

ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

December 24, 2014

SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Grievance: LGA-R-1392/14 [REDACTED] Termination)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Company: Colin LeCroy, Ogletree Deakins Nash Smoak & Stewart, P.C.

The Union: Brian Smith, Grievance Specialist, TWU, Local 555

Statement of the Award:

The Grievance is sustained. The Grievant shall be reinstated, with a Final Letter of Warning and a two-day disciplinary suspension. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Company.

BACKGROUND

Southwest Airlines Company (Company or Southwest) and the Transport Workers Union Local 555 (Union) are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011, and continuing. In this case the Union protests the June 18, 2014-termination of the Grievant as being without just cause as is required by Article Twenty, Section One, Paragraph A.

The Grievant commenced working for the Company as a Ramp Agent in August 2013. On June 11, 2014¹, he was assigned to be the lav driver at LaGuardia Airport on his shift commencing at 7:00 AM and he arrived on time. The duties of a lav driver include driving the lav truck, servicing and fueling it if necessary during the shift and at the end of the last shift, servicing lavatories, and assisting other Ramp Agents to offload the back of the bin. At approximately 10:30 AM the Grievant was found, asleep, in the driver's seat of the lav truck, parked, with the engine running. Prior to this incident the Grievant had never reported off from work for illness, but he been tardy twice and no-showed once, resulting in a score of -1.5 under the negotiated attendance policy in Article Twenty-Three, Section II. (CX 8.) Under that policy a Letter of Instruction is given at 1 - 2 ½ points and a Warning Letter is given at 3 - 4 ½ points. He has no discipline in his file.

At LaGuardia, Southwest has four gates at the end of Terminal B: gates B4 and B8 on one side and gates 3B and 7B on the other side. Due to the way gate B3 is positioned the Ramp Supervisor is required to act as a third wing walker for all flights at that gate. All flights are serviced by the one lav truck and driver. Each flight is to be serviced, although AirTran does not always request service and some are missed when the lav driver is pulled to assist if there are a lot of planes on the ground. The lav driver is to be in position to pull up to the aircraft as soon as the signal is given. It is standard practice for the lav driver to carry a radio while driving the lav truck. Section 5.18 – Lavatory Servicing of the Ground Operations Manual contains detailed instructions for servicing the aircraft. (CX 1.) Section 2.2 – Safety Responsibilities of the Ground Operations Manual requires employees to “promptly report malfunctioning or inoperative equipment to their Supervisors.” (CX 4.) At no time did the Grievant report any problems with the lav truck. The employee who took over for the Grievant on June 11 also did not report any problems with the vehicle.

There are two locations for refueling and designated times for Southwest vehicles to do this. The mobile fueler positioned closest to the terminal B gates may be accessed via the outer service road, a longer distance but with less traffic and congestion, or the inner service road which goes under terminal A. Typically, Company vehicles are fueled at that location 9:00 - 11:15 AM.

Early in his shift the Grievant spoke with Ramp Supervisor Giover Leavitt, who worked on gates B4 and B8 that day, and told him he wanted to take a “four-by-four” because he was

¹ All dates are in 2014 unless otherwise specified.

feeling ill. Taking a four-by-four would allow the Grievant to leave work after four hours without being charged for an absence. Leavitt approved this request and instructed the Grievant to let him know when he was leaving.

Leavitt testified that while he was working the flights at gates B4 and B8 he thought the Grievant was working flights at gates B3 and B7, until he received a radio call from Ramp Supervisor Adam Pierre who was at those gates. Pierre asked if the Grievant was on his side of the terminal because he needed the lav driver. After checking the back of the aircraft Leavitt radioed Pierre that the Grievant was not present. Flight 3842 had a heavy offload of freight and needed an assist. The Grievant was not there to assist, resulting in a delay. Leavitt said it takes approximately five to ten minutes to service the lav and the Grievant could have done both flights #4828 and #3842. On cross examination Leavitt described the Grievant as a good employee and said he had never disciplined him. He agreed he would not consider a truck being low on fuel to be a malfunction.

Ramp Supervisor Pierre testified that he started work at 4:15 AM on June 11 at gates B3 and B7. After flight #487 arrived he went to the break room looking for the lav driver and saw the Grievant. When he told the Grievant he needed to come outside, do the lavs and assist, the Grievant said he was taking a four-by-four sick out, agreed to come out and gestured like he was going to get up. Pierre left the break room before the Grievant. He did not see the Grievant at gate B7 and the ramp crew said he did not service the lavs.

The following summary of flights at the Southwest gates is based on the above testimony from Leavitt and Pierre and Company Exhibits 2 and 3.

Flight #	Arrival Time	Gate	Departure Time	Serviced	Comments
487	8:33	B7	9:14	no	
163	9:20	B8	9:55	no	no request from Air Tran for service
3863	9:42	B3	10:08	no	
4828	9:55	B7	10:33	no	
3842	10:05	B4	10:44	no	delayed

After unsuccessfully attempting to reach the Grievant by radio, Pierre spoke with Leavitt, as described above. He then went back to the break room but the Grievant was not there. Between 10:00 AM and 10:20 AM Pierre telephoned Manager of Ramp Operations Justin Fox to say he was using the Company truck to look for the Grievant. He drove around the concourse toward Delta, and at the far end of the building, where two airlines are positioned at the hammerhead gates, he saw the Southwest lav truck positioned in the far corner between hangers 2 and 4. (CX 5 and 6.) He said that area is United's fueling station, is not visible from the Southwest gates, and there is no reason to park a Southwest vehicle there or for Southwest

employees to be in that area during the day. It is near Zulu Alpha spot 2 where Southwest remotely parks aircraft overnight. He pulled up directly in front of the lav truck and could see the Grievant sleeping. He expected to get a response but there was none. He radioed Manager of Ramp Operations Fox that there was a situation. After picking Fox up at the terminal he drove back to the lav truck to find the Grievant still asleep.

MRO Fox testified that when, at approximately 10:15 AM, he learned that the Grievant was missing he notified Local Union Representative [REDACTED] he was going to look for the him. He then went through the operations and ramp break rooms, made numerous radio calls, and asked if anyone “had eyes” on the Grievant. After approximately 10 minutes he was contacted by Leavitt who said he had found the Grievant. He testified about the events at the truck’s location as described above. Fox said that when approached the vehicle he took photographs, then knocked on the window and asked the Grievant to come back to his office. The photographs show the Grievant resting his chin in his hand, leaning against the window. (CX 7.) On cross examination Fox acknowledged that Pierre had told him the Grievant had complained about feeling ill but he did not ask the Grievant if he was okay before telling him to drive back to the office.

At the office MRO Fox asked the Grievant what had happened. The Grievant responded that he was going to get fuel, didn’t make it, and “you caught me.” He did not report any mechanical problems and the tank was one quarter full. Nor did he say he was sick.

MRO Fox conducted a factfinding on June 13, at which the Grievant was represented. Fox testified that the Grievant said the truck was sputtering and he thought it needed gas. So, he attempted to get fuel, but felt ill so he pulled over for a five-minute break. When he proceeded he again felt ill, made a U-turn, and parked where he was found. He said the night before his tonsils were hurting. The Grievant admitted missing at least five flights.

After consulting with Manager of Labor Relations Jennifer Taylor, MRO Fox decided to terminate the Grievant for violating three provisions of the Ground Operations Employee Handbook– Section 3.2, Basic Principles of Conduct:

4. Complete coordination with Coworkers and Supervisors is required in order to provide harmonious working conditions.
7. Dependability and punctuality are necessary. You are expected to be in, or at your position and ready to work when you are scheduled.
19. Sleeping on Company premises during duty hours. [CX 9.]

Fox explained that the Grievant’s violations merited termination because of the intent. In his opinion, the Grievant left the operational area to go to a place where he was not supposed to be, to sleep, so that no one could catch him. Five flights were not serviced as is required on turns. The Grievant had every opportunity to leave throughout the morning but chose not to. No one in

management or leadership said he could not go home, although he would have incurred an attendance violation if he left. And, he did not bring in a doctor's note. Even as a nine-month tenured employee with three attendance occurrences, leaving early that day would not have affected his standing or put him in jeopardy of termination under the attendance policy. Fox said that, since this incident, he gave a Ramp Agent a letter of warning for sleeping in the break room for approximately one to three minutes. That employee did not miss any work, did not leave the work area, and was open and honest in admitting the infraction, which was his first. On one other occasion he gave a letter of warning to an employee found sleeping in his pushback equipment at the gate waiting for his flight. That employee also did not leave the operational area, did not miss any work, and was honest in admitting his infraction. He also disciplined a supervisor who admitted to sleeping between shifts when he was doing a double.

On cross examination MRO Fox said he did not believe there would ever be mitigating circumstances to mitigate discipline for sleeping. He believes someone sleeping should be held accountable. He did not consider being ill to be a mitigating circumstances because the Grievant should have gone home. He wants employees to go home sick and not try to tough it out if they come into work.

In preparation for the arbitration hearing MRO Fox took the lav truck and, using the photographs, parked it in the same location. He testified that it took him at least 2 to 3 times of pulling forward and reversing to get in that position.

The Grievant testified that he had been home on June 10 with his one-year old son. That night he felt sick, had a sore throat and could not sleep. The next morning when it was time to go to work he felt worse. He arrived thirty minutes early, got ready, and sat down just as a customer service manager came in. The manager said "dude, is everything okay?" He told the manager he was feeling "iffy" and had had better days. The manager told him if he was getting worse to just go home, that there was no point in his getting sick or having everyone else get sick also. He told the manager he was going to tough it out and would be all right.

The Grievant testified that there was really nothing to do from 7:00 to 8:00 AM. When the first turn came in he went out and dumped the flight. There was no offload so he went back to the break room. There he saw Ramp Supervisor Leavitt, and told him he would be leaving at 11:00 AM. Leavitt told him to let him know 10 or 15 minutes prior to his leaving.

The Grievant testified that he next walked out to gate B4 to help upload the last of the originator flights. After loading 20 to 30 bags he felt winded, went back to the break room and sat down. Ten to fifteen minutes later Ramp Supervisor Pierre came in and told him to go help out on the flight on gate B3. He told Pierre he was not feeling good and was going to take a "four and out" and Pierre responded no problem. He went back to the lav truck, got to gate B3, dumped the lavs and offloaded the freight. He said it was a very light offload and there was no upload. When he was ready to drive off the truck gave a little sputter and he looked at the gas meter. It was between the empty and quarter mark so he decided to get gas. He took the inner service road because gate B3 is right next to that road.

The Grievant testified that about halfway there he felt dizzy and nauseated but mostly dizzy, and stopped for a two-minute breather. He felt better, proceeded to drive, and then felt worse. He had about one hour and a half to go but decided he was not going to make it and would go home. He made a U-turn and again felt dizziness and nausea. He decided to sit for five minutes to breathe and gain composure, but fell asleep. Then MRO Fox arrived and woke him. At the office they met Union Representative [REDACTED]. Before he left the customer service manager asked if he wanted to take an ambulance home and suggested that, if he felt dizzy when he got to his car, he should just sit there. He said he did that and slept for about an hour before going home.

At the fact-finding the Grievant told them he was feeling ill, that he was sure he missed flights and that he did fall asleep. He did not think much about it. He was told “tell the truth and you should be all right.” He said he did tell the truth.

On cross examination, the Grievant testified that he began feeling ill in the afternoon of June 10. He could not recall whether, at the fact-finding, he complained of nausea, and said that his nose was running or that he felt winded. He did mention sore tonsils and being dizzy. The symptoms lasted and he was still wearing a hoodie when he came in for the fact-finding. He did not go to a doctor or bring a medical note because he did not have health insurance at that time. He was not asked about the truck being low on fuel and there were no mechanical problems, to his knowledge. To get to the parking spot he U-turned directly off the road and he did not reverse at all.

MRO Fox testified on rebuttal that he could not recall the Grievant, at the fact-finding, complaining about not being able to sleep the night before or taking medicine that day. He said he does not encourage employees to come to work if they are sick.

The Union offered testimony from District 5 Representative Robert Bettinger and Local 555 Vice President Jerry McCrummen about numerous past instances of discipline when employees were found sleeping during working hours. The Company offered testimony from Senior Manager-Labor Relations Ground Operations Trudy Christiansen about many of those cases. Their testimony, and the 22 Union exhibits, are discussed below in the Findings.

LaGuardia Alternate Ramp Representative [REDACTED] testified about instances of employees sleeping since the Grievant was terminated. On June 24, 2014, MRO Fox gave Letters of Warning for sleeping on Company premises during duty hours to him and another employee. (UX 23 and 24.) [REDACTED] also introduced video he had taken of an employee sleeping in the break room who was not disciplined and photographs of that employee. (UX 25-a and 25-b.) He said the location where that employee was sleeping, on more than one day, is diagonally across from the Ramp Supervisor’s office. He also said that he has come to work ill and the Company promotes that so as not to disrupt the operation. Since the Grievant’s termination he would not come to work if he was sick. He described the area where the Grievant was found as very active. Continental and JetBlue operate out of that terminal and the Company has two planes it cannot fit at gates that are placed there. The access road is a busy road. He said if someone wanted to hide there are better locations.

Senior Labor Relations Manager Christiansen testified that an employee found in an operational area who falls asleep is not necessarily terminated, unless they are at the termination level of discipline. If an employee has sought out a place to sleep away from the operational area, that is considered nesting and it would be terminable. On cross examination, she defined “operational area” as where Southwest operates or does business, including the ticket counter, lobby, T-point, gate area, baggage carousel, and the fuel farm where equipment is taken to be fueled.

**RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT
ARTICLE TWENTY
GRIEVANCE/SYSTEM BOARD/ARBITRATION
DISCHARGE and DISCIPLINE**

**SECTION ONE
PROCEDURES**

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

* * *

L. **Interpretation/Application of Agreement.**

* * *

14. Arbitration/Function and Jurisdiction. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

CONTENTIONS OF THE PARTIES

The Company’s Contentions

The Company contends that if the act is intentional and the employee tries to avoid detection, sleeping on duty usually warrants termination, even when it is the employee’s first offense. Here, the Grievant’s story demonstrates he left his work area to go to sleep. After

driving a Company vehicle away from the Southwest terminal, parking it in a corner no Southwest employee was likely to pass, and going to sleep with his head in his hand, leaning against the truck window, he later invented a story. That story, i.e., the truck sputtered and he thought it needed fuel, he pulled over because he was sick and he simply fell asleep is simply not true. The Grievant maneuvered his truck into a corner with some effort, and the picture of him sleeping shows he did not accidentally doze off.

Citing Elkouri and Elkouri and other arbitration decisions, the Company notes that arbitrators consider:

(1) whether the employee is caught in a “nest”, (2) if he has left his work station and hid himself in an effort to rest, (3) if the falling asleep is inadvertent and in an area where he had a right to be in (such as falling asleep in the lunchroom), (4) whether the circumstances associated with the employee’s work contributed to his drowsiness, and (5) whether the sleeping occurred while on duty.

Arbitrators also consider whether the sleeping affected production, whether there was an admission of responsibility or a cover-up, and the employee’s record of service.

The Company contends that the Grievant’s after the fact explanation for falling asleep, his reported symptoms and the position in which he was sleeping show he did not simply nod off. The Company’s conclusion that his conduct warranted termination is neither arbitrary nor unreasonable, which is the standard the Arbitrator must apply.

The Company contends that the instances offered by the Union of employees who received the discipline short of termination for sleeping offenses, or whose terminations were later overturned or reduced, do not justify reducing the Grievant’s penalty. Only one of those cases involve an allegation of an employee sleeping outside of Southwest’s operations area. In that case the arbitrator reduced the discipline from termination to suspension without pay because he was not convinced that the grievant had actually been asleep. (UX 2.) The Union’s reliance on the Choice Holland case is similarly misplaced. He was found in the bathroom in a Southwest area, and the irregularity report showed he was being sick. (UX 5.) Regarding the sleeping incidents in 1990, the Company notes it had not even created its Employee Relations department at that time and had different priorities 24 years ago. Further, there was no “arbitrary or unreasonable” standard in the agreement at that time. In neither case was the employee in a remote area. In the case of the employee who worked 80 to 120 hours a week, his schedule offered ample reason to mitigate his punishment. (UX 21.) In this case the Grievant had been off the day before. Finally, none of the pictures or videos of employees sleeping involve an employee sleeping outside of the Southwest terminal.

The Company maintains that it established just cause to terminate the Grievant and the arbitrator may modify or remove this penalty only if it is arbitrary or unreasonable. The Grievant’s act was intentional and he tried to avoid detection. He now offers an innocent

explanation, but did not do so at the time. The Grievant's intent and subsequent dishonesty separate his case from the examples the Union cited. The Company's conclusion that Grievant intended to go to sleep and hid himself is neither arbitrary nor unreasonable. Therefore, the Company had just cause to terminate his employment.

The Union's Contentions

The Union contends that an examination of the Seven Tests of Just Cause establishes that the Company did not meet its burden of proof in this case. The Union acknowledges that the rules in question are reasonably related to the safe operation of the business and that the Grievant had adequate notice of those work rules. However, the Union contends that an abundance of evidence shows that the Company failed in its obligations.

The Union contends that station leaders across the system seem to be consistent regarding the penalty for sleeping, and that penalty is not termination. (UX 1-20.) One example is from LaGuardia station one year prior. (UX 20.) The discipline varied from a Letter of Warning to a Final Letter of Warning with days off, depending on the circumstances and the number of times the employee had committed the offense. In addition, the Union refers to System Board decisions resulting in employees being given Final Letters of Warning with days off. Both of those employees had "nested". (UX 21 and 22.) By contrast, the Grievant here was found upright, with his eyes closed, after reporting ill. Since the Grievant's termination other agents at LaGuardia have been given Letters of Warning for sleeping, but have not been terminated.

The Union contends that the discipline administered in this case was not appropriate. The Grievant's illness does not indicate a lack of dependability or punctuality. It is a mitigating factor. He notified the Company several times prior to falling asleep that he was ill. The Union urges application of a reasonable person standard and maintains it is not reasonable to assume a normal person would report to work, tell three members of management he was ill, so he could miss flights as the only lav driver, sneak off and fall asleep. Rather, it is reasonable to assume that when a person believes he is ill, he would try to tough it out and work a shift, and inadvertently fall asleep.

The Union contends that the Grievant did not violate the Company's Basic Principles of Conduct in the manner alleged against him. As to the first charge, that he did not have complete coordination with coworkers and supervisors, the Union notes that the Grievant was forced to deal with less than ideal conditions because of his illness. As to the second charge, the Union disagrees that the Grievant failed to be dependable and punctual. The Grievant is being totally honest in stating he was ill and did not mean to fall asleep. His record for honesty, never calling in sick or leaving work early adds to his credibility. A reasonable manager, having been told by the supervisor that an employee was ill, would have asked early in the investigation about the employee's health.

The Union further contends that MRO Fox's testimony is not credible he conflicts with himself and the supervisor several times. He was evasive and misleading in his testimony.

Thus, the Union contends that the Company did not have just cause for termination. MRO Fox said he did not believe in mitigating circumstances. That statement is a violation of just cause. The Union asks that the grievance be awarded in full with back pay including overtime, and that the Grievant be made whole in every way.

ISSUE

Was the grievance discharged for just cause? If not, what shall the remedy be?

FINDINGS

The Grievant was terminated for violating three provisions of the Ground Operations Employee Handbook– Section 3.2, Basic Principles of Conduct. The first charge, that he failed to provide complete coordination with Coworkers and Supervisors” has been proven on this record. The Grievant left his work area, without a radio or other means of communication, and was not reachable when needed. The second charge, dependability, has also been proven in that the Grievant was not at his position and ready to work when he was scheduled. The Grievant readily admits to his culpability on the third charge, i.e., that he was sleeping on Company premises during duty hours. Therefore, the Company certainly had cause to discipline the Grievant. The question presented here is whether the Company has established that it had “just cause” for termination.

The Company’s case focused on several factors: the Grievant’s alleged intent; his choice of location; and his explanation. The Union’s rebuttal of those points rests heavily upon the fact that the Grievant had told three members of management that he was feeling ill that morning and that he was, in fact, ill.

Accepting the Company’s version of events as accurate would not resolve this case. The Union has introduced 22 examples of employees being disciplined for sleeping on the job. The Company has introduced no examples of employees being terminated for sleeping in on the job, but has sought to distinguish the cases cited by the Union. Therefore, those past instances must be examined in order to determine whether the Company’s action lacked just cause because it so deviated from how other cases were handled as to amount to an arbitrary or unreasonable penalty within the meaning of Article Twenty, Section One, Paragraph L-14.

First, the Company correctly distinguishes cases where the employee dozed off in the break room, in a vehicle at the gate while waiting for a flight or some other location in the employee’s normal work area, essentially in plain site. In those cases the offending employee did not miss servicing any aircraft and caused no delays. Whether such behavior was tolerated in the past or at a variety of stations has no bearing on this case. See, e.g., UX 1, employee was at gate waiting for flight; UX 10, employee sitting in de-icing truck at gate area; UX 15, employee was in the break room; UX 16, employee was in the break room; UX 18, employee was in the break room; and UXs 23 and 24.

Another category of past cases includes those where the employee's actions disrupted operations by missing or being late for flights. For example, in MDW-0180/07 the employee was found lying down in his vehicle with his eyes closed. He denied sleeping, but had not answered calls on his radio and cell phone. He was given a Letter of Warning and two days off. (UX 6.) In PHL-O-0339/07 an Operations Agent with less than one year of service was late to open the jetway for an originator flight and the following day was witnessed sleeping by her supervisor. For those two infractions the agent received a Letter of Warning. (UX 7.) In DNT-R-0535/10 a Ramp Agent was given a Final Letter of Warning for sleeping and failing to work a portion of a flight. (UX 12.) In HOU-R-1194/12 a Ramp Agent who had previously been terminated was found sleeping in the break room when he should have been working his originating flight and was given a Letter of Warning. (UX 15.) In HOU-R-1381/13 a Ramp Agent was found sleeping on the job and failed to arrive on time for a flight. He was given a Final Letter of Warning and three days off without pay. (UX19.) In none of these cases was the employee terminated for missing flights.

This incident was the Grievant's first offense. Several of the cases introduced by the Union involve employees with multiple offenses. The Company seeks to discount cases that occurred before the Employee Relations Department was established. I concur and will not consider decisions issued by the ROPA System Board of Adjustment as impacting the parties' procedures under the current CBA. (UXs 21 and 22.) In a recent case, however, HOU-O-R-1381/13, the Ramp Agent was found possibly sleeping and failed to arrive on time for a flight. He was given a Final Letter of Warning and three disciplinary days off. The Union withdrew his grievance because the "agent has been disciplined 8 different times with-in the past twelve months for the same offense." (UX 19.) Also, in BNA-R-0622/04 the Ramp Agent received a Letter of Warning and one disciplinary day off for two instances of sleeping on duty. (UX 4.)

Some of the instances cited by the Union involved employees who were ill or on medication. In BWI-R-0174/04 the Ramp Agent was found sleeping in the lav truck at a gate. The MRO issued a Final Letter of Warning and noted that "this has been an issue in the past with your job performance." The agent was on medication for back pain, provided documentation and apologized. In the Results of Fact-Finding Meeting the MRO acknowledged the medications could cause drowsiness but emphasized the employee's responsibility to be able to do his work. He also said "your sleeping on the job is not appropriate but your responses in the fact-finding were not unacceptable as well." (UX 3.) The employee found asleep in the men's room also said he was on medication. The Assistant Station Manager, issuing a Letter of Instruction, said "we are certainly sympathetic to your medical condition, as we discussed there are better ways that the situation could have been handled and averted." (UX 5.) In BWI-R-0249/11 the Ramp Agent was observed by two Ramp Supervisors sleeping in the locker room and received a Letter of Warning. Manager of Labor Relations Christiansen testified that he was on medication when this incident occurred. (UX 13.) From these exhibits it is not possible to tell precisely how much the employee's health issue factored into the decision of the manager regarding the level of discipline. However, it clearly was taken into account at some level. To the contrary, MRO Fox testified that he did not believe there would ever be mitigating circumstances to mitigate discipline for sleeping.

The Company has emphasized that the Grievant was not only out of his immediate work area, but was in a location that indicates his intent to hide so that he could sleep. A number of the cases cited by the Union also involve employees being out of their immediate work areas. It is appropriate, therefore, to look closely at these cases in order to determine whether the Grievant's actions, in comparison, support his termination compared to the lesser penalties given to the other employees.

In OAK-R-0018/02 the Ramp Agent was terminated after being found sleeping in the lav truck stationed "out on the perimeter (aircraft RON remote site)." Although the Arbitrator concluded that the grievant had not been sleeping, the location and culpability for being unable to respond to calls are closely analogous to the instant case. However, that employee had been given a disciplinary letter and a two-day suspension for sleeping on Company premises earlier that same month. Thus, it was not a first offense. (UX 2.)

In RNO-R-0720/08 the Ramp Agent was given a Final Letter of Warning for "sleeping in a lounge chair outside the baggage claim area in full sight of our customers." The Union notes that this employee left *his* work area. In ONT-R-0535/10 the Ramp Agent was given a Final Letter of Warning for sleeping and failing to work a portion of a flight, as scheduled. Ramp Supervisor Brian Behm reported finding him inside the terminal sitting in one of the airport chairs, however a Ramp Agent said that Behm found him sleeping "inside the elevator room by our smoking area." (UX 12.) Manager of Labor Operations Christiansen testified that the terminal is considered to be in the Southwest operations area. In BNA-R-0622/04 the Ramp Agent was found sleeping in the break room and also at gate C19. While the Company maintains that gate was in use, Union witness Bettinger credibly testified that, at the time, it was being used to park equipment. (UX 4.) These cases demonstrate the importance of an employee being where he or she is supposed to be. A Ramp Agent is not supposed to be in the terminal or baggage claim area sitting in chairs, or in an unused portion of Southwest's area. It is hard, however, to draw the bright line between those types of absences and the Grievant's location in this case. He was in an area used by Southwest, but only at night to park aircraft. Managers should not have to search any such areas to find missing employees.

The Company has cited arbitral authority for the principle that employees sleeping on the job, particularly if they do so out of sight so as not to be discovered, may properly be discharged for a first offense. The Company has not, however, offered one example to indicate showing when it has done so. The above review demonstrates that the Company does not terminate an employee for the first offense of sleeping on the job, although a future case might present sufficient aggravating circumstances to justify that penalty.

The Grievant readily admitted his infraction when he told MRO Fox "you caught me." His behavior that morning and his testimony indicates that his primary focus was to stay at work until 11:00 AM in order to avoid being charged with an absence. Obtaining a doctor's note would have caused him to incur an out-of-pocket expense he could ill afford. His subsequent attempts to explain his behavior were undoubtedly an exercise in trying to get himself out of the fix he knew he was in.

In consideration of mitigating factors, that the Grievant was feeling sick and this was his first offense, and the aggravating factors, that he placed himself outside his regular work area with no way to be reached, i.e., by radio or cell phone, and caused a flight delay, I find that the Company has not established that it had just cause for termination. In light of the treatment of numerous other employees who were found sleeping on the job under a variety of circumstance, this level of discipline was arbitrary and unreasonable within the meaning of Article Twenty, Section One, Paragraph L-14. Given that the Grievant did disrupt operations by not covering flights, causing a delay and by making himself unavailable some discipline beyond a Letter of Warning is called for. The termination is reduced to a Final Letter of Warning and a two-day disciplinary suspension.

For the above reasons, the Company has not established just cause for termination. The Grievance will be sustained. The Grievant shall be reinstated, with a Final Letter of Warning and a two-day suspension. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Company.

AWARD

The Grievance is sustained. The Grievant shall be reinstated, with a Final Letter of Warning and a two-day disciplinary suspension. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Company.



Elizabeth Neumeier, Arbitrator

December 24, 2014