

Wittenberg #2

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

The undersigned, having been designated by the parties, pursuant to the collective bargaining agreement, was selected to serve as Arbitrator of the dispute described below. A hearing was held on March 14, 2001 at the offices of the Union.

The parties had a full and fair opportunity to present evidence and oral argument and to examine and cross-examine witnesses. The hearing was declared closed on March 14, 2001.

ISSUE

Whether the Employer had just cause to discharge the Employee? If not, what shall the remedy be?

BACKGROUND

The Employee was employed by the Employer as a shop mechanic for eight years prior to his termination on September 9, 1998. The Employee was discharged for violating Rule #10 of the Rules of Conduct, misuse of pass privileges.

The events giving rise to the Employee's termination occurred on July 14, 1998 when he and a friend, Person 1, attempted to check in for an Employer flight from City 1 to City 2. Person 2 was the Customer Service Agent on duty in City 1 that day. Her version of the events that took place at the gate is as follows: The Employee came up to the desk alone and presented her with

two write-your-own tickets. The Employee's ticket was filled out completely. Person 1's ticket was not complete. Person 1 was seated in a chair at a distance from the gate. There was no check in the relationship box to indicate if the individual was an employee, spouse or son/daughter. Person 2 asked the Employee to complete the relationship box. He checked "employee." Person 2 told the Employee that if his companion was an employee, she should have her own write-your-own ticket. The Employee told the Agent that Person 1 was not an employee, that she was his girlfriend. The Agent told the Employee that he needed to use a companion ticket for Person 1. The Employee told the Agent that he did not have a companion ticket and had used a write-your-own ticket on the leg from City 2 to City 1. Person 2 told the Employee that she could not accept the write-your-own ticket for Person 1.

The Employee's version of the incident is as follows: on July 14, 1998 the Employee traveled with Person 1 from City 2 to City 1 on write-your-own passes after telling the Agent that Person 1 was his companion. On the return trip, the Employee and Person 1 were in line together and presented two write-your-own passes to the Agent at the podium. The Employee identified Person 1 as his companion. The Agent asked the Employee to complete the information on the pass.

The Employee asked the Agent what box he was supposed to check since Person 1 was not an employee, a spouse or his child. The Agent told him to check the employee box and he did so. The Agent entered information into the computer and told the Employee that he couldn't use the pass for Person 1. The Employee tried to explain to the Agent that he used the same pass to fly Person 1 from City 2 to City 1. He asked to speak to a supervisor. The Agent called a supervisor to the podium to discuss the matter. The supervisor advised the Employee that he would have to purchase a ticket for Person 1. He did so at a cost of \$100.00. The Employee used write-your-

own passes for his companion to travel with him on other occasions in 1998, including a trip between City 2 and City 3.

Person 1's version of the interchange with Gate Agent Person 2 is as follows: when she got to the counter, she heard the Agent tell the Employee that her ticket was not complete. The Employee told the Agent that it was complete and identified Person 1 as his companion. The Agent pointed to the relationship boxes on the ticket and told Employee to fill in one box. The Employee told the Agent that Person 1 was not his spouse, his son or daughter. The Agent told the Employee that he had to check a box. The Employee checked the employee box. After receiving a completed form, the Agent entered information in the computer and informed the Employee that he couldn't use the write-your-own ticket for a companion. The Employee told the Agent that he used the same form for the leg from City 2 to City 1. The Employee asked to speak with the Agent's supervisor who informed the Employee that he would have to purchase a ticket for Person 1.

The Employee was out on Extended Illness Status in late 1996 and 1997. He received companion passes in 1996 that he used the following year. He did not receive his 1998 companion passes until after the July 1998 incident. The Employee testified that he spoke with his Supervisor, Person 3, several times in 1998 to request his companion passes to no avail.

The Employee testified that it was his understanding that he could use write-your-own tickets until he received his companion tickets. He claimed that Shop Steward Person 4 gave him this information. Person 4 testified that he and other mechanics were informed by a foreman when the companion ticket program was first announced that they could use write-your-own tickets until their companion passes arrived. He related this information to the Employee in late 1997 or early 1998.

Person 3 was the Supervisor administratively responsible for the Employee while he was out on leave. Person 3 testified that he spoke with the Employee three or four times during 1996 and the beginning of 1997 with regard to medical issues relating to his leave of absence.

Person 3 spoke with the Employee again in late 1997 when he was reinstated on Extended Illness Status. Person 3 testified that his next contact with the Employee was subsequent to July 14, 1998. Person 3 denied that the Employee called him at any time between early 1997 and July 1998 concerning non-receipt of his companion passes.

Person 5, Staff Specialist in the Benefits Program, described the history of the Employer's companion pass program. Companion tickets were first introduced in 1995 in response to requests from employees and retirees. Each employee was entitled to 24 companion tickets per year. They were sent to each employee's home and personalized with the employee's data. The average service charge on a companion ticket was \$57.93. The average service charge on a write-your-own ticket in July 1998 was between \$5 and \$6.

During 1995 and 1996 employees were required to purchase companion tickets at ticket counters in advance of their trip. The companion had no flexibility in being able to alter his/her travel plans. The program changed in 1997. Companion tickets were charged to the employee through a payroll deduction after the companion traveled. The companion was also allowed more travel flexibility. The cost of the ticket also changed. However, there was always a \$25 minimum charge in effect.

Employees were notified of the Employer program in 1995 through Newsletter 1 and other methods, including a brochure mailed to each employee's home. Updates and changes to the program were announced periodically through Newsletter 1 and additional letters home. A brochure describing the program, including misuse and revocation procedures, was included in

the mailing with the employee's companion tickets. Each companion pass included information or guidelines on its use.

Person 5 was aware that some employees did not receive their companion passes in 1998. The Employer began mailing 1998 passes on October 15, 1997 for use on or after January 1, 1998. The department published a telephone number for employees to call if they did not receive their passes or if they had questions about their travel benefits.

CONTENTIONS OF THE EMPLOYER

The Employer contends that violation of Rule #10 of the Rules of Conduct is a dischargeable offense. It asserts that travel benefits are a privilege, not a right. The program is expensive and misuse of the benefit among an employee population of 100,000 could result in staggering costs. The Employer asserts that it provided employees with information about the use of the companion pass program through many letters and has done so since the program's inception in 1995. Some information is distributed at work; other information is contained in letters and brochures sent to employees' homes.

The Employer contends that the difference between write-your-own passes and companion passes is significant. Companion passes have a higher service charge, including a minimum charge, and are limited in number.

The Employer notes that the Employee used companion passes in 1997 while he was on Extended Illness Status. It claims that he received the passes in the mail at his home along with a letter explaining how the passes are to be used. He used companion passes twice in November 1997 for a trip from City 2 to City 4 and back. The Employee traveled with a companion four times during the months of June and July 1998 using write-your-own passes. He did not use the

remaining companion passes from 1997. The Employer also contends that the employee did not call the Employer to report non-receipt of his companion passes.

The Employer challenges the Employee's reliance on the advice of a Shop Steward with regard to use of companion passes. The Employer notes that Person 4's testimony was that he was informed he could use write-your-own passes until companion passes were issued when the program was first announced in 1995.

The Employer contends that, even if true, there is no evidence that write-your-owns could be used three years later.

Furthermore, the Employer asserts that the Employee should have consulted with a supervisor or manager or called the benefits office to ask about what he should do if he had not received his companion tickets.

The Employer also contends that the Employee's version of the events of July 14, 1998 is not credible. It argues that

Gate Agent Person 2 denied being told that Person 1 was the Employee's companion before asking him to check the relationship box. The Employer asserts that the Employee misrepresented his relationship with Person 1 and only acknowledged her as a companion when asked why she did not have her own employee ticket. The Employer contends that the Agent had no reason to lie. Furthermore, it claims that the Agent had no reason to check her computer to see if Person 1 was eligible to use a write-your-own ticket if she knew that Person 1 was a companion.

Finally, the Employer denies that Employee was the victim of disparate treatment. The Employer notes that another employee cited as having misused his pass privileges, did not intentionally violate the policy. This employee purchased a companion pass for a relative traveling with his

wife. The companion used the wife's pass in error on one segment of the trip. This particular employee was not present at the time and had already paid for the companion pass. The Employer contends that it has applied its policy consistently to employees who intentionally misused their pass privileges.

CONTENTIONS OF THE UNION

The Union contends that the Employee made an honest mistake in using a write-your-own pass for his companion instead of using a companion pass. The Union argues that the Employee did not intend to defraud the Employer and that he either made an error or was negligent. The Union asserts that the Employee's actions do not justify discharge.

The Union contends that in order to warrant discharge, there must be evidence that the Employee acted with intentional or malicious intent. According to the Union, there was no purposeful misrepresentation of fact. The Union contends that although the Employer accused the Employee of an act of dishonesty, his actions were merely negligent. In the alternative, the Union claims that the offense was not so serious as to mandate discharge.

The Union contends that the Employee was a credible witness whose account is worthy of belief. It insists that the Employee notified the Gate Agent that Person 1 was his companion before checking the employee box on the write-your-own ticket. The Union points out that Person 1 corroborated the Employee's testimony on this key point. The Union charges that it was the Gate Agent who told the Employee to check the employee box and insisted that he do so despite being told that Person 1 was Employee's companion.

The Union also contends that the Employee was a victim of disparate treatment. In the case involving the other employee that employee unintentionally or inadvertently misused his pass

privileges and was not discharged. The Union also challenges the Employer's reliance on other cases, noting that some of the incidents cited have been grieved and remain unresolved.

The Union contends that there are mitigating factors that warrant a reduction of the penalty.

First, the Union claims that the Employee had no intent to misrepresent or defraud the Employer.

Second, it asserts that the Employee made a good faith attempt to obtain his 1998 passes before using a write-your-own pass for his companion. He telephoned his supervisor several times in 1998 to report that he had not received his new companion passes and to request assistance in getting the passes. Third, the Employee had little opportunity to learn the rules for companion travel because he was on Extended Illness Status. He did not see the communiqués distributed at work and did not receive information about the companion pass program at his home. Instead, the Employee relied on other employees for advice, including the advice of a foreman that was communicated to mechanics when the program was introduced. The Union asserts that there was no proof that Employee knew the rules governing the companion pass program. Instead, he had a good faith misunderstanding of how passes could be used. The Union also contends that the Employee's eight years of satisfactory service with the Employer justifies mitigation of the penalty.

The Union contends further that the contract requires the Employer to utilize progressive discipline in the handling of misconduct, including rule violations. The Union contends that there is no reason to believe that the Employee would not have benefited from punishment less severe than discharge. The Union asks that the grievance be granted and that Employee be reinstated to his former position.

OPINION

The crux of the issue before me is whether the Employee intentionally misused his pass privileges on July 14, 1998. Upon careful review of the evidence and argument I find that the Employee intentionally violated Rule #10 of the Rules of Conduct and that the Employer had just cause for his discharge.

My reason follows.

There is no question that the Employee attempted to use an employee write-your-own pass to fly his companion from City 1 to City 2 on July 14, 1998. There is also no question that the only individual permitted to fly on write-your-own tickets are employees, their spouse or their children. If an employee wants to purchase a ticket for a companion, he must use a companion pass. Accordingly, when the Employee attempted to use a write-your-own ticket for Person 1, he violated his pass privileges and the Employer's Rules of Conduct.

The Union does not deny that the Employee misused his pass privileges. It contends, however, that his attempt to use a write-your-own ticket for Person 1 instead of a companion pass was a mistake and not an attempt to misuse his travel benefits or defraud the Employer.

The crux of the Employee's defense is that he believed that he had the right to use a write-your-own ticket because he had not received his 1998 companion passes in the mail. The Employee claimed that he relied on the advice of a Shop Steward who allegedly he was given this information three years previously by a foreman.

The testimony of Shop Steward Person 4, even if credited, does not establish a basis for the Employee's belief that he could use a write-your-own ticket for a companion. Even if a foreman told employees to use write-your-own tickets until companion passes were issued, this statement

was made in 1995, when the program was first introduced. Furthermore, if the Employee needed reliable information concerning his travel benefits, he was obligated to inquire of a supervisor, manager or representative of the Benefits Department.

The Employee claimed that he was ensuring of the rules governing the companion pass program because he was on Extended Illness States from September 1996. The record establishes, however, that numerous articles and communiqués were distributed and posted from the time the companion pass program was first implemented in 1995. Furthermore, the evidence shows that companion pass travel guidelines were attached to each companion pass sent to an employee's home. Since the record shows that the Employee received his 1997 companion passes, he had to have received a copy of the guidelines as well.

The guidelines clearly delineate the rules governing the use of companion passes and how they differ from those regulating employee and family travel. If the Employee was unsure of the rules governing companion travel, it was not due to any negligence on the Employer's part. The information was made available to the Employee as it was to all employees. Additionally, if the Employee was unsure of the rules governing companion travel, he was obligated to contact someone in the Employer responsible for the program. Given the Employee's eight years of service with the Employer, it is not believable that he did not have the knowledge or ability to inquire about his companion pass benefits from a Employer Representative.

I turn next to the events of July 14, 1998. My determination of what happened at the gate turns on the credibility of the key witness, Employee and Person 2.

The Employee testified that the only reason he checked the employee box for his companion was because he was directed to do so by the Gate Agent. The Employee testified that he was reluctant

to falsely represent Person 1's status and was aware that denoting Person 1 as an employee was incorrect.

Nevertheless, he stated that despite advising the Agent that Person 1 was his companion and not an employee, she insisted he check the employee box.

The Employee's testimony about how and why he checked the employee box for Person 1 is simply not credible for several reasons. The Employee used a write-your-own ticket to fly Person 1 from City 5 to City 3 and from City 3 to City 6 earlier in the year in which he designated her as an employee. Having misrepresented Person 1's status on the earlier flights, there was no reason for him to argue with the Gate Agent about designating Person 1 as an employee on the flight from City 1 to City 2. The Employee's prior use of write-your-own tickets for Person 1 misrepresenting her as an employee supports the Employer's contention that the Employee intentionally used an improper ticket for his companion in an effort to obtain travel benefits, including a lower cost fare, to which he was not entitled. The Employee's actions constituted intentional misrepresentation in violation of the Rule #10 of the Rules of Conduct. Moreover, there was no reason for Gate Agent Person 2 to check her computer to determine if Person 1 was an employee if the Employee already identified her as his companion. The Gate Agent also had no reason to urge the Employee to check a box improperly on the ticket if she was aware that the Employee's companion was not entitled to fly on a write-your-own pass. The credible evidence establishes that the Agent only learned that Person 1 was not an employee after Employee checked the employee box, handed her a completed ticket and she checked the computer to verify Person 1's employment. Both the Employee and Person 1 testified that the Agent checked the computer. The only reason for Person 2 to check the computer was to confirm Person 1's employee status. The sequence of events as testified to by the Employee & Person 1

supports the Employer's assertion that Person 2 was a credible witness whose account should be accepted.

Having found that the Employee intentionally misused his pass privileges, the final question before me is the penalty.

The Union contends that discharge is excessive. The Union's argument is based upon its assertion that the Employee made an error in judgment, not an intentional misrepresentation.

In determining whether the penalty is appropriate, the arbitrator looks at the seriousness of the offense, the employee's seniority and performance record and any mitigating circumstances. The charges against Employee are serious because his actions constitute dishonesty. The Employer has the right to expect that its employees behave in an honest and forthright manner, particularly where it involves the use of a benefit.

Where an employee's dishonesty is established, the Employer has the right to discharge. The Employee's length of service and performance record, standing alone, is insufficient to mitigate the penalty.

Moreover, there are no other mitigating circumstances in this case. The Union's reliance on the other employee case to establish a disparate treatment claim is unpersuasive. The record establishes that the other employee did not intentionally misuse his pass privileges. Furthermore, the record establishes that the Employer has acted consistently in discharging employees who intentionally misuse or abuse their pass privileges.

Therefore, on the basis of the record before me, I make the following award:

AWARD

The grievance is denied. The Employer had just cause to discharge Employee.