

ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

October 10, 2013

SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Grievance: ELP-P-0570/13 (██████████ Termination)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Employer: Christina Bennett, Senior Attorney, Southwest Airlines Co.

The Union: Jerry McCrummen, Vice President, TWU Local 555

Statement of the Award: The grievance is denied.

BACKGROUND

Southwest Airlines Company (Company or Employer) and the Transport Workers Union Local 555 (Union) are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011, covering ramp, operations, provisioning and freight agents. In this case the Union grieved the termination of [REDACTED] for being without just cause as is required by Article Twenty, Section One - A of the CBA.

The Grievant worked for the Company for nearly 25 years, 23 with perfect attendance, and had no active discipline in his file. He was one of 10 Provisioning Agents at the El Paso station (ELP). There are also three Provisioning Supervisors, Mike Hernandez, Sergio Rocha and Cuco Perez, and a Provisioning Manager, Carlos Ortiz, at ELP. Ortiz has worked for the Company since 1994 as a ramp agent, ramp supervisor, provisioning supervisor in Seattle and then in Baltimore. He subsequently worked in Dallas as the assistant provisioning manager before being transferred to ELP as the provisioning manager in 2008. Provisioning Agents are responsible for stocking Southwest planes with drinks, snacks, and paper products, etc. They have access to a warehouse containing alcohol, soft drinks, food, and other supplies.

The incident giving rise to the Grievant's termination occurred on March 18, 2013. The Grievant arrived at work and exchanged greetings with Manager Ortiz in the break room. Ortiz then went to his office and, when he checked his email, read the following:

From: Sergio Rocha
Sent: Saturday, March 16, 2013 12:41
To: Los Ortiz
Subject: [REDACTED]

Carlos,

Mike and Cuco have asked if I had ever seen [REDACTED] taking product to his truck while at work. I mentioned to them that on one occasion when we had some down time I had left to the post office to drop off some mail. When I returned I parked on the north parking and when I was walking to the warehouse there was a semi parked by American's dock. I noticed 3 cases of water on the floor behind [REDACTED]'s truck. I believe he saw me and quickly loaded the cases to his truck then walked to the front quickly as if he hadn't noticed me and talking on his cell. I couldn't see them because he has a cover and you can't see anything.

Apparently, other agents have noticed and told them in confidence that they have seen him loading his truck while we are conducting our checks on the flight line. Mike and Cuco have also noticed other plastic bags with toilet paper and other items in his truck. Just thought you should know. [UX 1, Body of email: CX 1.]

Hernandez was working at the time and Ortiz questioned him about this report. Hernandez related that two provisioning agents, ██████████ and ██████████, had told him they had seen the Grievant taking product without permission.¹ They then went to look in the back of the Grievant's vehicle.

Ortiz testified that through the back, tinted window of the Jeep SUV he could see four cases of Southwest water, clearly marked with the distinctive SWA logo, two cases stacked on top of the other two. Each case contains four six-packs. The color photographs he took of the vehicle and of the contents were introduced as Company exhibits 1 and 2. Ortiz testified that, due to the cover nearly covering the cargo area, the camera angle and lighting, the photographs do not show everything he could see. Ortiz then contacted employee resources to inform them and ask for advice. They decided to contact the police department to have an impartial third party present when the Grievant was confronted.

El Paso Police Officer Higgason, who was at the airport property routinely and knew, at least by sight, a number of Company employees including the Grievant, was shown the vehicle and agreed the Company water was visible. He asked Ortiz if the Company wanted to press charges or handle the situation internally, and, if the Grievant was present, if they could speak with him. Ortiz testified that he called the Grievant to his office and, with Officer Higgason present, told him "I have reason to believe that you have Southwest product in your personal vehicle that you have taken without permission. Is it true?" and he replied, "yes." When Ortiz asked him what he had, the Grievant replied "one case."

Ortiz testified that, after Officer Higgason again reiterated the two choices, Ortiz told him there are procedures to follow and it would be handled internally. Higgason then left and he commenced typing up a Notice of Fact-Finding Meeting, suspending the Grievant with pay pending that meeting. (JX 2, pg. 1) The Grievant asked what was going to happen to him, said he was sorry and that he was trying very hard, but Ortiz could not recall what else he said. The Fact-Finding was set for March 20, 2013. Ortiz testified that the Grievant did not question why he was being suspended. Ortiz told him he needed to collect his badge and keys, and to get the product back before he left. After the Grievant collected his jacket and cup of coffee from the break room, they both went out to where their personal vehicles were parked. Ortiz related their conversation as follows:

He stopped immediately outside of provisioning – the door – the door had closed behind us, and again, I don't recall everything he said. I do recall, you know, what's going to happen to me? I'm trying really hard. And he did say, Carlos, talk to me.

I let him know that I really don't know what to say other

¹This testimony was admitted over the Union's objection solely for the purpose of demonstrating why Manager Ortiz undertook the investigation and not for the truth of the report from the two provisioning agents to the Supervisors.

than, you know were going to have our meeting on Wednesday the 20th. Will discuss everything then. I'm just in a place I don't want to be, but I've got to follow what I'm supposed to do. [Tr. 30-31.]

After Ortiz again said he needed the product back, the Grievant went to the rear of his vehicle opened it, and gave him one case of water. Ortiz testified that he did not accompany the Grievant to the rear of the vehicle because he did not want to escalate a confrontation without witnesses or a Union representative present. Ortiz said he did not feel the Grievant had returned all of the product he had taken because he observed four cases in the back of the truck that morning.

Ortiz further testified that he conducted an investigation by asking human resources what happened in other locations with incidents similar to this, reviewing the Grievant's personnel file, and asking each of the supervisors if they had given the Grievant permission to take product. Both Fernandez and Rocha said no. Perez said he had given permission to take two six-packs of water previously and the Grievant took the water that same day. He asked the supervisors whether they had ever given him permission to take a case and they said they had not.

The Fact-Finding took place on March 20 attended by Provisioning Manager Ortiz, ELP Station Manager Bob Jacquemotte, the Grievant, ELP Station Representative ██████████ and ELP alternate Station Representative ██████████. Ortiz testified that Hernandez was not at the Fact-Finding because he had already questioned them and the purpose of the Fact-Finding was for the Grievant to give his side, with his Union Representatives present, and not for them to question Management witnesses. He had prepared questions to ask the Grievant including whether he recalled saying, in front of the police officer, that he had taken product without permission. The Grievant said yes, but added words that Ortiz could not recall exactly. Ortiz testified that the Grievant said he did have permission to take the product, he just didn't take it until March 18. Ortiz also asked whether the Grievant had called Provisioning Agent ██████████ to tell him Supervisor Fernandez had given permission. The Grievant agreed he had talked to ██████████. When Ortiz asked why he would call another agent and not him, the Grievant said "something along the lines because I can't talk to you. You and I – these are his words – you and I have this thing where I can't talk to you." The Grievant said he did not call a supervisor because Hernandez was not going to "stick up for me." Ortiz further testified that, at the Fact-Finding, the Grievant said that when the police officer showed up, part of the reason why he had said yes and meant to say no, that he had permission, was that he froze up, he was nervous and he was scared.

Ortiz testified that, after the Fact-Finding and as part of his investigation, he looked at the March 8 and 10, 2013 time cards for Mike Hernandez and the Grievant, because the Union Representatives had indicated Hernandez had given permission then. However, the time cards revealed that Hernandez and the Grievant did not work together either day.

Ortiz testified that he reached his decision to terminate the Grievant because he had taken product without permission, admitted that in front of a Police Officer and confirmed that admission during the Fact-Finding, and the time cards confirmed Hernandez's denial that

permission had been given. In addition, Supervisors are not authorized to give away large quantities of product, such as a case of water, without his permission. Although the Company does donate to community outreach events, the Grievant never asked permission to take water to the gym as he mentioned during the Fact-Finding. Employee Resources confirmed that once it has been determined that an employee has taken product without permission, the result is termination. The March 25, 2013 Results of Fact Finding Meeting – Termination Memorandum states:

A fact finding meeting was held on March 20, 2013, to discuss your alleged theft of Company property. Present at this meeting were you, TWU Representatives: ██████████ and ██████████, El Paso Station Manager Bob Jacquemotte, and myself.

During the meeting, you admitted to removing product from the ELP Provisioning facility on March 18, 2013. You acknowledged that you remove said product without permission. Furthermore, you admitted that you stored the removed product in your personal vehicle, which was parked at the Provisioning facility Employee parking area. Your testimony confirmed an original account of your actions that you gave to both and El Paso Police Officer and I on March 18, 2013. Additionally, you explained that you left some of the removed product at a gym.

Based on the events discussed during the meeting and the evidence presented, I have determined that your actions have violated the Basic Principles of Conduct; including, but not limited to the following:

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.
13. Act of theft or dishonesty, including knowingly presenting to the Company falsified documents.
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.

Due to your actions and the violations of the above mentioned policies, your employment with Southwest Airlines is terminated

effective immediately. [JX 2, pg.3.]

Ortiz acknowledged that the Grievant had filed an EEO charge three years ago and another after his discharge. The first charge was dismissed and no lawsuit was filed. He said that he bears the Grievant no ill will.

Supervisor Hernandez testified that he has worked with the Grievant in provisioning for 21 years. When he first heard from the two agents that the Grievant was taking product he did not believe it and, initially, did not report it to Manager Ortiz because he did not know whether he had permission. Hernandez once gave the Grievant permission to take a case of water, and informed Ortiz he had done so, when there was a death in the Grievant's family and he was having family members at his home. He has never given an employee permission to take a case without informing Ortiz. When they went to the vehicle, he looked in from the side, saw Southwest water cans, and did not look further. Hernandez testified that the Grievant had not asked him for permission that day or in the prior weeks, and he had not given it. He said that agents can drink water on the premises, and he can grant permission for a six-pack or two, but for more Ortiz must give permission.

Supervisor Rocha, who has worked for the Company for 17 years, always in ELP, and has been a supervisor for two years, testified that he has given the Grievant permission to take product in the past, when he asked for permission. Employees are allowed to take a case or two of expired product that could not be used on flights, but they had to ask or be told it was available. He said he never had any problems with the Grievant and was not aware of any with Ortiz. He did not give the Grievant permission to take product on or around March 18, 2013.

The Director of Labor Relations for Maintenance and Engineering, who has worked for the Company for 23 years and spent 13 years in ground operations employee resources, is responsible for answering questions from the stations, and administering the CBA, including the grievance procedure, system board, and arbitration. She testified that a Fact-Finding is required under the CBA when there is a loss of pay with discipline or discharge. The Company meets with the employee to share their side of the story and they are provided the opportunity to bring their union representative with them. This is a Company meeting and not an opportunity for the Union to conduct their investigation. However, any documents shared in the meeting would typically be provided to the Union. Depending upon the situation the Company might bring witnesses to the Fact-Finding, but not because the Union requested it.

The Director testified that the Company views theft the same way regardless of how much is taken. In October 2011 a provisioning employee was found, after a Fact-Finding, to have removed 20 cases of product without permission and he resigned rather than being terminated. (CX 8.) A 22-year flight attendant was found to have received and kept cash from passengers on flights when she had comped beverages. The arbitrator acknowledged that she had a clean record but upheld the termination. (CX 9.) A Tucson ramp agent was reported by his coworkers for taking toilet paper, facial tissue and provisioning supplies. The police officer looked in his vehicle, with his permission, and found airline tape and a nearly-empty box of SWA tissues. After further investigation and a Fact-Finding, at which the agent changed his

story, the Company terminated the agent for theft, with no progressive discipline. The arbitrator upheld that termination also. (CX 10.) She was not aware of any instances where the Company proved theft and termination did not result. This is a Company-wide rule.

The Senior Manager-Labor Relations, Ground Operations, who has worked for the Company for 24 years, including time as a ramp agent, operations agent, operations supervisor, and manager of ramp and operations, testified that the Company issues the Fact-Finding notices and the process is for the Company to determine what happened in any set event so the Company can make a decision. If the Union requests that witnesses attend or documents be produced, the Company may choose to bring them in. He said that the Company terminates in all cases of employee theft. In a 2010 case, in which the employee was caught red-handed taking liquor from a plane, the System Board denied the grievance. (CX 11.) In another case that year an employee was accused of stealing iPod accessories from a coworker and the Union withdrew the grievance. (CX 12.)

Police Officer Higgason testified that he sees the Grievant and Manager Ortiz day-to-day and they acknowledge one another, but do not have a personal relationship. He said that he asked Ortiz if he was looking at filing criminal charges or was going to handle the situation internally. Ortiz responded he wanted to handle it internally, but it would be up to his management and he wanted to see how it was going to go with talking with the Grievant. Higgason told Ortiz he could make a report that day or a week from now. He said that when he looked in the back of the Grievant's vehicle he observed 3 to 4 cans of Southwest water. He had a clear view and did not see four cases of product. In Ortiz's office he asked the Grievant if there was any product in his vehicle and he responded yes. He again asked Ortiz whether he wanted to file a police report, which would mean a criminal investigation, and, if not, he would leave. Ortiz indicated he would handle it internally and Higgason left. Higgason testified that he would not have told Ortiz he was going to arrest the Grievant because this was a class C misdemeanor and it is usually a citation. He documented in his log that he assisted with a civil issue at the provisioning office. The Incident/Investigation Report, with Ortiz as Reporting Person (RP) and the Grievant as the Offender (OF-1), reads as follows:

RP called the Telephone Reporting Unit to file a report. RP stated that between the listed dates and times, IO-2 notified RP that OF-1 had property belonging to the victim. RP stated that he and EPPD officer can attest that there was property, belonging to victim, in OF-1's vehicle. RP stated that he confronted OF-1 in the presence of the officer, and OF-1 confessed to having the property. RP did advise the officer that he would be handling it internally. Therefore, the officer was no longer needed. RP stated that OF-1 only returned one out of the four items of property that were in his vehicle. RP stated that they will not be filing charges, and only needed this report for documentation purposes only.

RP stated that the officer was not needed initially, but upon further investigation within the company, he was told that he would need

to follow up with a police report.

IO-2: Mike Fernandez/ Supervisor at Southwest Airlines . . .

RP stated that the property was found in OF-1's vehicle: Red Jeep
Laredo TX plate # ----

RP stated that OF-1 is a union member. [JX three.]

The Grievant testified that he never intended to steal water from the Company. On March 18 he came to work, punched in and worked all the originators. At around 6:30 he took the case of water to his vehicle, then returned and worked flights. Later, in the office, talked with Manager Ortiz. He again worked flights, then returned to the office and chatted with Supervisor Fernandez, Mechanic [REDACTED], and Agent [REDACTED]. Ortiz and Officer Higgason came in and Ortiz asked him to come to his office. Higgason asked if he had products in his vehicle and he said yes. The Grievant testified that at that point he was terrified, he did not know what was going on and was thinking unclearly. Higgason then asked Ortiz whether he needed a police report from him and Ortiz said no, he would do this internally. Higgason left and Ortiz asked if he had permission from one of the supervisors or from anyone. The Grievant testified that he told Ortiz no. He testified that he did not have permission that day, but had permission previously. On March 6 Supervisor Perez gave him permission but he only took three bags of snacks and did not take the water. Later, because it was a different Supervisor, he asked Hernandez and he said "no problem." He further testified that he felt backed into a corner and asked Ortiz "why are you doing this?" He was trying to explain himself and it seemed like Ortiz just wanted to get his badge and get him out the door. He said he had been trying hard to get along with Ortiz as an individual and coworker, and that agents from the ticket counter and ramp could see there is friction. He feels like Ortiz does not like him for some reason, based on how he is treated at times. The Grievant denied that he had gone to the break room and said Ortiz escorted him out the door and told him to get the water. Ortiz stayed at the door and could see him the entire time while the Grievant retrieved the case of water. When he handed Ortiz the case of water he did not respond or ask for more. He just took it and went inside. The Grievant then left and contacted Union Representative [REDACTED].

The Grievant further testified that in 2010 he had filed an EEOC complaint based on being treated unfairly and racism. In the provisioning department in El Paso there are nine Hispanic, three Caucasians and one African-American. The Manager and Supervisors are all Hispanic. On March 22, 2013, he filed a second EEOC charge, based on this incident and on retaliation for having filed the first charge. (UX 3.) The Grievant testified that Ortiz had pulled him into his office, closed the door, and said he did not appreciate Ortiz filing the EEO complaint. Ortiz said he felt that the Grievant was trying to get him fired and he didn't appreciate it. The Grievant told him he just wanted to be treated equally.

Regarding the Fact-Finding, the Grievant testified that he asked to talk to Supervisor Hernandez, but Ortiz denied the request even though Hernandez was at work. He said that he understood theft is a terminable offense and would not have jeopardized his job for a \$4 case of

water.

On cross examination the Grievant said that he had asked for and received permission to take water from Supervisor Perez on March 6, because a friend was coming by who was driving to Lubbock. Perez gave him permission, but he did not take the water that day. Then, on March 11, in the warehouse, he asked Supervisor Hernandez if he could take a case of water. Because he was working, he forgot about taking it that day. So, as of March 18 he felt like he had permission from both Perez and Hernandez. He said that he asked for a case, like he usually did. He needed the water because people were working on his house.

Union witness ██████████ has worked for the Company for 33 years and held several positions with the Union. He worked in El Paso for 19 years and knows a lot of the people involved in this case. On April 25, 2013, he was in El Paso to help Union members because the Company had announced they were shutting down ELP provisioning. While there he became aware of the Grievant's termination. The reason, taking water, seemed trivial to him and, speaking with three employees, he asked "doesn't everybody take water?". They said yes and one person said people take other stuff. He asked if they would be willing to testify, but they declined due to negative repercussions toward them. On cross examination, he declined to say which provisioning agents take water and other stuff without permission.

Union witness ██████████ is the Station Representative for El Paso provisioning, operations, freight and ramp. She testified that her manager, Bob Jacquemotte, the ramp side operations freight manager, holds Fact-Findings differently than Ortiz did in this case. Union representatives are able to ask questions and they talk about what occurred. In this case the Union Representatives were not allowed to actively participate. She had questions about some of the questions Ortiz was asking the Grievant, and when she tried to ask him, Ortiz would stop her mid sentence, and say he would answer her questions after the meeting. During the Fact-Finding Ortiz kept using the words "my products" but when she asked if it was one case of water, he said yes. When the Grievant tried to explain that he had said no but meant to say yes, Ortiz stopped him and did not allow him to say anything else. When they asked, three times, to bring in Supervisor Fernandez, Ortiz said "this is not a system board, I will ask the questions here."

Station Representative ██████████ testified that after the Grievant left she and her alternate sat down with Ortiz to ask her questions. She said that after going around in circles for 10 to 15 minutes, she concluded they were not getting anywhere and left. As they were walking through the warehouse to where their tug was parked, Ortiz ran up to her. She described what occurred in a SOFI incident report as follows:

Narrative

After a fact finding meeting in provo we were leaving the area and Carlos ran out and approached ██████████ and I. He started yelling and pointing his finger at me saying that if I knew that if the agent had any more of his product need to return it right now. He also said if I knew there was more product that wasn't returned I need to tell him right now, this is not a joke. He walked away then turned

yelled I need the product by Monday the 25 at the results finding or he will press charges.

I felt this was unprofessional and felt threatened in a way that if I don't tell him or bring back his product something will be brought up against me. [UX 6.]

Station Manager Bob Jacquemotte entered the following comments as the reviewer of this incident:

After this incident ██████████ and ██████████ came to my office to discuss the conversation that had taken place.

They expressed their concern about the conversation. I assured them that I'm sure this was not how Carlos intended to come across. I asked them if it would be alright for me to contact him regarding their concerns. They said yes. I called Carlos and discussed how they interpreted his final remarks as they were ready to leave the Provo location and head back to the Station side. He confirmed my thought that he did not intend his remarks to be threatening, and they were not directed personally at ██████████ or ██████████. He told me he would contact them both, and apologize for how he came across in his final comments. I called both ██████████ and ██████████ back to let them know I had discussed the incident with Carlos and assured them he did not intend to be threatening or hostile. His intent was to be firm, and directed toward the issue they had been dealing with, not them personally. The next day Carlos apologize to both employees for the misunderstanding. [UX 6.]

Fernandez said that Ortiz did apologize to both of them. On cross examination, she said that it is not a common practice in El Paso for agents to take things without permission and agreed that taking one case, without permission, is stealing.

Alternate Representative ██████████ testified that at the Fact-Finding the Grievant did not admit to theft. Rather, he named the supervisors who had given him permission and asked that the Supervisor be brought in. She said that on every Fact-Finding she has attended everyone involved was allowed to ask questions to try to get all the facts. Ortiz said, multiple times, that one case of water had been taken and never said four cases. She described the incident related above and said she had never been confronted like that. She also wrote a report. (UX 5.) She said she was not satisfied with the outcome because it seemed Ortiz apologized because he had to, not because he meant it.

Union witness ██████████ started with the Company in 1987 and has worked for the local union as a grievance specialist full-time since 2005. He was on the system board for

this case and there was testimony that all supervisors have to give stock to agents. ██████████ also identified Union requests for information and said that the Union was impeded in its investigation because that information was not provided for several weeks. The names ██████████ and ██████████ were not mentioned or identified prior to the arbitration hearing. When he served as a Station Representative he was involved in many Fact-Findings and the idea was to get to the bottom of what happened. He said “you get everybody in the room and get it figured out.” He said that in some places it seems like they do not want to get everybody in the room at one time as they still do in other locations.

On rebuttal, Supervisor Perez testified that on March 6 he gave the Grievant permission to take product. In the warehouse the Grievant already had a couple of six packs and asked if he could take them because his girlfriend was going to Midland. Perez told him “yeah, go ahead” and the Grievant took the water outside. When he came back he did not have the product. Perez further testified that if someone asked for a case of product he would talk to Manager Ortiz. He denied giving the Grievant permission to take product on March 18. He was on vacation at the time.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

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.

* * *

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

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

conditions:

- a. The suspension shall be 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 suspension;
- 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 fact-finding, and a copy of the decision shall be delivered to the local representative of the Union.

CONTENTIONS OF THE PARTIES

The Employer's Contentions

The Company contends that trustworthiness is an integral part of each employee's job responsibilities at Southwest Airlines and the Grievant violated this duty. He was terminated for acting dishonestly with intent to steal Company property. The Grievant was aware of, acknowledged receipt of and received training on the basic principles of conduct that expressly prohibit acts of theft or dishonesty.

The Company contends that it conducted a full and fair investigation into the Grievant's conduct, including requesting police assistance, interviewing numerous witnesses, taking photographs, and conducting a Fact-Finding hearing at which the Grievant was given the opportunity to provide responsive information and present his position. The Fact-Finding provided the due process required under the CBA so that the Grievant could present his version of events prior to a decision to terminate being made.

The Company notes that the Grievant changed his story numerous times. At Arbitration, he claimed that Supervisor Perez gave him permission on March 6 to give water to his girlfriend, but that he never took it so he did so on March 18, instead. Perez directly and credibly rebutted that testimony. The testimony of Supervisors Rocha and Hernandez also was logical and consistent. None of the Company witnesses had an incentive to lie. The Grievant's stories, told at various times, are mutually exclusive and, hence, not credible.

The Company cites prior arbitration decisions holding that, although progressive discipline is customarily an element of just cause, when the issue is theft or dishonesty it is not

required. Such offenses warrant summary discharge because the act, conduct, or behavior involved is inimical to employer-employee trust. The Company has a long-standing practice of terminating in every instance where theft is proven. This rule is applied Company wide, even when the theft is an item of nominal value.

The Company rejects the Union's contention that the Grievant was treated differently from other employees. Union witnesses refused to provide names or specifics of employees who took Company property without permission, were caught, but were dealt with differently. No evidence was offered that the Company was aware of the alleged commonplace practice of theft happening "all the time." The Union has not carried its burden in proving disparate treatment.

The Company contends that the evidence establishes the Grievant knew he needed permission to take product, that he was well aware he did not have this permission and that he knew he could be terminated if caught stealing. His employment record provides no basis for mitigating the penalty of discharge.

The Company requests that this grievance be denied.

The Union's Contentions

The Union contends that the Grievant had no intent to and did not commit an act of theft. The Company failed to prove this charge.

The Union notes that the Company offered no testimony or evidence that the Grievant had ever taken product in the past. Manager Ortiz incredulously testified that he observed four cases of water, but that fabrication or mistaken testimony was refuted by every witness that took the stand. He had much to gain by presenting embellished testimony and filing a false police report.

The Union contends that because the names [REDACTED] and [REDACTED] were not revealed prior to the arbitration hearing the Union never had an opportunity to interview agents to prepare for the Grievant's defense. Instead, the Company, in an attempt to represent that he had taken product before, introduced an email full of unsubstantiated, alleged, past incidents of theft. This document shows that there was no independent investigation or discovery, but instead the management group colluded and conspired in its gathering of documentation to build case. It must be ignored as any proof of wrongdoing.

The Union contends that the Grievant had asked for water many times in the past and been granted permission every time. He had no reason to believe this would be different. Former ELP Provisioning Agent [REDACTED] was told by three different agents that everyone does it. This incident does not rise to the level deserving summary discharge.

The Union contends that the Company failed to perform a thorough and complete investigation. The Company assumed the Grievant was guilty of theft without going to the vehicle and asking to look inside. He returned the one case of water he was under the impression

he could take, and there were no other cases as alleged. Ortiz could have asked him to open the vehicle but chose not to, and filed a false police report. The Company produced no records that any product or inventory was missing. Further, the Company produced no writeups for irregularities supporting any concerns by fellow agents.

The Union contends that the Company impeded the Union's ability to perform its own investigation through Ortiz's refusal to answer questions at the Fact-Finding and afterwards. He demonstrated resentment of the process, during the Fact-Finding and afterward when he accosted the Union Stewards, and he refused to provide a copy of the police report that was in his possession. Thus, the Union was unable to challenge the veracity of statements, documents or witness testimony and Ortiz had the opportunity to develop his web of allegations.

The Union contends that Ortiz is not credible, having filed a false police report, and being biased toward the Grievant. His testimony on many points was contradictory and contradicted by other witnesses. He repeated stated that he could not recall. Despite his having a strained relationship with the Grievant, the Company tried to portray them as friends. The Grievant had never been in this type of situation before and, understandably given their history, did not feel Ortiz would give him a fair shake.

The Union sees this decision as having been made on alleged hearsay and fabricated accusations to justify what would be considered by a reasonable and unbiased individual as a witch hunt instead of an investigation. This was an opportunity for the Company to "dump payroll" in advance of a RIF. Even if it is believed that the Grievant failed to get permission in a timely manner, this is a misdemeanor case, not a felony case of theft. The punishment must fit the crime. The Company cannot ignore a 24-year exemplary career without solid, incontrovertible evidence or proof that there was theft or an intent to steal.

The Union asks that the grievance be sustained, that the Grievant be reinstated to his former position, that he receive full back pay and all seniority and benefits.

STIPULATED ISSUE

Was ██████████ terminated for just cause; if not, what is the remedy?

FINDINGS

In this case a number of key facts are not in dispute. First, the Company's policy regarding theft is clearly stated in the COMPANY POLICIES & PROCEDURES, PROVISIONING MANUAL, Revised, December 21, 2009, BASIC PRINCIPLES OF CONDUCT and includes the following:

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.
13. Act of theft or dishonesty, including knowingly presenting to the Company falsified documents.

* * *

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. [CX 5.]

Second, on January 8, 2011, the Grievant signed that he acknowledged receipt of these Basic Principles. Third, at the arbitration hearing, the Grievant testified that he knew theft was a termination offense. Fourth, the Grievant was found to have a case of the Company's water in his vehicle on March 18, 2013.

Facts that are in dispute in this case include whether the Grievant had permission to take the water, or, alternatively, whether he had reason to believe he had permission so that there was no intent to steal.

In addition, the Union has raised objections to the Company's handling of this matter from the start of the investigation, through the Fact-Finding, and to the Company's interference with the Union's ability to properly represent the Grievant. Thus, there is a dispute as to whether those objections, if upheld, would warrant upholding the grievance.

In light of the manner in which the Grievant was initially asked, on March 18, about product being in his vehicle, i.e., being called to his Manager's office with a Police Officer present, it is understandable that he was not thinking clearly and may simply have misspoken on that occasion. His explanation at the arbitration hearing of what had occurred was, however, directly contradicted by the Supervisors he named as having given him permission to take water

– a case – on March 6 and on March 11.

March 6 - Supervisor Perez

Supervisor Perez testified that when he encountered the Grievant in the warehouse he was already holding a couple of six packs. Perez was specific in his testimony that the Grievant wanted the water for his girlfriend who was going to Midland and, after Perez granted permission, the Grievant went outside with that water and returned without it. The Grievant testified that he had asked Perez for permission to take water but he only took three bags of snacks and did not take the water at that time. On cross examination the Grievant testified that he was talking on the telephone to his friend, who was coming by before leaving for Lubbock, and Perez, who knows his friend, said “hi” on the phone. He denied that the water was for her and said it was for him.

The Grievant’s testimony is problematic. He explained that, after asking for water for himself, he did not take it at that time because he was working and forgot. However, on March 18 he put water in his vehicle before his shift ended. He agreed, on cross examination, that a grant of permission to take water did not mean he could take it whenever he wanted or every day, yet he took the water 12 days later without again talking with Perez about it.

March 11 - Supervisor Hernandez

The Grievant testified, on cross examination, that just he and Hernandez were in the warehouse when he went up to him and asked “do you mind if I take a case of water?” He said that Hernandez responded “no problem, man.” He said he did not take it right then because he was working and forgot to take it that day, and then he was not thinking about it the next day. Hernandez, however, testified that he had given the Grievant permission to take a case on only one occasion, for guests when there was a death in his family, and that he informed Manager Ortiz. He denied that he had given permission for the Grievant to take anything in the week before March 18.

This conflict in testimony brings forward another conflict: that involving when and how an employee may be granted permission to take a case of water, rather than one or two six packs. The Grievant testified on cross examination that he usually asked for a case of water and any of the Supervisors let him have that. All three Supervisors testified that they must get approval from Manager Ortiz to give that much product to an employee.

The Company’s interest in tracking inventory in its provisioning warehouse is obvious. It is a reasonable delegation of authority to permit Supervisors to allow employees to take an occasional six pack or two of water. Allowing employees to take water by the case is likely to have an impact on the inventory. Therefore, the rule spoken of by the three Supervisors and Manager Ortiz, i.e., the manager must give permission for an employee to take a full case, makes operational sense.

The Union offered hearsay testimony that at ELP “everybody takes water.” That

testimony does not establish that employees do so without permission, or that they are routinely permitted to load a case of water into their vehicle to remove from the premises for personal use. Station Representative ██████████ testified, on cross examination, that it is not a common practice for agents to take things without permission. To establish a practice of employees taking water by the case, as the Grievant did here, the Union would have had to put forward evidence of that practice and evidence that management was aware of it. The Union was unable to do so.

Weighing all of the above compels the conclusion that neither Supervisor Perez on March 6 nor Supervisor Hernandez on March 11 gave the Grievant permission to take a case of water. He acknowledged that being given permission to take water does not mean he could take it at any time. His attempt to reach back in time to justify his action on March 18 must, therefore, fail. The Company has, on this record, established that the Grievant took a case of the Company's water without permission and placed it in his vehicle with the intention to keep it, in violation of the Basic Principles of Conduct.

The undersigned arbitrator finds no flaw in how the investigation was initiated. Supervisors had received reports that they felt should be referred to their Manager. Their Manager then questioned them and went to look at the Grievant's vehicle. The fact that the initial reports were not anonymous and that the names were not revealed until the arbitration hearing is irrelevant here. The Union would not have benefitted in its representation of the Grievant from having those names earlier because the Grievant was not charged with stealing the items referred to in those reports. The sole basis for his termination was the water he took on March 18. In addition, ELP is a small base and it would be a simple matter for the Union to question its Provisioning Agent members about the existence of any relevant practices regarding the taking of water.

The Union offered testimony from several credible witnesses that during other Fact-Findings the Union asked questions and, if requested, additional witnesses were brought in. The provisions of Article Twenty, Section One-G, however, contain no such requirements. Under the CBA, in cases involving suspensions pending Fact-Finding, the conditions are that the suspension be with pay, that the basis for the suspension be reduced to writing and presented to the employee and Union representative within two days, that the Fact-Finding be held within three days of that notice, and that the Company render the decision, in writing, within five working days of completion of the Fact-Finding. All of those conditions were met in this case.

The Union's testimony regarding how other Managers conducted Fact-Findings fell far short of establishing a binding practice that would supplement the Section One-G procedures agreed to in the CBA. Grievance Specialist Clevenger testified that Fact-Findings are handled differently at different locations. This simply shows that managers have and exercise discretion in conducting Fact-Finding meetings. Therefore, the Union has not established that Manager Ortiz's refusal to bring Supervisor Hernandez to the Fact-Finding, or to allow the Union to raise questions during that meeting violated the Grievant's rights under Section One-G.

The Union argues strongly that Ortiz was not a credible witness and had reasons for wanting the Grievant terminated. First, the Union notes that only Ortiz testified that there were

four cases of water in the Grievant's vehicle, as he also stated in the police report. That testimony was contradicted by Office Higgason and Supervisor Hernandez, as well as by his own behavior in letting the Grievant leave after returning only one case. It is nevertheless undisputed that the Grievant did have one case of Company water in his vehicle. As discussed above, he did not have permission, as required. Therefore, there is no need to resolve the discrepancy in testimony regarding what the three witnesses saw when they looked in the vehicle.

The Grievant testified that in 2012 Manager Ortiz questioned him about the EEOC charge he had filed two years before. Assuming that Ortiz had objected to the accusations made in that charge, this is not sufficient to establish that in this instance the Grievant was treated differently from any other employee in similar circumstances. The Company offered numerous examples of employees in various classifications who, upon being caught with Company product without permission, were terminated regardless of years of service or amount taken. The Union offered no examples of employees in similar circumstances who were not terminated. Therefore, on this record, no disparate or retaliatory treatment has been proven.

Finally, the Union's argument that this termination was undertaken in anticipation of the RIF simply was not substantiated.

For the above reasons, the grievance will be denied.

AWARD

The grievance is denied.

A handwritten signature in cursive script, reading "Elizabeth Neumeier", followed by a horizontal line.

Elizabeth Neumeier, Arbitrator

October 10, 2013