp Agent stationed in St. Louis, Missouri ("STL"), received a termination notice dated August 1, 2008 which stated, in pertinent part, as follows:

> On July 28, 2008, a Fact-Finding meeting was held to discuss your possible OJI Leave and/or OJI pay abuse in regard to your claim dated May 30, 2008. Present at this meeting were you, TWU Representative [redacted] Manager of Ramp and Operations Mike Lovett, Ramp Supervisor Evan Jones, Ramp Supervisor Epenesa Epenesa, Jessica Heiney Station Administrator, and myself.
>
> 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 did use OJI leave and OJI pay for a purpose other than that intended which is a violation of the Agreement by and (b)etween Southwest Airlines Co. and TWU Local 555, which states:
>
> > Using OJI leave or OJI pay for a purpose other than that intended constitutes abuse and shall warrant immediate termination.

Based on the above, and as a result of your actions, your employment with Southwest Airlines is terminated effective immediately. * * *

The Union grieved alleging that the Grievant's termination lacked just cause. The Union requested that the Hearing be bifurcated which was granted by the Arbitrator. For reasons which will be discussed in the Opinion, the question of time frames is the only issue before the Arbitrator for this Award.

The grievance was appropriately processed and remains unresolved. The Parties stipulate that the matter is properly before this Arbitrator for Opinion and Award. The Parties also stipulate that the Arbitrator may retain jurisdiction in the event a remedy is ordered for the purposes of implementing such remedy.

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE 20
FACT FINDING PROCEDURES

* * *

E. **Time Frames.** For the purpose of this Article, a working day shall be defined as Monday through Friday, excluding all Company recognized holidays. It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent. Furthermore, if the time frames set forth are violated by the Union the grievance shall be considered withdrawn. Determination of time frame violation issues shall take precedence over consideration of any other issue, and, if upheld, no further determination shall be appropriate.

F. **Extension of Time Frames**. It is understood and agreed that, at any step of the fact finding or grievance procedure, the time limits set forth may be extended by mutual agreement between the Company and the Union, in writing. Further, in the event either party, due to circumstances beyond the reasonable control of such party, does not become aware of, or is prevented from disclosing, facts or circumstances which would give rise to either a fact finding or a grievance, the time frame for pursuing such fact finding and/or grievance shall be extended as appropriate. 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, the Company may issue the notice to the Employee upon his first full day returned to work.

G. **Fact-Finding Procedures**. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a fact finding, with the right to have a Union representative present, in accordance with the following procedures:

1. **No Suspension**. In circumstances where no suspension is imposed:

a. 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.

b. The fact finding shall be held within five (5) calendar days from the date such notice is given to the Employee and the local representative of the Union; and

c. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the fact finding, and a copy of the decision shall be delivered to the local representative of the Union.

2. **Suspension**. Not withstanding the foregoing, the Company may suspend a covered Employee pending a fact finding and/or until such time as the decision of the Company resulting from the fact finding is rendered, subject to the following conditions:

a. The suspension shall be a paid suspension;

b. The basis for the suspension shall be reduced to writing and presented to the Employee and the local representative of the Union within two (2) working days of the suspension;

c. The fact finding shall be held within three (3) working days of the presentation of the written notice of the basis for suspension; and

d. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the fact finding, and a copy of the decision shall be delivered to the local representative of the Union.

OTHER RELEVANT PROVISIONS

MEMORANDUM REGARDING TWU WORK RULES INTERPRETATION – REVISION EIGHT (Dated July 29, 2008)

* * *

10. If a System Board deadlocks on the issue of time frames, and TWU requests arbitration, even though the System Board has not heard the merits of the grievance, will the entire case be forwarded to arbitration? (Section One, Par. L 11)

Yes. One arbitrator will first hear and rule on the time frame issue, and if he finds time frames were not violated, the same arbitrator will then hear and rule upon the substance of the grievance. If this happens, the System Board Step for the merits of the grievance would be, effectively, by-passed.

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

The Company violated Article 20.G of the Collective Bargaining Agreement ("CBA") by failing to advise the Grievant and the Union of the nature of the fact finding not later than ten (10) calendar days from the time the Company became aware of the incident concerning which the fact finding was convened. The Grievant reported his arm injury to the Company on May 30, 2008 and saw Dr. Kopp, a physician often used by the Company, the following Monday, June 2, 2008. STL Managers Ramp & Ops ("MRO") Lovett and Lopez immediately were suspicious about the Grievant's injury and as early as June 6, 2008, McGough & Associates was contacted to conduct surveillance. On June 12, 2008, the Grievant was secretly videotaped by McGough & Associates, and the tape showed the Grievant mowing his front lawn. Occupational Benefits Representative Bellinger became aware of the videotape by no later than June 16, 2008. Thus, the Company was required to provide the Grievant with a Fact Finding Notice by no later than June 26, 2008, which is ten

(10) calendar days from the date the Company became aware of the videotape. Additionally, on June 19, 2008, MRO Lopez contacted Dr. Kopp's office to find out if he had yet viewed the videotape. Therefore, if the ten (10) days runs from the date Management became aware of the videotape, the contractual time period would have expired on June 29, 2008. However, a Fact Finding Notice was not provided to the Grievant until July 25, 2008, almost a month later than required by the CBA's time frame provision. The Company never sought to extend the ten (10) day time frame.

Occupational Benefits Representative Bellinger testified that she was not aware of the Parties' contract, and was not informed by the MROs about contractual time frames involved in claims. Additionally, Dr. Kopp testified that no one asked him to look at the videotape as soon as possible. Had Dr. Kopp been advised of the contractual time limits, it is unlikely he would have delayed looking at the videotape from June 17 to July 9, 2008, when he finally viewed it. These delays were not beyond the Company's reasonable control. The Company chose not to inform Occupational Benefits Representative Bellinger and Dr. Kopp of what was contractually required, and its negligence does not excuse the Company's failure to comply with the time frame set forth in Article 20.G of the CBA.

Other portions of the CBA, while not involved in the instant grievance, shed light on the serious nature of time frames as set forth in the CBA. For example, a Side Letter concerning application of Article 20, Section 1.G.1.a requires that investigations into cases alleging harassment, intimidation, threats, Customer complaints or criminal activity are to be

> * * *conducted in an expeditious manner.

In the instant matter, Company employees were dealing with third party administrators and subcontractors, and the Company had the right to expect compliance with the CBA. Additionally, Article 20, Section 1.H of the CBA – while not involved herein – requires that certain letters of warning or reprimand be issued

> * * * no later than five (5) working days from the time the Company has full knowledge of the incident.

This language reflects the Parties' expectation that time frame constraints contained in the CBA will be rigidly observed. If the Company does not satisfy this time frame requirement, Section 1.E of Article 20 provides that "the Employee shall be awarded the desired settlement without precedent." If the Union violates the time frames, Section 1.E provides that the grievance shall be considered withdrawn. Despite this contractual language reflecting the need to act within certain time frames, the Company showed no urgency to comply with the time frames established in the CBA.

The Company's alleged reliance on Dr. Kopp's opinion as the start of the applicable time frame is misplaced and flawed for several reasons. Paragraph G 1(a) specifies that the employee is to be notified 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.

The relevant incident was the Grievant mowing his lawn, not Dr. Kopp viewing the videotape. Providing a copy of the written notice to the employee starts the fact finding process, and is not meant to be served at the end of the investigation/fact finding process. The evidence presented showed that the MROs were suspicious of the Grievant's injury as soon as it occurred, and that he was placed under surveillance a week after he was injured. Moreover, the Company became aware that the Grievant was mowing his lawn using his injured arm by no later than June 16, 2008 and on June 19, 2008, MRO Lopez contacted Dr. Kopp's office to find out if he had yet viewed the videotape. Thus, it is clear that the Company was aware of the incident many weeks prior to its July 25, 2008 issuance of the Fact Finding Notice to the Grievant. If the Company truly was relying on Dr. Kopp's medical opinion it could have told Dr. Kopp his opinion was needed as quickly as possible or the Company could have sought an extension of the applicable time frame. Yet the Company did neither. Furthermore, Dr. Kopp's opinion was not conclusive and merely gave the Company's insurance carrier a reason to dispute the Grievant's claim. However, the ultimate legitimacy of the Grievant's Workers Compensation claim will be determined by the State of Missouri.

Further, the Company knew its planned course of action as of July 10, 2008, and the Grievant worked on July 13, 2008 which was his last scheduled workday within the time frames due to a previously bid vacation. All of the Grievant's time off during the relevant ten (10) calendar days was scheduled time off.

The Company's violation of the contractual time frame results in the Grievant being reinstated and made whole, pursuant to Article 20, Section 1.E of the CBA, which provides that:

> E. Time Frames. For the purpose of this Article, a working day shall be defined as Monday through Friday, excluding all Company recognized holidays. It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent.

The Company has violated the time frame requirements of the CBA. The required notice is intended to start the fact finding process, but the Company chose to delay issuing the Fact Finding Notice to the Grievant until it had already decided what course of action it would take. The Company chose to delay issuing the Fact Finding Notice, and the circumstances were well within its control. The Company should not be allowed to ignore contractual time frames and expect to benefit from it. The Fact Finding Notice to the Grievant should have been issued no later than June 26 or June 29, 2008 but was not issued until almost a month later. Article 20, Section 1.E of the CBA provides that the Company's violation of a time frame results in the Employee being awarded the desired settlement without precedent. Therefore, the Union respectfully requests that the Arbitrator rule in its favor concerning the applicable time frame and that the Grievant be reinstated immediately and made whole as to back pay and other pay, seniority and benefits.

POSITION OF THE COMPANY

The Company makes the following arguments and contentions in support of its position:

The Company timely issued the July 25, 2008 Fact Finding Notice concerning the Grievant's possible OJI abuse. Although Company Leaders were suspicious about the Grievant's alleged OJI claim and were aware of a videotape showing the Grievant mowing his lawn while using his injured arm, the Company did not receive a medical opinion of the videotape until July 15, 2008. Not until receiving the medical opinion and the resulting denial of the Grievant's claim for OJI benefits did the Company become aware of the facts giving rise to a disciplinary fact finding. Therefore, the Company met the time frame requirements set forth in Article 20, Section G.1.a of the CBA by issuing the Fact Finding Notice on July 25, 2008.

On May 30, 2008 the Grievant reported that his left elbow was hurting, and requested OJI leave. The Company was suspicious of the Grievant's claimed injury as he had previously submitted a number of OJI claims and because he reported his May 30 injury shortly before his security badge was going to expire at midnight. The Company's third party administrator, Cambridge, retained a private investigator to observe if the Grievant's conduct was consistent with his claimed injury. On June 12, 2008, the private investigator observed and videotaped the Grievant mowing his front yard using his allegedly injured arm. The videotape was sent to Dr. Kopp, a physician who was treating the

Grievant for his OJI, for review and medical opinion. Dr. Kopp testified that he was unable to look at the videotape until July 9, 2008 at which point he contacted Cambridge and gave his opinion as to the Grievant's condition. The Company issued the Fact Finding Notice on July 25, 2008 based on the denial of the Grievant's OJI claim and Dr. Kopp's medical opinion concerning the actions depicted on the videotape, which facts became known to the Company on July 15, 2008. The Fact Finding Notice issued on the first day the Grievant returned to work after more than ten (10) days of vacation.

The Fact Finding Notice was issued within ten (10) calendar days of when the Company became aware "of the incident concerning which the fact finding shall be convened" and complies with Article 20 of the CBA. While the Company may have been suspicious of the Grievant's OJI as early as May 30, 2008 and became aware of the mowing videotape during June, it was not until July 15, 2008 that the Company was notified of the denial of the Grievant's OJI claim based on Dr. Kopp's review of the videotape. When the Company became aware of possible OJI abuse on July 15, 2008, it issued the contractually required Fact Finding Notice within ten (10) calendar days. Had the Grievant's OJI claim been approved, there would have been no fact finding or disciplinary action.

The Union's assertion that Dr. Kopp reviewed the videotape in June, 2008 is not credible. Dr. Kopp testified that he did not review the videotape until July 9, 2008 because he did not have time to do so before then. Dr. Kopp's testimony also made clear that his June 2008 release of the Grievant to work was based on his clinical perceptions at the time, and not due to the videotape. Additionally the testimony of Occupational Benefits Manager Patti Colwell refuted the Union's claim that she had told a Union representative that Dr. Kopp looked at the videotape in June. The preponderance of the credible evidence establishes that Dr. Kopp did not look at the videotape until July 9, 2008.

Should the Union argue that the ten (10) days started running on July 10, when Cambridge denied the Grievant's OJI claim, the Company wishes to point out that the Grievant was out on vacation from July 14 through July 24 and, thus, unavailable for the Company to issue notice. July 25, 2008 was the first day the Grievant returned to work and also the date the Fact Finding Notice issued. Article 20, Section F of the CBA provides that:

> 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 the Company may issue the notice to the Employee upon his first full day returned to work.

Thus, the Union cannot prevail on its time frame argument if it relies on July 10, 2008 as the date the ten (10) days began running.

Moreover, to the extent that the Union argues that Dr. Kopp should have reviewed the videotape earlier than he did, Section F of Article 20 provides for an extension of the time frame:

> Further, in the event either party, due to circumstances beyond the reasonable control of such party, does not become aware of, or is prevented from disclosing, facts or circumstances which would give rise to either a fact finding or a grievance, the time frame for pursuing such fact finding and/or grievance shall be extended as appropriate.

Dr. Kopp was unable to view the videotape until July 9, 2008, although it had been delivered to his offices in June and several requests had been made that he look at it. Neither Cambridge nor the Company had sufficient facts to establish possible OJI abuse by the Grievant until Dr. Kopp reviewed the videotape and gave his clinical opinion. Any delay in the OJI claim determination was based on Dr. Kopp's inability to view the videotape earlier than he did, which is a circumstance beyond the Company's control. Thus, the Company is allowed an appropriate extension of time frames per Article 20, Section F.

The Union has failed to establish that the Company violated Article 20, Section G.1.a of the CBA by issuing the Fact Finding Notice to the Grievant on July 25, 2008. Accordingly, its request for reinstatement and a make whole remedy based on violation of contractual time frames should be denied.

OPINION

Bifurcation

At the beginning of the Hearing, the Union requested bifurcation for resolution of a threshold issue concerning whether timely written notice was given to the Grievant in accordance with Article 20, Section 1. G. 1 (a). The Company opposed bifurcation asserting that the Parties did not always bifurcate proceedings, as they had had hearings covering the merits as well as the time frame question in the past. The Arbitrator notes that the occurrence of some non-bifurcated hearings is not conclusive evidence of the

interpretation of the relevant language, particularly in light of the relevant language and the Parties' mutual interpretation of that language. In those prior instances, the Parties could have waived the provision for a particular proceeding. Section 1. E of Article 20 specifies as follows:

> (d)etermination of time frame violation issues shall take precedence over consideration of any other issue, and, if upheld, no further determination shall be appropriate.

In this Arbitrator's mind, the contract language might arguably allow a proceeding wherein the Arbitrator hears all of the evidence relating to time frames as well as the merits but rules first on the issue of time frames. Yet, the Parties have mutually clarified their interpretation of the above quoted language. A Memorandum Regarding TWU Work Rules Interpretations (Revision Eight, dated July 29, 2008) states the following question and answer:

> 10. If a System Board deadlocks on the issue of time frames, and TWU requests arbitration, even though the System Board has not heard the merits of the grievance, will the entire case be forwarded to arbitration? (Section One, Par. L 11)
>
> Yes. **One arbitrator will first hear and rule on the time frame issue, and if he finds time frames were not violated, the same arbitrator will then hear and rule upon the substance of the grievance**. If this happens, the System Board Step for the merits of the grievance would be, effectively, by-passed.
>
> (Emphasis added).

Based on the contractual language and the Parties' mutually agreed interpretation, at the Hearing, this Arbitrator sustained the Union's request for bifurcation and received evidence concerning the time frame issue only.

THE FACTS

The facts are fairly straightforward, and indicate as follows:

The Company is a domestic airline, with headquarters in Dallas, Texas. The Grievant was a Ramp Agent stationed in St. Louis, Missouri ("STL"), and had worked for the Company for approximately six (6) years when he was terminated effective August 1, 2008.

On May 30, 2008, while at work, the Grievant reported that he had injured his left elbow while working. He went to an emergency room after reporting the injury. On June 2, 2008, at the Company's request, the Grievant visited Dr. Kopp, who is retained by the

Company for treating employees' work-related injuries. Dr. Kopp examined the Grievant's left arm and diagnosed tennis elbow. Dr. Kopp placed the Grievant on disability leave based on his medical findings relating to the Grievant's alleged injured elbow.

On June 4, 2008 STL MRO Mike Lovett spoke with Company Senior Occupational Benefits Representative Terri Bellinger by telephone about the Grievant's OJI claim. After that conversation, Representative Bellinger contacted Cambridge, the Company's third party administrator for Workers Compensation claims, to request that surveillance be conducted on the Grievant. On June 5, 2008, Cambridge Claims Adjuster Melissa Martinez contacted STL MRO Rolando Lopez to discuss the Grievant's OJI. During the conversation, MRO Lopez voiced suspicions about whether the Grievant had actually sustained an OJI. On June 6, 2008 Cambridge retained a private investigation firm, McGough & Associates, to conduct surveillance on the Grievant.

On June 12, 2008, an employee of McGough & Associates surreptitiously videotaped the Grievant mowing his front yard. The Surveillance Investigation report prepared by McGough & Associates states, in part, as follows:

> At approximately 5:06 p.m., the (Grievant) was observed walking into view of our investigator, now pushing a lawn mower. The Grievant then began mowing the front yard. Our investigator did not observe the (Grievant) wearing an elbow brace and did not observe any restricted movement on behalf of the (Grievant). On multiple occasions, the (Grievant) was observed pushing and pulling the mower utilizing one extremity at a time including the left arm. Our investigator began obtaining intermittent videotape footage.

A copy of the videotape showing the Grievant mowing his yard was furnished to Cambridge by McGough & Associates on June 13, 2008. Cambridge Claims Adjuster Martinez informed Company Senior Occupational Benefits Representative Bellinger of the videotape by e-mail dated June 16, 2008 and, on June 17, 2008, a copy of the videotape was delivered to Dr. Kopp's office pursuant to Representative Bellinger's request.

On June 12, 2008, the Grievant returned to Dr. Kopp's office for examination and evaluation. He also visited Dr. Kopp's office on June 19, 2008 and received a full release to return to work. The Grievant worked his scheduled shift on June 19, 2008.

On June 19, 2008, Cambridge Claims Adjuster Melissa Martinez contacted MRO Lopez, who confirmed that the Grievant had returned to work with a full release. On July 10, 2008 Cambridge Claims Adjuster Martinez had a conversation with Dr. Kopp, noting in part that:

> (Dr. Kopp) was able to view surveillance video. Reports it is suspicious due to the repeatedly pulling up hill with left arm. Feels (Grievant) probably did not have (a)s much problems as he was stated (sic) given how quickly he healed. There is reason for concern after viewing the video that (Grievant) may not have the symptoms as he reported. States (Grievant's) complaints pretty much mild. He can not be 100% sure that (Grievant) did not really have an injury due to his original complaints were consistent with what he was reporting but video shows concern with what (Grievant) actually reported). (Dr. Kopp) will provide me something in writing to reflect our conversation.

Cambridge Claims Adjuster Martinez discussed the status of the Grievant's claim, including Dr. Kopp's statement and the video surveillance, with Company Representative Bellinger. By letter dated July 10, 2008 Cambridge informed the Grievant as follows:

> After further investigation of your reported claim of 5/30/08, we are disputing that an injury occurred within the course and scope of your employment.

On July 14, 2008, Representative Bellinger e-mailed Cambridge to ask if the Grievant's claim was denied. Claims Adjuster Martinez responded that same day, stating:

> Claim was denied after our conversation on 7/10/08. Letter was sent to (Grievant) on 7/10/08.

The Grievant was on vacation from July 14 through July 24, 2008. On July 25, 2008, when the Grievant had returned to work, the Company issued the Grievant a Suspension – Fact Finder Notice concerning alleged "possible OJI Leave and/or pay abuse in regards to (the Grievant's) claim dated 05/30/08." The Fact Finding was held on July 28, 2008.

By Memorandum dated August 1, 2008, the Grievant was notified, in part, that he was being terminated effective immediately and that:

> After a thorough and complete investigation into this matter, and after considering the evidence and testimony presented at the (July 28, 2008) Fact-Finding it has been determined that you did use OJI leave and OJI pay for a purpose other than that intended which is a violation of the Agreement by and (b)etween Southwest Airlines Co. and TWU Local 555, which states:
>
> > Using OJI leave or OJI pay for a purpose other than that intended constitutes abuse and shall warrant immediate termination.

This grievance ensued.

THE ARGUMENTS

The Contractual Language

Article 20 of the Parties' CBA specifies, in part, the time frame within which notice of the nature of a fact-finding must be given. The relevant language is as follows:

> G. **Fact-Finding Procedures**. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a fact finding, with the right to have a Union representative present, in accordance with the following procedures:
>
> 1. **No Suspension**. In circumstances where no suspension is imposed:
>
> a. 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**.
>
> (Emphasis added).

The Union contends that the Company violated this provision because it "knew" by June 16, 2008[1] that the Grievant had been observed and videotaped using his injured arm while mowing his lawn. Thus, the Union asserts that the 10-day time period began running on June 16 and that the contractual time limit expired ten (10) days later, on June 26, 2008. This Arbitrator does not agree.

The basis for terminating the Grievant was the "use of OJI leave for a purpose other than that intended." Thus, the Grievant was allegedly violating a Company rule which required a medical determination, not a Management determination[2]. The Company is not a medical provider as is Dr. Kopp. Although the Company may have been suspicious about the Grievant's injury, perhaps even as soon as it occurred, it does not have the medical

[1] In support of this argument, the Union notes that by June 19, 2008, MRO Lopez was contacting Dr. Kopp's office to find out if Dr. Kopp had looked at the videotape. The Union contends that, even if this latter date is accepted as proof of the Company's knowledge, the Fact Finding Notice would have to have been issued no later than June 29, 2008.

[2] Had the Company "rushed to judgment" and terminated the Grievant without the benefit of a medical opinion concerning the Grievant's physical condition, it would have left itself vulnerable to the claim that it reached conclusions that it had no medical expertise to make.

knowledge or skill to determine whether the Grievant's actions, as reflected in the June 12, 2008 videotape, were consistent with his claimed injury or whether the actions depicted on the videotape indicated that the Grievant's OJI claim was not legitimate. In other words, although the Company might have suspected that the Grievant was not injured as he claimed, it could not know if this had occurred without obtaining the medical opinion of Dr. Kopp or some other qualified medical provider. To accept the Union's argument would amount to allowing the Company to make a medical decision that it is neither entitled nor qualified to make. Therefore, this Arbitrator concludes that the Company cannot be said to have become "aware of the incident concerning which the fact finding shall be convened" – the Grievant's possible use of OJI leave and OJI pay for a purpose other than that intended -- until July 15, 2008 when it learned of Dr. Kopp's medical opinion. The Company, out of necessity, needed the medical expertise to determine whether a Company rule was, in fact, violated. Therefore, the Fact Finding Notice is not untimely under Article 20 G.1.a.

Extension of Time Frame

Nevertheless, the Union argues that the Company could have made Dr. Kopp[3], who is a provider to the Company, look at the videotape earlier than July 9, 2008 and that its failure to demand that he do so prevents it from invoking the extension of time set forth in Article 20 F:

> Further, in the event either party, due to circumstances beyond the reasonable control of such party, does not become aware of, or is prevented from disclosing, facts or circumstances which would give rise to either a fact finding or a grievance, the time frame for pursuing such fact finding and/or grievance shall be extended as appropriate.

The evidence indicates that the videotape was provided to Dr. Kopp's office on June 17, 2008. It appears that Company officials did request Dr. Kopp to review the videotape but, for whatever reason, Dr. Kopp indicated that he did not have time to do so until July 9, 2008. The Company made a good faith effort and, thereafter moved on the matter as soon as it received the information.[4] While it would have been prudent for the Company to request an extension of time frames, the evidence herein persuades the Arbitrator that the Company was not required to request an extension.

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[3] There was an assertion that Dr. Kopp may have reviewed the videotape prior to July 9, 2008, but the weight of the evidence indicates that he reviewed the videotape on July 9, 2008

[4] The evidence indicates that Dr. Kopp is a provider, but is not employed by the Company. Thus, the Company has only limited control over his actions on a case by case basis. The timing in this case, although not optimal, is not unreasonable.

CONCLUSION

This is a rather unique case, as the Union makes a good point that the apparent conclusion concerning the Grievant's misconduct, i.e., Dr. Kopp's determination, occurred before the fact finding and before the commensurate fact finding investigation even commenced. That is probably not the general intent of the contract language providing for the fact finding. Nonetheless, out of necessity, the Grievant's employment hinges on the opinion of medical professionals and the Dr. Kopp's determination needed to be made before the Company could properly go forward with the fact finding process. One could argue that something discovered in the fact finding might have perhaps changed the Company's position despite Dr. Kopp's initial determination.

Thus, this Award is to be narrowly construed based upon the unique facts herein For the purpose of applying the contractual time frame restrictions, the Company is held to have become "aware" upon receipt of Dr. Kopp's medical opinion and not when it was notified of the existence of the videotape.

For the reasons hereinabove setforth:

AWARD

When the Company issued the Grievant, [redacted], the Notice of Fact-Finding dated July 25, 2008, it did not violate Article 20, Section 1. G.1.a of the Collective Bargaining Agreement with regards to time frames. Therefore, the grievance will be heard on its merits or remanded to the Parties, if mutually agreed.

Signed this 4th day
of February, 2009 in
Houston, Texas

Diane Dunham Massey