GRIEVANCE ARBITRATION DECISION
TRANSPORT WORKERS UNION, LOCAL #555
&
SOUTHWEST AIRLINES, INC.
JANUARY 29, 2023

In the matter of:	}
	}
Transport Workers Union, Local Union #555	}
	}
&	} Grievance DCA-O-1677 /2022
	}
Southwest Airlines, Inc.	}

TABLE OF CONTENTS

ISSUE

Was the Grievant, [redacted] terminated for just cause, and if not, what should the remedy be?

DATES

GRIEVANCE: July 14, 2022; **ARBITRATION HEARING**: October 28, 2022; **BRIEFS**: December 15, 2022; **ARBITRATION AWARD**: January 29, 2023.

REPRESENTATION

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I. ISSUE

Was the Grievant, [redacted] terminated for just cause, and if not, what should the remedy be?[1]

II. FACTS

All dates refer to 2022 unless stated otherwise.

A. Overview

[redacted] an Operations Agent (Ops Agent) at DCA, went home ill on July 1st shortly after his 5:00 a.m. shift started. The Company terminated Mr. [redacted] believing that he was not sick but engaging in a concerted sickout with three co-workers.[2]

The Union strongly disagrees, saying that the Company made unfounded assumptions and erroneous fact findings about Mr. [redacted] And regardless of what Mr. [redacted] did on July 1st, there is no evidence that he influenced his co-workers to leave work minutes later, claiming sickness.

B. *Company's Evidence*

The Collective Bargaining Agreement prohibits sick leave abuse in Article 23A.[3] Southwest trained Mr. [redacted] on policies that prohibit false claims for sick leave. The Basic Principles of Conduct ("BPOC") from the Ground Operations Employee Handbook address expectations for Operations Agents, including listing prohibited conduct that could result in discipline and termination.[4] Mr. [redacted] received regular training on provisions in the BPOC.[5]

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1 The Parties stipulated this issue at T. 8-T. 9.
2 T. 119.
3 Jt. Ex. 2; T. 67.
4 Co. Ex. 9, T. 94-95.
5 *Id*.

On July 1st, at approximately 3:45 a.m., Customer Service Supervisor Chemere Wallace (previously surnamed Berry) learned that two of the six Operations Agents scheduled to work that morning had called out sick.[6] Ms. Wallace immediately contacted the DCA Station and requested that flights previously assigned to the two Operations Agents be reassigned, including to the other Agents still coming in that day, and to herself.[7] As a result, Mr. [redacted] was reassigned to additional flights.[8]

This sequence of events started with Mr. [redacted]'s return from a vacation in Mexico. His flight arrived at DCA approximately 15 minutes late, at around 12:15 a.m. on July 1st. He went home, showered, and returned to DCA, clocking in at 4:14 a.m. for his 5:00 a.m. shift.[9]

Before coming in for his shift on July 1st Mr. [redacted] could not see that additional flights were assigned to him. He could only see the additional flights after he clocked in and logged in to his computer.[10] Mr. [redacted] and three other Operations Agents showed up to work on July 1st but soon called out sick and walked out within seconds of each other.[11]

Three other Operations Agents still on the schedule also arrived to work for their morning shift and clocked in.[12]

6 T. 25-26.
7 T. 27-33.
8 T. 28-34.
9 T. 186-190.
10 T. 29-32.
11 Co. Ex. 10.
12 T. 171.

Customer Service Supervisor Laura Padilla walked into the room where Mr. [redacted] and three other Ops Agents were working that morning.[13] Mr. [redacted] was sitting right next to another Ops Agent, [redacted] [14]

The Ops Agents, including Mr. [redacted] said good morning to Ms. Padilla, a Customer Service Supervisor. All were in the same small room for five minutes or more, but the Ops Agents did not report to Ms. Padilla that they were feeling ill or needed to go home.[15]

Moments after Ms. Padilla walked out, three Ops Agents, including Mr. [redacted] called her and another Supervisor from the same room and phone within seconds of each other.[16] Another called within the same minute but from an adjoining room.[17] All four Agents repeated that they were going home sick without any explanation or elaboration.[18] Three of the four Operations Agents who called, including Mr. [redacted] clocked out from the same time device within two minutes of each other, from 5:16 a.m. - 5:18 a.m.[19]

The entire Southwest operation was severely affected by the walkout. On July 1st Southwest had ten originator flights scheduled to leave from the DCA airport.[20] It is critical for all flights, especially originator flights, to depart on time because even a short delay affects the entire network for the rest of the day.[21]

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13 *Id*.
14 *Id*.
15 *Id*.
16 T. 35-38; T. 82-85.
17 *Id*.
18 *Id*.
19 Co. Ex. 10; T. 96-99.
20 *Id*.
21 T. 36.

On July 1st all ten originator flights were delayed. Among the 49 Company flights out of DCA on July 1st 44 flights were delayed.[22]

The multitude of delayed flights also caused a chaotic scene in the Company's DCA terminal, which is relatively small, as it became overcrowded.[23]

The delays cascaded throughout the Company's network, with DCA Station Manager Michelle Porter testifying that she was on calls with Company Vice Presidents and different station leaders. These discussions covered a range of emergency contingencies, such as the need to compensate customers and order other employees into mandatory work assignments.[24]

Numerous employees had to travel to DCA to assist, including an employee who flew from Chicago to specifically handle the backlog.[25]

Because the DCA Station did not know whether other employees, in addition to the four that morning— including Mr. [redacted] would participate in an orchestrated walkout for employees who were scheduled later, the Station took the drastic step of declaring a State of Operational Emergency ("SOE").[26]

All Ops Agents, including Mr. [redacted] were notified of the declaration at 9 a.m. that morning. The SOE extended through the morning of July 2nd because the DCA leadership team was concerned about the walkout being repeated on this busy holiday weekend.[27]

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22 T. 171.
23 T. 101-105.
24 T. 101-105; T.123.
25 *Id*.
26 Co. Ex. 11, T. 102-104.
27 T. 102-104.

Mr. [redacted] went to the doctor after the SOE declaration. He received a doctor's note at the Express Care. Mr. [redacted] testified that he reported to the doctor that he was experiencing "diarrhea," "an overwhelming headache," and "terrible stomach pain."[28] Nonetheless, the doctor's note cleared Mr. [redacted] to work the next morning.[29]

Mr. [redacted] also told Ms. Wallace (then Ms. Berry) that the four Operations Agents who called out sick "were rooting for (her) from their sick beds."[30] She memorialized her conversation on July 2nd with Mr. [redacted] in an email sent on July 3rd to Ms. Porter, the DCA Station Manager.

When Ms. Wallace asked Mr. [redacted] about the meaning of his "rooting for (her) from their sick beds" message, Mr. [redacted] explained that they called out sick because "they were tired of people not getting in trouble for calling out."[31]

Later that same day, rumors were floating around the DCA Station that the Ops Agents would call out sick again.[32] When Ms. Wallace asked Mr. [redacted] if the rumors were true, he responded cryptically, "COVID."[33] She viewed this as a possible indication that the Ops Agents might collectively call out again, using COVID-19 as their excuse.[34]

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28 T. 199-T. 204.

29 Co. Ex. 12; T. 104-T.106.

30 Co. Ex. 1. Customer Service Supervisor Wallace, a former Operations Agent, was friends with Mr. [redacted] In fact, Mr. [redacted] was invited to her relatively small wedding ceremony a week before July 1st. Co. Ex. 1 & 2; T. 50; & T. 208-T. 209.

31 Co. Ex. 1.

32 *Id*.

33 *Id*.

34 *Id*.

The Company scheduled a fact-finding meeting with Mr. [redacted] to allow him to present his side of events. During the meeting, Mr. [redacted] was uncooperative and refused to answer Ms. Porter's questions.[35] He offered no significant medical information to support his explanation for calling off sick.[36] He testified that he refused to share any information at the fact-finding because the Company was "hostile" towards him.[37]

Two Union Representatives who attended the fact-finding testified at the arbitration hearing that the Company was respectful to Mr. [redacted] that he was given an opportunity to share information; and that the Union was permitted to ask questions during the fact-finding.[38]

Based on the totality of the circumstances and Mr. [redacted]'s lack of explanation or cooperation during the fact-finding process, the Company terminated his employment for violating sick leave policies and for dishonesty under the BPOC.[39]

C. *Union's Evidence*

Mr. [redacted] was an Ops Agent at Ronald Reagan Washington National Airport (DCA) who began his career in February 2017. He worked without any disciplinary sanctions.

Mr. [redacted] travelled to Mexico while on vacation from June 26th through June 30th. He travelled with a small group of co-workers, including [redacted] who works

35 T. 109-T. 110; T. 196-T. 197; T. 234; & T. 241-T.242.
36 T. 196-T. 197.
37 *Id*.
38 T. 234; T. 241-T. 242.
39 T. 116-T. 120; & Jt. Ex. 2.

as an Ops Agent at the Portland Oregon Station (PDX). They both planned to return to their respective cities the evening of Thursday, June 30th.[40]

Ms. [redacted] became so ill on June 29th with gastrointestinal symptoms that she was unable to leave her room.[41] She was still ill when she returned to Portland on June 30th. On July 1st she also called in sick.[42] While in Mexico, prior to becoming ill, Ms. [redacted] and Mr. [redacted] dined together for all their meals.[43]

Mr. [redacted] testified that as he travelled back from Mexico, he began to feel somewhat ill.[44] He thought a nap on the plane would help him feel better. He planned to arrive back at DCA on the evening on June 30th, but his flight was delayed. As a result, he arrived between 12:15 a.m. and 12:30 a.m. on July 1st.[45]

Mr. [redacted] was not feeling better when he arrived in DCA, but still tried to go to work on July 1st. He testified that he arrived at the parking lot at around 3:00 a.m. because of the congested parking situation at the airport.[46] He clocked in around 4:15 a.m., feeling "a little run-down."[47] He had "headaches" but thought he could "push through."[48]

After he clocked in at 4:14 a.m. for a shift start time of 5:00 a.m.,[49] Mr. [redacted] went into the "Ops Breakroom." He continued not to feel well, and stayed to

40 Un. Ex. 2; T. 213-T.214; 7 T. 180-T. 181.
41 T. 214.
42 T. 215.
43 Un. Ex. 2; T. 215.
44 T. 184.
45 T. 181.
46 T. 166.
47 T. 167.
48 *Id*.
49 Co. Ex. 10, at 1.

himself.[50] Another Ops Agent was already in the room,[51] but the two did not know each other and they did not speak. Mr. [redacted] kept to himself and did not converse with anyone prior to the start of work at 5:00 a.m.

As Mr. [redacted] sat in the room, he was aware at some point that a supervisor, Laura Padilla, had come into the room and was making copies, but they did not speak.[52] Still feeling ill, Mr. [redacted] did not sign into the computers, nor did he print any flight paperwork.[53] After sitting at work not feeling well for about an hour, and waiting for his shift to begin, he saw his Supervisor, Chemere Wallace.[54] Shortly after 5:10 a.m., Mr. [redacted] called the supervisors' office. He told the supervisors, who had him on speaker phone, that he did not feel well and was going home sick. Supervisor Wallace responded, "Ok, have a good day, be safe."[55]

Mr. [redacted] hung up the phone, grabbed his possessions, and left the room without speaking to anyone. The time clock is just a few steps outside the Ops Breakroom.[56] He punched out and headed from the building to his car.

At the arbitration hearing, a factual discrepancy arose about what happened in this brief interval of time. Supervisor Laura Padilla testified on direct examination that it is about a one-minute walk from the Ops Breakroom (where Mr. [redacted] called from) to the supervisors' office.[57] Supervisor Wallace testified that about a minute after Mr.

50 T. 169.
51 T. 188.
52 T. 169
53 T. 170.
54 T. 135; T. 170.
55 T. 171.
56 Co. Ex. 6.
57 T. 82.

[redacted] called them, a co-worker named [redacted] called to say he was going home. Using Ms. Padilla's estimate, Mr. [redacted] who had already left the breakroom, would already be in the hallway by the back side of the supervisor's office. He would not know what was going on in the Ops Breakroom. Also, he would also be just a few yards from exiting the building on to the ramp area.[58]

Mr. [redacted] clocked out at 5:16 a.m.[59] The other agents did not clock out until two minutes later.[60] This means that by the time they punched out, Mr. [redacted] had already exited the building. The only co-worker he saw as he departed was Ms. [redacted] and she was not in the breakroom when he left.[61]

Mr. [redacted] went home from the airport and tried to get some rest.[62] Still not feeling well, he went to his doctor's office between 9:00 a.m. and 10:00 a.m. to make an appointment. He could not get an appointment until 4:00 p.m., so he chose to do a walk-in. He waited in the doctor's office until he could be seen. While at the doctor's office, he was also tested for COVID.

Mr. [redacted] was medically cleared to return to work July 2nd. He returned to work with his doctor's note, as permitted by the Collected Bargaining Agreement (CBA).[63] The Company accepted this note.[64] The Company verified the note's

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58 Mr. [redacted] marked and indicated the route he used to exit the Station. *See* Co. Ex. 6; *also see* T. 171.

59 Co. Ex. 10, at 1.

60 Co. Ex.10, at 2-4.

61 T. 176.

62 T. 178.

63 Jt. Ex. 2, Art. 23, Section One, C, at 70.

64 T. 128.

authenticity with the issuing facility.[65] This rendered Mr. [redacted] s absence as excused for July 1st, according to the Collective Bargaining Agreement.[66]

On July 7th, the Company issued Mr. [redacted] a Fact-Finding Notice to "discuss possible violations of Article 18 L and Article 23 A."[67] Article 18 L relates to compliance with the Railway Labor Act, and Article 23 A states the purpose of the Attendance Control Policy.

The Fact Finding was held on July 11th. By July 14th, the Company concluded that Mr. [redacted] was guilty of sick time abuse, falsification, and dishonesty in connection with absences that occurred at the DCA Station on July 1st.[68]

Mr. [redacted] filed a grievance the same day, July 14th. The grievance proceeded through the appeals process to the System Board of Adjustment.

On September 8th, 2022 the System Board deadlocked.[69] The Union requested arbitration on September 9th. The arbitration hearing was held in-person in Dallas on October 28th.

III. ARGUMENT

The Parties provided highly detailed briefs. Their arguments are now summarized.

A. Company Arguments

1. The Company Has Met All Tests of Just Cause Termination

The just cause standard requires an employer to establish that the Grievant committed the accused offense and that the offense is one for which discharge is an

65 T. 129.
66 Jt. Ex. 2, Art. 23, Section One, C, at 70.
67 Jt. Ex. 1, at 13.
68 Jt. Ex. 1, at 11.
69 Jt. Ex. 1, at 4-7.

appropriate penalty in light of all the facts and circumstances reflected by the record as a whole.

The Arbitrator's authority relating to review of a just cause grievance is limited by the CBA "to the determination of the question of whether the Employee(s) involved were disciplined for just cause"; and "[i]f the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty."[70]

2. The Company Proved that Mr. [redacted] Violated the CBA and BPOC Rules

In this case, the Company proved that Mr. [redacted] violated the CBA and the Basic Principles of Conduct. The overwhelming weight and preponderance of the credible and undisputed evidence supports the Company's decision to terminate the Grievant for sick leave abuse. His dishonest misconduct violated both Article 23 of the CBA and BPOC #17, prohibiting sick leave abuse and false sick leave claims. It was undisputed at the arbitration hearing that Art. 23A of the CBA prohibits Operations Agents, including the Grievant, from using sick leave for a purpose other than intended—for example, their own illness. In that collectively bargained-for provision of Article 23, the CBA specifies that sick leave abuse "shall warrant termination."[71] The CBA and BPOC Rules clearly prohibit sick leave abuse and false sick leave claims by Operations Agents. At the arbitration hearing, the Company offered proof that Mr. [redacted] was provided training on the BPOC rules, most recently in January 2020.

3. Mr. [redacted] s Sick Leave Claim Is Not Credible

The totality of the evidence demonstrates that the Grievant's sick claim is not

[70] Co. Br. at 8, citing Jt. Ex. 2, p. 64.

[71] Co. Br. at 8, citing Jt. Ex. 2, Art. 23.

credible. When the circumstances of July 1st are reviewed in totality, the Grievant's explanation (or lack thereof) cannot be believed. It is simply not credible that all four Operations Agents, including the Grievant, came to work but then coincidentally became ill, called out sick from the same phone and the same room, clocked out from the same time clock, and left the Station—all within seconds of each other. The Grievant's testimony that he did not speak to anyone all morning or see anyone else leave sick is belied by the testimony of Southwest's witnesses, one of whom saw Mr. [redacted] sitting next to another Operations Agent that morning. Mr. [redacted] said nothing about feeling ill, and the other Ops Agent testified she received the sick calls from the same number one after another.

Instead, the only reasonable inference from these facts is that Mr. [redacted] came to work and realized he would be assigned to additional flights and whether from frustration or some other emotion, decided to walk out and leave his Station without any Operations Agents that morning, causing major distress to other Employees, Customers, and the Company's entire operation. With facts like these, the circumstantial evidence is actually more probative than if there was direct testimony.

4. Mr. [redacted] Was Given an Opportunity to Refute the Charges But Failed to Provide Convincing Evidence

Mr. [redacted] was provided an opportunity on July 11th during the fact-finding process to present evidence to support his contention that he was actually ill. Instead, at the fact-finding, he refused to answer the most basic questions posed by the Company. Mr. [redacted] decided to present additional information only after his termination and in preparation for the System Board and this Arbitration. This evidence should be completely disregarded in analyzing whether the Company had just cause to terminate the

Grievant because the Company was never afforded an opportunity to consider the information at the time the termination decision was made.

5. The Doctor's Note and DCA Parking Situation Are Red Herrings

The Union's repeated references to the authenticity of Mr. [redacted] s doctor's note and overcrowded parking lots at DCA are red herrings. The Company did not terminate Mr. [redacted] because of a falsified doctor's note— he was not contractually obligated to bring a doctor's note because the Company's State of Operational Emergency was declared after he had already left work sick. Thus, the fact that his note may meet the technical requirements of an acceptable doctor's note is irrelevant.

Similarly, the Union dedicated a significant portion of its testimony related to parking issues and the routes individuals may have taken when they left after calling out sick. This evidence is irrelevant.

6. The Decision to Terminate Mr. [redacted] s Employment Was Reasonable

The CBA grants the Arbitrator authority to remove or modify a penalty assessed by the Company "if the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable."[72] The general rule is that a disciplinary decision should stand if management's decision is not arbitrary, capricious, blatantly unreasonable, or based on a serious mistake of fact.[73]

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[72] Co. Br. at 8, citing Jt. Ex. 2, p. 64.

[73] *See* SWA/TWU Local 555, Case PHX-R-2051/13 at p. 20 (Arb. Hill, 2014). This principle has been further explained as follows:

> The boundaries of reasonableness should not be so narrowly drawn that management's judgment must coincide with the arbitrator's judgment. If the penalty imposed is within the bounds of what the arbitrator can accept as a range of reasonableness, it should not be disturbed.
> Here, there was nothing unreasonable about terminating the Grievant's employment. Not only do all of the policies mentioned above expressly state

7. Equal Treatment: The Company Terminated Other Operations Agents for the Same Conduct

Mr. [redacted] was not singled out for the events of July 1st. Three other Operations Agents who walked out when he did were also discharged.

8. Mr. [redacted] s Discharge Is Supported by Arbitral Authority

The Company's decision to terminate Mr. [redacted] for sick leave abuse was consistent with the terminations of other Operations Agents for the same misconduct. In the arbitration of former Operations Agent [redacted] a very similar situation to this case— Ms. [redacted] called out sick December 24, 26, and 27 during the Christmas holiday peak travel season but flew home to where her family lives instead and had made flight listings for those dates weeks earlier. The Arbitrator upheld her termination for sick leave abuse, stating:

> Had the grievant abused sick leave during the lightest travel period of the year, Article 23, Section Two, subsection E.2 still would have mandated termination. Her decision to abuse sick leave over the Christmas holiday when it was most critical for employees to be at their conscientious best….[74]

> that employees may be terminated for violating them, but it is undisputed that Grievant had read and was familiar with all of the aforementioned policies. Indeed, the CBA mandates termination as the discipline if sick leave abuse is found. Southwest conducted a fact-finding and allowed the Grievant to present any evidence he wished or to refute the evidence against him—which the Grievant failed to do. Therefore, there is no basis for concluding the Company's decision was arbitrary or unreasonable.

[74] Arbitration Decision [redacted] v Southwest Airlines (Arb. Helburn, 2001, at p.11) (attached hereto as Exhibit "B"). The Company cites other arbitral authority, notably from Arbitrator McCoy in *Stockham Pipe Wing*:

> Where an employee has violated a rule or engaged in conduct meriting disciplinary action, it is primarily the function of management to decide upon the proper penalty. If management acts in good faith upon a fair investigation and fixes a penalty not inconsistent with that imposed in other like cases, an arbitrator should not disturb it. The mere fact that management has imposed a somewhat different penalty or a somewhat more severe penalty than the arbitrator would have, if he had had the decision to make originally, is no justification for changing it. The minds of equally reasonable men differ...The only circumstances under which a penalty imposed by management can be

In sum, reinstatement of Mr. [redacted] would be severely detrimental to the Company. His conduct on July 1st was egregious and reverberated throughout the entire system. The Company's decision to terminate him for this dishonest misconduct was consistent with the CBA requirement that such violations shall warrant immediate termination, as well as its policies under the BPOC, and similar instances of misconduct and is supported by prior arbitral authority.

Accordingly, the Company requests that the grievance be denied in its entirety.

B. Union's Arguments

1. Lack of Proof: The Company Offered Only Circumstantial Evidence

The Company's entire case relies on the barest of circumstantial evidence, none of which was confirmed or verified by any direct evidence. Instead, the Company's case relies on flawed assumptions.[75]

Objective analysis shows that Mr. [redacted] would have had to sign into "Ops Suite" on a Company computer to realize that other co-workers had called out sick for the July 1st shift. There is no such proof, only an assumption.

In addition, the Company assumes without any proof that Mr. [redacted] and all the Ops Agent walked out together. The Company's proof comes down to Ms. Porter's

rightfully set aside by an arbitrator are those where discrimination, unfairness, or capricious and arbitrary action are proved. In other words, where there has been an abuse of discretion.

[75] Co. Exs. 3, 4, 5 show the flights scheduled and who was scheduled to work them. Co. Exs. 8 & 9 list the unilaterally promulgated work rules (BPCs) and a training log. Co. Ex. 11 is the "State of Emergency" (SOE) notice, sent out after Mr. [redacted] had left work. Co. Exs. 13 & 14 are incomplete lists (2 of 12) of flight delay codes for the day and two copies of thanks from the same flight crew. None of these exhibits bear on Mr. [redacted] s culpability.

conclusory statement, "I think the evidence speaks for itself."[76] This is plainly contradicted by the fact that Mr. [redacted] did not speak to co-workers before the July 1st shift, during the July 1st shift, or after the July 1st shift.

2. Unfair Investigation

By July 2nd the Company had already reached the conclusion that Mr. [redacted] had not been ill. This is evidenced in Ms. Wallace's accusatory confrontation, where she asked Mr. [redacted] "What were you thinking?" The Company relies on Mr. [redacted] s comment that he was rooting for Ms. Wallace from his sickbed. This spin on his remarks takes Mr. [redacted] s comments out of the context of that moment. He felt defensive because Ms. Wallace was grouping him unfairly with the other employees.

The formal investigation that started with a July 7th Fact-Finding Notice gave Mr. [redacted] his first indication the Company's accusations. He was dumbfounded by the Article 18 L reference, which specifically deals with Railway Labor Act Compliance. Essentially, the Company charged him with an illegal work stoppage, a strong accusation without any basis in fact.

3. Arbitral Precedent Shows That the Company Cannot Discharge an Employee for Just Cause Based on Circumstantial Evidence

In a case involving alleged abuse of sick time leave and dishonesty, Arbitrator Gil Vernon concluded that "until the Company's evidence adds up to a prima facie case, he has no burden to prove himself innocent."[77] Similarly, Arbitrator Marvin Hill ruled

[76] T. 132.

[77] Un. Br. at 8, citing DEN-P-0576 /2012 [redacted] Arbitration Decision at 13—Attachment 1.

against the Company in a discipline case where a Grievant was charged on the basis circumstantial evidence.[78] In that case, the Company also put little effort into trying to verify their assumptions. Arbitrator Hill explained his reasoning by quoting Arbitrator Thomas Angelo on circumstantial evidence.[79]

4. Mr. [redacted] Was Falsely Accused by the Company

Mr. [redacted] was exposed to a stomach bug from his travelling companion on a vacation to Mexico that immediately preceded the onset of his symptoms on the morning of July 1st. Upon arriving early on that day, Mr. [redacted] went home to get a short nap and then dress for work. Several hours later, when Mr. [redacted] arrived at work, he was not feeling well but tried to push through it. After clocking in, he still was not feeling well. Even though he was not feeling well, he thought he could "push thru" it and make it through his day.

78 HOU-O-1611 /2010 [redacted] Arbitration Decision - Attachment 2. *Id*.

79 *Id*. at 13, stating:

> Circumstantial evidence is defined as a collection of facts which, taken together, leave only one reasonable conclusion. A single difference from direct evidence is that circumstantial proof requires more "work" by the proponent of the evidence, since a series of facts must be established, and that collection of evidence must lead to only one conclusion. Circumstantial evidence is typically challenged by disproving one or more of the circumstantial links or by demonstrating the evidence, taken as a whole, leads to more than one reasonable conclusion.

Arbitrator Hill went on to award the grievance in that case:

> Because the evidence record leaves me with more than one possible conclusion regarding how the misboarding of a passenger happened on November 2, 2010, coupled with the fact that little effort was made to obtain the story from Afra, the one person would could shed the most light on how he ended up on the wrong flight, the following award is compelled.

Id. at 16.

In the first few minutes of the shift, his discomfort grew to a point where he knew he had to call off sick and get to a doctor, which he did. He received a note from the clinic validating his absence and returning him to work the next day. At no time did Mr. [redacted] coordinate or communicate this information to his co-workers. Yet the Company's falsely accused him of this plotting with co-workers.

In sum: Mr. [redacted] was terminated without just cause. The Company performed little or no investigation, relying instead on unsubstantiated assumptions. Agents that should have been interviewed, who reportedly had information about July 1st, were not interviewed. It is clear that the Company failed in its burden of proving anything because they acted blindly instead of carefully reviewing and considering all the evidence.

Nevertheless, the Company imposed career-ending capital punishment, without either clear and convincing evidence or preponderance of the evidence. For all the foregoing reasons, the Union respectfully requests that this grievance be sustained in its entirety, and that Mr. [redacted] be made whole and reinstated to his former position with no loss of seniority, no loss of benefits, and with full back pay, including pay for all overtime he could have worked.

IV. ANALYSIS

Few arbitration cases are based on a credibility judgment made in connection to the oath administered by an arbitrator to a witness. This is such a case. At the hearing in Dallas on October 28th, this Arbitrator swore in each witness as follows: "Do you swear to testify to the truth, the whole truth, and nothing but the truth, so help you God?" Prior to the formal start of the hearing, the Arbitrator explained to prospective witnesses,

including Mr. [redacted] that he would administer this standard oath. However, if anyone had a religious objection to being sworn, the Arbitrator would provide an alternate method to affirm a witness's testimony. The oath, as well as the pre-hearing overview, was intended to convey the solemnity of this formal adjudicatory hearing.

As the hearing progressed, the Parties presented similar evidence but vastly different theories. The Company alleged that Mr. [redacted] was part of a group of DCA Ops Agents who colluded to stage a concerted sick-out on July 1st at the DCA Station, bringing the Company's nationwide system to an official State of Operational Emergency (SOE).

The Union rejoined there was not a shred of evidence to tie Mr. [redacted] to any collusion. The Company's case was built entirely on assumptions and circumstantial evidence. Mr. [redacted] was the first person on July 1st to leave work due to a sickness. However, what the other DCA Ops Agents did that day was not orchestrated, discussed, or in any way related to Mr. [redacted] In short, there was not a scintilla of evidence of a concerted effort by Mr. [redacted] to collude with his co-workers.

This overview provides context for the following analysis.

The Union would have the better of this argument except for Mr. [redacted] s enigmatic comments to Ms. Wallace on July 2nd. By this time, Ms. Wallace testified that she had serious doubts that her subordinates were ill the previous day. She questioned their motives by asking the following:

> The next day, I came into the Ops break room and [redacted] and [redacted] were there. I asked them how they were doing. I briefed them for the operation and then asked them what they were thinking. [redacted] sat there not saying

> anything. [redacted] stated, 'That they were rooting for me in their sick bed.' I immediately stated, the operation will go with or without you. That they had not only inconvenienced our external customers but also our internal customers. That we don't know people's situations on why they are traveling. [redacted] stated, 'that they were tired of people not getting in trouble for calling out.'[80]

With this answer, Mr. [redacted] breathed life into the Company's suspicions—so much that this suspicion hardened into a fact-finding during the Company's investigation, leading to formal grounds to discharge Mr. [redacted] [81] For their respective parts, Mr. [redacted] and the Company disagreed on the meaning of Mr. [redacted] s answer to Ms. Wallace, leaving this crucial fact-finding unresolved until now.

A moment of truth or consequences arrived at the arbitration hearing during the Company's cross examination of Mr. [redacted]

> **Q**. Okay. Chemere (Ms. Wallace) stated the next morning, on July 2nd, she saw you in the Ops Break Room—
>
> **A**. Um-hmm.
>
> **Q**. and she briefed you on what the plan was for the day and asked how you were feeling. And in her statement, she said that you sarcastically responded that you were "rooting for her while in the sickbed."
>
> Do you see that?
>
> **A.** I do, yes.

80 Co. Ex. 2, at 2.

81 *Id*.

Q. Okay. And you don't dispute that she said— that you said that, do you?

A. No.

Q. Okay. So why would you sarcastically say, knowing… because when you came in on July 2nd, you had found out that all the Ops Agents had called out by that day, correct?

A. I then found out, yes.

Q. Yeah. So, you were aware of it. So then why would you say something sarcastic like that to somebody that was your friend?

A. Well, someone who was my friend, who worked with us for quite a long time, and understood that I'm a sarcastic guy. It's my tone of voice. And her and her fiancée— well, wife right now— her partner, they both know me to be a sarcastic, fun guy, and they return that same energy. So—

Q. You said—

A. … the way I speak to her is the way I've always spoken to her.

Q. Okay. You said "sarcastic, fun guy," correct?

A. Correct.

Q. She didn't take it as fun, did she? Is that—

A. I … It was hard for me to gauge how she took it—

Q. Okay.

A. … because she usually just— she usually keeps it going.

Q. Okay. Well, let's go a little bit further. She said— she responded back that what she was doing was "for our passengers, and what happened was sad." You see that part in the statement?

A. I do see that.

Q. Okay. And she was responding— when she said— when she was referring to "what happened was sad," she was referring to you and the other three agents clocking out the morning that you had already arrived, correct?

A. Correct.

Q. Okay. And your response was that "we were tired of people not getting in trouble for calling out," correct?

A. I won't say completely correct, because I believe what she is doing is taking my words out of context, depending on how I said them. Because, again, I'm sarcastic.[82]

Sarcasm may have a place in late night comedy shows or political commentary, but legal authorities generally agree that sarcasm in a formal adversarial proceeding—a trial or arbitration— usually backfires. And it backfires because in various ways it tends to impede an inquiry into the truth.

One expert counsels: "Jurors are people, and most people do not take well to arrogance, impatience, or sarcasm."[83] Other authorities instruct: "One tone is

[82] T. 192-T.192.

[83] Paul C. Lee, *Expert Testimony in Liquor Liability Cases*, 11 NO. 5 PRAC. LITIGATOR 51, Practical Litigator (September 2000).

unacceptable, however: sarcasm."[84] They also instruct that "the court may wonder whether you are resorting to sarcasm because your arguments are not strong enough to stand on their own merit."[85] Another legal authority cautions: "Anything in the nature of sarcasm or bitterness is ... improper and should be avoided."[86]

Courts take a similarly dim view of sarcasm. In *Ashley v. Southern Tool Inc*.[87] Bettye Jane Ashley filed a discrimination lawsuit after she was fired for being absent at work too often. Some co-workers were also discharged for the same problem but during their investigatory meetings with a manager they admitted to the problem and vowed to correct the situation. Ms. Ashley took a different tack, however, as the court explained:

> According to Southern Tool, Mr. Medders received plaintiff's (Ms. Ashley's) Request for Appeal form the following day. He reviewed the information listed on the form and concluded that some of the absences were avoidable. *He also concluded that the "Try not to get sick" statement was sarcastic and evidenced a lack of sincerity on Ms. Ashley's part toward improving her attendance*. Mr. Medders also took note of past attendance problems, and the fact that plaintiff had received several Notices of Occurrences shortly prior to her final occurrence. Accordingly, he denied Ms. Ashley's Request for Appeal, basing his decision on the belief that she should have avoided several of the occurrences; her failure to provide a plan for correcting her attendance problems on the Request for Appeal; *the sarcasm and insincerity apparent on the form*; and his knowledge of her recent attendance problems (emphasis added).[88]

The Court found that the employer was justified in terminating Ms. Ashley; and that she was not subjected to unlawful discrimination, but only different treatment based on her absences and her insincerity in addressing the matter.[89]

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84 DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, SYNTHESIS: LEGAL READING REASONING AND WRITING 224 (2d ed. 2003).

85 SCHMEDEMANN & KUNZ, at 224.

86 FREDERICK BERNAYS WIENER, BRIEFING AND ARGUING FEDERAL APPEALS 343 (2001).

87 201 F.Supp.2d 1158 (N.D. Ala. 2002).

88 *Id*. at 1162.

89 *Id*. at 1166-1167.

Returning to the oath at this arbitration hearing, Mr. [redacted] swore to tell the truth, *the whole truth*, and nothing but the truth.[90] By the time the Company cross-examined him late in the hearing, Mr. [redacted] s meaning in stating to Ms. Wallace that "they were rooting for (Ms. Wallace) from their sick bed" emerged as a point of contention between the Company and the Union.

From the Union's perspective, this was a meaningless comment.[91]

However, the Company viewed the comment not only as an admission of colluding in a coordinated sickout but also connected it to a threat to do this again.[92] Cross examination further fleshed out a possible motive for Mr. [redacted] to call off sick at work—his frustration with other co-workers calling in sick and not facing a consequence.[93]

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[90] T. 165, recording as follows:
MR. CLEVENGER: I call [redacted] the Grievant.
THE ARBITRATOR: Sure.
(OATH ADMINISTERED BY THE ARBITRATOR.)

[91] *See* Un. Br. at 12, stating: "The company's spin on his remarks takes [redacted] s comments out of the context of the moment that they were said in. This was done to fit [redacted] s comment to their conclusion and to try to make it, as counsel Bagby said, the company's 'smoking gun'" (quoting to T. 15).

[92] T. 48-T. 49 (Company's direct examination of Ms. Wallace):
Q. Okay. And when you asked [redacted] are they going to do it again, what does [redacted] say back to you?
A. "COVID."
Q. He didn't say, "I was sick yesterday. I was sincerely sick, and I didn't do a part of a walkout"?
A. No.
Q. What did you interpret it to mean when he said "COVID"?
A. That that was going— that they were going to call out again, and that was going to be their excuse.

[93] T. 47 (Company's direct examination of Ms. Wallace):
Q. Okay. And what did he respond back, kind of, when you made that statement?
A. And he said that they were tired of people not getting in trouble.
Q. Not getting in trouble for what?
A. Calling out.
Q. When he said that they were tired of people not getting in trouble, who did you interpret to be the "they"?

The Arbitrator has no supernatural powers to divine whether Mr. [redacted] was actually sick on July 1st, and if so, whether his return to work on July 2nd contradicted his excuse for not working due to illness the day before. As to these points, Mr. [redacted] enjoyed the benefit of any doubts leading up to the time he remarked sarcastically to his supervisor.

Nor can the Arbitrator find on this record a preponderance of evidence that Mr. [redacted] coordinated with his fellow Ops Agents to engage in a concerted sickout. The circumstantial evidence, while incriminating, does not close the evidentiary circle that is needed for proof.

But Mr. [redacted] did not tell the *whole truth* when he was asked repeatedly by the Company's Attorney for the meaning and intent of his sarcastic remark to Ms. Wallace that "*they* were rooting for (Ms. Wallace) from their sick bed (emphasis added)." His use of "they" gave direct substance to the Company's allegation of collusion.

Making matters worse at the hearing, Mr. [redacted] s testimony that he is "a sarcastic, fun guy"[94] was a verbal dodge that failed to remove suspicion about his motives.

By stating to Ms. Wallace that "*they* were rooting for her from their sick bed (emphasis added)," Mr. [redacted] provided a crucial element in support of the Company's prima facie evidence of his involvement in a coordinated action on July 1st.

A. The four that left that morning— the previous morning.
Q. And who were the people that they were frustrated about for not— that were not being held accountable for calling out?
A. The two that called out –.

94 T. 192.

At this point, the burden of proof shifted to Mr. [redacted] to rebut the Company's inferences of collusion and falsification of sick leave.[95]

In sum, and to be clear, the evidence fails to establish that Mr. [redacted] colluded with co-workers, and the evidence also fails to show that that he falsified a document in connection with his absence of July 1st.

Nonetheless, a preponderance of evidence shows that Mr. [redacted] was not wholly truthful during the Company's investigation into events on July 1st. When he gave verbal support to Ms. Wallace's insinuation of collusion on July 2nd, he was either truthful about a conspiracy involving himself and co-workers to engage in a sickout, or he seriously misled his supervisor to worry about ongoing coordinated interruptions of service, resulting in costly consequences for the Company. Asked on July 2nd to clarify what happened and asked the same question at the arbitration hearing on October 28th, Mr. [redacted] muddied the waters both times with sarcasm in a manner that obfuscated the Company's legitimate search for the truth.

His dishonesty, therefore, supported the Company's allegation in its Termination Fact Finding that he violated Point 13 in the Basic Principles of Conduct by engaging in an "act of … dishonesty."[96]

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[95] *See* DEN-P-0576 /2012 [redacted] Arbitration Decision at 13, where Arbitrator Gil Vernon concluded that "until the Company's evidence adds up to a prima facie case, (a Grievant) has no burden to prove himself innocent."

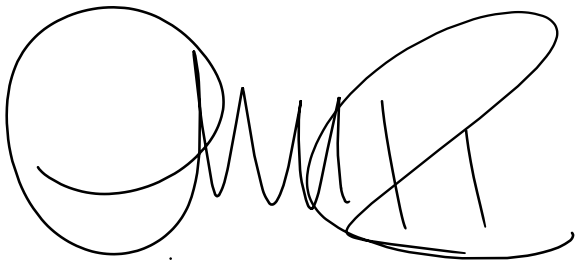
[96] Co. Ex. 8, at 1. The complete statement of BPOC's Principle 13 provides: "Act of theft or dishonesty, including knowingly presenting the Company falsified documents." In this case, there is no finding that Mr. [redacted] presented a falsified document—nor is this necessary under Principle 13. The principle's use of "including knowingly presenting the Company falsified documents" is a specific example but not a limitation to the principle's general idea that an Employee shall not engage in an "act of … dishonesty."

This single element in the Company's charges against Mr. [redacted] is found to have a basis in fact.

Having sustained its burden of proof for this single charge, the Company has proved by a preponderance of evidence that it had just cause to discharge Mr. [redacted]

V. AWARD

1. The grievance is denied.



Arbitrator Michael H. LeRoy

This Ruling Entered Into
This ***29th Day of January 2023***.