ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

August 13, 2016

SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Grievance: BUR-0158/16 (Agent X Termination – Time Frames)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Company: Kevin Minchey, Senior Attorney, Southwest Airlines Co.

The Union: Cortney Heywood, Vice President, TWU, Local 555

Statement of the Award: The Company did not violate time frames. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Union.

BACKGROUND

Southwest Airlines Company (Company or Southwest) and the Transport Workers Union Local 555 (Union) are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011, and continuing through the times relevant to this grievance. In this case the Union protests that the Company violated time frames in conducting a fact-finding that resulted in the Grievant being terminated.

The essential facts underlying this case are undisputed. The Grievant had been employed by the Company since 2003 and, at the time of the events giving rise to this dispute, was working as a ramp agent at the Burbank station (BUR). In November 2015 he was suspended with pay pending an investigation and was subsequently issued a 90-day disciplinary suspension commencing December 10, 2015 and running until March 8, 2016, and Final Letter of Warning for participating in an illegal job action. On December 24, 2015, BUR Station Manager Niko Dible received text messages from employees concerning a post or posts the Grievant had made on Facebook. As discussed in more detail below, Dible commenced an investigation.

The Grievant's 90-day suspension was subsequently reduced and, on January 1, 2016, he was contacted by the Company and informed that he would be returned to work on January 4, 2016. On that date, near the end of his shift, Station Manager Dible issued the Grievant a notice of fact-finding and suspension with pay pending the results. The results of fact-finding was scheduled for January 11, 2016, but by mutual agreement of the parties the time frames for that meeting were extended until January 21, 2016. At the results meeting, the Grievant was notified of his termination as follows:

> On January 7, 2016, a fact-finding meeting was held to discuss your alleged violation of Company policies while on a Last Chance/Final Letter of Warning ("Last Chance").
>
> As you know, on December 8, 2015, you were issued a Last Chance with a 90-Day unpaid suspension for refusing to follow a work order and taking part in an illegal job action. In the letter, we specifically warned that if you violated any other policy or rule while on the Last Chance, your employment with Southwest would be immediately terminated.
>
> Despite that warning, you posted comments to Facebook that were offensive in nature. Specifically, you posted comments alleging the temporary Southwest Employees working in Burbank were "scabs" and were not adequately performing their job. You also posted a comment providing the names, job location, and tenure of a number of the temporary Employees. When asked about this at the fact-finding, you refused to provide any

background or the reasoning behind your posts. In fact, although you were given ample opportunity to explain your behavior, you elected not to answer most of the questions you were asked. Based on your actions in the fact-finding, you have failed to cooperate with the Company's investigation.

Agent X, I have determined that your Facebook posts contained disrespectful, harassing, intimidating, threatening and retaliatory language towards Southwest Employees. Indeed, I have determined that your only purpose in calling the temporary Employees scabs and posting their names, location, and tenure was to harass and intimidate these Employees because they had volunteered to assist the Company in a time of need. Your conduct was in violation of several Company policies, including, but not limited to, the Southwest Airline's Employee Social Media Policy, the Policy Concerning Harassment, Sexual Harassment, Discrimination and Retaliation, and the Southwest Airline's Workplace Violence Prevention Policy. Your conduct also violated the following Basic Principles of Conduct:

2. An Employee on duty and in uniform reflects the SWA attitude to our Customers on a personal basis. It is imperative that you remember that your appearance, attitude, and conduct, whether on or off duty, may be a reflection on SWA, and that you act accordingly.

5. Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow Employees or their work.

25. Southwest does not want to interfere in the personal affairs of Employees, however, conduct on or off the job which is detrimental to the Company's interest including unacceptable or immoral behavior on Company property or any adverse conduct that reflects on the Company, whether on or off duty, may be cause for immediate dismissal.

26. It is the responsibility of all Southwest Airlines Employees to protect the interests and privacy of our revenue and nonrevenue Customers and Coworkers. You may not inappropriately discuss, solicit, disclose, or use for your personal benefit, information in Company records, files, or databases, such as Rapid Rewards Membership Information, Passenger Name Records (reservations), refund or credit card transactions, Employees/Customer

> correspondence, personnel files, or work schedules. Refer to the Ground Operations Manual for more information.
>
> 27. Fighting, abusive and disrespectful behavior toward a fellow SWA Employee or Customer.
>
> 33. Harassment and sexual harassment is strictly prohibited. Please review the policy as stated in the Guidelines for Employees.
>
> 34. Interfering with or failure to cooperate with the Company in any investigation or fact-finding.
>
> Based on the violations of the policies above, and because you are on a Last Chance, your employment with Southwest Airlines is terminated effective immediately. [JX 2, pg.12.]

The grievance, filed on January 21, 2016, protests that the termination was "unfair and unjust." After the grievance was denied by the Company, the case was presented to the System Board on March 22, 2016. When Station Manager Dible testified that he had become aware of the allegations on December 24, 2015, the Union raised a time frames objection and called an end to the System Board hearing on the merits. The subsequent System Board deadlocked on the time frames issue. The Union appealed to arbitration and the parties agree that the instant case is properly before the undersigned arbitrator solely on the issue of whether the Company complied with the time frames for issuing the notice of fact-finding.

The Union offered testimony from the Reno elected Station Representative, who testified about application of the pertinent provisions of the CBA, the Grievant, who testified about the relevant dates and contacts by the Company, and District Representative Mike Roach, who testified about prior cases and investigations.

The Company offered testimony from BUR Station Manager Dible, who testified about the information he received and his investigation, and Bob Watkins, Labor Relations Manager, who testified about prior cases.

Union witness R testified that, under Article Twenty, Section G, the Company has 10 calendar days to conduct a fact-finding. Since the Company became aware of the allegations on December 24, 2015, the 10 calendar days would have elapsed on January 3, 2016. The fact-finding notice was not issued until the 11th day. He noted that Article Twenty, Section E refers to working days. R further said that Side Letter Three states that an investigation may be required, but also refers to when the Company is "aware." On cross examination, he agreed that one way to interpret the language is that the Company needs to conduct an investigation and the date of awareness does not come until after the investigation is concluded. He, however, would use the date of awareness. R further testified, on rebuttal, that at the System Board on the time frames issue, the Company did not make a claim under Side Letter Three.

The Grievant testified that on January 1, 2016, he received a telephone call from the Manager of Customer Service, Greg Hewlett, who said he was required to come into work on January 4, 2016. After working seven of his eight hours, under the guise of amending his disciplinary letter, he was called to the station manager's office and was given the instant notice of fact-finding and was suspended again. The Grievant said that during his suspension and prior to January 1, 2016, he was contacted by BUR management three times, by email (for the purpose of bidding a January schedule) and by telephone. He responded to each of those contacts and made no attempt to avoid conversations with the Company. He acknowledged, on cross examination, that he could have done what he wanted during that period of time and nothing prohibited him from going out of the country. He did not know if the Company has a policy of requiring him to answer the telephone.

Station Manager Dible testified that on December 8, 2015, when he gave the Grievant his Final Letter of Warning and 90-day suspension, the Grievant was not asked to stay in contact and there was no requirement that he answer the phone or be available to the Company. He said that on December 24, 2015, at around 9:00 P.M., he received text messages and a screenshot from several agents who were upset about "harassing posts" on Facebook. They complained that it was harassing, intimidating and threatening for them to have their names, dates of service and the stations they were working from posted while they were temping in Burbank. Dible said that he has never posted on Facebook and had never dealt with a situation like this. At that time, he did not know whether any Company policy or work rule had been violated. He got his direct leader and Labor Relations involved, and had to talk to the affected employees. Labor Relations got Employee Relations involved. After conducting the investigation, on December 28, 2015, he determined that the Grievant had violated a Company policy and that a fact-finding needed to be held.

Dible further testified that he learned on December 31, 2015, that the Company had decided to reduce the suspensions of all employees and, that day, started notifying them to come back to work starting on January 4, 2016. The majority of them were notified, but some were hard to get a hold of. The Grievant did return to work on January 4, 2016, and Dible met with him that day to give him the letter changing the return date from suspension from March 18 to January 4 and to give him the letter that he was being suspended pending fact-finding. On cross examination, he said that he did not know when the Grievant was called to return to work. He said he has never bothered an employee who was off to come in for a fact-finding. He said that, according to the CBA, the Company does not have to ask him to come earlier to give him a notice, although he could have. He reiterated that he had never been involved in any violations of the social media policy, so he had to make sure that he got people involved on what needed to be done because there were quite a few upset agents. Dible said that the Grievant, by his inappropriate actions leading to his suspension, had made himself unavailable.

Labor Relations Manager Bob Watkins testified that the purpose for Side Letter Three is to allow the Company, when the matter involves harassment, intimidation, threats, customer complaints, or criminal activity, to perform an investigation before it is considered that the Company has knowledge of an event requiring a fact-finding. In such cases, it stops the time frames. Watkins described the Agent Y case from 2008 in which an inappropriate note was

discovered in a coworker's mailbox on July 31, 2008. (CX 2.) Watkins said that Employee Relations did an investigation because it was an allegation of racial harassment, a possible Title VII violation. The investigation took nearly three months before the notice of fact-finding was issued on October 29, 2008. He said he has never seen a case that the Union settled when there has been an outstanding time frames issue. The Agent Y case ultimately was settled on the merits, on a non precedent, nonreferral basis.

Watkins testified that Side Letter Three is applicable to this case because employees claimed they were being harassed and felt intimidated. Therefore, the Company investigation had to happen before the time frames start. A part of that investigation would be to determine whether they were being harassed or intimidated based upon one of the Title VII protected categories. He said this case is similar to the Agent Z 2011-case from Fort Lauderdale in which the employee was accused of making comments of a sexual nature to a female employee on April 3, 2011. (CX 3.) Employee Relations did an investigation, and issued a confidential report outlining the dates of the occurrence. Then, the notice of fact-finding was issued on April 28, 2011. If Side Letter Three had not applied, that would have been far outside of time frames.

Watkins further testified that Paragraph F of Article 20, Section One, automatically extends time frames to the employee's next full day of return to work, if the employee is not present on the last day within time frames. He said that in the recent Agent A case out of Chicago, in November 2015 the Company became aware, from an FBI background check, that an agent had a 28-crime disqualifier. (CX 4.) The agent had been on OJI leave for approximately 1 ½ years. When he returned from that leave, the Company issued his notice of fact-finding his first day back at work and held the fact-finding the same day. In that case, as here, the agent was not available for work on the last scheduled day within time frames. He said that a requirement that the Company find a way to give an employee a fact-finding notice when the employee is not required to report for work would severely limit the Company's ability to hold a fact-finding and would prevent the Company from being able to investigate inappropriate behavior. If someone is not at work, Paragraph F provides an automatic extension and there is no requirement for an employee to answer the phone, open mail, etc. so that the Company can reach an employee who is not at work.

Union witness Roach testified, on rebuttal, that in the Agent A case the grievant requested that the grievance be withdrawn. He said that he has handled cases he thought were strong, but where the grievant requested withdrawal because money became an issue and they wanted to get to their profit-sharing and 401(k). Roach said that, as the District Representative, he is familiar with the instant case and Employee Relations did not do an investigation and never contacted the Grievant. He said that Side Letter Three does not apply here, where the Company was aware of the incident, with a picture in front of them, with a signature that he did it, and they knew about it. They needed no further investigation before proceeding and the Grievant should have been notified of the fact-finding meeting within 10 calendar days. On cross examination, he emphasized that there was only one post on social media and the manager had it. He said that Dible could have talked to the complaining employees in the 10 days before the fact-finding. This situation did not warrant an investigation, or the Company would have had the investigator testify at the arbitration hearing. He agreed that the Agent Z case did require an investigation

because of the lack of evidence. The Company did not have a video or recording of the comment Agent Z made to the other agent.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE TWENTY
GRIEVANCE/SYSTEM BOARD/ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE
PROCEDURES

* * *

E. **Time Frames.** For the purpose of this Article, a working day shall be defined as Monday through Friday, excluding all Company recognized holidays. It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent. Furthermore, if the time frames set forth are violated by the Union the grievance shall be considered withdrawn. Determination of time frame violation issues shall take precedence over consideration of any other issue, and, if upheld, no further determination shall be appropriate.

F. **Extension of Time Frames.** It is understood and agreed that, at any step of the factfinding or grievance procedure, the time limits set forth may be extended by mutual agreement between the Company and the Union, in writing. Further, in the event either party, due to circumstances beyond the reasonable control of such party, does not become aware of, or is prevented from disclosing, facts or circumstances which would give rise to either a factfinding or a grievance, the time frame for pursuing such factfinding and/or grievance shall be extended as appropriate. If an Employee makes himself unavailable (other than on his regularly scheduled days off) to work his full shift on his last scheduled workday within the time frames under the fact finding procedures and paragraph H of this article, the Company may issue the notice/letter to the Employee upon his first full day returned to work.

G. **Fact-Finding Procedures.** No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following

procedures:

* * *

2. **Suspension.** Notwithstanding the foregoing, the Company may suspend a covered Employee pending a factfinding and/or until such time as the decision of the Company resulting from the factfinding is rendered, subject to the following conditions:

a. The suspension shall be a paid suspension;

b. The basis for the suspension shall be reduced to writing and presented to the Employee and the local representative of the Union within two (2) working days of the presentation of the written notice of the basis for suspension; and

c. The fact-finding shall be held within three (3) working days of the presentation of the written notice of the basis for suspension; and

d. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the factfinding, and a copy of the decision shall be delivered to the local representative of the Union.

* * *

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. ...

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.

SIDE LETTER OF AGREEMENT
NUMBER THREE

This will confirm the understanding reached during negotiations leading up to the Agreement between the Company and the Union regarding the application of Article 20, Section 1.G.1.a.:

In cases involving allegations of matters involving harassment, intimidation, threats, Customer complaints, or criminal activity, it is understood that an internal investigation may be required before the Company will become aware of the incident concerning which the fact-finding shall be convened. If such an investigation is required, it will be conducted in an expeditious manner.

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends that the Grievant did not make himself unavailable, but rather exercised what he believed to be a contractual right and was suspended by the Company. He had no way of knowing this would happen. During his time on suspension he had multiple conversations with BUR leadership, returning their calls when he missed them. The Company's perversion of the automatic contractual extensions is a desperate attempt to save their case. The Union contends that the Company has admitted they were aware, no later than December 24, 2015, and, despite multiple contacts, made no attempt to discuss issuance of a fact-finding notice during the time frames.

The Union reiterates the objection it made at the arbitration hearing to the Company's detour into the merits of the case. The Company's attempt to include the merits should be seen as an attempt to gain a negative inference. This case solely concerns whether the Company properly adhered to their requirements for timely notification.

The Union contends that Company witness Watkins was neither credible nor an expert on the cases for which he testified. Under his assertion the Company would be under no obligation to conform to contractual time frames whenever an allegation of harassment is made, even when they could have become aware. He could not attest to any of the details concerning the cases he introduced.

In a number of instances arbitrators have overturned terminations when the Company failed to follow proper procedures, including Arbitrator Fox in 1999, Arbitrator Overstreet in 2000 and Arbitrator McKee in 2009. These cases reiterate that no matter how strongly the Company feels about the merits of a case they must still adhere to the CBA. Automatic extensions of time frames are covered "due to circumstances beyond the reasonable control" of a party. Here, the Grievant's suspension was not a circumstance beyond the Company's reasonable control. They were in total control of how long he would be suspended and made multiple, successful, attempts to contact him during that time. However, they made no effort to bring him in for proper timely notification. Regarding Side Letter Three, the Company made no attempt to prove they conducted an investigation. The Union thus views this as a convoluted excuse.

For the foregoing reasons, the Union respectfully requests that this grievance be sustained, that the remedy sought in his grievance be awarded, and that the termination issued on January 21, 2016, and all references to it be purged from the Grievant's file.

The Company's Contentions

The Company acknowledges that under Article 20, Section One, Paragraph G(1)(a), it must issue a fact-finding notice to an employee within 10 days after the Company becomes aware of an incident necessitating a fact-finding. Here, Dible testified that he received complaints about the Grievant's inappropriate social media posts on December 24, 2015. Those complaints clearly involved "allegations of matters involving harassment, intimidation, [and] threats" under Side Letter Three. That Side Letter provides that "an internal investigation may be required before the Company will become aware of the incident concerning which the fact-finding shall be convened." Dible determined that an internal investigation was required and conducted an investigation by speaking with the employees who made the complaints, reaching out to his leaders, and to Labor Relations, who then contacted Employee Relations. Dible testified that by December 28, 2015, he had gathered enough information through his internal investigation to believe a fact-finding meeting with the Grievant was warranted. As a result, the 10-day time frames period started to run on that date, under Side Letter Three, giving the Company until January 8, 2016 to issue the fact-finding notice.

The Company asserts a practice of applying Side Letter Three to extend time frames based on nearly identical cases. In the Agent Y case the Company was notified on July 31, 2008, of a harassing note with the racial epithet in a co-worker's mailbox. The fact-finding notice was issued after an internal investigation, and some three months later. The Union withdrew its time frames objection, recognizing that Side Letter Three extended the time frames until after the internal investigation was complete. The Company also investigated the complaints before issuing a fact-finding notice to Agent Z on April 28, 2011. The Union did not raise a time frames argument in the case and withdrew the grievance.

The Company contends that it determines whether an internal investigation is warranted, not the Union. Therefore, the Union's view that Side Letter Three was not applicable, because no investigation was warranted due to the Grievant's social media posts being so offensive on their face, should be rejected. The Company asserts that as long as the investigation is conducted in an

expeditious manner, the time frames are automatically extended. Further, the inappropriate conduct in Agent Z and Y also was offensive on its face, but there was an investigation.

The Company contends that when serious allegations of harassment or intimidation are made against an employee, it is reasonable and usually necessary under both federal and state law for the Company to investigate those allegations before presenting them to the employee for a response and a formal fact-finding meeting. Neither the Company nor the Union would want the Company to hold a fact-finding meeting and accuse the employee of harassing a coworker without first having investigated the allegations and finding sufficient support for them.

The Company also contends that Paragraph F of Article 20 extends the time frames because the Grievant was not available to work his full shift on the last day in time frames, due to being on disciplinary suspension. Thus, the fact-finding notice was properly issued to the Grievant on his first full day returned to work, January 4, 2016. As in the Agent A case, the notice was issued on the employee's first full day returned to work. The Union did not raise a time frames argument in that case. Under Paragraph F, the Company is not required to call the Grievant and asked him to voluntarily come into work to receive the fact-finding notice. A contrary interpretation would conflict with the Agent B arbitration decision.

For the foregoing reasons, the Company requests that the Arbitrator find that the fact-finding notice issued to the Grievant on January 4, 2016 was timely under the CBA and past practices, and the grievance should proceed to a hearing on the merits.

ISSUE

Did the Company violate the time frames set forth in Article Twenty of the CBA when it issued the Grievant a fact-finding notice on December 17, 2013? If so, what shall the remedy be?

FINDINGS

The Company's reliance upon Side Letter Three in this case is misplaced. In each of the cases the Company relied upon to establish a practice regarding the application of Side Letter Three, a substantive, internal investigation was undertaken by Employee Relations. The results of fact-finding in the Agent Z case refer to the "results of the Employee Relations investigation." The investigation by Employee Relations was required to conclude that "you made inappropriate sexual comments about a female Coworker on two separate occasions." The results of fact-finding in the Agent Y case state as "we discussed at the meeting, Employee Relations investigated the incident and concluded that you put the note in your Coworker's mailbox." The investigation by Employee Relations was required to determine who was responsible for the inappropriate note. Here, by contrast, the record evidence and testimony only establishes that Labor Relations contacted Employee Relations. There is no evidence that Employee Relations undertook an investigation in any manner.

There is also no evidence that a delay was required to obtain reports from employees in other departments, such as occurs when a report from a flight attendant must be investigated. The complaining employees in this case were ramp agents and they were in direct communication with Station Manager Dible, as evidenced by the simple fact that they texted him.

In this case Station Manager Dible undertook the investigation and spoke with the complaining employees, as would normally be the case at the station level. It also was entirely normal that he consult with his direct Leader and Labor Relations. The mere facts that the complaint involved a matter of harassment, intimidation and threats and that Dible had not previously dealt with allegations of harassment, intimidation or threats via social media is insufficient to bring this case under the exception established in Side Letter Three.

The inclusion of customer complaints and criminal activity in that Side Letter indicates a recognition, by both parties, that such matters may take more than 10 calendar days to investigate. Further, matters of harassment, intimidation and threats *may involve* Title VII violations and, hence, Employee Relations properly would be involved in the investigation, as was done in the Agent Y and Z cases. There is no evidence that the objectionable social media post or posts made by the Grievant in this case could have involved Title VII violations in any manner. Rather, they were directly related to a work dispute and possibly involved a violation of Company rules.

As to the application of Article Twenty, Section One, Paragraph F, however, the Company has the better argument. First, both parties agree that an employee has no obligation to be available to the Company on days off, vacation, leave of absence, OJI, etc., or during the period of a disciplinary suspension. An employee in such a non-working status may willingly respond to Company contacts via telephone, text or email, etc., but no binding Company rule requires that they do so. This means that acceptance of and response to any communication rests solely with the employee. Under such circumstances it would be nonsensical to interpret the language of Article Twenty , Section One, Paragraph G.1.a to require the Company to advise an employee of a fact-finding within time frames, while that employee is in a non-working status.

Article Twenty, Section One, Paragraph F provides for an extension of time frames if:

> an Employee makes himself unavailable (other than on his regularly scheduled days off) to work his full shift on his last scheduled workday within the time frames under the fact finding procedures …, The Company may issue the notice/letter to the Employee upon his first full day returned to work.

That language plainly contemplates that the employee being issued the notice *has* a scheduled workday on the last day within the time frames. The Grievant here, as in the Agent A case, did not. The Company properly issued the notice of fact-finding on the Grievant's first full day returned to work.

For the above reasons, the Union has not established that the Company violated time frames. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Union.

AWARD

The Company did not violate time frames. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Union.

Elizabeth Neumeier, Arbitrator

August 13, 2016