IN THE MATTER OF ARBITRATION	)	**(Grievant) Agent X**
	)	**Case DCA-O-2825/15**
Between	)	
	)	**Hearing Date: March 16, 2016**
SOUTHWEST AIRLINES, INC	)	**Love Field, Dallas, TX**
EMPLOYER (SWA),	)	
	)	**Time-Lines Grievance**
and	)	
	)	**Marvin Hill**
TRANSPORT WORKERS UNION	)	**Arbitrator**
(TWU) LOCAL 555, UNION.	)	
	)	

APPEARANCES

For the Union:

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I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

Many of the essential facts giving rise to this grievance are in dispute.

In a nutshell, this case involves the question whether the Company violated the parties' collective bargaining agreement regarding time lines with respect to providing the Grievant a copy of their terminating letter for attendance issues (JX 2 at 10). While the merits of the Grievant's termination is not before me, the issue of time lines under the parties' collective bargaining agreement is in play.

A grievance was filed by the TWU on December 12, 2015 (JX 2 at 8) asserting the absence of just cause for the discharge of Agent X. The grievance was denied on January 4, 2016 by Mr. Vance Foster (JX 2 at 8). A System Board was held on January 21, 2016, which deadlocked (JX 2 at 5). Unable to resolve the matter in the lower steps of the parties' grievance procedure, the matter was moved to arbitration. A hearing was held on March 16, 2016, at the Doubletree Hilton, Love Field, Dallas, TX. The parties appeared through their representatives and entered exhibits and testimony. Post-hearing *Briefs* were filed on or before May 15, 2016, and electronically exchanged through the offices of the undersigned Arbitrator. The record was closed on that date.

II. ISSUE FOR RESOLUTION

Was the dismissal of Agent X warranted in view of time-frame requirements and, if not, what shall be the remedy? Specifically, did the Company violate Article Twenty (Grievance/System Board/Arbitration, Discharge and Discipline), G. 1. c. of the parties' collective bargaining agreement (JX 1 at 40-41) in terminating the Grievant's employment?

III. POSITION OF THE UNION

The position of the Union, as outlined in its opening statement and post-hearing *Brief*, is summarized as follows:

The instant case is contractual in nature (i.e., non discharge) and, as such, the Union bears the burden of proving a violation of the parties' collective bargaining agreement. A fact-finding was held for the Grievant on December 1, 2015. The results of that fact-finding (where the Company is required to render its decision in writing to the employee) were made known on December 9, 2015. In the Union's eyes, the Company failed to do so. According to the Union, the Grievant, Agent X, never received their termination letter. Agent X did not leave DCA with their termination letter (R. 12). Indeed, to this day the employee has not received their termination latter, the Union asserts (R. 15).

To this end the Union asserts that Mohd Nohr, the Assistant Manager, left the results meeting to make copies (according to his testimony at the System Board). The Union denies that he was gone only five minutes. In the Union's opinion, after Mr. Nohr left, the Union Representative, Bill Kelly, and the Grievant sat in the conference room so they could fill out their grievance and review the process with Bill Kelly for at least ten minutes. Several minutes later before leaving the Grievant's pocketbook needed to be retrieved. It was the operations manager, Laura Harte, who was also the same person escorting Agent X (who no longer possessed an airport ID), who retrieved the Grievant's belongings, except their cell phone was missing, so Bill Kelly went to retrieve that.

(R. 12). Not only did Harte escort Agent X out of the station, but she escorted the Agent all the way to their car. In the Union's view, it had been almost 20 minutes that Mohd Nohr was gone before Harte started to escort the Grievant out of the station (R. 13). In the Union's words: "Plain and simple, Mohd forgot. He forgot to come back and give Agent X their termination letter. When he realized his error, he went to Bill Kelly to give him both copies." (R. 13).

The Union submits that at System Board Mohd testified that Bill Kelly promised he would give Agent X the termination letter. The Union maintains that it is the Company's responsibility to render the results in writing as Mohd Nohr acknowledged at System Board. Second, the conversation never took place. While Mohd did go up to Kelly with two copies, Union Representative Kelly never promised Mohd anything, as confirmed by George Davis (R. 13). According to the Union, "we're here [in arbitration] because Mohd was upset at what George said to them about not serving Agent X their termination letter. They have a history going back to the Baltimore station." (R. 14).

At all times the Union denies that the Union Representatives planned this outcome. Here the Union asks: "How do you plan something you do not know was going to take place? How would the reps know ahead of time that Mohd would not come back and give Agent X their termination letter? Not to mention the agent was being escorted by the operations supervisor." (R. 14).

In further support of its position, the Union notes that there is an arbitration ruling on this very issue out of Nashville, the Agent Y arbitration (*Southwest Airlines & TWU 555*, Case No. BNA-R-1978/13 (Elizabeth Neumeier, 2014). In the Union's opinion, these two cases are almost identical (R. 14). According to the Union, "if you change the genders and locations, it's hard to tell which case is which." (R. 14; *Brief for the Union* at 3).

For the above reasons the Union requests that the Arbitrator follow the Agent Y decision and award the Grievant the same as what Agent Y was awarded (R. 16). Also supporting its position is *SWA & TWU 555*, Case PHX-R-0284/99 and *SWA & TWU 555*, Case DEN-R-0433/09. As a remedy the Union requests a ruling that the agent's results are out of time frames. In addition, the Union prays that the Grievant be reinstated with full backpay and seniority as if the termination never existed (*Brief for the Union* at 7).

IV. POSITION OF THE COMPNAY

The position of the Company, as outlined in its opening statement and post-hearing *Brief*, is summarized as follows:

According to the Employer, the issue is whether the Company properly rendered its decision to terminate the Grievant's employment within the five working days

requirement and delivered a copy of the decision to the local union representative (R. 10). The Company submits that the parties are in arbitration pursuant to a contractual issue under Article 20, G. c (R. 17). As such, because the grievance involves a matter of contract interpretation, the Union bears the burden of proving a violation of the collective bargaining. In support of its position the Company advances the following arguments:

Management first asserts that it satisfied the obligation set forth in Article 20 by first reading the discharge letter to Agent X, providing them with the original letter to sign, and then providing the union rep with copies of the original for Agent X and a copy for the Union (R. 17). To this end the Company contends it is frankly shocked and appalled that it is even here in arbitration. In addition to precisely following the requirements outlined in Article Twenty, the Company believes that this grievance significantly undermines the trust between the parties. Indeed, in the Company's view the Union violated its duty of good faith and fair dealing so as not to deprive the other party of the benefit of the bargain stuck (*Brief for the Company* at 12, citing Elkouri & Elkouri, *How Arbitration Works* (BNA Books, 478)(6th edition, 2003)). Here, the Union is attempting to avoid consideration of the underlying merits of the termination by putting forth an arbitrability argument based on a timeliness objection.

The Company maintains that it is undeniably clear that the Grievant intentionally undertook evasive tactics to avoid receiving a copy of the termination letter that day for the sole purpose of challenging the proper termination on time frames. In Management's words: "This type of conduct should not occur ever, let alone between two parties who have an ongoing relationship like the Company and the Union." (R. 18). In the Company's view: "[T]he Union attempts to place an obligation on the Company that is simply not part of the collective bargaining agreement – namely, the obligation to ensure that the employee accepts or retains a copy of their discipline." (*Brief* at 11).

Further, and addressing a past practice argument, the Union provides insufficient evidence to demonstrate why the contract language should not be followed as the Union could not establish a past practice which might otherwise might override the language, nor could it point to arbitral authority that would cover the instant case. Because witnesses, presented by both parties, testified as to a mixed practice with respect to how discipline rendered at DCA at the time the Grievant was discharged, the elements required to establish past practice were not met.

Addressing Arbitrator Neumeier's decision regarding a Nashville grievance several years prior, the Company asserts that it is clearly distinguishable from the facts of the instant case (R. 18-19). Specifically, SWA asserts the Grievant undertook avoidance techniques while the employee in Arbitrator Neumeier's case did not.

For the above reasons, the Company requests that the Union's grievance be denied in its entirety.

V. RELEVANT CONTRACT PROVISIONS

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 hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

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

(JX 1 at 3)

ARTICLE TWENTY
GRIEVANCE / SYSTEM BOARD / ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE
PROCEDURES

A. **Purpose**. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

* * * *

C. **Cost of Arbitration**. It is understood and agreed that the cost of arbitration shall be borne of the losing party.

(JX 1 at 40).

G. **Fact-Finding Procedures.** No covered employee shall be subject to discipline involving loss of pay or discharge without 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:

* * *

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 factfinding, and a copy of the decision shall be delivered to the local representative of the Union.

(JX 1 at 40-41).

VI. DISCUSSION

In a non-disciplinary arbitration the party who has the burden of proof must present enough evidence in support of its asserted claim to make out a *prima facie* case; that is, if no other evidence was offered on the propositions at issue, the offer of evidence would persuade the trier of fact that the claim should be granted. Accordingly, the burden lies with the Union to identify some contractual limitation which prohibited the City from acting as it did. *Reynolds Metal Co.*, 62 LA (BNA) 695, 696 (Volz, 1974)("[I]n this case it was not incumbent upon the Company to find affirmative contractual support for what it did; rather, the burden was upon the Union to point to come contractual limitation."). See also, *Dow Chem. Co.*, 110 LA (BNA) 1140, 1144 (O'Grady 1998) ("In a contract interpretation case, it is well-established in arbitral law that the Union bears the burden of proving that the Company's action violated the Agreement."); *Willard City Sch. Dist.*, 108 LA (BNA) 1091, 1092 (Klein 1997) (noting that the union has the burden of proof in all contract interpretation matters); City of Elyria, 106 LA (BNA) 268, 271 (Fullmer 1996) (stating that the union bears the burden of establishing facts which demonstrate that the employer violated the collective bargaining agreement). This burden requires the moving party to prove by a preponderance of the evidence that the contract was breached. See, *Kroger Food Co.*, 109 LA (BNA) 470 (Baroni 1997).

The concept of "burden of proof" should not be regarded lightly. As stated by Arbitrator Sears in *International Minerals & Chemical Corp.*, 61-2 ARB ¶ 8284 at 4047 (1962):

> This discussion of burden of proof should not be viewed by the parties as a mere academic exercise having no bearing on the merits of the present controversy. On the contrary, it is very important to the disposition of this case. "Burden of proof" really means that the party which has the burden must produce at hearing MORE [emphasis in original] evidence than the party which does not have that burden **. . . The Arbitrator firmly believes that most arbitrators, at least subconsciously, are of the opinion that in contract interpretation cases, such as this, the grieving party has the burden of persuading the arbitrator that its position is the correct one.**

A. Relevant Testimony

Agent X testified they are 27 years old and a one-year employee with Southwest Airlines. At the time of their dismissal they were working as an operations agent (R. 20). Discussing the so-called "results meeting," Agent X testified that it was attended by themself, Laura Harte, Union Representative Bill Kelly, and Assistant Station Manager Mohd Nour (R. 20). Asked what took place at the meeting, Agent X answered: "Basically what took place in the results meeting is I was terminated for my points, and we – he showed me – read the letter to me, and I signed it and I gave it back to him. After that he told me he would be right back to make copies of the termination letter. * * * At the time I was upset. I was hurt. I was crying, and Bill Kelly was consoling me. And then after that, we started the grievance process." (R. 20-21).

Agent X testified that it took them and Kelly about ten minutes to go over the grievance (R. 21). Agent X then told Laura Harte that they had belongings in the operations office. As such, they then went to retrieve their personal belongings (R. 22). After Bill Kelly retrieved their cell phone, Laura asked them if they were ready to leave. In their words: "And as we were walking out, I then ran into Bill Kelly and George Davis. George Davis seen that I was upset about something, and he was asking me what went wrong. Then Laura asked me again, was I ready, and I told her yes, and we walked out. She walked me out [to my car]." (R. 22).

Agent X asserted that they were called in for the results meeting around 12 noon (R. 22). They indicated that Operations Supervisor Laura Harte started escorting them out of the station around 12:30 (R. 23). Agent X asserted that they never stated that "I had to leave right now." (R. 23).

During cross examination Agent X stated that they did not attend the System Board because "no one asked me to." (R. 24). They acknowledged that their time card indicated that they punched in around 12:27 on December 9th (R. 26). Agent X stated that they were not at work five minutes "and then they told me to come into the conference room. I didn't even work my first flight." (R. 27). The Grievant conceded that they previously testified that they started work at 11:30 and the results meeting started at noon, and that 30 minutes passed between the time they came to work and the time that the meeting started (R. 28). They later confessed that "they really did not remember." (R. 28). Asked how long the meeting lasted, Agent X responded: "The meeting didn't take nothing but about five minutes for him to read the letter and for him to present the letter that I signed and I gave it back to him. That took no more than five minutes." (R. 31). They still asserted that Mohd made them wait "a very long time." (R. 31).

> Q. [By Ms. Berencsi]: But you were only there for 30 minutes.
> A. [By Agent X]: That's a long time.
>
> Q. The whole meeting – coming, clocking in, having the meeting, talking to your union rep, filling out the grievance form, and leaving all happened in 30 minutes and that's a long time to wait?

A. Yes, ma'am, for someone to bring a copy. (R. 31).

* * *

Q. Did Mohd read you the termination letter in the meeting?
A. Yes, he did

Q. Did he explain what it meant?
A. Yes, he did.

Q. And then he explained to you that he was gonna go make copies, that you should wait there, work on the grievance procedure, and also told you that Laura would walk you out in that meeting?
A. That's incorrect. He told me that he would make copies. He didn't say, "Stay here."

Q. He just said, "I'll make copies and I'll be back." That's it. (R. 32-33).

DCA Operations Agent and Union Representative William Kelly testified that he was in the results hearing with the Grievant when Mohd issued them a letter of termination. He was the only Union Representative present (R. 42). According to Kelly, "after their termination, we went over the grievance procedure and completed – started our grievance. After that, Laura Harte, who was the operations supervisor, was present at that time and they left the conference room, went to retrieve their items. And as they returned, they left their cell phone and Agent X asked me to go retrieve their cell phone, and I did that and brought that back." (R. 39). Kelly stated that about 20 minutes passed from the time that Mohd left to make copies of the termination notice and when Harte walked Agent X out to their car (R. 39). Kelly denied that the incident was in any way planned (R. 41). Significantly, Kelly denied testifying at System Board that he promised to give Agent X their termination letter (R. 41). Kelly did acknowledge that Mohd came up to him with two letters and said, "'Here is your copy and Agent X's copy,'" and I just looked at him." (R. 42). Kelly conceded that Mohd gave him a copy of the letter:

Q. How long after Agent X was escorted out did Mohd give you the letter?A. I received a letter probably eight to ten minutes after we dispersed from the conference room. (R. 43).

* * *

Q. So when Mohd came to you and said, "Here's a copy for you, and here's a copy for Agent X," did you accept those copies?
A. Yeah, I took them. (R. 44).

Union Representative Mark Waters discussed the Nashville case decided by Arbitrator Neumeier who ruled in favor of the Union, in part because of the parties' past

practice (R. 49-50; UX 1)(discussed *infra*). With agreement of both parties' representatives, the transcript in the Neumeier hearing was introduced (R. 57; UX 2).

DCA Assistant Station Manager Mohn Nohr, the person who issued the Grievant their termination letter, testified that under the parties' collective bargaining agreement the Company has the obligation to provide copies of the decision reached in fact-finding to the Union Representative (R. 65). Asked about the procedure, Nohr asserted: "We start the meeting pretty much saying: We are here today for a results meeting of this case. The fact-finding was held on such and such day and the results of our meeting will be concluded in this letter. Then I will read the letter, pretty much, with the decision to the employee, and I'll hand the original over to the employee to sign. After that I go make copies for the employee and the Union." (R. 65).

Mr. Nohr testified that the results meeting, scheduled to start at 12:30, lasted about 15 minutes (R. 70). Discussing the procedure followed in the Grievant's case, Mr. Nohr had this to say: "I held the results meeting. I start by pretty much saying: We're here to conduct the results of the fact-finding that we held in Agent X's situation. I read the letter, advised Agent X of our – of the results. I rendered them the copy, the original copy, and they signed it. It was the only copy that I had, so it was the original. I kept it so I could make copies of it and bring it back." Significantly, Mr. Nohr went on to testify that he
"made it very clear that I was going to step away while they're having that conversation to make the copies for both the Union Rep and Agent X and come back. * * * I also said that Laura was going to be the person who was going to escort Agent X out when everything was done." (R. 71). Asked whether the Grievant said anything at the meeting, Mr. Nohr answered: "They did talk about the termination. They didn't think that it was fair." (R. 71).

Nohr stated that he made two copies and when he returned to the conference room the door was closed. "I opened it and it was empty. I walked over to the break room area, looked to see if everybody went there; looked through the break room, didn't find anyone. * * * Walked this way (indicating), checked the break room. Then walked over to the operations area to see if anyone was there, and no one was there. Walked over to the ramp – to the op sup's office to see if Laura was there, and she wasn't." (R. 75-76).

Q. And what happened next?

A. As I'm walking back from the op sup's office through that door, right through this area right here (indicating), as I opened this door, I saw Bill Kelly walking toward me.

Q. Did you have a conversation?

A. Yes.

Q. How did that go?

A. I asked him where Agent X was, and he said, "Agent X's gone." <u>I said,</u>

<u>"Well, I told you guys I'm giving you time to go over the grievance process, and I'm going to make copies and come back,</u> and they're gone. I need to give

them a copy of their letter."

And he said, "Well, I'll make sure they get it."

So I gave him both the copies; the TWU copy, and the copy I was going to have to give to Agent X.

Q. Did Mr. Kelly accept both copies?
A. Yes, he did.
Q. Were you concerned that Agent X was not going to get their copy at that time?

A. At that time, after having the conversation, no.

Q. If you were concerned, what would you have done?
A. If I were concerned, I would have FedExed a copy to Agent X. (R. 77; emphasis mine).

When asked on cross examination whether the parties' collective bargaining agreement specifically states that the decision must be given to the employee, Mr. Nohr responded "the contract states that I have to render a decision in writing to the employee, which I did." (R. 79).

In a final exchange with the Arbitrator Mr. Nohr outlined what went on at the results meeting after the Grievant signed their letter of termination:

> Q. They gave it back to you, okay. And what, to the best of your recollection, did you say to them or to the people there? What did you say? Give me the nouns and verbs.
>
> A. The whole conversation is on what I recall, and I recall this very well. I said – I addressed both the Union Rep and Agent X, and I said to the Union Rep, "Agent X's only been here for about a year. I want to make sure they get all the information they need from the Union. So I want you to sit down with them, and go over that grievance process in this office while I make these copies and come back. I'm going to go make them, come back, and Laura, the ops sup that was standing there, she's going to be the one escorting Agent X when everything is done."
>
> Q. Did you say the words, "Stay here till I get back"?
>
> A. There was no – I didn't get the feeling that they were leaving. **I said, "I'm going to make the copies and come back to you. After that Laura's going to escort you guys out where everything's done – when you guys are done." (R. 86-87; emphasis mine).**

DCA Operations Supervisor Laura Harte testified that when an agent is disciplined, "I usually have the agent come in. They can bring their union rep if they want to. I just give them a copy of the letter and have them sign it. And then we'll make a copy, give the agent a copy, if they want one, and then give the Union a copy." (R. 89). Harte stated that she does not go to the meeting with three copies of the discipline letter –

that she only comes in with one copy, the original (R. 90). Ms. Harte testified that she was present at the meeting (in the conference room across from the ramp sup's office) where the Grievant was rendered the decision that they were discharged (R. 90). The meeting took 15 maybe 20 minutes, according to Ms. Harte (R. 91).

Significantly, when asked how the meeting wrapped up, she answered: "Mohd gave them an opportunity to discuss whatever they needed to discuss. He told them that they could use the room and that he was gonna go out and make copies. He told them that I was gonna walk them out – that I was gonna walk them out and get their badge and their ID and that he'd be right back." (R. 92). Mohd Nohr did not give a specific time that he was going to return to the conference room (R. 92).

During cross examination Ms. Harte testified that the results meeting only lasted 15 or 20 minutes (R. 97). Ms. Harte asserted that the Grievant was distraught and in a hurry to go, "so I just respected that and took them out [to their car]. They were ready to go." (R. 98). Later he expanded: "They were in a hurry to get out of there. They were very distraught. They were very – and I just respected that, and we walked out across the ramp. We didn't – they didn't want to see anybody. They didn't want to – you know, they were very upset." (R. 100). No time limit was given on how long they could stay in the conference room: [Harte] "No, he didn't give a time limit. I think they could have been there all day if they wanted to." (R. 101).

DCA Assistant Station Manager David Lewis (17 years) testified that his practice regarding issuing discipline is as follows: "Render discipline, I pull the agent in. I do read them the copy of the written discipline we have. I have them read it sometimes after I read it, and then they sign it. And I give a copy to the Union Rep as well." (R. 103). Lewis asserted that he makes the copies at a copy machine, "so I only bring one, usually. Sometimes I bring all three in, depending." (R. 103). He described it as a "mixed practice." In his words: "It all depends on the situation. I go back to one now because we do have more and more copiers readily available." (R. 104).

DCA Operations Supervisor Gregory Langan testified that he brings just one copy of the disciplinary letter to the disciplinary meeting (R. 109-110). According to Langan, he makes one copy for the Union Representative while the original copy gets filed away in the employee's file (R. 110). Asked if he gives a copy to the employee, he responded "If they ask for one, yes." (R. 110). Langan testified that he was in the Grievant's chain of command (R. 110).

Mr. Langan further testified that he twice disciplined the Grievant (EX 4 & EX 5). To this end Langan documented two Letters of Instruction, one for personal appearance (EX 4), the other for job performance (EX 5). Langan maintained that he never brought three copies for the Grievant to sign (R. 113).

B. Decision and Analysis of Evidence Record

The National Academy of Arbitrators, in their recent text *The Common Law of the Workplace* 69 (BNA, 2005)(2d edition), had this to say regarding rules of contract interpretation:

> Labor arbitration is a matter of contract. It is the role of parties to a collective bargaining agreement to determine the value of their exchange and, then, the role of arbitrators to interpret the labor contract consistent with the parties negotiated preference. Arbitrators generally refrain from evaluating the prudence of a particular contractual term or inquiring into bargaining power imbalances and issues of justice. It is the role of arbitrators to use standards of contract interpretation to understand the meaning of the parties' contractual goals and to render a decision in keeping with the parties' intent.
>
> * * *
>
> § 2.2 The Prime Directive: Intent of the Parties
>
> Standards of contract interpretation used by arbitrators are designed to determine the intent of parties in adopting certain language to express their rights and obligations.
>
> Comment:
>
> Parties rarely hold precisely the same understanding of a contractual term. As a consequence, standards of contract interpretation have arisen and are designed to discern the parties' mutual intent as nearly as reasonably possible. Arbitrators also often confront circumstances not contemplated by the parties at the time of contract formation. Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are (1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle of reasonableness. Such interpretative guidelines are frequently used in conjunction with each other.
>
> *Id.* at 71.

As articulated by the National Academy of Arbitrators, and as I have noted in prior cases, there is no question that the primary goal of the labor arbitrator is to effect the intent of the parties. Arbitrator Jules Justin, in the often-quoted (albeit dated) *Phelps Dodge Copper Products Corp.* decision, 16 LA (BNA) 229, 233 (1951), stated that the parties' intent is to be ascertained from the words used in their agreement. In the words of Arbitrator Justin:

> Plain and ambiguous words are undisputed facts . . . An Arbitrator's function is not to rewrite the parties' contract. His function is limited to finding out what the

parties intended under a particular clause. The intent of the parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the Arbitrator is constrained to give effect to the thought expressed by the words used.

Arbitrator Louis Solomon stated the rule regarding clear and unambiguous language in the often-quoted *Ohio Chemical & Surgical Equipment Co.*, decision, 49 LA (BNA) 377, 380-81 (1987), as follows:

> It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry.

Arbitrator Charles LaCugna, in *Hecla Mining Co.*, 81 LA (BNA) 193, 194 (1983), likewise declared:

> It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probative intent, and to putative intent, always governs.

Also, as stated by Arbitrator Wyman in *Clinton County, Iowa*, 113 LA (BNA) 757, 762 (Wyman, 2000):

> The issue, then, is not whether the labor agreement permits a management action that has given rise to a grievance, but, rather, whether the action taken is prohibited by the labor agreement (or prevailing laws and other regulations). The union must prove that the contract (or law) prohibits a management action. . . . The arbitrator is confined to determining the "rights" of the disputants: What does their agreement provide for? That what may be "fair" or "desirable" – even "reasonable" – in a collective bargaining agreement, or in a union-management relationship, may be – and often is – an emotional matter. But it must remain an emotional matter unless or until it is incorporated into the written language of the agreement in objective and unambiguous terms. . . . It is the responsibility of the crafters of contract clauses to draft language that does not leave the matter in doubt. If it was the Union's intent to have [a particular provision included in the contract], then this intent should have been included in the language [of the contract]. The arbitrator, properly, is precluded from putting it there. (Emphasis in original).

With respect to determining whether contract language is ambiguous, Arbitrator Robert Mueller, in *Community Mental Health Center of Linn County*, 78 LA (BNA)

1236, 1238 (1981), suggested the following test:

> To test whether or not particular provisions of a contract are clear and unambiguous or are in fact ambiguous, one must take a particular provision and examine the manner of its application throughout the contract to determine whether or not it has been afforded a consistent application.

Similarly, Professor Dennis Nolan had this to say about determining ambiguity:

> How does the arbitrator know whether certain language is "clear and ambiguous"? An ambiguity is not created simply because the parties disagree over the meaning of the phrase, for that would only encourage them to argue over the clearest provisions in the hope of a favorable arbitration award. See, Nolan, Labor Arbitration Law and Practice (West Publishing, 1979) at 136. According to Nolan, the test most often cited is that "there is no ambiguity if the contract is so clear on the issue that the intentions of the parties can be determined using no other guide than the contract itself."

Perhaps the best summary of the thinking of arbitrators in this matter is provided by Prasow & Peters in their1983 text:

> An unambiguous provision, in lawyers' language, is one that "can be nailed down on all four corners." The degree of clarity in language can range from the exactitude of the proverbial four corners to the relative imprecision of merely pointing in a direction, so that arbitrators enunciate as a criterion, "If the language points in one direction and the practice points in another, go with the language." There may be exceptions to this rule, but in the vast majority of cases it is applicable."

See, Prasow & Peters, *Arbitration and Collective Bargaining* 92 (McGraw-Hill, 1983).

* * *

In an exchange with the Arbitrator Mr. Waters was asked exactly what was the infirmity in this case:

> Q. [By Arbitrator Hill]: What exactly are you contending the Company did wrong with respect to Agent X? What did they do wrong?
>
> A. When they give the results of the fact-finding –
>
> Q. They handed them – they handed them the results of the fact-finding. [The letter] says, "You're terminated because of points on attendance. Sign this."
>
> A. Um-hum.
>
> **Q. And they signed it. And then they gave it back to them, or slid it back to them, or they took it or something like that.**

A. Um-hum.

Q. That wasn't enough in your world?
A. Correct.

Q. What else did they have to do?
A. They have to give them a copy of it. They have to actually give it to

them, and they use it for their unemployment hearing or whatever it is. The way we've done it before, a lot of times they'll come in with three copies of it, and you sign all three copies. One's the company's, one's the employee's, and one's the Union's. They failed to give the copy of the results of the fact finder to the employee. (R. 59-60).

* * *

Q. [By Ms. Berencsi]: You said a lot of times they'll come in with three copies. That means, at least, sometimes they don't come in with three copies. Is that your understanding?

A. They do it – they do it several different ways, yes. (R. 60).

As noted, the operative language in this case is Article Twenty, Section G. 1. c. which reads: The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the factfinding, and a copy of the decision shall be delivered to the local representative of the Union (JX 1 at 40-41). Significantly, the contract does not say that the Company must provide a copy of the decision to the employee. It only says that the Company "shall render its decision (inclusive of any discipline) in writing to the employee," which it did in this case. However, important in this respect is a decision reported by Arbitrator Elizabeth Neumwier.

Specifically, in *SWA & TWU 555*, Case BNA-R-1978/13 (2014)(Agent Y, Grievant), Arbitrator Neumeier considered similar language (Article Twenty, Section One, G. 2. d) and stated as follows:

> Article Twenty, Section One, Paragraph G-2-d does not say that the Company shall try to render its decision in writing within five working days, it states that it shall do so. As applied by the parties for many years, "render" means providing the employee with a copy of the written decision, not merely informing the Grievant of it. As discussed above, this normally occurs because the employee is ordinarily given a copy at the results of factfinding meeting. In this case, [the] MRO intended to do so, but [a] Supervisor was quick to escort the Grievant out. Through no fault of the Grievant, FedEX did not fulfill the Company's obligation.

(Neumeier at 11)

It is significant that Arbitrator Neumeier did not find a past practice requiring that employees be handed a written result of the factfinding *at the results meeting.* According to Arbitrator Neumeier:

> Such a requirement would be must more restrictive than the five-working day time frame provided for in Article Twenty, Section One, Paragraph G-2-d. The record evidence demonstrated that it is commonly done, for good and obvious reasons, but even the highly-experienced Union Representatives acknowledged that Article Twenty does not require the Company to carry out its notification responsibility in only that manner. Further, where, as the Company points out in this case, the results of factfinding meeting is held quickly after the factfinding, the Union's alleged practice would require the results to be hand delivered to the employee even before the time frame for holding the results meeting had run. Such a significant rewrite of the contractually-agreed to procedure requires stronger evidence, demonstrating that both parties knew of and agreed to take that approach, than was presented here. **Therefore, the Union's request that a binding past practice be found requiring the Company to hand the employee a copy of the results of factfinding at the close of the results of factfinding meeting is rejected on this record.**

(Neumeier at 19)

I will give the Union this: Given Arbitrator Neumeier's decision in the Agent Y case, the Union's argument that the Grievant must be given a copy of the decision is credited. While the parties' collective bargaining agreement is really silent on the matter, Arbitrator Neumeier's declaration is entitled to great weight, if not *res judicata* status (at least in the jurisdiction at issue in that case, BNA (Nashville, TN)).

The problem for the Union, however, is the Grievants' conduct and the subsequent interchange that Mohd Nohr had with the Grievant's Union Representative, William Kelly.

Mr. Nohr testified he told the Grievant to wait "while we were still in the room, after I rendered the decision." (R. 84). In an exchange with Union Counsel, Mohd Nohr explained:

> **Q. Didn't you say earlier that you told them you were making copies?**
> **A. I told them I was making copies after I finished rendering the results.**
>
> **Q. But you never told them to wait.**
> **A. <u>I told them to wait for me to get the copies.</u>**
> **(R. 85; emphasis mine).**

Significantly, in all relevant respects the Grievant corroborated Nohr's testimony: "He just said, 'I'll make copies and I'll be back.' That's it." (R. 32-33).

The evidence record indicates that the Grievant, upset as they were, elected to leave. What did the Grievant and their Union Representative think Mohd Nohr was doing when he left the room to make copies, stating that he would be back? Numerous arbitrators have cited the employee's evasive conduct as not entitling the employee to avoid time frames. Indeed, Arbitrator Neumeier pointed out that "in this case there is no evidence that the Grievant took evasive action." (*Neumeier* at 11). This is exactly what Agent X did when they left before Nohr returned with the copies.

Even aside from the above (and any finding of evasive conduct by the Grievant),

Mr. Nohr testified in no uncertain terms he gave Agent X's copy to their Union Representative Bill Kelly and he accepted it. In his words:

> **And he said, "Well, I'll make sure they get it."**
> **So I gave him both the copies; the TWU copy, and the copy I was going to have to give to Agent X.**
>
> **Q. Did Mr. Kelly accept both copies?**
> **A. Yes, he did.**

Noteworthy, Mr. Kelly corroborates Mr. Nohr's account, confirming that when Nohr came to him and said, "Here's a copy for you, and here's a copy for Agent X," he accepted them (R. 44). This occurred within minutes of Agent X signing a copy of the Company's termination letter.

In *Southwest Airlines & TWU 555*, Case No. PHX-R-1538/14 (Hill, 2015), I upheld the Union's grievance effectively allowing TWU 555, as exclusive representative for the bargaining unit, to sign an employee's name making him a named grievant in a contract case. Reviewing labor law, I pointed out that it is the Union that owns the grievance, and as agent for the employee, the Union can sign for that individual. Similarly, aside from Agent X leaving the meeting before Mohd Nohr came back with the copies, Agent X's Union Representative, William Kelly, was duly empowered to accept the copy on their behalf. Any other decision would be non-sensical and contrary to established labor law clothing the Union with representational authority. [1]

For the above reasons the following award is issued:

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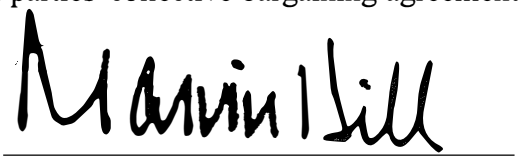
[1] The interesting irony in this case is this: Resolving the case in the Company's favor really enhances the representational authority and exclusively of the TWU as agent and representative of the unit. Just as a TWU Union representative may sign for an employee (See Case PHX-R-1538/14 (2015)(discussed *supra*)), absent a clear contractual provision to the contrary, a Union Representative is also authorized to receive documents on behalf of the employee.

VII. AWARD

The grievance regarding an alleged violation of timelines is denied in all respects. The matter may proceed to arbitration on the merits given, of course, that the Union elects to move the grievance to the arbitral forum.

Pursuant to Article Twenty (C) of the parties' collective bargaining agreement, costs are assessed against the Union.

Dated this 18th day of May, 2016
at DeKalb, Illinois, 60115.



Marvin Hill
Arbitrator