

Gentile #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ISSUE:

Was the discipline of the Employee just and proper?

If not, what shall the remedy be?

A hearing in this matter was held on February 15, 1994, before the undersigned, who was mutually designated by the Employer and the Union to serve as arbitrator pursuant to the terms of the collective bargaining agreement. The parties had full opportunity to be heard, to present evidence and testimony in support of their respective positions.

BACKGROUND:

The Employee has been employed by the Employer since June 7, 1976. The Employee presently enjoys the job classification and hourly rate of pay of a Ramp Serviceman at the Employer's City 1 Ramp Service Department.

On April 10, 1992, subsequent to the issuance of a counseling notice to the Employee, Supervisor Person 1, cited, the Employee for a Level One Report of a Non-Punitive Disciplinary Action for unsatisfactory dependability. The issuance of the Level One Report emanated as a result of the Employee incurring seven absences on three occasions within a seven month period.

The Employee protested the issuance of the Level One Report on May 15, 1992. The City 1 Grievance Committee processed the grievance to the Second Step of the grievance procedure. Person 2, Manager Ramp Service, denied the grievance on July 1, 1992. The grievance was later appealed to the Third Step on March 25, 1993. The Third Step appeal of the grievance was denied by Person 3, Employee Relations Representative.

The parties were unable to resolve the dispute and each concur that the matter is properly before this arbitrator pursuant to Article XV11, H, 1, of the agreement.

The pertinent Articles involved are as follows:

Article XIV, Sick Leave

G. The employee covered by this Agreement and the Union recognize their obligation of being truthful and honest in preventing unnecessary absence or other abuse of either non-occupational or occupational illness or injury leave privileges. No employee shall be reprimanded for the legitimate use of sick and/or injury leave. An employee whose dependability record is unsatisfactory shall be so advised. furnished a copy of his record and given a reasonable opportunity for improvement before any disciplinary action is taken.

Article XXI, General and Miscellaneous

I. The right to hire; promote; discharge or discipline for cause, and to maintain discipline and efficiency of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. In addition, it is understood and agreed that the routes to be flown; the equipment to be used; the location of plants, hangars, facilities, stations and offices; the scheduling of airplanes; the scheduling of overhaul, repair and servicing of equipment; the methods to be followed in the overhaul, repair and servicing of airplanes are the sole and exclusive function and responsibility of the Employer.

UNION'S POSITION

The Union contends that the discipline of the Employee, a Level One Report, was not just and proper. The Union also contends the issuance of the Level One Report is a misuse of the negotiated Non-Punitive Disciplinary Procedure. The Union asserts that this misuse puts this

procedure into jeopardy, and it's a mistake the Union would like to correct. The decision making process in the instant dispute was capricious and dangerous to good labor management relations. The Union is not in the market to make the Employer follow a certain guideline for all cases. The Union agrees that dependability records have their own qualities and idiosyncrasies and each case should be considered on its own merits.

In the instant dispute the Employer methodology is way out of line. The Employer has forced the Union to fall back on a precedent setting guideline that is found in System Board Case No.48625-DEN - Canady - referred to by both the Employer and Union as the Canady Case. The Union submits that the charge of "failure to maintain an acceptable record of dependability" was never properly substantiated by the Employer in the subject case. Therefore, it is the Union's position that the Employee's record as presented and established was a satisfactory record. The Employee is only exercising his contractual rights of sick leave, as delineated in Article XIV, Sick Leave, of the agreement.

EMPLOYER'S POSITION

The Employer contends that the Employee was properly disciplined for a violation of Rule No 32 of the Employer's Rules of Conduct. The Employer has an established practice of counseling and progressively disciplining employees who fail to meet basic attendance expectations. The Employee was counseled on August 12, 1991 concerning his unsatisfactory dependability record. Subsequent to that counseling, his attendance record continued in a similar pattern over a seven month period. In addition, the Employee had established a pattern of calling in sick on weekends and/or in conjunction with his regular days off. The Employee's attendance record is unacceptable in our schedule driven work environment. The Employee's attendance record was

evaluated on reasonable criteria, which have been established and utilized by the Employer across our system.

DISCUSSION AND OPINION

The thrust of the Union's assertions is two fold, in that the Employer did not have cause to penalize the Employee when he utilized a contractual right, sick leave, and there exists a binding precedent affecting absences, commonly referred to as the Canady Case. The Canady case cited by the Union refers to the question of excess absences. The Union relies upon the arbitrator's conclusion that ten absences within a twelve month period are not excessive. The Employer disputes the viability of the Canady case and maintains that, in all circumstances affecting absences; each is judiciously measured and considered case by case.

The issuance of a Level One discipline was initiated after the Employer had reviewed the Employee's pattern of absences. It then determined that the pattern of absences occurred at a time when the Employee had enjoyed a weekend off or one abutting a regular day off. The Employer asserts that this pattern of absence is suspect, and a happenstance that is unacceptable to a schedule driven industry. To support this representation the Employer alluded to prior arbitral awards that sustained the Employer's present action. The cited arbitral awards sustained the discipline of employees whose pattern of absences abutted weekends off and/or regular days off. The grieving of counseling notice, a non disciplinary matter and/or a 14-G notice, traditionally have not been grieved. The status of a counseling notice was clarified in a letter dated November 2, 1989, authored by Person 4, Director of Employees Relations. Person 4 acknowledged in his letter that if an employee, received a Level One notice, the entire matter of absences, including 14-G notices, may be revisited.

It is not refuted that the issuance of the Level One discipline notice was triggered by what the Employer considers an unacceptable pattern of absences. This unacceptable pattern of absences spawned the issuance of the G-14 notice and the present Level One disciplinary notice. The Employee's supervisor acknowledged that he did not question the validity of the Employee's claim of illness as the cause of the absences. However, the supervisor retreated to a position that his actions were motivated by the suspected pattern of absences. The suspect pattern of absence spawned the discipline. The record does not contain independent inquiry as to the propriety of each claim of illness, nor was it suggested that the suspected absences required verification.

Article XIV provides for non occupational sick leave predicated upon an employee's length of service. Paragraph G. obligates the employee to a presence of honesty and truthfulness in the use of sick leave. It is noted that the language of the controlling paragraph states that "no employee shall be reprimanded for the legitimate use of sick and/or injury leaves". The paragraph later addresses those instances of a dependability record that is considered unsatisfactory and recognizes those instances directing the issuance of discipline.

In weighing the language of Paragraph 14-G one is persuaded by the construction of the paragraph that the language exists to convey to all an awareness for honesty and truthfulness. To reinforce this characteristic the paragraph alludes to a consequence for unsatisfactory dependability. One must presume that in the absence of honesty and truthfulness, management may act accordingly to correct such abuse. If abuse is evident, a circumstance that may be difficult to discern, management may exercise its right to discipline. However, the language disallows reprimands, a method of discipline, until the offending employee is afforded an opportunity for improvement.

If employees are granted an entitlement where the possibility of abuse is ever present, such a happenstance does not bestow upon management a lesser measure of commitment in assessing the honesty and/or truthfulness of an employee. Even in those circumstances when the Employer perceives as an alleged abuse of an entitlement. To make a valid claim of abuse, something other than a cursory scrutiny of document needs to be present.

Arbitrators are reluctant to supplant the judgment upon management in matters of discipline unless mitigating, or extenuating circumstances exist, or it is found that management acted in a capriciousness or arbitrary manner. In the instant grievance, I find such circumstance. I am of the belief that the Employer, in the instant grievance, acted in an arbitrary manner. The issuance of discipline for an alleged unacceptable pattern of absence, and the acceptance of the sick leave absences as legitimate is inconsistent with the language of Article XLV (G). In addition, the lack of a meaningful inquiry to measure the question of honesty and/or truthfulness is also inconsistent with the language of said Article XIV, (G) of the agreement. A supervisor acknowledged the propriety of each sick leave day and such a validation complies with the required honesty and truthfulness articulated in the controlling language.

The Employer argued that they review each case presented on a case by case basis. The Employer also acknowledged the Employee's sick leaves as being legitimate. If the Employee was honest/truthful, and the Employer did not have cause to challenge the propriety of the absence, clearly the claim submitted must be of sick leave and/or injury leave.

Sick leave is a contractual entitlement that is afforded to employees who incur a legitimate non occupational illness. If a circumstance exists otherwise, the possible consequence of discipline for the offender exists. In the absence of reasonable circumstance to the contrary, an employee

has a right to avail themselves to the provisions of Article XIV, when a legitimate need for sick leave is present.

This arbitrator is of the belief that the Employer, in the instant grievance, failed to demonstrate to this that the Employee was either less than honest and/or truthful in availing himself to sick leave as provided in Article XIV of the agreement.

In consideration of all the facts, evidence and testimony adduced at the hearing, I find:

AWARD

The discipline of the Employee was not just and proper.

The grievance is sustained