BEFORE

WILLIAM H. LEMONS

ARBITRATOR

In the Matter of the Arbitration between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	**Case No. ATL-P-1647/14**
	)	
and	)	
	)	
Transport Workers Union of America, AFL-CIO	)	**Termination –** [redacted]
Air Transport Division, Local 555	)	
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	

OPINION AND AWARD OF THE ARBITRATOR

February 13, 2015

ARBITRATION AWARD

In the Matter of:

Southwest Airlines Company
Dallas, Texas

and

Termination – [redacted]

Transport Workers Union of
America, Local 555

APPEARANCES:

For the Company:	Amit K. Misra, Esq. **THE MISRA LEGAL GROUP**
For the Union:	Brian Smith Grievance Specialist TWU Local 555
IMPARTIAL ARBITRATOR:	William H. Lemons **WILLIAM H. LEMONS, P.C.** 4040 Broadway, Suite 616 San Antonio, Texas 78209

By the terms of the collective bargaining agreement (Jt.Ex. 1) between Southwest Airlines Company, hereinafter referred to as the "Company," and TWU Local 555, Transport Workers Union of America, AFL-CIO, hereinafter referred to as the "Union," William H. Lemons of San Antonio, Texas, was selected by the parties to serve as impartial arbitrator (Jt.Ex. 2). A hearing was held at the Wyndham Dallas Love Field, 3300 W. Mockingbird Road, Dallas, Texas, on November 20, 2014. In addition to the appearances noted above, several other party representatives attended the arbitration, as noted in the Official Record. The "Rule" was invoked and witnesses excluded during other witness testimony. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral

arguments, and did so very ably. In all, the Company introduced ten exhibits and the Union seven. These included several photographs demonstrating the nature of the impact to the aircraft, and the gate areas at Atlanta in proximity to Gates D-1 and D-3 in the D Concourse, portraying how those areas might have looked on the date and time in question. I have examined each carefully. Post-Hearing Briefs were filed (I received the Union's Post-Hearing Brief on December 8, 2014) and cross-exchanged on January 9, 2015, and these proceedings were declared closed on that date.

ISSUE

Was the Grievant, [redacted] terminated for just cause? If not, what shall be the remedy? The parties stipulated to this issue, and stipulated that there were no time-frame or process issues and that this matter was properly before me for a final and binding decision (TR. P. 8).

PROVISIONS OF THE LABOR AGREEMENT

Article 2 – Scope of Agreement

> C. **Reasonable Work Rules.** Employees covered by this agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

* * *

Article Five – Classifications

Section One
Ramp Agent/Provisioning Agent

A. Loads, unloads, services, guides, and directs company aircraft.

Article 17 – Safety and Health

E. **Safety Reporting Requirement**. The Company and the Union agree that the safe operation and condition of equipment shall be maintained. Employees shall promptly report malfunctioning and/or inoperative tools or equipment to the Company, who shall cause such tools or equipment to be inspected and, if appropriate, withdrawn from service until the necessary repairs are made and documented by the Company.

* * *

Article 20 – Grievance/System Board/Arbitration

Discharge and Discipline
Section One
Procedures

A. **Purpose**. No employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

L. **Interpretation/Application of Agreement**. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

14. Arbitration/Function and Jurisdiction. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

OTHER PERTINENT INFORMATION

GROUND OPERATIONS EMPLOYEE HANDBOOK
Ground Operations – Basic Principles

3.2 Basic Principles of Conduct

Each Employee is expected to be familiar with and adhere to all Company policies and procedures. Any violation of the following will be grounds for disciplinary action. Discipline may range from a reprimand to discharge, depending on the particular violation and the circumstances. The following list is meant to be representative only, and in no way is it intended to be a complete list of all violations of our Basic Principles of Conduct:

12. Abuse or destruction of Company property. Converting to your own use, including sale or purchase of any Company property from the premises without proper approval of the Company.

14. Performing your job in a careless, negligent, or unsatisfactory manner.

16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.

28. Failure to comply with safety rules or regulations.

(Co. Ex. 10)

STATEMENT OF FACTS

[redacted] began his employment with AirTran on December 8, 1998, and became employed by the Company as a result of the merger. He had been working in the Provisioning Department in Atlanta (ATL) since March, 2014. On the day in question, May 7, 2014, he was working as a Provo Driver, and had worked three prior flights before the incident. The Grievant says he did a walk-around, and noticed that the preferred exit route (backing out towards the terminal) was not possible due to the congestion of so many baggage carts staged in the immediate area. He claims he tried to get help over the radio, as he had attempted with prior flights, but

received no response either then or earlier. Deciding to try it as best he could on his own, he backed up, got out to look around, then got back into his Truck 2 and proceeded to leave the area.

The situation at D Concourse, and particularly Gates D-1 and D-3 in Atlanta ("ATL"), is a little unusual – "*in Atlanta, we're like no other station*" (TR. P. 18). When the Grievant was informed of the incident, he submitted a written statement (Co. Ex. 4). The damage to the aircraft is portrayed in Co. Ex. 5, collectively. Apparently, the Grievant was not suspended, and maintains that he received retraining on the Provo policies with videos the next day. There is no indication in the record of any previous discipline, or that the Grievant's work record was not satisfactory.

On July 23, 2014, following a fact-finding meeting on July 18, 2014, the Grievant was given a letter of termination. In effect, based upon its investigation, the Company concluded that the Grievant's intentional backing towards the wing of an aircraft without a Guide Agent, which it asserts was an intentional violation of established Safety guidelines, resulted in damage to both aircraft and equipment. The Company maintains that the Grievant's actions violated the Company's Ground Operations Basic Principles of Conduct ("BPOC"), in the following particulars:

12. Abuse or destruction of Company property.

14. Performing your job in a careless, negligent, or unsatisfactory manner.

16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.

28. Failure to comply with safety rules or regulations.

POSITION OF THE COMPANY

I summarize the Company's position when I say that it feels this is not only a case about carelessness, but more importantly, "failure to immediately report to [the Grievant's] Supervisor

an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property." The Company is convinced that the Grievant knew, or should have known, of his contact with the aircraft at Gate D-3, and it was his failure to report that incident that resulted in his termination. After all, says the Company, the Grievant did admit that his truck caused damage to the Gate D-3 aircraft (Co. Ex. 4). Evidence indicates that the Grievant had been trained on Forward Galley Back-Off Procedures (Co. Ex. 2), but he also admitted he routinely failed to follow those procedures. He often backed his truck off toward adjacent aircraft and routinely came too close to those aircraft. On the day in question, May 7, 2014, the Grievant failed to wait for the congestion to clear and after verifying how close he was to the aircraft, tried to snake his way to the clear anyway. Relying on the Agent X decision (Southwest Airlines, TWU-Agent X Discharge, Case No. LAS-P-0659/06 (May 16, 2006) (Arb. Jennings) (Tab A to the Company's Post-Hearing Brief), the Company maintains that it can establish not only just cause, but consistency in treatment.

In conclusion, the Company maintains that it has met its burden of proof to show that management carefully investigated the incident, that the Grievant was disciplined for "just cause" and that no disparate treatment has been demonstrated. Therefore, the disciplinary action should be upheld and the grievance denied in its entirety.

POSITION OF THE UNION

The Union explains that, in the first place, the Company did not conduct a fair and complete investigation of exactly what happened that day. That had it done so, it would have learned from actual witnesses (perhaps the pilot of the B-717) that the Grievant did carefully try to weave his way around the maze that existed in those congested gate areas. That, in fact, the Grievant was not negligent, and that he would have reported the incident had he been aware that he

had scraped the aircraft. The Grievant did perform a walk-around, but soon realized that the preferred exit strategy was not an option due to the congested baggage and other equipment in the area. The Union maintains that either due to inadequate staffing or inattentiveness, or both, he received absolutely no reply to his call for help on his radio. He did the best that he could because he was left to handle things on his own. Notwithstanding that the Grievant was not aware of the slight impact with the B-717, and there is no evidence to the contrary, the labor relations group in Dallas ordered the Grievant's termination. According to the Union, the Company did not show that the Grievant violated any of the BPOC in the manner alleged, much less BPOC 16, which is the real reason he was fired. The Union asks that the grievance be sustained.

OPINION OF THE ARBITRATOR

Both parties were well represented in this dispute and presented persuasive arguments. The excellent briefs submitted by each party were most helpful in fashioning my decision. [redacted] played the cards he was dealt as well as anyone could. He just didn't have a very good hand. In the final analysis, my determination is based upon a careful and meticulous analysis of what the Company's witnesses could testify they knew about the alleged actions of the Grievant, and their admissions as to what, in fact, they did not know and could not prove. As described hereinafter, this Arbitrator has determined that the Company did not have just cause to discipline the Grievant. To demonstrate just cause, the Company must first prove the guilt or wrongdoing, prove that it observed basic due process in administering discipline and then show the imposed penalty was appropriate. Let me explain why it cannot meet this burden.

I point out initially that many arbitrators maintain that an employer should conduct "a careful and unbiased investigation of the charge" that leads to "the conclusion that sufficiently

sound reasons exist to discipline the employee *before taking disciplinary action."*[1] While many authorities do not require that the investigation be exhaustive, or that every conceivable witness be interviewed, when an investigation is found to be inadequate, many arbitrators conclude that the just cause standard has not been met.[2] As one arbitrator said:

> *There is an inherent unfairness in discharging employees first, then determining whether they deserve it. The action, once taken, loads the scales with a desire to justify, and short of arbitration, the burden is put on the employee and the Union to persuade the Company that the employee is entitled to his job back.*[3]

See, for example, Brand, N. and Biren, M, *Discipline and Discharge in Arbitration,* at pp. 41-62 (ABA, 2008 – Second Edition).

As I have stated in prior decisions, any determination of *just cause* requires me to make two determinations and answer one visceral question. Was the employee guilty of misconduct warranting discharge? If so, was the discipline imposed a reasonable penalty under the circumstances of the case? Once the Company makes out a *prima facie* case, the Union must plead and prove mitigating factors such as seniority, good work record, lack of notice of rules, disparate treatment, etc. The underlying question: Did the Grievant get a *fair shake?*[4]

I think he did not. It is my conclusion that the Company did not sustain its burden of proof under even the traditional burden of showing by a preponderance of the evidence just cause for the termination. Let me explain.

Evidence of Guilt. I have carefully considered all the testimony and the evidence, and it is my profound belief that the Grievant did not realize that he had scraped the wing of the aircraft in question. Provisioning Supervisor Steven Carnegie's statement (Co. Ex. 1) does not change any of this. The Grievant's handwritten statement (Co. Ex. 4) does not affect my analysis. The

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[1] *Grace Indus., Inc.,* 109 LA 119, 123 (Knott, 1993); *Amoco Chem. Corp.,* 70 LA 504 (Helburn, 1978).
[2] *Penn Window Co.,* 120 LA 298, 305 (Dissen, 2004); *Grief Bros. Cooperage Corp.,* 42 LA 555 (Daugherty, 1964).
[3] *Aerosol Techniques, Inc.,* 48 LA 1278, 1279-80 (Summers, 1967).
[4] Southwest Airlines and TWU Local 555: Agent Y Grievance (Hill, 2012) (Exhibit 1 to the Company's Post-Hearing Brief); *Ritchie Industries, Inc.,* 74 LA 650, 655 (Roberts, 1980).

Company's attempt to say now that he *admitted* that his truck struck the aircraft is too little, too late. I feel that what the Grievant said was more like "well, if you say that I did, and we can see a scrape, then I must have."[5] But is crystal clear to this Arbitrator that he did not realize it at the time. As Mr. Camp testified, the Grievant's failure to immediately report the incident is the real reason he was terminated (TR. P. 49 and P. 100).

Company Attorney Misra valiantly tried to turn this case into one where negligence was the key – that the Grievant would still have been terminated even had he immediately reported the incident. The facts do not support that, and prior instances of discipline at this property do not bear that out. But there is yet another fundable problem with that theory.

There are three doctrines in tort law called "unavoidable accident," "inherently dangerous condition" and "proportionate responsibility." At or around the time of this incident, I flew from Atlanta on my way home to San Antonio. I observed the gate situation, and the crowded conditions there. My personal observations are borne out by Union Exhibits 1 and 2. Due to obsolete facilities, poor planning, or both, the conditions under which Provo Truck drivers must operate are an accident waiting to happen. Under the circumstances, I do not find that the Grievant was performing in a careless or negligent manner. Even if he was, I attribute an equal amount of negligence to the Company in how it operates that gate area and in not having adequate staffing to provide the assistance that the Company now says the Grievant had but to ask for.

I thus conclude that the Company has not shown evidence of guilt in this case by a preponderance of the credible evidence.

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[5] On November 5, 2014, I attended a function in downtown San Antonio, and drove my then-only-two-weeks-old new car. Backing it out in the garage, I felt something and my wife said "did you just hit something?" I said "no," as I really did not think that I had hit anything. It was when I got home that I noticed slight damage to the right rear bumper. I did not realize at the time that I had experienced a reportable incident.

Due Process. As I have intimated earlier, I think that the initial investigation of this matter left a lot to be desired. Nobody talked with the pilots who reported the incident, or with any agents who might have been in a position to observe something. Management gathered up what information it thought it needed, then called labor relations to obtain the blessing needed to terminate the Grievant. While I am not comfortable with sustaining this grievance solely on the basis that a shoddy investigation has led to a violation of due process, and here I don't have to do that, it is a very close question in this case. Suffice it to say that after forty years of experience, I find that where there has been an incomplete or perfunctory investigation, there more often than not is a profound reluctance on the part of the Arbitrator to uphold the discipline. The two go hand in hand. Why? Because, as here, if the matter had been more carefully investigated, it most likely would not have resulted in any discipline at all. Certainly not termination.

So while I have some concerns about fundamental fairness, such do not rise to the level where they would affect my decision about guilt or the appropriateness of the penalty. Because I have found on this record that there was insufficient evidence of guilt, I need not go there.

Appropriate Penalty. Nothing in this decision should be read as my condoning carelessness or authorizing employees to forego the use of procedures set forth in the Provisioning Manual as pertain to "Driving & Ramp Safety." That is not the culture on this property. My decision is limited to these facts, this location, these gates and the evidence before me. I did not endorse Grievant Agent X's statement in his Statement of Grievance where he declared, in effect, *I did not hit anything, so obviously I was not performing my job in a careless, negligent and unsatisfactory manner.* The "no harm, no foul" rule does not work well around hundred ton aircraft filled with people and highly flammable fuel. I also don't condone the apparent view by the Company that, well, you hit something, so you must have been careless and/or negligent.

Because I have found inadequate evidence of guilt, I cannot simply impose another lesser or different penalty on Grievant. The Company's reliance on the [redacted] decision is misplaced. [redacted] had been with the Company about six and one-half years, and only three as a Provisioning Agent. She drove her truck into the wing of an aircraft, and after hitting the aircraft, proceeded to drive underneath the wing, scraping her truck and taking a piece of the wing with her truck. The [redacted] incident delayed seventy-eight passengers on Thanksgiving Day, and the aircraft was out of service for nearly two weeks at a cost of over $600,000 in repairs. November 24, 2005 was a clear day, and there were no other aircraft parked adjacent to the one that she ran into. It thus is readily apparent that, but for [redacted] actions, the accident would not have happened. It is also apparent from the decision that she had a well-documented history of violating safety and driving rules and a history of poor performance. This Arbitrator would also have denied her grievance.

I have also carefully considered the [redacted] decision (Southwest Airlines, TWU-[redacted] Termination, Case No. TPA-P-0314/99 (April 21, 2000) (Arb. Barnard) (Tab B to the Company's Post-Hearing Brief). In that case, Arbitrator Barnard quite correctly points out:

> "Moreover, Dallas is a very busy Station, unlike the Tampa Station. The conditions in the above incidents were not similar to the Grievant's [redacted] and their only relevance *is to illustrate the Company's very reasonable disciplinary philosophy that ever incident must be separately examined.* Terminating a nine-month Employee who, in perfect weather in the middle of the afternoon, drove forward into the wing of an aircraft, admittedly not looking where he was, is a far different situation than disciplining a fifteen year Employee attempting to maneuver backwards in glaring sun through a crowded ramp area with the wing of the aircraft directly behind him."

I have also carefully considered, compared and contrasted my two prior decisions involving similar incidents and these Basic Principals of Conduct. Last year, in the [redacted] case

(Southwest Airlines, TWU-[redacted] Termination, Case No. LAS-R-1151/14 (October 11, 2014) (Arb. Lemons) after considerable scrutiny of the Grievant's credibility,[6] this Arbitrator made the following observations:

> "This Grievant had over two hours to comply with BPOC 16 and report her damage to equipment and injury to her knee. She steadfastly evaded this responsibility, and was obviously more concerned with trying to find out what management might have known about the incident than reporting it. I find that she knew darned good and well that she hit a bollard head-on with her tug, that she had damaged her tug and hurt herself in the process. This was not a scrape of one of her baggage carts. She had been adequately trained in what was expected under the Basic Principals of Conduct, and particularly with respect to "new" BPOC 16. While there may be some doubt whether the Grievant properly reported the damage to the tug, there is no doubt that she did not properly report the injury to her knee."

[redacted] case is more similar to that of [redacted] (Southwest Airlines, TWU-Safety – [redacted] Case No. BNA-R-0137/14 (July 1, 2014) (Arb. Lemons). There, I sustained the grievance and directed that the Letter of Warning be removed and rescinded. I did this in part because the particular situation at his gate (BNA Gate C-18) creates an unusual situation when an aircraft comes in and misses the J-line. I found that the unusual situation was somewhat akin to the "S-turn pushback" and the Skytrain pillar that was the focus of Arbitrator Hill's earlier decision that I cited in that decision. In essence, I found it unfair to penalize an Employee when the Company and the particular circumstances placed him in an inherently dangerous situation. It remains my firm belief that the Company should have spent more time coaching both TWU members and supervisory personnel on what should happen when this unusual situation occurs, and like the present case, [redacted] case should never have gone beyond the local station management, much less have been escalated to arbitration.

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[6] Hill, M. and Sinicropi, A.V., *Evidence in Arbitration* (Washington, D.C.: Bureau of National Affairs 1980); *See also* West Coast Panel Report: *Decisional Thinking of Arbitrators and Judges,* Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators 121 (BNA Books 1981).

AWARD

The grievance is sustained. The Company did not have just cause to terminate the Grievant, [redacted] by issuing the letter of termination dated July 23, 2014. The referenced letter should be removed from his file, and all references to it shall be purged from his personnel file and other records. The Grievant shall be reinstated to his former position effective five (5) days of receipt of this Award. He shall be made whole with respect to seniority and benefits as if he had not been terminated, including being repaid his SWAG points and eligibility for Earned Award Days as part of the Company's Perfect Attendance Program. The Grievant shall receive full back pay from the date of his discharge to the date of his reinstatement. The undersigned retains jurisdiction for a period of ninety days to resolve and determine any differences regarding interpretation or application of this Award, including the amount of back pay that is appropriate, upon written request of the parties.

As I find the Union was the prevailing party in this matter, the expenses of the arbitration shall be borne by the Company, in accordance with Article Twenty, Section 1(C) of the CBA.

William H. Lemons

WILLIAM H. LEMONS
Impartial Arbitrator

DATED: February 13, 2015, in San Antonio, Texas.