

Parnell #3

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

ARBITRATION DECISION AND AWARD

INTRODUCTION

This grievance was presented by the parties for final and binding decision under a current collective bargaining agreement (hereinafter the CBA) between the Union and the Employer.

The record indicates the matter is arbitrable and properly before this Arbitrator for disposition.

The record also indicates, and no parties contend otherwise, that all the preliminary steps in the grievance process have either been complied with or effectively waived.

A hearing was held on March 4, 1993 at the Employer's premises. Testimony was taken from four witnesses and documentary exhibits were introduced. The parties agreed they did not need a transcript requiring a court reporter. The Arbitrator's notes constitute the official minutes of the hearing. Both parties agreed to submit a written statement of position that would reflect solely their respective argumentation and not a review of the entire proceedings. Both parties agreed the above submission would take place prior to the Arbitrator's rendering of a decision. Both parties have complied with their submissions.

ISSUE

Did the Employer violate the CBA, Article 1, Paragraph E, when it terminated the Employee on August 3, 1992 without just cause? If so, what shall be the remedy?

APPLICABLE CONTRACT PROVISIONS AND HOUSE RULES

ARTICLE I. PURPOSE OF AGREEMENT

E. The right to hire, promote, discharge or discipline for cause in accordance with the terms of this Agreement and to maintain discipline of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. 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; and all other matters of policy and management are the exclusive function and responsibility of the Employer, providing such matters are not in conflict with the terms of the Agreement.

HOUSE RULES

C. Causes of Discipline or Discharge

CATEGORY I: (Violations will result in discharge.)

1. Unauthorized (actual or attempted) possession, removal, or purposeful misplacement of any Employer property including records, confidential information, or property of employees or customers.
2. Falsification of Employer records or reports, including, but not limited to personal time cards or payroll records and punching another employee's time card or payroll records.
3. Falsely claiming sick leave pay, occupational injury leave pay, other paid leave, or Worker's Compensation benefits.
4. Furnishing false information concerning absence from work.
5. Drinking or being under the influence of any alcoholic beverage or intoxicant while on duty or on Employer property at any time.
6. While on duty or on Employer property at any time possessing, using, receiving, selling, distributing or being under the influence of medically unauthorized or illegal drugs.
7. Refusing to cooperate when ordered to provide information, including written statements to the Employer during an investigation.
8. Refusing to permit a search of your person or property during the course of an Employer investigation.
9. Misuse of pass or reduced fare travel benefits by an employee or the employee's family members or eligible dependents.

10. Deliberate destruction or serious damage or defacement of Employer property or the property of others, or property for which the Employer bears responsibility.

11. Unauthorized possession of firearms, explosives, or other weapons while on duty or on Employer property at any time.

12. Transporting on Employer aircraft prohibited or illegal articles or unauthorized transportation of goods or materials.

13. Defrauding or attempting to defraud the Employer.

14. Being convicted of a crime which bears a substantial relationship to an employee's position and/or results in the employee's inability to be covered by a fidelity bond.

15. Repeated violations of Employer rules.

16. Fighting, threatening bodily injury towards supervisors, employees, passengers, vendors, officers or officials of the Employer or any other individual.

17. Any deliberate or concerted slow down, retardation or other interference with production.

18. Racial, sexual or any other type of harassment of employees, customers or any other individual.

19. Insubordination.

CATEGORY II: (Violations will result in disciplinary action, up to and including discharge.)

1. While on duty, or on Employer property at any time in the possession of alcoholic beverages or any intoxicant.

2. Refusing or failing to comply with a direct order of a Supervisor or other person in authority.

3. Restricting work output or encouraging others to do so.

4. Sleeping or giving the appearance of sleeping during working hours.

5. Failing to promptly report work-related accidents, property damage or injuries.

6. Anyone having knowledge of or being witness to an accident/incident shall, if requested, give full and truthful testimony pertaining to the incident/accident.

7. Wearing the Employer uniform while drinking or giving the appearance of drinking alcoholic beverages or being in a liquor store or an establishment which has as its primary purpose the dispensing of such beverages.
8. Gambling on Employer property.
9. Any negligent or unsafe action which results in, or has the potential of resulting in, injury to the employee or others, or damage to Employer property or the property of others.
10. Failure to maintain an acceptable level of dependability or comply with the Employer's Dependability Policy.
11. Unauthorized absence from work or leaving the work area without permission.
12. Failure to properly notify the Employer of absence.
13. Failure to do job assignment, careless workmanship, or unacceptable job performance.
14. Wasting time, loafing or loitering on Employer premises, while on Employer business, or during working hours.
15. Making or publishing false, vicious, or malicious statements concerning any employee, Supervisor, or the Employer.
16. Misconduct of employees and/or their eligible spouses/dependents while traveling or attempting to travel on a pass or reduced fare.
17. Solicitations or distribution of petitions, handbills, or other literature, written or printed matter of any kind on Employer property without the permission of management.
18. Unauthorized use or operation of Employer equipment, machines, or tools.
19. Failure to comply with security regulations.
20. Misusing or permitting others to misuse the Employer's computer equipment — including computers, terminals, printers, and related support hardware.
21. Misusing, destroying, or distorting computer information data or instruction codes.

BACKGROUND

The Employee was hired on August 7, 1989 as a part time Reservations Agent and on January 7, 1990 she bid for and was placed in the position of Customer Service Agent, Cargo (Freight) Department.

From the time of her assuming her new job until her termination on August 3, 1992, the Employee received disciplinary warnings concerning her attendance. From 1/17/91 to 6/30/91, The Employee was on sick leave for 8 days. She had received a verbal warning on January 16, 1991 and a written warning on July 10, 1991. On June 1, 1992, the Employee received a second written warning for the period 9/4/91 through 5/28/92. During this period, she was on sick leave 15 days and tardy 8 times. This warning carried the caution that further incidents will result in discipline up to and including termination. The record shows the sick leave was often also in conjunction with her days off.

About June 25, 1992, the Employee's supervisor, Person 1, was told by a Customer Service Agent, Person 2, that he (Person 2) had overheard the Employee telling others she had falsified a sick leave claim. Person 1 investigated the Employee's sick leave claims—specifically one claiming an "ear infection." Director Person 3, when informed, contacted a Doctor 1. Doctor 1 confirmed that he did not see the Employee on the date as noted on the Employer sick leave form, June 27, 1991. Further, Doctor 1 did not sign the disability statement the Employee had submitted for that day. Doctor 1's confirmation letter was received by Person 3 on July 20, 1992. On July 22, 1992, the Employee was held out of service pending further investigation.

Person 3 conducted an investigative hearing on July 29, 1992 and decided to terminate the Employee for falsifying a sick leave claim, which had been paid, and which constituted a

Category I violation of the House Rules. At the hearing, the minutes show Person 2 had stated the Employee had said she removed a pad of Disability Certificates from Doctor 1's office and used the slips to certify sick leave. The notation "ear infection" enabled the Employer to pinpoint what it termed a fraudulent sick leave claim.

The Union argued that the termination was in retribution for the Employee's civil rights violation claim. The Employee claimed retaliation for an application for occupational leave for harassment in June 1992. The Employee also admitted submitting her sick leave application for June 27, 1992. She refused to answer if the Disability Certificate was false; but asserted it came from Doctor 1.

The hearing did note the investigation of the sick leave claim commenced before the Employee's complaint to the Civil Rights Commission since the Employer was not notified of the Complaint by the Commission until July 22, 1992. In addition, the State Unemployment Compensation Division considered these facts and still denied her compensation claim.

There was an appeal to the third step of the grievance process with a hearing on August 28, 1992. At this hearing, the Employee now admitted falsifying the Disability Certificate. The Employee also gave instances of other employees who allegedly violated House Rules without discipline. These instances were investigated, according to management, and found to be without merit or evidentiary foundation. The termination was upheld.

Regarding the Human Rights Commission charge filed on July 17, 1992, the Employee does allege sexual harassment up to May 23, 1992. There was also the claim she was denied forklift equipment without reason and the attendance warnings were retaliatory. The Complaint named a Senior Customer Service Agent, Person 4, as the sexual harasser.

At the arbitration hearing, Person 1 gave testimony on the claims of disparate treatment. In one incident of alleged unpunished employees drinking in the Employer parking area, management did go into the parking lot when informed such was taking place. While there appeared evidence of beer cans, no one was seen actually drinking. However, cautionary letters were sent to the employees that had been seen there. Person 3 investigated a claim of theft of a cellular telephone against an employee. The employee had a purchase receipt and there was no claim of theft from the carrier. Other claims of drinking on the job failed when no evidence was offered to support them. A claim of sick leave by another employee who was attending a concert was made, but no date was furnished and the employee did have a sick leave slip from a doctor for about that time. An allegation against another employee for falsely claiming sick leave failed when the employee had come forward voluntarily stating she had been stranded on the mainland, and no sick leave claim was submitted.

Regarding the sexual harassment, the Employee apparently never raised the forklift issue with non-bargaining unit management such as Person 3. The Employee also canceled a meeting with Person 3 concerning Person 4.

The Employee testified when she complained to a supervisor about workload, both she and the supervisor were counseled about bickering. The Employee now testified she was the subject of obscene remarks by Person 4 in January 1992. This issue was raised with Person 1 who promised to speak to Person 4. While it is unclear from the record when the Employee voiced her complaint to management, on May 29, 1992, management circulated a memorandum to all cargo employees stating use of language of a sexual nature is subject to discharge.

The Employee at the arbitration hearing testified she did have "pilots" fill out her doctor's slip. She says they made up the "ear infection" excuse. She could not remember any names and did not know who actually signed the slip. She also stated the wording on the Civil Rights charge was that of a Commission employee.

Testimony was submitted by a Union witness, Person 5, a Senior Customer Agent. Her testimony consisted mainly of what she had been told by others.

POSITION OF THE PARTIES:

EMPLOYER POSITION

The Employer first asserts that the Employee has been afforded all her rights under the CBA. She knew of the rules against knowingly falsifying a doctor's disability certificate in order to defraud the Employer. The Employee at first denied such a falsification. Then she admitted it.

The Union's defense is founded on a claim of disparate treatment, yet the record shows no hard evidence of such. Each claim resulted in an investigation. All the employees who committed Category I and II violations were disciplined. Some violations had mitigating circumstances and penalties less than termination were administered. Given the Employee's admission, short service and poor attendance, the Employer had sufficient reason to terminate her.

The Employer goes on to question the Employee's credibility. The Employee's testimony about an anonymous pilot filling out the Disability Certificate with no input from the Employee is ludicrous. All of the Employee's claims of different treatment were demonstrably false and there was no evidence submitted by the Union concerning any mitigating circumstances. No other claim concerns false disability certificates.

If the Employer had earlier notice of her falsification, it would have acted sooner. Her actions were never condoned.

The filing of a Civil Rights charge had nothing to do with the Employee's termination. It was her falsification and overall record. There were two arbitrations where the Employer was upheld for terminating employees after receiving false sick leave claims.

The Employer has complied with Article I, paragraph E of the CBA in that it had good cause to terminate. The case has been proven beyond a reasonable doubt that the Employee, after first denying, did admit to deliberate misbehavior.

The Employee did receive a fair hearing and there is no evidence that shows Person 3 was not impartial.

The investigation commenced before any knowledge of the Employee's filing of a Civil Rights charge and the Employer's actions were independent of that charge. The falsification was first brought to the Employer's attention 26 days before the charge. Any delay in the termination was the result of the investigative and grievance process. There was no evidence that the termination was retaliatory. None of the claims of misconduct by other employees were based on sound evidence. Moreover, all claims were investigated and found to be false or incomplete. Even Person 5 stated she only heard of such allegations from third parties.

The Union implies all Category I violations should result in discharge, but sound labor relations requires a complete investigation and review of circumstances before imposing discipline. There was no evidence presented to show falsification in order to obtain paid sick leave has been treated any differently. There have been no suspensions for such conduct and there is no basis for leniency when dealing with a thief. The lack of candor by the Employee and past history indicate

no mitigating circumstances. The Employer concludes they have met their burden of proof and there is sufficient evidence to justify termination.

UNION POSITION

The Union notes that the Employee asserts she was singled out because of her Civil Rights charge. She does not deny she falsified her doctor's slip.

As for disparate treatment, the Union asserted an employee called in sick for two days while at a resort. Person 6 left the premises before his shift was completed and Person 2 punched out for him. There was no discipline despite management's knowledge. Person 4 has not been terminated for sexual harassment. Person 7 used travel benefits the same day she took sick leave and Person 8 was intoxicated on the Job and not terminated.

The Union argues the falsification took place a year before termination and management only knew of it because a fellow employee spoke of it. Person 2, was never questioned as to his motivation for turning in the Employee.

The Employer made the Employee subject to investigation about the time the Employee started making complaints about working conditions. Several of her complaints were not investigated and did not lead to action against these fellow employees.

The Union contends Cargo Department managers did not treat the Employee in the same manner as employees who received no punishment.

The Union requests the Arbitrator consider the testimony of Union witnesses and reinstate the Employee.

ARBITRATOR'S ANALYSIS

The Arbitrator has closely read the documentary exhibits, his own notes, and the able briefs from both parties. Both parties, I am sure, are sufficiently familiar with arbitrations to understand that while every item submitted to the record is not discussed, this does not mean it has not been considered. Like most arbitrators, I feel no need for prolonged discussion of matters clearly tangential or without hard probative evidence to support them.

Also, as in most arbitrations, the first matter to be considered is that of credibility. Here, I find the Employee's credibility to be lacking or nonexistent in fundamental areas.

It is hardly in the Employee's favor that she was completely unresponsive to the question of falsification when put to her at the first grievance hearing. Whether it was outright denial is beside the point. She refused to answer and, except in a formal court of law, that draws an adverse inference. Her reticence shows a disturbing lack of candor. I realize the Employee finally, at the third step, admitted the falsification as she probably must have been faced with the overwhelming extensive evidence.

However, after the admission, the Employee presented testimony that I find can only be characterized as absurd and unworthy of belief. I simply cannot fathom how I was expected to accept that anonymous pilots would fill out a doctor's slip with exact date without any input from the Employee. The disclaimer of not knowing who signed the slip that others had filled out boggles the mind. As to the "made up" claim concerning the "ear infection," I passed that without comment.

I gave little weight as to whether the Employee stole a pad of slips from her doctor as portrayed by Person 2, or whether there was an additional blank slip stuck to a legitimate doctor's slip as

claimed by the Employee. This dispute is irrelevant to the issue that the Employee deliberately falsified the slip obtained by any means.

All of this, of course, despite its air of unreality, is beside the point. The Employee knowingly and deliberately turned in a Disability Certification she absolutely knew to be false in order to collect a day's pay. The Employer's characterization is in keeping with well established arbitral determination. That is, simple theft, and theft, except under the most extenuating circumstances, justifies termination. I need not recite a long litany of arbitral citations that stand for the proposition that any deliberate theft destroys the trust that is necessary between employees and their employer.

With that in mind, I turn to the Union's arguments of either mitigation or disparity of treatment. I must note that even a passing familiarity with the Elkouri's basic text makes clear that leniency or clemency is solely the prerogative of management. There is more than a little suggestion in the Union's argument that if all Category I violations do not result in termination, then there is disparate treatment, as in the Employee's case. I reject that out of hand since there can be mitigating circumstances in even Category I violations.

Turning to the disparate treatment, the examples, it seems to me, were met by the Employer in each instance with credible and, most important, factual responses. While the "tit for tat" defense is common in disciplinary arbitrations, it does have its limitations unless the evidence is clear and convincing.

Speaking to the alleged exceptions, I listened closely to Director Person 3 whom I found to be a credible witness. I believe he did investigate each allegation. Apparently Person 6 did leave early, but the Union's claim of no punishment ignores the un-refuted statement that Person 6 received a letter of warning. It may well have been that Person 2 was at the resort when on sick

leave. Given no dates were furnished, and Person 2 had a doctor's slip, the allegation appears unproven. The allegation against Person 7 is simply untrue. It is not disputed that she never actually went on sick leave when stranded on the mainland and she voluntarily acknowledged her actions. The intoxication charge against Person 8 appears to be totally founded on hearsay and is not worthy of discussion.

Speaking of hearsay, I find no serious probative evidence offered in the testimony of Person 5 as it relates to accusations against fellow employees. Person 5 could not even remember the year some events happened. Therefore, I give little or no weight to her testimony about any of the allegations.

I find the allegations of sexual harassment by employee Person 4 much more troublesome. If true, he is guilty of continued despicable conduct and should be subject to immediate termination. The trouble is there is no testimony from Person 4, so I cannot make a ruling on the authenticity of the allegations. Management denied it knew of Person 4's alleged misbehavior. While that is generally a poor defense even if true, without more in the record I cannot make a proper determination.

Further, even if arguably true, although, given my credibility resolution on the Employee and the lack of corroborating evidence, I feel required to question the truthfulness of the claim, this problematical allegation cannot serve to establish disparate treatment without more probative and corroborative evidence. This is a matter for the Civil Rights Commission to determine.

In any event, the Employer correctly points out that the argument of retaliation must fail because of timing. The investigation stemming from the allegation of falsification commenced well before the Employer's knowledge of the Civil Rights charge. I conclude there is no demonstrated nexus between the charge and the investigation.

More to the point, the retribution argument overlooks the most important demonstrated fact. The falsification did take place and no outside factor can insulate the Employee from discipline for her action. Even if the investigation had started after the Employer had knowledge of the charge, the fact of the matter is that falsification was admitted. Even though I find the investigation took place completely independent of the Commission charge, the Employer's right to discipline would still stand, given the nature of the offense.

In viewing the record as a whole, I find no mitigating circumstances that would justify my substituting my judgment as to the penalty imposed by management. The Employee's job tenure was short and her attendance record was sufficiently poor to justify the verbal and written warnings. The Employer's offering into evidence of past arbitrations supports the contention that there was consistency in how the Employer dealt with sick leave abuse. The Employer's investigation afforded the Employee full industrial due process and I found no probative evidence in the record of prejudice on the part of Person 3.

In consideration of the entire record before me, I find that the Employer's penalty of discharge was not capricious or arbitrary according to well established arbitral standards. Rather, I conclude the Employee admitted knowing and deliberate falsification of her Disability Certificate and its submission for sick leave pay gave the Employer just cause to terminate her. Therefore, I conclude the record is without sufficient evidence to mitigate this action.

AWARD

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