

IN THE MATTER OF ARBITRATION)
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)
SOUTHWEST AIRLINES CO.)
)
)
and)
)
)
TRANSPORT WORKERS UNION OF)
AMERICA, AFL-CIO, LOCAL 555)

Case DAL-P-0754/16

Chris Maberry, Esq., for the Employer
Curtis Clevenger, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the discharge of Grievant Agent A.

A hearing was held on August 3, 2016, at Dallas Texas. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Witnesses were sequestered and a stenographic transcript was prepared. Both parties filed briefs. The record closed with the receipt of briefs on September 7, 2016.

Contract Provisions Involved

ARTICLE TWO
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.

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

ARTICLE FIVE
CLASSIFICATION

SECTION ONE
RAMP AGENT/PROVISIONING AGENT

The work of Ramp, and Provisioning Agents includes the functions which have been historically performed by such agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract. Agents required to perform such duties must be current and qualified within that classification.

* * *

O. Works according to Company regulations and procedures and instructions from supervisors issued in accordance with this Agreement.

T. Provides friendly service to all co-workers and Customers.

ARTICLE SEVENTEEN
SAFETY AND HEALTH

A. Scope. Safety and health of the Employees shall be protected. The Company shall provide the necessary training for Employees to safely perform their duties. The Company and the Employee shall maintain safe, sanitary, and healthful conditions at all stations. The Company and Employee shall comply with all applicable Federal, State, and Municipal safety and sanitary regulations.

ARTICLE TWENTY
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.

B. Representation Requirements. The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the

Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

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.

1. No Suspension. In circumstances where no suspension is imposed:

- a. The Employee shall be advised, in writing, with a copy to the local representative of the Union, of the nature of the factfinding not later than ten (10) calendar days from the time the Company becomes aware of the incident concerning which the factfinding shall be convened.
- b. The factfinding shall be held within five (5) calendar days from the date such notice is given to the Employee and the local representative of the Union; and
- c. 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 (“Contractual Grievances”), or in the event of a disciplinary action other than discharge (“Disciplinary Grievances”), the following steps shall apply. However, in the event of a grievance involving discharge or a Union grievance concerning a change in Work Rules (“Discharge/ Work Rule Grievances”), 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. If a termination is grieved, insurance benefits will continue until all grievance procedures have been exhausted and a final decision has been rendered. Employees are required to continue to pay the premiums when they are due; failure to do so will result in termination of insurance benefits.

15. 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.

The Facts

This case involves the termination of Grievant Agent A, a Provisioning Agent in Dallas with 26 years of service, for his involvement in an incident that occurred on April 8, 2016. There is no indication in the record that Agent A had any prior discipline.

Exactly what occurred on April 8 is in dispute. What is not disputed is that near the start of their shift, Agent A and Agent B became engaged in a brief dispute, probably lasting less than a minute; that Agent A did place a hand on Agent B; and that another employee stepped between them, at which point the incident was over. Neither employee suffered any injury. Agent B is 67 years old, 5 feet 7 ½ inches tall and stated that he weighs 125 pounds, although he appeared to me to be substantially heavier than that. Agent A is 50 years old, 6 feet tall and weighs 245 pounds. Prior to April 8, 2016, Agent A and Agent B had worked together for over 20 years.

At the arbitration hearing, Agent B testified that on April 8, he was talking to other employees, when someone behind him said, are you talking about me. Agent B turned around, and Agent A said several times, are you talking to me. Agent B responded, I am not talking about you, shut the fuck up. If I said anything to you, I apologize. Agent B turned and walked off. Agent A came over as fast as he could, and choked Agent B for 1 or 2 or 3 seconds. Agent A said that Agent B smelled bad and had bad teeth. Agent A let go, Agent B fell down on one leg, and Agent C helped him up. Both walked off.

Agent B stated that later that day Provisioning Manager James Garcia was there, and he went up and told Garcia what had happened, that Agent A was holding and choking him. Garcia asked him to write a statement about what had happened. At the hearing Agent B stated that he would not be comfortable working around Agent A.

On cross examination Agent B first denied, then acknowledged, having received a disciplinary letter over the incident. On cross Agent B also stated that Agent A grabbed him by the throat and

knocked him to the ground. He stated that Supervisor Cotton Davis came out into the hallway, but left before Agent A choked him.

According to Agent B, it was after Davis came out and told them to keep it down, that Agent A choked him:

Q. And what did y'all do after that?

A. And that's when Cotton walked off and I stayed here and stayed at the area where we were, he was –

Q. Did y'all continue arguing?

A. No.

Q. So the arguing was over after Cotton told y'all to knock it off?

A. That's correct.

Q. All right. Now, you just testified that Agent A choked you after that.

A. Uh-huh.

Q. So did Cotton come out before or after you were choked?

A. Okay. Cotton walked off, and then Agent A came up and choked me after he walked off.

Q. So it wasn't over yet?

A. It wasn't over at that particular time. Cotton walked off. Agent A come in up here, yes, second. Because that's why we were talking. He – Agent A and I was talking back and forth, and then he left and that's when Agent A came up and choked me.

Agent B has suffered a stroke, which he stated causes him some difficulty reading and speaking.

Grievant Agent A testified that at around 1:15 p.m., shortly after shift start on April 8, he heard Agent B talking loudly in the locker room. Agent B said, why don't you shut the fuck up. Agent A said to Agent B, why don't you shut up. Agent B replied, I wasn't even talking to you. Agent B came up close to him, and Agent A said, get the fuck back. When Agent B got close to him, Agent A put his hands up to keep Agent B at bay. He acknowledged when he put his hand out, he touched Agent B in the sternum. Another employee told them to cut it out, they were both old enough to be his grandfather. Supervisor Cotton Davis came out and told them to break it up. At around that time, Agent C stepped between the two and nothing further happened that day.

Agent A denied that he ever grabbed Agent B's throat or shirt and denied that he choked Agent B. He denied knocking Agent B to the ground or that Agent B fell or even went to the ground. He denied holding or shoving Agent B.

Agent C testified that on April 8 he heard Agent A and Agent B arguing, cussing and yelling. The two were about a foot apart. Agent A tapped his index finger on Agent B's chest and said get out of my face you nasty breath smelling. Agent A put his hand up. Agent C demonstrated that Agent A placed his right hand near, but not around Agent B's neck. Agent A's hand was open, and he placed his hand in the area of Agent B's collar bone, with the thumb to one side of Agent B's neck and the fingers to the other side. The crook of Agent A's hand between his thumb and forefinger was an inch or so below Agent B's larynx. He described what Agent A did as consistent with trying to keep Agent B out of his space. He stated that Agent A did not grab Agent B's throat. Agent C stepped between the two and pushed them away from each other. Supervisor Cotton Davis opened his door, popped his head out and said, keep it down.

According to Agent C, Agent B appeared to be processing, and acted as if falling down but did not go to the ground. Agent C denied helping Agent B up.

As Agent C saw it, Agent A was the aggressor in the incident.

Agent B told Agent C that James Garcia may want to talk to him. Later on Friday Agent B told Agent C that Garcia wanted to see him. Garcia asked Agent C what happened and Agent C said that they got in an argument and he had to separate them. Agent C denied telling Garcia that he saw Agent A choke Agent B, and denied telling Garcia that Agent B fell and he had to pick him up. Garcia said he may need a statement.

Agent C worked Saturday and Sunday, and was off Monday and Tuesday. On Monday Union Representative A asked Agent C to write a statement. Agent C did so, and emailed it to Rep A. On Wednesday April 13, Garcia paged Agent C to his office. Agent C asked for a Union Representative. Garcia asked him for a statement, and Rep A told him to get a copy of the statement Agent C had earlier emailed to Rep A. Agent C did so and gave the statement to Garcia. The only question Garcia asked was whether Agent B fell. Agent C laughed and said that this did not happen.

Agent C denied ever telling Garcia that Agent A choked Agent B or that he had to help Agent B up.

Agent B, Agent A and Agent C were the only individuals present at the April 8 incident who testified. Agent D provided a statement to the Company, but did not testify at the arbitration hearing.

Dallas Provisioning Manager James Garcia, who did not himself witness the event, testified that Agent B came to his office around 2:00 p.m. on April 8 and asked if it was okay for another employee to choke someone. Garcia asked what he meant, and Agent B said I just got choked, that he and Agent A got into an argument in the break room hallway and Agent A choked him. Garcia characterized Agent B as frustrated and having difficulty explaining what had happened. Agent B told Garcia another employee saw the event and he would get him to talk to Garcia.

Garcia stated that Agent C came to his office later and said he heard an argument and saw the two together, and that Agent A was touching Agent B and he went between them. Agent C said that

Agent A grabbed Agent B by the throat. He also said he helped Agent B up. Garcia asked Agent C for a written statement and checked the roster to see which other employees had been working. He asked other employees to provide statements, but for the most part they provided no useful information.

Agent C's signed, undated, statement is as follows:

It was Friday, April 8 around 13:30 regarding the incident with Agent B and Agent A. I was sitting in the break room waiting to clock in when Agent A walked through the break room towards the offices. Agent A said to Agent B, along the lines of "don't tell me to shut the fuck up". I didn't even hear Agent B say anything and Agent B replied with "what? I'm not even talking to you" and Agent A said "I'm the only one walking through this hallway" so . . . At this point I stood up and turned a corner to see what was going on and Agent B was taking a step back away from Agent A and Agent A took a step forward toward Agent B and was poking him in the chest saying "get out of my face you nasty smelling breath motherfucker" and then grabbed him firmly by his throat and that's when I intervened and separated them.

Agent D provided a signed statement dated 4/16/16, as follows:

4/8/16

To whom it may concern. I Agent D was in the break room and heard two people arguing as I started walking to the office. Agent B and Agent A where [were] in one another's face Agent A try to walk away Agent B follow talking. Agent A turn back around putting finger in Agent B's chest Agent B keep talking Agent A reach for Agent B. I turned away walking through the door look back and Agent C was breaking them up.

Agent B's statement, which his wife wrote but he signed, is as follows:

On Friday April 8th around 1:00 pm I (Agent B) was talking to several people waiting to clock in for work.

Agent A came up behind me and said are you talking about me. I told him that I wasn't talking about him. He kept saying why are you talking about me. I kept telling him I wasn't.

Agent A then took ahold of my throat choking me knocking me to the ground after grabbing my shirt. A fellow employee helped me up who witnessed the attack.

I don't understand after telling him that I wasn't talking about him that he had to become physical and take matters into his own hands.

I don't feel like I'm working in a safe environment. I feel threatened.

The Company's termination notice, dated April 22, 2016, states:

A fact-finding meeting was held on April 12, 2016 to discuss your involvement in possible violence in the workplace on April 8, 2016. Present at this meeting were you, TWU Representatives A and B and myself.

After completing the investigation into this matter, and after consideration of the matters discussed in the Fact Finding we have concluded that you had an argument with a coworker, poked him in the chest and grabbed him by the throat. Such conduct on April 8, 2016 was a violation of the Southwest Airlines' Ground Operations Basic Principles of Conduct, including, but not limited to, the following:

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.
4. Complete coordination with Coworkers and Supervisors is required to provide harmonious working conditions.
8. Restricting work, using threatening or abusive language, intimidating, or interfering with fellow Employees or their work.
18. Striking another Employee in a display of anger shall warrant termination.
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.
27. Fighting, abusive and disrespectful behavior to a fellow SWA Employee or Customer

In addition, your actions are in violation of the Southwest Workplace violence Policy, which states: "Southwest Airlines maintains a "Zero Tolerance" policy. Workplace violence will not be tolerated at Southwest Airlines, and any Employee found to be in violation of this policy will be subject to disciplinary action, up to and including termination of employment."

Based on the severity of your actions and based on the above, your employment with Southwest Airlines is terminated, effective immediately.

The Company's Workplace Violence Prevention policy provides as follows:

To ensure a safe work environment for all Employees and to minimize the risk of violence, all Employees should become familiar with the Workplace Violence Prevention Policy and have a clear understanding of their role in reporting workplace violence. Southwest Airlines maintains a "Zero Tolerance" policy. Workplace violence will not be tolerated at Southwest Airlines, and any Employee found to be in violation of this policy will be subject to disciplinary action, up to and including termination of employment.

What is workplace violence?

Workplace violence is defined as actions or words that endanger or harm another individual, or result in that individual having reasonable belief that he or she or someone else is in danger. More specifically, any acts of physical violence, threats of physical violence, damaging of property, harassment, intimidation, or other threatening behavior that occurs in the workplace, at Company sponsored events, or has a connection to the Company or affects the workplace, is prohibited and will not be tolerated. It can affect or involve Employees, Customers, contractors, and/or vendors.

Examples (includes but is not limited to the following):

- Threatening to or causing physical harm or injury to another person
- Making threatening remarks, bullying, abusive, or intimidating conduct, exhibiting acts of hatred, or other similar behavior
- Aggressive or hostile behavior that creates a reasonable fear of injury or subjects another person to emotional distress
- Intentionally damaging SWA property or the property of others
- Unauthorized possession of a weapon while on Company property (including parking lots)
- Committing acts motivated by or related to Sexual Harassment or domestic violence
- Stalking type behavior such as constantly calling, texting, or e-mailing another Employee in a harassing manner
- Making threats on social media sites such as Facebook ®, Myspace ®, etc.

No Employee shall be subjected to criticism, reprisal, retaliation, or disciplinary action for reporting acts pursuant to this policy. However, if after investigating any complaint or threat of workplace violence, Southwest Airlines determines that the complaint was not made in good faith or that an Employee has provided false

information, the Employee will be subject to disciplinary action, up to and including termination of employment.

The Basic Principles of Conduct state:

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.

Pertinent items from the list are quoted above in the termination letter.

There is no dispute that Grievant Agent A had been trained in the Basic Principles of Conduct and the Workplace Violence Prevention program. Both policies were implemented unilaterally by the Company.

Agent B was issued a letter of warning on April 22 over his role in the April 8 incident. The letter states:

A fact-finding meeting was held on April 12, 2016 to discuss your involvement in possible violence in the workplace on April 8, 2016. Present at this meeting were you, TWU Representatives A and B, ELDP Supervisor Chanda Smith and myself.

After completing the investigation into this matter, and after consideration of the matters discussed in the Fact Finding we have concluded that you had an argument with a coworker. Your continued engagement in that argument was a factor in the escalation of the situation. Such conduct on April 8, 2016 was a violation of the Southwest Airlines' Ground Operations Basic Principles of Conduct, including, but not limited to, the following:

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.
4. Complete coordination with Coworkers and Supervisors is required to provide harmonious working conditions.
8. Restricting work, using threatening or abusive language, intimidating, 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.

Based on your actions and based on the above, this will serve as your Letter of Warning. Please be advised that the behavior you have displayed will not be tolerated. Any further violations of this nature will result in discipline, up to and including termination. If you are unclear as to what is expected of you, or if there is anything that we can do to assist you, please don't hesitate to contact a Supervisor or Manager.

Issue

The issue, as agreed to by the parties, is whether the Grievant was terminated for just cause, and if not what should the remedy be.

Position of Management

The Company notes that Grievant Agent A is 17 years younger than Agent B and significantly outweighs him. It asserts that Agent A grabbed Agent B by the throat and choked him. It regards Agent C as substantiating the version that Agent A put his hand around Agent B's throat.

It maintains that arbitrators have generally found just cause for discharge when an employee physically assaults a coworker, and that a single instance is sufficient. It cites two arbitration decisions upholding terminations for grabbing another employee.

The Employer submits that Agent A cursed at Agent B, poked Agent B in the chest and then grabbed him by the throat and choked him. It asserts that the only evidence to support the Grievant's version is his own testimony. It cites Agent B's reaction that he felt threatened and in an unsafe environment. It recognizes its own obligation under the collective bargaining agreement to provide a safe working environment, as well as its potential legal liability.

It points to the Basic Principles of Conduct and the Workplace Violence Policy, which had been provided to the Grievant. It regards the Grievant's conduct as in violation of both.

The Company reasons that if it continued to employ Grievant Agent A, it could be in violation of its duty under Article 17 to maintain safe working conditions.

It disputes any claim that the Grievant was subjected to disparate treatment. It distinguishes the warning letter issued to Agent B on the basis that Agent B never touched the Grievant.

It asks that the grievance be denied.

Position of the Union

The Union emphasizes the Grievant's 26 years service with a clean personnel record.

The Union maintains that Grievant Agent A did not strike, or attempt to strike, Agent B in anger. It submits that there was no testimony from anyone other than Agent B that characterized the Grievant's actions as anything other than an effort to keep Agent B out of his face. It contends that this version is consistent with the Grievant's account at the fact-finding, and with Agent C's testimony at the arbitration hearing. It regards Agent C's testimony as corroborating Agent A and in sharp contrast to Agent B's testimony. It notes Agent C's testimony that Agent A did not choke Agent B, and that Agent B did not fall to the ground.

The Union faults the Company for failing to call Agent D and Supervisor Cotton Davis as witnesses. It stresses that Agent D's written statement makes no mention of choking or falling to the ground, but portrays Agent B as pursuing Agent A, all contrary to Agent B's account. It contends that all Agent A did was to try to get Agent B out of his face. It depicts Agent B as "the instigator, agitator and aggressor," who received only a warning letter.

It argues that the termination was based on assumptions, rather than facts disclosed in the investigation. It regards the Company as failing to conduct a fair and complete investigation. It deems that there never was an actual investigation. It urges that the Company misinterpreted the word "by" in Agent C's statement, and never asked him what he meant, which it interprets as "near" the throat.

The Union asserts that Agent B decided to "play victim," but that there are serious inconsistencies in his claims. It notes that his account that Agent A choked him after Cotton Davis told them to knock it off, and that he was knocked to the ground, are not supported by anyone else's testimony. It depicts Agent B as an antagonist of other employees.

The Union distinguishes the arbitration cases relied upon by the Company: in one an employee hit another with a suitcase, in a second case the employee pinned the victim to the floor and choked him with both hands, in a third the employee picked up a woman, shook her, and threw her into a chair; in the fourth the employee engaged in a premeditated act to threaten and intimidate Company CEO Gary Kelly. It contrasts the cases it cites in which discharge was excessive for heated arguments and belly bumping.

It asks that the grievance be sustained and that the Grievant be reinstated and made whole, with no loss of seniority, and that reference to the incident be removed from his employee file.

Analysis and Conclusions

The case against Grievant Agent A rests primarily on the testimony of Agent B. A number of considerations cause me to doubt the accuracy of his account.

By his own acknowledgment, Agent B suffers the effects of a previous stroke. At the hearing, he had difficulty reading the statement he provided, and he had his wife write the statement because of his difficulty. He also had some difficulty recalling the names of some people he worked with, Agent C and James Garcia. At times he seemed to have difficulty understanding the questions on cross examination. At times his testimony was confused or confusing:

Okay. I did not walk away the first time. I -- I mean, I did not walk away the second time. The first time I was there. That's when he came to me at that time. He only done it one time, choked me only one time.

These factors lead me to doubt the accuracy of Agent B's testimony. I do not doubt that Agent B is an honest man, and that his testimony was his best recollection of what had happened. But I do have doubts as to Agent B's capacity to accurately recall and relate the events. My impression seems in keeping with James Garcia's testimony about Agent B's difficulty in describing the event to Garcia shortly after it had occurred: "He was a little frustrated and having some tough time explaining what he was trying to say * * * ."

Further, Agent B's contradiction in first denying, and later acknowledging that he himself received discipline over the incident causes additional doubt about his capacity to accurately recall and relate the event.

Aspects of Agent B's account are contradicted by, or at least not corroborated by, anyone else present. No one else agrees with Agent B's version that Agent B ended up on the floor. No one other than Agent B stated that the incident went on even after Cotton Davis told the employees to knock it off, and Agent B's recollection that Agent A put his hands on Agent B only after Davis had told them to cut it out, seems implausible, at least as to the sequence of events. No one else confirms Agent B's account that Agent A grabbed his shirt. In this regard, I believe that Agent C more accurately described what happened, that Agent A poked Agent B with his finger.

In general, I accept Agent C's testimony as the most accurate account of the event. Agent C was a bystander, a person who saw rather than participated in the incident, and had no personal emotional involvement in it, and therefore no psychological predilection to perceive himself as the "innocent" party. So far as the record indicates, Agent C had no greater personal connection to Agent A than Agent B, nor vice versa. I find that the event happened as Agent C related it.

In summary, I find that Agent A and Agent B had a brief misunderstanding, that Agent A said something about Agent B having bad breath and poked him in the chest, and that Agent A tried to fend off Agent B with one hand before Agent C split them. I find that Agent A contacted Agent B in the way described by Agent C, with an open hand, and not wrapping his fingers around Agent B's throat.

I recognize that there is an apparent discrepancy between Agent C's testimony at the arbitration hearing and his earlier written statement that Agent A grabbed Agent B "by his throat." It may be, as the Union asserts, that the discrepancy is more apparent than real, if one interprets the word "by" in the statement to mean "near." In any case, Agent C's testimony at the arbitration hearing was under oath, and his earlier statement was not, and I accept the accuracy of the account he provided at the hearing.

In making my factual determinations, I draw no inference from the Company's failure to call Agent D and Cotton Davis as witnesses. Agent D was equally available to either party, and from the accounts of the other witnesses, Davis simply did not observe the critical portion of the event.

It is not accurate, in my view, to describe Agent A as "choking" or "grabbing" Agent B. Agent A used only one hand, rather than both, and I conclude that he was attempting to ward off Agent B, rather than attempting to prevent Agent B from breathing. By Agent B's own account, Agent A had his hand on Agent B for only between one and three seconds. I conclude that Agent A did not in fact choke Agent B, and that Agent A did not attempt to choke Agent B. Agent A did poke Agent B in the chest, and did place one hand on Agent B, but did so in order to hold off Agent B rather than to harm Agent B.

Based on these factual findings, I conclude that Agent A was no more culpable than Agent B for the incident and that just cause did not exist for the Company to terminate Agent A. Just cause would support, at most, a disciplinary letter similar to that issued to Agent B. Agent B stated that he would not feel comfortable working around Agent A, but one employee does not have the prerogative to veto the continued employment of another. It may be that Agent A would also feel uncomfortable working around Agent B, but this would not be reason to increase Agent B's discipline from a written warning to a termination.

I therefore sustain the grievance to the extent of abrogating the discharge of Agent A and reducing the discipline to a letter of reprimand.

I have considered the cases cited by the Employer, but all involve aggression against a co-worker, rather than simply attempting to hold off an employee from coming too close: deliberately striking another employee with a suitcase; pushing or shoving a fellow employee and holding him down (which Arbitrator William L. McKee characterized as "an act of violence"); employee "grabbed Ms. A's vest near the collar area and shoved and shook her"; employee grabbed Company CEO with both hands and pulled him forward, asking "when are you going to give me my raise," (which Arbitrator Elizabeth Neumeier characterized as "a deliberate act of threatening and intimidating

conduct”). I do not regard my conclusion in this case as inconsistent with any of the decisions cited by the Company.

In summary, I conclude that the Company lacked just cause to terminate the Grievant, and that the grievance therefore should be sustained, to the extent of reducing the discharge to a written warning.

Award

The grievance is sustained. The Company shall offer reinstatement to Grievant Agent A with no loss of seniority, and shall make him whole for economic losses suffered. The Grievant’s termination is modified to a written reprimand, and shall be so treated for purposes of any subsequent discipline. Pursuant to Article Twenty Section One C of the collective bargaining agreement, the arbitrator’s fee and expenses are allocated to the Company.

Issued September 28, 2016

Matthew M. Frankiewicz