**IN THE MATTER OF THE ARBITRATION BETWEEN:**

**TWU LOCAL # 555,**
**Union,**

**and** **Grievance Number: TWU-ALL-1185/2022**
**Doctors Note Not Accepted**

**SOUTHWEST AIRLIINES CO.**
**Employer,**

## DECISION OF THE ARBITRATOR

An in person hearing in this matter was conducted on August 5, 2022 by Arbitrator Peggy A. McNeive. TWU Local # 555 (hereinafter "Union" or "Local") was represented by Mr. Jerry McCrummen, Vice President, Local # 555. Southwest Airlines Co. (hereinafter "Southwest" or Company") was represented by Ms. Jacquelyn L. Thompson of Ford Harrison.

**Issue Statement:**

The parties agreed the case was properly before the Arbitrator and mutually agreed to bypass the system board and proceed straight to arbitration. Although the Company proposed an issue at the arbitration, it was not stipulated to by the parties[1] In its Post-Hearing Brief the Union states the issue as follows:

> Was the contract properly applied and interpreted correctly? If not, what is the proper remedy?

Southwest submitted the following issue:

> Was it a violation of the CBA for the Phoenix station to no longer allow doctor's notes from Dr. Alejandro Mioni? Is so, what is the proper remedy?

[1] See the Transcript of the Arbitration in the Matter of Doctors Note Not Accepted-TWU Group Grievances, Group Grievance No. TWU-ALL-1185/2022 Between TWU Local 555 and Southwest Airlines Co. (hereinafter "Tr.") at page 8-9.

The Arbitrator frames the issue to be:

> "Did the Company violate the collective bargaining agreement when it placed restrictions on the doctor's notes it would accept from employees at the Phoenix under Article 23 of the collective bargaining agreement? If so, what is the remedy?"

**Background:**

Southwest Airlines and TWU 555 negotiated a collective bargaining agreement in accordance with the Railway Labor Act which covers, among other groups, the ramp employees at the Phoenix facility. A provision in the Agreement allows employees to bring in a doctor's note stating the employee was ill on a certain day; this prevents the employee from accruing an occurrence under the attendance policy included in the Agreement. Employees can submit a doctor's note to avoid receiving an attendance occurrence up to four times a year. The provision requires the doctor's note to include the dates of the illness/injury, the date of treatment, the date the employee can return to duty and the doctor's signature.

Early in 2022 the management of the Southwest terminal in Phoenix, Arizona began to notice an increased number of absences among ramp employees. This led to a review of the doctor's notes the ground operations employees were submitting to avoid receiving an occurrence on their attendance record. Between January and April of 2022, ramp employees at the Phoenix facility submitted approximately 300 doctor's notes. Eighty-four of these notes, about 28 percent were obtained from Dr. Alejandro Mioni.[2]

On May 9, 2022, Mr. Dave Yarbrough, Phoenix Station Director, issued a memorandum, with a subject matter of "Doctor Statements from Dr. Alejandro Mioni". The memo stated, effective May 13, 2022, the

> PHX Leadership Team will no longer accept and/or apply doctor statements (notes), which are authored/directed by Dr. Mioni, from any Ramp, Cargo, Operations, Provisioning, and Customer Service Employees concerning attendance occurrences, medical leaves of absence (excluding FMLA claims), transitional duty, and restricted duty. Accordingly, said notes are ineligible to be used as any of the 4 doctor notes as outlined in the CBA/GOEH.

[2] See Joint Southwest Company Exhibit 3.

If employees submit notes, which are authored/directed by Dr. Mioni - after May 12, 2022 – then the following will apply:

- **PHX Leadership will not accept the notes.**
- **All attendance rules will apply to the absences, for which the notes were originally submitted.**
- **Employees will be given 24 hours in order to submit eligible notes to PHX Leadership.**
- **All attendance letters – if applicable- will be issued in accordance with Article 23 of the CBA/GOEH. [3]**

Mr. Yarbrough did not author this memo; it was a collaboration between the Human Resources and Legal Departments. He did, however, believe it was appropriate the memo come from him as the Station Director.

The Union filed a grievance on May 17th which stated the Company's refusal to accept doctor's notes from Dr. Mioni was a violation of the collective bargaining agreement. The grievance was processed through the grievance procedure without reaching an agreement on the issue. The parties agreed to submit the grievance to arbitration.

**Relevant Contract Provisions:**

The following provisions of the collective bargaining agreement[4] are relevant to this matter:

**ARTICLE TWO**
**SCOPE OF AGREEMENT**

…

C. **Reasonable Work Rules.** Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereinafter 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.

…

[3] See Joint Exhibit 3.

[4] Agreement by and between Southwest Airlines Co. and Transport Workers Union of America AFL-CIO Local 555 representing Ramp, Operations, Provisioning and Freight Agents for the period February 19, 2016 through February 18, 2021 (hereinafter "Joint Exhibit 1" or "Agreement").

## ARTICLE 23
## ATTENDENCE

A. **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 the progressive discipline procedures. 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 termination.

…

## SECTION 1
## ATTENDENCE PROGRAM

…

C. **Reported Illness.** (Non Chargeable). Four (4) doctor statements per calendar year shall be allowed for an Employee calling to report that he shall not report to work because of his personal illness/injury. No more than one (1) doctor statement shall be accepted for any Employee during the period from November 1 through and including January 3.

…

1. **Doctor Statement.** An Employee utilizing a doctor's statement to excuse his absence must furnish it to local management on his first day back to work. Upon receipt of the doctor's statement on the Employee's first day back, if the Employee has not utilized his allowable number of doctor's statements under paragraph C. above, the absence shall be excused.

…

2. **Statement contents.** The doctor's statement for verification of illness/injury must contain the following information or it shall be deemed unacceptable:
   1- Inclusive date(s) of illness/injury (Must be included unless verified in writing by the doctor's office that the Employee contacted them and they were initially unable to treat due to scheduling)
   2 – Date(s) of treatment;
   3 – Date Employee can return to full duty; and
   4 – Doctor's signature.

…

Section II of Article 23 sets out the points given for different categories of absences and what constitutes an employee being tardy. If also sets out the discipline associated with the accumulation of occurrences. Although Article 22, entitled Grievance/System Board/Arbitration/Discharge and Discipline is relevant, it will not be cited because the parties have stipulated the case is properly before the Arbitrator.

**Summary of the Party's Positions:**

The Union argues the Company violated the Agreement when Regional Director Yarbrough issued a memo on May 9, 2022 informing employees that Phoenix management would no longer accept doctor's statements by Dr. Alejandro Mioni to satisfy the requirements under Article 23 allowing employees the opportunity to avoid receiving an occurrence for an absence. Article 23 requires the Company to accept a doctor's statement if it contains the inclusive dates of the employee's illness/injury, the date of treatment, the date the employee could return to work and the doctor's signature. Notes rejected by the Company that employees produced from Dr. Mioni included all this information.

The plain meaning rule of contract interpretation can only lead the Arbitrator to find the Union's interpretation of the Agreement is correct. Southwest is ignoring the plain language of Article 23 and attempting to expand the management rights clause to cover this situation because there is no other language in the Agreement which allows the Company to issue such a memo. The Arbitrator does not have the authority to change, add to or modify the provisions of the Agreement; therefore, she must rule the memo is in violation of the Agreement.

Since the parties are currently in negotiations for a new collective bargaining agreement, the Company must adhere to the provisions of the expiring Agreement until a new Agreement is reached in accordance with the Railway Labor Act. Issuing the memo is an attempt to change the status quo and interpret the language of Article 23 in different way than the parties have in the past. This type of memo has never been issued in the past and should not be allowed now. Acceptance of management's position would affect all the employees covered by the Agreement, not just the employees at the Phoenix facility. Since there are no guidelines for how it would be implemented, each facility would potentially come up with their own practice; this would result

in discriminatory and inconsistent policies. The Union requests the Arbitrator sustain the grievance.

Southwest assets that, since the contract is silent on the issue of whether the Company can issue restrictions on what doctor's notes it will accept, the Company has the right to issue such restrictions. The parties negotiated the minimum requirements for the content of the doctor's notes; this does not preclude the Company from finding notes unacceptable as long as they have reasonable reasons for not accepting the doctor's notes. These restrictions fall within the Companies right to issue reasonable work rules. In addition, the management rights clause allows the restrictions since the Agreement is silent on the matter. The Union has not met its burden to prove its interpretation is correct.

The Company had several reasons for finding Dr. Mioni's notes unacceptable. These include the similarity and uniformity of the notes, the fact many of the notes were for Fridays, weekends and Mondays and the information the benefits department obtained concerning notes being available for $20.00 after an employee was initially seen by Dr. Mioni. In addition, two ramp employees had their notes changed in a matter of hours by Dr. Mioni so they could receive wages while working with on-the-job injuries.

Both the Union leadership and the employees were given notice the Company would not be accepting doctor statements from Dr. Mioni after May 12, 2022. Only one statement from Dr. Mioni was accepted after that date; it was accepted because it was issued before May 12, 2022 and the employee returned to work on May 13, 2022. Acceptance of this doctor's statement does not constitute discriminatory application of the rule.

The bargaining history of the parties support the Company's interpretation because the Union did not submit the issue during the last negotiations session. It is simply trying to obtain something through arbitration that it did not obtain through bargaining. In the alternative, the issue is not a mandatory subject of bargaining because the Railway Labor Act only extends to subjects directly related to rates of pay, rules and working conditions.

Acceptance of the Union's position in this case would wreak havoc on the Company's ability to manage its workforce. Therefore, the Company requests the Arbitrator deny the grievance.

**Discussion and Opinion:**

Both parties agree the Union has the burden of proofing the Company's refusal to accept notes from Dr. Mioni violated Article 23 of the Agreement. In addition, both parties suggest the Arbitrator determine whether the Union has carried that burden by a preponderance of the evidence. The Arbitrator agrees it is the appropriate standard.

The substantive controversy in this case is whether the Company has the authority to place restrictions on the doctor's notes employees obtain in order to avoid being assessed an occurrence under the negotiated attendance policy. When a question of contract interpretation arises, an arbitrator must consider the entire contract to determine the most appropriate interpretation. In Great Lakes Dredge and Dock Co. Arbitrator Kelleher discussed this concept as follows:

> It is a rule that the contract must be construed in its entirety … Taking the contract as one complete expression of understanding, however, the parts can fit in a pattern so as to give an easy and natural meaning to the words used by the parties. It is therefore a rule that, when alternative interpretations of a contract are possible and one interpretation would give effect to only part of the language of a contract and the other interpretation would give meaning and effect to all provisions of the contract, the latter interpretation is to be followed.[5]

In a case involving the interpretation of a collective bargaining agreement language involving the difference between a provision concerning job bidding and job bumping, Arbitrator Dunham expressed the following rule of interpretation:

> The Arbitrator must view the whole of an Agreement to give proper interpretation and meaning to a particular section or provision of the Agreement. This is necessary since a single phrase, sentence or paragraph in an Agreement taken out of context (that necessary language which goes along with it) may logically abort the intent of the parties.[6]

In order to determine if the Union has met its burden of proof several articles in the Agreement will be reviewed.

[5] 5 LA 409 (Kelleher, 1946) at page 410.
[6] Milton Roy Co. 77 LA 377, (Dunham, 1981) at page 379.

The Union contends the plain language of Article 23 conveys a benefit on employees which allows them to avoid being assessed an occurrence under the attendance policy if they bring in a doctor's statement, which contains the required information, the day he/she returns to work. Since the language of Article 23 is clear and concise it is not open to any other interpretation, nor is it subject to revision based on the management rights article in the Agreement.

Through testimony of the Company's witnesses, the Union proved the notes obtained by employees from Dr. Mioni met the requirements contained in Article 23, Section 1, paragraph (C) (2). Ms. Gordon, the Station Service Manager in Phoenix, testified the notes contained in Company Exhibit 4, which were notes submitted by employees from Dr. Mioni prior to Mr. Yarbrough's memo, met the requirements for doctor's statements contained in Article 23.[7] Mr. Camacho, the Assistant Station Manager at the Phoenix facility, testified Article 23 did not have any requirement for management approval.[8] In addition, he stated the note the Company received from Mr. [redacted] had all the required information but was rejected because it was a note from Dr. Mioni.[9] Finally, Mr. Yarbrough, the Station Director, also testified Article 23 did not contain a requirement for the employee's doctor's statements to be approved by management.[10] He further testified Mr. [redacted] s doctor's note satisfied the requirements contained in Article 23; it was rejected because it came from Dr. Mioni.[11]

According to the Union, Phoenix management is, essentially, mandating which doctors it will allow employees to visit to obtain a doctor's note. This is violation of the Agreement because Article 23 does not contain any requirement for employee's doctor's notes to be approved by management. The management rights clause cannot be used to cover this situation because it is subject to the terms and conditions of the Agreement. Extending the management rights clause to allow management the authority to disallow certain doctor's notes would violate the Agreement. It further argues that, if Phoenix management can disallow Dr. Mioni's notes, it opens the door for all facilities to expand the management's rights clause in order to dictate which doctor's notes will be accepted by each of Southwest's facilities.

[7] Tr. at page 78-79
[8] Tr. at pages 127-128.
[9] Tr. at page 129
[10] Tr. at page 155.
[11] Tr. at page 163.

Southwest argues it is not imposing additional requirements on all employees who are submitting doctor's notes, it is only disallowing notes from Dr. Mioni because of the negative impact those notes have had on the operations of the Phoenix facility. It has three major arguments to support its authority to take this action; first, since Article 23 does not address which doctors can submit notes and the management rights clause of the contract allows it to make such a determination. Second, the determination that Dr. Mioni's notes will no longer be accepted is a reasonable work rule. Finally, the negotiations history supports the Company's right to disallow Dr. Mioni's notes.

The Company's contends there is no language concerning the limitations on whether employees can be restricted on which doctor they can use for notes so, under the managements rights clause it has the right to place restrictions on the use of notes from Dr. Mioni. Southwest is correct when it states restrictions on the ability of employees to bring notes from their personal physician are not contained in the language of Article 23. Instead, the language states that, if the employee brings in a doctor's notes which has all of the information listed under the section on statement contents, and the employee is eligible to use the doctor's notes, **the absence shall be excused** (emphasis added).

> Arbitrators often have ruled that, in the absence of a showing of mutual understanding of the parties to the contrary, the usual and ordinary definition of terms as defined by a reliable dictionary should govern. The use of dictionary definitions in arbitral opinions provide a neutral interpretation of a word or phrase that carries the air of authority. (Citations omitted)[12]

Black's Law Dictionary states "shall" as used in statutes, contracts, or the like is generally imperative or mandatory…Shall is a word or command…[13] The Merriam-Webster Dictionary defines "shall" as "used as an auxiliary to express a command, what seems inevitable or likely in the future, simple futurity, or determination".[14] It is clear from the plain language of the contract that when an employee provides a note from a doctor containing all the required information it

[12] How Arbitration Works, Elkouri and Elkouri, BNA, 8th Edition, Arlington, VA at page 9-24.
[13] https://www.facebook.com/GovernorMigunaMiguna/photos/the-blacks-law-dictionary-definition-of-the-word-shall-shall-as-used-in-statutes/1445484462307596/
[14] The Words You Need, Based on Merriam-Websters Collegiate Dictionary, 11th Edition, Springfield, MA (2005) at page 454.

must be accepted by management so there was no need to put in language concerning how to determine when a certain doctor's note would be unacceptable.

Next, the Company argues that, under the management rights clause it has the authority to make reasonable rules concerning accepting doctor's notes. In support of this argument the Company cites two cases involving Southwest Airlines which uphold its authority to make reasonable rules concerning the attendance policy. Both of these cases are distinguishable because they involve a collective bargaining agreement which does not include the attendance policy. Contrary to the Company's assertions, the negotiators delineated the requirements of a doctor's note for it to be accepted. They are set forth in Article 23, Section 1(C) (1); the note needs to specify the dates of the illness/injury, the date the employee saw the doctor, the date the employee can return to work and the doctor's signature.

If the negotiators wanted to put further restrictions on doctor's notes or if they wanted to make some aspect of the Attendance Program subject to management's approval, they could have negotiated such provisions. There are a number of examples in the contract where an employee must obtain management's approval in order to act in a certain way. Some of these examples are Article 6, section K (requests for shifts trades submitted less than 12 hours in advance must be approved by management); Article 7, Section A (an employee may waive the requirement for a ¾ hour minimum overtime with the approval of management); Article 12, Section A (any permanent employee may take a leave of absence with management approval) and Article 14, Section F, Subsection 5 (employees may take DAT/FTO days in excess of the allotted daily amount or requested with less than 24 hours' notice at the discretion of management).[15] Several of these articles relate to benefits employees may request; it is within management's right to grant or deny such requests. Clearly, there is no such requirements to obtain management's approval to exercise an employee's rights under Article 23.

In addition, the memo issued by Mr. Yarborough is not characterized as a work rule. Article 2, Section C addresses the issuance of reasonable work rules by the Company. Work rules must be issued by someone authorized to do so; there was no testimony during the hearing that the Company authorized Mr. Yarborough to issue his memo. Although it was drafted by the Legal and

[15] See Joint Exhibit 1.

Human Resources departments before it was signed by Mr. Yarborough, there is no indication it was vetted by the entire management team and authorized by Southwest. In addition, work rules cannot be in conflict with the provisions of the Agreement. Since Article 23 does not require management approval of doctor's notes or give management the authority to determine which doctors can submit notes, any work rule which gives managers the authority to do so is in violation of the Agreement.

Southwest also argues the negotiating history supports its right to restrict the use of notes from Dr. Mioni under Article 23. It cites the testimony given by Ms. Jordan; she testified that, although the attendance policy was the subject of negotiations, there were no discussions concerning doctor's notes. The Company argues the Union cannot obtain through arbitration what it attempted to negotiate and failed to do so. This is an accepted principle of arbitration. However, it does not apply here. Nothing was discussed concerning the doctor's notes according to Ms. Jordan during the last set of negotiations. If there were no proposals concerning the subject, the Union did not attempt to change the provision on doctor's notes. This principle applies only when one party has made a proposal and it is rejected by the other party; therefore, the negotiating history does not support the Company's position.

The only other person who testified to his understanding of what the attendance policy was designed to do was Mr. Yarbrough. Although he had never been in contract negotiations[16] he testified his understanding of the purpose of the attendance policy was "[t]o have parameters that allow the employee to be absent for legitimate and specific reasons and, you know, still feel good about being able to have gainful employment."[17] He further stated the management rights provision provide the ability to the Company to also make sure that this attendance program is being implemented in a constructive manner. Although managers often have an opinion of what language in the Agreement means, these individual interpretations do not govern how the Union and the Company interpret the Agreement. If it did, there would rarely be a consistent practice as to how a particular contract provision is interpreted.

Nothing in Article 23 indicates the Company has a right to impose restrictions on a group of employees other than the requirements concerning doctor's notes and the outline of progressive

[16] Tr. at page 165.
[17] Tr. at page 168

discipline to be imposed on all employees. The substance of the provision is to ensure individual employees are not habitually absent or tardy and, if they are, to notify them of the consequences of such behavior. None of the management personnel at the hearing testified the memo was to curb the behavior of any one employee, instead it was to lesson absences of an entire group of employees.

[redacted] testified his personal physician for ten (10) years was Dr. Mioni.[18] Mr. [redacted] s note from Dr. Mioni[19] was not accepted because it was submitted after Mr. Yarbrough's memo was issued. As a result, Mr. [redacted] did not receive his roll-off which would have given him a perfect attendance record for that 90-day period. At the time of the hearing, he had negative two points on his attendance record; he would have had a negative five points if the note had been accepted.[20] There is no indication in Article 23 that this type of result was intended by the drafters of the Agreement language.

There is no question Southwest was experiencing problems with covering all the shifts at the Phoenix facility during the Spring and Summer of 2022. Several factors contributed to this situation, including the difficulty in increasing staffing levels after the low levels of travel during COVID and the increase in flight volume because of spring break and baseball training camps. The management team was frustrated by the need to call, or be prepared to call, State of Operational Emergencies at the Phoenix facility during March of 2022 and continuing during the summer months. While the Arbitrator empathizes with these problems, their existence cannot justify violating employee's rights under the collective bargaining agreement.

**Award**

After consideration of the evidence, exhibits, briefs concerning the party's positions and the case law cited above the Arbitrator sustains the grievance. Southwest is ordered to rescind Mr. Yarbrough's memo and commence accepting Dr. Alejandro Mioni's doctor's statements for employees under Article 23 of the Agreement.

Executed this 21st day of October, 2022 by Peggy A. McNeive, Arbitrator

[18] Tr. at page 44.
[19] See Union Exhibit 4.
[20] Tr. at pages 49-50.