

### **Horowitz #3**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

This arbitration arises pursuant to the 1994-2000 Mechanics' Agreement ("Agreement") between the Employer the Union. The parties concur the grievance in question has been processed pursuant to the provisions of Article XVIII of the Agreement and the matters at issue are properly in arbitration before the System Board of Adjustment with Fredric R. Horowitz, as sole neutral arbitrator.

### **MATTERS AT ISSUE**

Grievance No. B06771-IADMK presents the following issues to be decided in arbitration:

1. Whether there was just cause to terminate Employee on June 11, 1996?
2. If not, what should be the remedy?

### **BACKGROUND**

The Employee was hired by the Employer as a Temporary Ramp Serviceman on December 11, 1989. Thereafter, he was promoted to a permanent Cabin Service position. Prior to the events at issue in this proceeding, the Employee was issued a Level 4 disciplinary letter on May 6, 1996 for violation of Employer rules related to unwelcome sexual misconduct on the job.

On Tuesday, June 4, 1996, the Employee was working a shift from 11:15 a.m. to 7:45 p.m. at Airport 1. At approximately 3:45 p.m., Manager of Ramp Operations Person 1 was told by a

pilot that a ground employee was asleep in the Flight Operations Quiet Room. Person 1 then asked Process Coordinator Person 2 to accompany him to that lounge. Person 1 and Person 2 entered a darkened room and observed an employee sleeping on a lounge chair covered by an Employer blanket. After two minutes, the employee stirred and pulled the blanket from his face. Person 1 and Person 2 then observed this employee to be the Employee in question.

Person 1 queried the Employee concerning his actions. The Employee admitted that he had been sleeping and did not have any assignment in the pilot lounge. Person 1 then instructed the Employee to see Cabin Service Manager Person 3. In his office, Person 3 asked the Employee why he had been asleep and if he was experiencing any problems. The Employee replied that he had a headache and family problems. Person 3 recommended that the Employee visit an Employee Assistance Program representative the next day to determine if there was a medical or other justifiable reason for him sleeping on the job.

The Employee could not get an EAP appointment until Friday, June 7, 1996. Meanwhile, because Person 3 had referred Employee to the EAP rather than initiate disciplinary action, Union stewards Person 4 and Person 5, as well as Employee, assumed that the Employee would not be terminated for this offense. On Monday, June 10, 1996, Person 3 learned EAP had not uncovered any medical or behavioral reason to explain the Employee's behavior. Person 3 thereupon conducted a shift investigation with the Employee and his Union representatives. The Employee was relieved from duty on June 11, 1996 pending further investigation of the incident on June 4, 1996.

On June 24, 1996, an Investigative Review Hearing was conducted. The Employee was terminated effective June 26, 1996 for violating Rule of Conduct No. 25 (sleeping) on June 4,

1996. After the parties were unable to resolve the matter through the steps of the contractual grievance procedure, the dispute was duly appealed to arbitration herein.

For his part, the Employee did not dispute at arbitration that he slept in the pilot lounge while on duty June 4, 1996. The Employee stated he was suffering from a headache and family problems at the time. The Employee also testified there was a woman giving massages in the break room; he received a massage which relaxed him, and this apparently was why he fell asleep in the Flight Operations Quiet Room.

#### **EXCERPTS FROM THE RULES OF CONDUCT (REVISED 10/96)**

Violations of one or more of the following Rules will result in discharge unless mitigating factors are considered applicable:

25. Sleeping or giving the appearance of sleeping during working hours. Level 3 to discharge.

#### **POSITIONS OF THE PARTIES**

The Employer claims there was just cause to discharge the Employee for sleeping on duty. The Employer argues the Employee deliberately secreted himself for the purpose of going to sleep in a room he did not belong without any justification or excuse. The Employer maintains sleeping on the job is a serious offense and that termination was warranted because the Employee received a Level 4 only one month before this misconduct. It is said the fact his manager referred to him to EAP should not have been construed by the Union as a waiver of disciplinary action. Management also contends the subsequent incident of sleeping involving another employee does not establish disparate treatment. For these and other these reasons, the Employer urges the grievance be denied.

In turn, the Union contends just cause for this termination was not established at arbitration. The Union claims disciplinary action should not be permitted to supersede the referral of the matter to EAP by Cabin Service Manager Person 3. It is said that the Employee has been treated differently than other employees at the company who have committed the same offense. In the alternative, the Union argues that the Employee should not have received any discipline higher than Level 3 for this misconduct under the Rules of Conduct. Accordingly, the Union seeks reinstatement with full back pay and benefits for the Employee.

## **OPINION**

The evidence demonstrates the Employee was sleeping on duty in the Flight Operations Quiet Room on June 4, 1996 at around 3:45 p.m. Ramp Operations Manager Person 1 was notified by a pilot that a ground employee was sleeping in the pilot lounge. Person 1 went to the lounge with Process Coordinator Person 2 and observed the Employee for two minutes to be asleep on a lounge chair covered by an Employer blanket in the darkened room. Once awakened, the Employee readily admitted he had been sleeping and that he had no duties in the area. From these facts, a violation of Rule of Conduct No. 25 is established.

Having found the Employee committed the offense charged by the Employer, the inquiry turns to the appropriate disciplinary penalty. Under the Non-Punitive Disciplinary Program, the penalties for various offenses range from a Level 1 to Level 5. Level 1 has the same effect as a written warning, Level 2 a 1-4 day suspension, Level 3 a 5-19 day suspension, Level 4 a 20+ day suspension, and Level 5 is termination.

The normal disciplinary progression under this policy for an employee on Level 4 is to be assessed a Level 5 for any Level 1-5 offense. Rule of Conduct No. 25 prescribes a range from Level 3 to discharge for sleeping on duty. Because the Employee received a Level 4 on May 6, 1996 for unwelcome sexual misconduct on the job, management believed the penalty of termination for the Employee's offense of sleeping on duty was consistent with these policies and the requirements of just cause.

The Union claims the Employer should be prevented from taking disciplinary action against the Employee because Cabin Service Manager Person 3 first referred the case to the EAP. But this argument is not persuasive. The evidence demonstrates Manager Person 3 knew Employee was on a Level 4 and this latest act of misconduct would likely result in his termination. Person 3 therefore took the appropriate precaution to learn if there were any medical or other extenuating circumstances which might mitigate the offense before initiating disciplinary action. When a few days later the inquiry revealed no medical or other excuse for the incident, Person 3 promptly convened the requisite shift investigation. From these facts, it can be seen the efforts to determine if there were any medical or other factors in mitigation of the offense prior to convening the formal disciplinary investigation did not result in any significant delay or prejudice to the Employee.

The Union next asserts that the Employee was the victim of disparate treatment. In support of this contention, the Union cites the case of Ramp Serviceman Person 6 who was found sleeping at 4:45 a.m. on September 5, 1996 in a large shipping container after having been counseled earlier that evening for dozing off on the ramp. Person 6 was first told by supervision he would be only counseled for his conduct, but he was later issued a Level 3 by management to be consistent with the range of penalties contained in the Rules of Conduct for sleeping. Unlike the

Employee who was on a Level 4 at the time he was caught sleeping, Person 6 did not have a record of sustained disciplinary action at the time of the offense. For this reason, the Employer was justified in assessing a more severe progressive penalty against the Employee than Person 6 for sleeping on duty.

Finally, the Union maintains termination was too severe in light of the mitigation in this case.

The Union claims the Employee had family and financial problems which caused him tremendous stress and worry. The Union also cites the Employee's satisfactory record of performance during six years of service. But these factors do not outweigh the aggravating circumstances presented. The record reflects the Employee related the same personal problems to Manager Person 3 in discussions after the events which resulted in the Level 4 one month earlier. At that time, the Employee was urged to seek assistance from EAP, but there is no showing he made any effort to address these problems prior to the incident in question. Rather, the evidence demonstrates the Employee deliberately elected to ignore his job responsibilities the afternoon in question by receiving a massage while on duty, sequestering himself in the pilot lounge, lying down, covering himself with a blanket, and going to sleep. Given the reality this behavior came on the heels of a Level 4, the decision by the Employer to discharge the Employee was warranted. It follows there was just cause for this termination. The grievance is therefore denied.

## **AWARD**

1. There was just cause to terminate Employee on June 11, 1996.
2. The grievance is denied.