Parnell #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

INTRODUCTION

This grievance was presented by the parties for final and binding decision under a collective bargaining agreement (hereinafter the CBA) between the Union and the Employer. The parties stipulated that the matter is arbitrable, properly before this Arbitrator, and the preliminary steps of the grievance procedure have either been met or effectively waived.

A hearing was held on July 30, 1996. Both parties were afforded the opportunity to present evidence and examine witnesses. Both parties agreed not to submit briefs subsequent to the close of the hearing, but rather submitted oral statements of positions immediately upon the conclusion of the evidentiary part of the hearing.

ISSUE

Was the termination of the grievant on November 11th, for just cause? If not, what shall be the remedy?

APPLICABLE CITY 1 POLICY HANDBOOK AND RULES OF CONDUCT

Policy Handbook Time Card

2. It is Employer Policy that each employee punches in/out on their own timecards. The punching in/out of another employee's timecard is not allowed. Employees doing so are

subject to disciplinary action, up to and including dismissal from the services of the Employer.

Rules of Conduct

Category I. (Violations will result in discharge.)

2. Falsification of Employer records of reports, including, but not limited to personal time cards or payroll records and punching another employee's time card or payroll records.

BACKGROUND

Employer is engaged in the business of providing scheduled inter-land flight services for passengers and freight. Among the functions covered by the bargaining unit employees are "upstairs" assignments. These deal with passengers, and the employees are customer service agents. The "downstairs" function involves the loading of baggage and freight onto the aircraft and this is done by terminal agents (commonly known as baggage handlers).

The Employee had been employed by the Employer since October 1989, mostly as a terminal agent at the City 1 Airport. On November 11, 1994, the Employee was working the 4:30 AM to 1:00 PM shift. Person 1 was the manager on duty. At 12:40 PM, Person 1 went looking for two senior customer services agents (Person 2 and Person 3) who were supposed to be monitoring the bag room. Person 1 could not find either, so Person 1 went to the time card rack to see if they had punched out. There, at 1:00 PM, Person 1 observed the Employee punching out three time cards. When asked what he was doing by Person 1, the Employee responded, "What’s the problem?" The Employee had punched out Person 2 and Person 3 as well as himself. Person 1 felt punching out Person 2 and Person 3 was improper. The Employee's "punch out" was legitimate.

Person 1 testified that the Employee acted surprised and stated, "They asked me to punch them out. It happens all the time." The Employee said that the two came in early, so he thought it was okay to punch them out ten minutes early. Person 1 secured the time cards.

The Employee was taken by Person 1 to two other managers, where he repeated what he said. A shop steward was present. The Employee was held out of service for a probable dischargeable offense.

The Employer denied it was a common practice to leave early if an employee had come to work early; working outside shift hours needs approval of management, since overtime must be paid.

The Employer testified that senior agents are in the bargaining unit. They are working supervisors. They come in at 4:30 AM and assign terminal agents to specific flights. They cannot grant time off or prepare employees' work schedules. That is done by management. Seniors are to see that early flights are loaded properly; that is the full extent of their authority. There are generally four seniors to a shift (two upstairs and two downstairs). The two punched out by the Employee's were senior customer service agents.

The Employer acknowledged that employees, including seniors, do punch in early. If they perform work before the start of shift, overtime would have to be paid.

Person 4, Customer Service Manager at City 1 Airport, testified that he has been in Employer Management for 25 years. He directs both ramp and customer service. His primary assignment is the ramp (downstairs). He testified that he covered time cards in classroom training with the policy handbook. He felt a violation of the time card rule was a violation of trust. He has sent out employee reminders on the Rules of Conduct and Person 4 testified that he discussed time cards during shift briefings. The Employer submitted a memo dated October 1, 1994 to all terminal agents stating that employees were not to "play games" with other employees' time cards.

The Union argued that the seniors were the Employee's direct supervisors and he never questioned their order. He had seen seniors come in early and there was no attempt to defraud.

The Employee testified that on November 11, 1995 all flights had been secured (loaded) and other seniors were coming on duty. He believed he was obeying orders and leaving early was normal. The Employee stated that seniors and terminal agents start earlier than 4:30 AM to accommodate the earliest flights. This is true if a large amount of medical or bank supplies need to be loaded.

On November 11, 1995, the Employee testified that he finished loading the plane at Gate 46 at about 12:50 PM. He went to the break room and two senior agents asked him to punch them out. All the planes were loaded and waiting for departure times. That is normal at the end of shift. The Employee was asked to punch them out as they all walked toward the break room. The Employee said others have been asked to punch out seniors. He himself has punched out these seniors before and he has punched out other seniors. Other terminal agents have punched out other terminal agents as well.

Under cross examination, the Employee admitted having the station policy handbook but couldn't remember any shift briefing. The two seniors were at work when the Employee reported in and they discussed work in the load room before starting work. When the Employee punched out Person 2 and Person 3 the work was finished.

The Employee was subject to an investigative hearing on November 29, 1995 and the Employee was terminated as of November 11, 1995 for violation of Rules of Conduct, Category I, paragraph 2. There was a third step appeal hearing on December 19, 1995. The decision dated December 20, 1995 was to sustain the termination. Hence the instant grievance.

POSITION OF THE PARTIES: EMPLOYER POSITION

The Employer first points out that there is no dispute over the fact that the Employee did violate a Category I Rule of Conduct. The two senior agents had left work ten minutes early. The Employee only assumed they came to work early. He did not know when the two senior agents came to work.

The Employer asked if the rule against punching out other employees' time cards is reasonable and the answer is, of course. It is a common rule. The Employer asserts the rule was promulgated and discussion of the rules was covered with the Employee. There was no mixed message from management.

The Employer notes that, after similar misconduct occurred with mechanics trying to catch earlier flights, there was a one-time settlement. A week after that, a mechanic was caught again punching other employees' time cards and was terminated. An arbitrator upheld that termination.

The Employer notes that from examination on the record the Employee knows right from wrong.

The Employer submitted all the Employee's disciplinary reports but withdrew those that had been removed from the employee's record after two years in keeping with Article XVIII, paragraph B of the CBA.

The following disciplinary actions occurred in the last two years:

1) April 12, 1994. Letter of warning: attendance - oversleeping.

2) May 20, 1994. Swapping privileges: suspended for six months due to not coming to work after swapping shifts with another employee.

3) December 20, 1994. Five day suspension stemming from no-show, no-call relating to May 20, 1994 incident.

4) July 18, 1995. Verbal warning for being asleep on a bench in the locker room at 8:41 AM.

The grievance should be denied.

UNION POSITION

The Union argues that the Employee believed the senior agents were his direct supervisors, so he never questioned orders from seniors. He had seen seniors and others come early and he made no attempt to defraud. All the flights had been secured and other seniors were coming in to work.

The Employee thought he was obeying orders since leaving work early was normal.

The Employee did not believe what he did was a violation. What he did was what he was asked to do by seniors.

The Employee felt the seniors had come in early and no one was defrauded. He is the only one who has been terminated.

Any discipline involving the mechanics was not known throughout the terminal agents' area.

The grievance should be sustained.

ARBITRATOR'S ANALYSIS

First, I note that I do not feel it necessary to address every single argument or issue put forth by the advocates. This does not mean I have not considered all the arguments and issues presented. Rather, I choose to speak only to those that have a significant impact on my decision-making process, and I do not comment on those arguments or issues, although considered, that I find superfluous, redundant, or rendered moot by my final decision.

The salient point in this proceeding is the fact that there is hardly any dispute over the facts of the matter. Not only did Manager Person 1 credibly testify that he observed the Employee punch out the time cards of Person 2 and Person 3, who had left, work early, but the Employee readily acknowledged that he had done so. I accept as true that the Employee acted surprised that his

acts were questioned and in turn asked what the problem was. The Employee went on to state that it happened all the time and he had done this same thing before.

Arbitrators function in a manner akin to both juries and judges. As juries, arbitrators are asked to decide whether or not misconduct has taken place. In doing so, arbitrators also are called upon to make a judgment concerning the reasonableness of the rule(s) that allegedly have been violated. In the instant matter, this aspect of the arbitral process is not in dispute. The Employee stated that as he was walking to the break room the two senior customer service agents asked him to punch them out at 1:00 PM. The Employee acknowledged that he assumed they had started work early and admitted he had punched out the two, as well as others, on previous occasions.

During a third step hearing, the Employee acknowledged that he violated the Rules of Conduct, although at the arbitration hearing it was strongly inferred that he was not familiar with Category I, Sub-paragraph 2 as it pertains to punching out another employee's time card. At this point, the Employee stated he did not remember any training or shift briefing by Manager Person 4 specifically related to time cards.

I conclude that, in regard to the question of whether misconduct in the form of violation of a Category I Rule of Conduct took place, the answer is undisputed that it did. Also, I conclude the rule is a reasonable one that has been in effect for many years in a majority of companies using time clocks.

At this point, the arbitrator, following the establishment of guilt, assumes the role of a judge in speaking to the issue of possible mitigation. As Arbitrator David Person 1dman held in Monfort Packing Co., 66 LA 286 (1976):

> . . . the concept of just and sufficient cause mandates not only a determination that the employee was guilty of the infraction, but that the reasons for the discharge were fair and just under the circumstances.

The excuse offered by the Employee for his action centered on his being asked to punch out the two senior agents. As I listened to the Employee, this was a request, not an order. It was casually made while all three were walking towards the break room. The whole argument, that the Employee was following "orders," rests on very shaky ground. The senior agents were fellow union members in the bargaining unit. Their principal function was to direct terminal agents to load up specific flights. Any other authority function, it appears from the record, lay with supervisors. Based on all of the circumstances, I find the Employee was being accommodating to a request.

The Employee believed the two senior agents came in early and were entitled to punch out early. The Employer is persuasive that this was merely an assumption on the part of the Employee. The two senior agents were present when the Employee came to work and that is the Employee's only firsthand knowledge.

In addition, there is a further assumption that because employees are at the job site before the commencement of a shift, they are also working. However, it is undisputed that while many came to work at varying times before their shifts began, if they actually perform work outside their shift hours they need supervisor approval of paid overtime.

Further, I credit Supervisor Person 1 that the two senior agents had not finished their work for the day. Person 1 credibly testified he had gone looking for them. The two senior agents were supposed to be supervising the bag room. When Person 1 couldn't find them, he went to the time clock to see if they had punched out. There, he encountered the Employee punching out their cards. As I see it, the Employee was incorrect when he said the two senior agents were entitled to leave since they had completed their duties for the shift. I credit Person 1 that this was not the case.

I believe the Employee was fully aware of the Rule of Conduct relating to time cards. I credit Person 4 as discussing this at shift meetings and I am not impressed by the Employee's loss of memory concerning knowledge of this rule.

I cannot find any probative evidence in the record that there was any disparate treatment. Person 1 testified without contradiction that the two senior agents were charged, withheld out of service, and discharged. There was some inference offered that subsequent actions took place but these were only rumors or hearsay. I have given them no weight. In addition, the Employer submitted documentation of a discharged mechanic for essentially the same misconduct.

I have also given consideration to the Employee's work record, as it relates to possible mitigation. In so doing, I give full observance to the CBA limitations on what can be considered. Even so, I find the thought expressed by Arbitrator Leonard Oppenheim as quoted in Fairweather, Practice and Procedure in Labor Arbitration, 3rd. ed., p. 258 (1991), to best sum up my point of view:

> Thus a good record may result in mitigation of an offense and a bad record may aggravate it. An employee's past record may often be an important factor in the determination of a proper penalty for an offense.

As I view the Employee's above-noted disciplinary record, I find nothing there that would serve as a mitigation factor.

Based on the above circumstances, I conclude that the Employer was neither arbitrary nor inconsistent in its decision to implement the penalty of discharge for the acknowledged misconduct. That leaves me to consider finally whether there is any argument for corrective discipline less than discharge.

The problem I have with this is two-fold. One, the offense of punching out other employees' time cards is a serious one. It is a Category I offense, "violations will result in discharge." That is clear

and unambiguous language (see Elkouri and Elkouri, How Arbitration Works, 4th Ed., pp. 672-673, [19851).

Far more troublesome when considering possible rehabilitative discipline is the Employee's own testimonial attitude towards his misconduct. It appears clear to me that the Employee still exhibits the same outlook that he did when initially confronted by Person 1. It can best be summed up by a "what's the big problem" position.

Far from showing any remorse, regret, any acknowledgment of wrong doing, or any vow to not repeat the misconduct, I conclude the Employee still is of the mindset that he did nothing wrong. Even the "I was only following orders" and "everybody does it" arguments appear to be just a veneer on the basic contention that the Employee never did anything that constituted a punishable offense.

I conclude that under other circumstances this is a case that could easily call for lesser discipline or perhaps a "last chance" award, but in light of the Employee's lack of any acknowledgment of wrongdoing; I am reluctantly forced to conclude also that such an award would be futile or at least inappropriate under the circumstances.

I must compliment the Union advocate on an outstanding effort to place the Employee's position in the best possible light. I cannot think of what else the Union could have done to better its presentation. However, in view of my own conclusions, based entirely on the record and especially in close consideration of the Employee's testimony, I determine that the Employer has not acted capriciously or in a manner beyond its discretion in this matter. In consideration of all the circumstances before me, I conclude that the Employer has met its burden and the grievance must be denied.

AWARD

For the reasons and grounds hereinabove stated, the Grievance is denied.