In the Matter of Arbitration

Between

Southwest Airlines,	)	
the Company	( )	Grievance No. JAX-R-0455/15
- and -	( )	Grievant: Agent X
Transport Workers Union of America,	(	Re: Termination
AFL-CIO, Local 555,	)	
the Union	(	

Before the Labor Arbitrator, Kathy L. Eisenmenger, J.D.

Introduction

Pursuant to Article Twenty, Section One, paragraphs L.11 and L.12, of the collective bargaining agreement ("Agreement") between Southwest Airlines Company ("Company" or "Southwest") and the Transport Workers Union of America, AFL-CIO, Local 555 ("Union"), the parties assigned the above-captioned grievance arbitration to me to resolve. I conducted an arbitration hearing on May 8 at a hotel near Dallas Love Field Airport, Dallas, Texas. Ms. Ruth Ann Daniels, Attorney at Law with Gray Reed & McGraw P.C., represented the Company. Mr. Jerry McCrummen, Vice President of Local 555, represented the Union and the Grievant, Mr. Agent X. The parties submitted two joint exhibits that were admitted into the record.

The Company presented Mr. Cody Sad, Ramp Supervisor in Company's station at the Jacksonville, Florida airport ("JAX"); Mr. Brad Taylor, JAX Ramp Supervisor; Mr. Brian Fairbanks, then-JAX Station Manager; and Mr. Dan Kusek, Labor Relations Specialist, as witnesses for the May 8 hearing. The Company submitted ten (10) exhibits that were admitted into the record during the hearing.

The Union presented as witnesses the Grievant, Agent X, former JAX Ramp Agent, and Agent Y, JAX Ramp Agent. The Union submitted four (4) exhibits that were admitted into the record.

All the witnesses gave sworn or affirmed testimony. The hearing was transcribed by a professional court reporter. At the conclusion of the evidentiary hearing on May 8, the parties elected to submit post-hearing briefs. The parties timely transmitted their respective briefs on June 19, 2015. I closed the arbitration record as of that date.

Issue

The parties differed slightly on framing the statement of the issue to be resolved in this arbitration. The Union posed the issue as: "Whether the Grievant was terminated with just cause, and if not, what should the remedy be?" The Company framed the issue as: "Was the Grievant, Agent X, discharged for just cause; if not, what is the remedy?"

Pertinent Contractual Provisions

ARTICLE TWO

SCOPE OF AGREEMENT

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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 Officer 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.

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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 discharged without just cause.

. . . .

L. **Interpretation/Application of Agreement.** In the event of a grievance arising over the interpretation of, or application, this Agreement, or in the event of disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. . . .

. . . .

11. **System Board Deadlock.** Should the System Board of Adjustment deadlock . . ., . . . the Union shall notify the Company, . . . whether Arbitration is requested. . . .

. . . .

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.

STATEMENT OF FACTS

The parties made several verbal stipulations of fact at the hearing, as follows:

1. The instant matter is properly before the Arbitrator for a decision and there are no procedural issues or violations.

2. The bag at issue was damaged by the Grievant, Mr. Agent X.

3. The Grievant had February 9 and 10, Monday-Tuesday as off days, and Wednesday, February 11 was his free day.[1]

4. The blue fabric found in the marks on the ground between Gate C-1 and the barrage claims carousel came from the damaged bag at issue.

At the time of the Grievant's termination of February 20 the Grievant had been a Ramp Agent with the Company for approximately three years and nine months. The Company hired him on April 15, 2011. The Grievant worked at JAX station at the time of his termination from employment. The Grievant initially worked at the Company's LaGuardia Airport (LGA) station. The Grievant had previously worked for Delta Airlines, ABQ Air, and Comair Delta Connections. Overall, the Grievant had been employed in the airlines industry for approximately nine (9) years.

The Company effected the Grievant's discharge for the charges of "fail[ing] to report damage [he] caused to a Customer's bag," and for not being "forthcoming about the damage when asked by [his] Leader." The Company concluded that the Grievant violated Ground Operations Basic Principles of Conduct ("BPC") #14, #16, #28 and #34, upon management's review of the circumstances.

These BPC items state as follows:

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

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

c. #28 Failure to comply with safety rules or regulations.

[1] All dates hereafter refer to 2015, unless otherwise indicated.

d. #34 Interfering with or failure to cooperate with the Company in any investigation or fact finding.

Spanish is the Grievant's first language. His supervisors did not observe the Grievant to have problems with or an inability to communicate in or understand English. The Grievant admits he speaks English "well." Observations made during the hearing, particularly during the Grievant's testimony, reveal that his speech patterns and his writing word choices were consistent with an English as Second Language (ESL) speaker.[2]

Being a relatively short-term SWA employee, the Grievant does not have an extensive work history with the Company, but his record was generally favorable. Ramp Supervisor Sad, the Grievant's supervisor at JAX, had never known him to damage a bag before this incident. The Grievant had good attendance while at JAX, and was only one level below having the best attendance rating possible. The Grievant's job performance had been rated in May 2, 2014, at JAX as meeting and exceeding expectations. Specifically, he was described as being "very good at his job" and "a proactive employee;" having a skill set "above normal;" "work[ing] circles around most of his coworkers;" being "very dependable and fun to be around;" and "handl[ing] customer's luggage with care and quality." Ramp Supervisor Sad wrote the evaluation and Manager Fairbanks reviewed and signed approval of it. Finally, before coming to JAX, while at LGA, the Grievant was a Station Trainer, for which he was recommended for the same assignment in his 2014 JAX appraisal.[3] The Grievant's discipline record with the Company reveals his prior termination while at LGA in August 2012 (four to eight months after he assumed Station Trainer responsibilities) for engaging in an aggressive verbal confrontation with a co-worker. The Company voluntarily reinstated him within a month and awarded back pay, due to the Company having missed a grievance deadline. Sometime shortly thereafter, the Grievant relocated or was transferred to JAX.

Supervisor Sad testified that the Grievant's performance, attitude, and work ethics had deteriorated since his last appraisal. Mr. Sad testified at arbitration he would have rated the Grievant as having only satisfactory or even poor performance because it was "up and down," the Grievant was only doing "the bare minimum" to be "satisfactory," and the Grievant had

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[2] For example, the Grievant testified at the hearing during a replay of the video that he said to Mr. Fairbanks, rather than simply stating he saw he caused the damage, "I was like, okay, I see, yes, I understand that now it is my fault, that one," to reflect that he told management he was responsible for the damage.

[3] The document is a letter of commitment dated December 13, 2011, by the Company but signed by the Grievant on April 12, 2012.

gotten into "several arguments" with co-workers. Mr. Sad related only one incident where the Grievant allegedly engaged in an oral argument with a co-worker. The record contains no recent documentation of counseling or discipline issued to the Grievant to reflect these asserted matters. Supervisor Sad equivocated in describing the quality of the Grievant's work performance, first insisting it was poor, then describing it as "satisfactory" for doing the "bare minimum."

On Sunday February 8 between about 9:15 p.m. through 9:30 p.m., the Grievant off-loaded an airplane at Gate C-1 that had arrived from Baltimore ("BWI"). The Grievant worked at the belt loader at the rear of the plane. During the off-loading process, generally another Ramp Agent in the aircraft places luggage bags in a standard position of the bags placed on the belt face down/wheels up. In this position, the top of a bag is not usually visible. Witnesses described the lighting at Gate C-1, and particularly at the rear of the plane, as "standard airport lighting," "poor," "not the best" and "the worse lighting" of the JAX SWA gates. During the unloading process, the Grievant did not observe any damage to a bag while loading the luggage onto his three baggage carts.

While the Grievant drove his luggage tug and three (3) carts to baggage Carousel 6, the bag at issue apparently fell and got caught under the frame next to the front wheel of the second baggage cart towed by the Grievant. The bag was dragged or pushed at least some of the distance from the aircraft to the baggage carousel as the Grievant drove his tug pulling the three baggage carts. The friction from the bag scraping along the ground created sparks that can be observed in the video recorded by Airport Operations.[4]

The movement of the bag against the ground "shredded" and "destroyed" it. A rip in the bag caused some items to fall and were strewn from a short visible trail behind the bag and the second cart. The video segment shows the Grievant picking up items of a personal nature from the ground and depositing them into the damaged blue bag. Ultimately, the Customer lost one shoe, an electronic device charger, and the use and value of the bag. The Company estimated the total value of damage at $350.00 to $375.00. The Company made no allegation that the Grievant stole any of the missing property

The Grievant noticed the bag caught under the cart when he arrived at the baggage carousel. He picked up the bag from the ground. The Grievant did not appear in the video to

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[4] Ramp Supervisor Mark McCann viewed the video recordings taken from different cameras for the area, date and time at issue. He described their contents to Manager Fairbanks, who personally saw the video recordings for the first time at the fact finding meeting with the Grievant and his Union representative. Copies of the video recordings were also utilized by the Company at the System Board hearing and at arbitration. Ramp Supervisor Brad Taylor testified that he recorded copies of three (3) Airport Operations video segments with his cell phone camera, at the direction of Company management, because the JAX Airport Operations' video could not be easily copied and/or uploaded to the Company. At the fact finding meeting, the parties looked at the Airport Operations' actual video. At some point, Ramp Supervisor Taylor provided the cell phone copy of the video recording segments to SWA Labor Relations.

have to strain to remove the bag. He placed the fallen items into the bag and took the bag to the carousel. He briefly put the bag on the carousel, then took it off the carousel. The Grievant stuck his head in the flaps separating the SWA side from the public side of the circular baggage carousel, and alerted the Customer Service Agent ("CSA") Jason Strong that "there was" or "he had" a "damaged bag." Shortly thereafter, CSA Leon Sherman came outside and retrieved the destroyed bag. Presumably, CSA Sherman took the bag inside to SWA's Baggage Claim Customer Service office to present the bag to the customer. Presumably, the baggage claim CSAs receive and process baggage complaints from customers who traveled on SWA.

The Grievant did not notify Ramp Supervisor Sad of the damaged bag at the time he discovered it. His offered reason for not making the notification was because he did not have a radio, did not know where Mr. Sad was, and assumed it was sufficient to notify CSA Strong "knowing that … he will actually have a radio and he will actually alert Cody (Sad) to let him know that … this is a damaged bag." The Grievant neither informed CSA Strong nor CSA Sherman that he had dragged or pushed the bag along the ground with one of his cart, or that he had had to pick up and replace spilled contents. The Grievant did not ask either CSA to inform Supervisor Sad of the damage to the customer's bag.

Ramp Supervisor Sad learned of the damaged bag as he was going upstairs and saw an irate female customer in Customer Service after the arrival of the BWI-JAX flight. He testified that he had received no prior report from the Ramp crew of a damaged bag, and therefore initially assumed the bag had arrived from Baltimore in the damaged condition. He so informed one of the of the CSAs on duty that evening of his assumption. The customer complained that one of her Air Jordan shoes was missing from the contents of her bag. Supervisor Sad used his radio to contact a ramp employee to go out to the flight and see if there were any missing items that may have come from the arriving BWI flight. Other than have the customer make an itemized report and issue her a temporary bag, Mr. Sad took no further actions for the remainder of the shift.

On occasion, bags become damaged in the airline industry. However, rarely does a bag become shredded or destroyed to the extent as did the bag at issue. Under SWA's default policy, the cost of loss due to damaged luggage is charged to the terminating airport. SWA has established ratios for acceptable damage for each serviced airport. At the time of this incident, SWA at JAX had not met the damage ratio for several months. If the bag damage had occurred on the originating BWI flight, however, it could have been "charged back" to Baltimore. A secondary issue is charge for the loss to either the departing or terminating airport or to the Company when the damage is the result of a SWA Company's negligence. The primary issue is the inconvenience and/or harm to the customer for the loss. The Company's practice is to initiate an investigation based on a customer's complaint even if a Company employee has not informed a supervisor of the complained-of damage. Supervisor Sad testified that BPC #16 requires a Ramp Agent to immediately report to the agent's supervisor an accident or incident involving damage to a customer's piece of luggage. He stated that the purpose of the importance to report the incident of damage immediately is for the supervisor to be able to handle the situation. For example, he opined that on February 8 he could have handled the customer's situation and been able to have informed her what had truly happened to her bag if he had been notified of the damage by the ramp agent.

On the following day (Monday February 9), at the ramp operation's usual 9:00 a.m. briefing, Mr. Sad informed Mr. Fairbanks that a bag had been damaged during the previous night shift. Mr. Sad imparted that he believed the bag arrived from Baltimore damaged. He had not yet been told about the damaged bag from anyone on the Ramp's crew who worked the late February 8th shift. Mr. Fairbanks recalled that Mr. Sad reported at the briefing that CSA Jason Strong told Mr. Sad that the bag came in to JAX damaged.

After the morning meeting on February 9th, Mr. Sad returned to his office, where Ramp Supervisor Mark McCann came to him and said he wanted to show him something at Gate C-1, the same gate the damaged bag had arrived at the night before. Mr. Sad and Mr. Fairbanks went with Mr. McCann to Gate C-1. At Gate C-1, beginning where the tail end of the plane and the belt loaders would have been, there were streaks on the ground. The marks continued the entire distance to the T-point makeup area, the same area of the carousel where the bags were off-loaded from the carts. The marks contained blue fabric matching that of the damaged bag. Mr. Fairbanks photographed the streak marks, the blue fabric debris and areas around the carousel where bags from the BWI-JAX had been off-loaded. After visiting the area between Gate C-1 and Carousel 6 at the ramp sites, Mr. Fairbanks realized the Company needed to change the damage claim from BWI to JAX. He also realized he needed to initiate an investigation into how the bag became damaged. Mr. Fairbanks believed that the bag had somehow been dragged and someone must have seen this incident. He directed Mr. Sad to contact each of the Ramp Agents who had worked the Sunday (February 8) evening shift to ask them if they had seen a bag come in with damage like that of the bag at issue or had seen a bag be dragged or anything that may relate to the damaged bag. Mr. Fairbanks' concern to initiate the investigation focused on the inconvenience to the customer for her damaged bag.

Mr. Fairbanks instructed the customer service supervisor to change the chargeback made against Baltimore inasmuch as it appeared that the bag was damaged at JAX. Supervisor Sad investigated the matter, including interviews with the Ramp Agents working Gate C-1 the previous night. Mr. Sad recalled that his questions typically asked the employees on duty if they knew anything about the incident at issue and, if so, to give a written statement of what they knew. Mr. Sad questioned four of the six Ramp Agents shown working the night of February 8th. Because Supervisor Sad was to be away for the next following days, he asked Ramp Supervisor Taylor to interview the other two Ramp Agents on the duty roster for February 8th; i.e. Agent Z and the Grievant.

Supervisor Taylor interviewed the Grievant on Thursday, February 12th. The Grievant admitted to Mr. Taylor to having off-loaded the damaged bag. However, the two men differ as to what exactly the Grievant told Mr. Taylor about the incident. Mr. Taylor asserted consistently in his written and verbal reports to Mr. Fairbanks on Friday, February 13 and in his testimony at arbitration, that the Grievant's immediate response to the Supervisor's inquiry about the bag was in words to the affect, "It came off the plane like that." and asked if they were "trying to blame [him] for this?" Mr. Taylor further testified that the Grievant was "crystal clear" about the bag coming off the plane damaged, and that he in turn was "very clear" in his questioning and of his understanding of what the Grievant said. The Grievant denied that he told Supervisor Taylor that the bag had come off the arriving BWI airplane damaged.

The Grievant stated at the fact finding, at the Systems Board and at arbitration that he told Supervisor Taylor only that the bag "might" have come "off the plane like that." The

Grievant did not tell Supervisor Taylor about having pushed or dragged the bag. The Grievant did not mention to Mr. Taylor that he had found the bag caught under the cart when he arrived at the carousel. The Grievant also failed to impart having to retrieve the spilled contents from the bag and to replace them in the bag. The Grievant did not testify to being confused by Ramp Supervisor Taylor's questions asked of him during their February 12 investigative interview.

Supervisor Taylor and the Grievant do not dispute that Supervisor Taylor asked the Grievant why he did not report the baggage. The Grievant responded that he did not have a radio with which to call Supervisor Sad, so instead he informed "the first person of contact," CSA Jason Strong.

By Friday February 13, Mr. Fairbanks reviewed the information gathered from Supervisors Sad, McCann and Taylor; i.e., marks and fabric on the ground were consistent with the bag having been dragged at JAX, and Supervisor Taylor's statement that the Grievant told him the bag came off the plane damaged that way. Mr. Fairbanks concluded that the situation necessitated a fact finding. He directed Ramp Supervisors Sad and Taylor to reduce their discussions with the Ramp Agents working on February 8 to writing. The Company issued a fact finding notice.

Additionally, on February 13th, Mr. Fairbanks requested the JAX Airport Manager to review, secure and save the relevant Airport Operations video footage for February 8. Subsequently, Supervisor McCann viewed the video and verbally relayed the contents to Mr. Fairbanks. As discussed above, Supervisor Taylor later made a copy by using his cell phone recording feature and provided it to Labor Relations. Supervisor Taylor's copy was presented at the System Board hearing. One video segment shows the Grievant driving into the baggage claim area with the bag being dragged or pushed under a cart. Another clip from the front of the carts shows the Grievant pulling the damaged bag from underneath the cart.

On February 18, the Company held a fact finding attended by Mr. Fairbanks, Ramp Supervisor Taylor, and the Grievant. Ramp Agent Agent Y was also present at the Grievant's request. Union and Company witnesses disagree on some of what was said at the fact finding.

Mr. Fairbanks and Ramp Supervisor Taylor gave testimony generally consistent as follows. Early in the fact finding, Mr. Fairbanks asked the Grievant what had happened with the bag and when was the first time he noticed there was a damaged bag. He also relayed to the Grievant that the supervisors had found the blue streak on the ground. The Grievant initially said "The first time I saw it, it was laying on the ground next to the carousel." Mr. Fairbanks drew a not-to-scale diagram of the baggage carousel and carts and asked the Grievant to mark where he found the bag. Mr. Fairbanks' drawing incorrectly reflects the carts as being immediately adjacent to the carousel. However, Supervisor Taylor testified without rebuttal that the carts are usually pulled alongside but about two to three (2-3) feet away from the carousel. The carts are positioned thusly to leave the Ramp Agents space to move while lifting and transferring the bags from the carts to the carousel. According to Mr. Fairbanks, he asked the Grievant clarifying questions to ensure the Grievant was stating he found the bag next to the carousel and "not underneath the carts." Because the hand-drawn diagram is inaccurate to scale, it cannot be determined whether the Grievant accurately reflected the bag as being between the two carts or as being found next to the carousel.

The Grievant testified that he again stated at the fact finding only that the bag "might" have arrived from Baltimore in the damaged condition.

All witnesses consistently maintain the following about the February 18 fact finding. Mr. Fairbanks asked Ramp Supervisor Taylor to impart to the group his previous discussion with the Grievant. As Mr. Taylor began his recital that the Grievant informed him on February 12 that the bag came from Baltimore damaged, the Grievant interrupted him and said in words to the affect, "No, that's not true. I never said that," in an allegedly agitated manner. Mr. Fairbanks replied in words to the affect, "Well, we have video of you pulling into baggage claim, dragging a bag, and you pulling the bag out from underneath the car, not next to the carousel." Mr. Fairbanks asked the Grievant what he thought they would see when they watched the video. According to Mr. Fairbanks, the Grievant responded, "No, you're not going to see me pulling a bag out from underneath the cart." Neither Ramp Agent Y nor the Grievant rebutted this latter testimony.

The four individuals at the fact finding went to Airport Operations to view the video recording. The video shows the bag caught underneath the frame of the second cart and in front of the cart's first right wheel. The video also shows sparks as the bag is pushed or dragged toward the baggage carousel location, the Grievant pulling the bag out from under the cart and the Grievant placing the bag next to the carousel in the same approximate location where he told Mr. Fairbanks during the fact finding that he first saw the damaged bag.

According to Mr. Fairbanks, the Grievant did not say anything while viewing the video footage. Mr. Fairbanks observed that the Grievant "basically just kind of shut down, crossed his arms, kind of sat there and kept his head down, and he never said anything after that." In contrast, Ramp Agent Y and the Grievant testified that the Grievant realized upon viewing the video that he had caused the damage after all, and made a verbal remark to that affect. Mr. Agent Y testified the Grievant made the remark to him. Mr. Agent Y further stated he did not know if anyone else heard the Grievant's remark, but they were all sitting close together. The Grievant testified that he "pointed this out" directly to Mr. Fairbanks. Mr. Fairbanks and Mr. Taylor both deny hearing the Grievant make any remarks to indicate he accepted responsibility for the bag's damage. Mr. Fairbanks testified that after they reviewed the video and returned to the fact finding meeting site he asked the Grievant and Mr. Agent Y if either of them had anything to add after seeing the video. Mr. Fairbanks stated that both Ramp Agents "just said no, they had nothing to add."

The entire fact finding, including waiting for and viewing the video, took about two (2) hours. At no time during the fact finding did the Grievant say to the Company that he damaged the bag or admit to having removed the bag from underneath the cart. Both the Grievant and Mr. Fairbanks testified that the Grievant did not mention during the fact finding the Grievant had picked up the bag's spilled contents. However, Mr. Agent Y testified that the Grievant admitted at the fact finding he found several items on the ground that had been spilled from the damaged bag. He specified that the Grievant mentioned he noticed some sort of cosmetic product and a phone charger which he placed inside the bag before he placed the bag aside. While watching the video at the JAX Airport Operations, the Grievant exclaimed, "Yes, that's what happened," when the film segments showed the blue bag beneath the second cart behind the Grievant's tug being pushed/dragged while the cart is pulled forward, presumably from the BWI aircraft to the baggage carousel.

According to the Grievant, Mr. Fairbanks did not pointedly ask the Grievant upon the group's return to the Company offices any additional questions, such as "Okay, you saw the video, now do you take full responsibility?" The Grievant further stated that Mr. Fairbanks did not pointedly ask the Grievant if anything came out of the bag. The Grievant testified he made no admission of culpability at the fact finding, as alleged by the Company witness.

After the fact finding, Mr. Fairbanks submitted his views of the meeting to the Company Labor Relations representative, Ms. Jen Traylor. Several days later the two had a discussion about the matter and Mr. Fairbanks decided that termination was the only option for the Grievant's misrepresentations, omissions and lack of forthrightness. Mr. Fairbanks issued the notice of termination based on his determination the Grievant had not been truthful about what happened despite having a number of opportunities to do so. The termination notice, issued to the Grievant on February 20, and effected immediately, states in pertinent part:

> A fact-finding meeting was held on February 18, 2015, to discuss a possible violation of the Southwest Airlines Basic Principles of Conduct and an incident of damage to a Customer's bag on February 8, 2015. . ..
>
> After a thorough and complete investigation of this matter and after considering the issues discussed at the fact-finding, we have determined that you failed to report damage you caused to a Customer's bag, and then you were not forthcoming about the damage when asked by your Leader. Such conduct is in violation of the following Ground Operations Basic Principles of Conduct, including, but not limited to: [the notice thereafter cited BPC items #14, #16, #28 and #34, reproduced above on page 4.]

After the fact finding and upon the suggestion of his Union representative, the Grievant wrote a statement describing events from his perspective of the meeting. In his statement, he did not mention having picked up the bag's contents. The Grievant wrote that he did not know if the bag came off the aircraft damaged or if it was dragged. His explanation at arbitration for these omissions was that he was describing step-by-step what he knew as he learned it.

The Company considers that if a Ramp Agent promptly and accurately reports damage to a bag that does not, by itself, typically result in termination. Mr. Fairbanks considered that the Grievant had made misrepresentations and was obstructive with the investigation of the bag's damage by his omissions of material facts. He concluded that the Grievant's conduct raised substantial trust and integrity issues about his continued employment with the Company.

The Union filed a Step 1 grievance on February 23 concerning the Grievant's termination. The Union followed with a Step 2 grievance on March 2. The Company denied the grievance on March 16.

On April 8, the parties convened a System Board of Adjustment hearing on the Grievant's termination at the Union's office in Dallas, Texas. The parties dispute what was said at the Board's hearing. Mr. Fairbanks attended the System Board with LR representative

Traylor. Mr. Fairbanks testified at arbitration that the Grievant stated for the first time at the Board hearing that the bag may have come in damaged, or that he may have placed it on top of the cart without seeing it and then the bag might have fallen off and been dragged to the baggage claim area. Mr. Fairbanks viewed this as a third version of events the Grievant had related. The Grievant, in contrast, testified that he accepted responsibility at the Board hearing for dragging and damaging the bag, as he had so done at the fact finding after viewing the video. He also testified that he informed the System Board that he had to pick up items that had fallen out of the bag.

On July 23, the Company revised its Ground Operations Employee Handbook, Section 3.2, Basic Principles of Conduct (BPC). Previously, No. 16 of the BPC had read as follows: "Failure to immediately report to your supervisor an accident involving personal injury or damage to Company property." BPC No. 16 now reads as follows: "Failure to immediately report to your supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination." The change was not negotiated with the Union.

The Company submitted evidence of past instances in which termination of the employee's employment was determined as the appropriate level of penalty for failing to report damage and/or obstructing an investigation into the damage when compounded with other offenses such as violations of BPC Nos. 14 and 34.

The System Board of Adjustment members could not reach a joint resolution and declared a deadlock on April 8., The Union invoked arbitration on April 13 under at Article Twenty, Section One, Paragraph L, sub-paragraphs 11 and 12.

POSITIONS OF THE PARTIES

For the Company

The Company asserts it met its burden to show just cause for the Grievant's termination. The Company posits there was substantial evidence of negligence by the Grievant which caused the damage to a passenger's bag. The Company claimed that the misconduct was compounded by the Grievant's failure to report the damage to his Supervisor, as required by the Company's BPC, and his subsequent attempts to cover up his negligence by providing multiple, inaccurate versions of what happened. The Company considers the Grievant's dishonesty as possibly more egregious and destructive to the Company's trust than was his negligence with the bag.

The Company maintains that the charges against the Grievant based on the BPC constitute reasonable exercise of the Company's authority. The Company asserts that its expectation for employees to conform to the rules of conduct relate directly to the effective and efficient operation of its business. The Company claims the Grievant violated Principle No. 14

by his careless, negligent or unsatisfactory performance in the handling of the damaged bag. The Company further claims the Grievant violated Principle No. 16 by his failure to immediately report to his Supervisor the damage to the property that occurred in the Grievant's workplace. The Company alleges the Grievant violated Principle No. 34 when he interfered with or failed to cooperate with the Company's investigation into the circumstances that resulted in the bag's damage.

The Company maintains it conducted a full, fair investigation during which the Grievant was given multiple opportunities to provide a truthful explanation of what happened. The Company asserts that before issuing discipline to the Grievant the investigation included interviews of witnesses, reviews of video footage taken of the areas of the bag's travel route, and a fact finding meeting for the Grievant to provide an additional opportunity to describe his actions. The Company observes that the Grievant eventually admitted that the bag was damaged while in his care; however, he was not honest nor forthright about what had happened.

The Company asserts there are few mitigating factors in light of the Grievant's short work history and recent deterioration in work attitude and performance. The Company claims any mitigating factors are far outweighed by the Grievant's dishonesty. The Company argues that the Grievant's misrepresentations have broken the essential bond of employer-employee trust, and his lack of remorse shows he is not a good candidate for rehabilitation.

The Company further argues there was no disparate treatment inasmuch as the Company has consistently terminated employees who caused relatively minor property damage but thereafter failed to properly report the incident or to be forthcoming about it. The Company refers to the termination of a Ramp Agent formerly at the Dulles airport ("IAD") for damage he caused while operating a tug and for his untruthfulness to report the incident or be forthright in the investigation. The Company also refers to the termination of another bargaining unit employee for negligence that resulted in damage to property and for his dishonesty by denying he had been the operator of the provo truck at the Philadelphia airport ("PHL"). The Company insists that the circumstances involved in these two cases are similarly situated to the Grievant's termination. The Company further refers to the termination of a third Ramp Agent at the McCarran International Airport ("LAS") that was sustained in arbitration.[5]

For the Union

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[5] *Southwest Airlines Co. and Transport Workers Union of America, AFL-CIO, Local 555,* Case No. LAS-R-1151/14 (Lemons, 2014) (*citing Genie Co.*, 97 LA 542 (Dworkin, 1991) ("In order to prove disparate treatment, a union must conform the existence of both parts of the equation[.] It is not enough that the employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties.").

The Union asserts that the Company failed to show just cause to terminate the Grievant's employment. The Union claims the termination was an excessive penalty because the Grievant did not intentionally damage the bag. The Union contends that the Grievant did not intentionally mislead the Company about the cause of damage.

The Union points out that the Grievant could not report the fact of a damaged bag to Ramp Supervisor Sad because the Grievant did not have a radio that night. The Union insists that the Grievant reported the damaged bag immediately to the relevant Company personnel; i.e., Customer Service Agents at the Baggage Claim office, who are charged with responsibility for processing customer complaints regarding baggage. The Union observes that Ramp Supervisor Sad learned of the damaged bag within minutes of it being off-loaded at the carousel and, thus, he had the opportunity to start an investigation immediately. The Union argues that in light of these facts the Company's interpretation of BPC # 16 is "nonsensical" because the intent of the rule is that the Supervisor be notified, which he was. The Union further argues that the rule—which was not negotiated with the Union—should be applied reasonably to major damage or injuries, not to minor damage as what occurred here.

The Union contends that the Grievant could not initially admit liability for damaging the bag because he was unaware of the bag falling and being dragged, there was poor lighting in the area where he transported the bags and he wore ear protection. The Union claims that at no time on February 8 did the Grievant tell the CSAs or Supervisor Sad that the bag came from Baltimore already damaged. The Union insists that the Grievant demonstrated his honesty and reliability by immediately accepting responsibility once he was shown the video of the incident at the Fact Finding. The Union maintains that the Grievant also accepted responsibility at the Systems Board. The Union opines it is not the Grievant's fault that the Company representatives did not hear him admit responsibility at either event.

The Union claims the Company failed to follow established principles of just cause by management's predisposition to discipline and their rush to judgment. The Union observes that just cause holds that the employer's choice of penalty must be reasonable, not arbitrary, and to fit the proven offense. The Union argues that the decision to terminate the Grievant for the incident with the bag was excessive. The Union claims that Mr. Fairbanks' misconception of the Grievant's statements as dishonest, deceptive and lacking accountability caused Mr. Fairbanks' predisposition to nullify a fair and just investigation. The Union intimates that Mr. Fairbanks came to an erroneous decision that the Grievant "interfere[red] with the investigation by not being truthful about what happened." The Union asserts that none of the evidence shows the Grievant stated on February 12 that the bag arrived from Baltimore [BWI] damaged or that he had made such a statement to Mr. Fairbanks.

The Union insists the Grievant provided credible and forthright verbal information but some was "lost in translation" due to English is his second, not primary, language. The Union emphasizes that the Grievant was unaware of how the bag became damaged until he saw the video footage. The Union points out that the Grievant admitted "the bag could have come off the plane like that." The Union raises a number of questions concerning the validity and veracity of the Company's evidence. The Union urges that the testimony of Mr. Loomis prevail due to his objectivity as a witness.

The Union argues that the Grievant's situation with the damaged bag lacks similarity to the situation of the termination of the Ramp Agent formerly at LAS. The Union observes that the arbitrator in the latter case found the grievant there committed an offense of Principle No. 16 and her termination met just cause given those unique circumstances. The Union contends that the Grievant, unlike the former LAS Ramp Agent, did not attempt to hide the incident of the damaged bag, did not fail to abide by the intent of BPC Principle No. 16 and did not try to evade his responsibility to report the incident. The Union asserts that the termination was excessive under just cause. The Union posits that despite the verbiage of BPC Principle No. 16, the Company must apply the just cause standard pursuant to Article Twenty.One.A of the Agreement.

Analysis and Decision

The Union brings this grievance under Article Twenty of the parties' negotiated grievance procedure in the Agreement. Article Twenty, Section One qualifies the Company's authority to effect a discharge penalty only for just cause. Under a just cause clause, the employer bears the burden of proof to show the employee committed some offense that warranted some form of discipline or discharge. The employer must also show there was just cause to issue the level of penalty to the employee. To determine whether the discharge taken satisfies the elements of just cause, the arbitrator reviews the evidence surrounding the entire circumstances of the situation giving rise to the discharge action.

Application of just cause takes into consideration the employee's work and discipline record and his/her candor. Where the employee's dishonesty is serious; however, an unblemished work record may contribute little weight to mitigate the discipline or discharge action. The Company has a legitimate expectation for employees to be truthful in the employee's dealings with the Company, especially when investigating damage to customer property. An exception to the general principle of progressive discipline may be allowed where the employee's first offense proves to be egregious misconduct that irreparably harms the employment relationship.[6]

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[6] BRAND, N., DISCIPLINE AND DISCHARGE IN ARBITRATION 225 (ABA, 1998) ("Among the most serious forms of employee misconduct are acts of dishonesty;" however, "Intent is a critical component when employees are disciplined for such actions," and "Some arbitrators will consider mitigating factors such as the value of what was taken, the employee's prior employment record, length of service, harm to the employer motivation of the employee or attempts to deny the act;" ". . . the dishonesty may involve not a taking but some other act of intentional falsehood that compromises employer-employee trust[, such as] . . . actions that compromise the employee's duty of loyalty to the employer"; and, *Id*. at 235 ("Arbitrators often reject arguments of de minimis harm, concluding that the employee's honesty, trustworthiness, and reliability are at issue, not the loss to the employer").

BPC #16 rests upon a reasonable expectation for employee conduct. Timely notification of damage to Company property has obvious reasons. The situation of damaged property may present an immediate safety hazard to employees, passengers, vendors, contractors or others in the vicinity. Additionally, timely notification of damaged property allows the Company management to make immediate assessments, to determine the cause and to take the possible repair or remedial action. Timely notification promotes the Company's opportunity to conduct an investigation into the circumstances that led to the damage and any aftermath. Management may survey the scene of the damaged article, or have the immediate opportunity to interview pertinent witnesses, and to conduct an investigation while memories remain fresh and documents and electronic information are preserved. In some cases, timely notification of the damage to a customer's property may aid in resolving customer complaints or concerns. Supervisor Sad could have taken the initiative on the evening of February 8 to investigate the cause of the damaged bag upon becoming aware of it when he observed the irate customer in the CSAs' office. However, his presumption that the bag had been damaged at BWI was made in good faith based on his reliance on the Ramp crews' integrity to report damage of customer luggage; i.e., other property in the workplace. The Grievant's failure to report the manner in which he discovered the damaged bag and its spilled contents contributed to the supervisor's mistaken assumption.

BPC #16 contains unambiguous language to express what ramp operation employees must do when aware of damage, whether that be to equipment, facilities, aircraft "and/or other property in the workplace." The principle makes no expression to limit the coverage to only Company-owned equipment, facilities, aircraft or other Company-owned property, except that the item be "in the workplace." A customer's piece of luggage placed in the care of the Company logically falls within the types of articles for which the Company and, in turn, the Ramp Agent has a duty of care.[7] Therefore, the employer's policy adequately informed Ramp Agents that BPC #16 applied to customers' baggage in the workplace. Further, the principle unambiguously directed the agent to "immediately" report his/her awareness of the damaged subject "to your Supervisor." Thus, BPC #16 plainly directs the Ramp Agent to report with immediate action to his or her own ramp operations supervisor upon becoming aware of damage to covered property.

Unless the parties expressly agree to modify or qualify their contractual use of the just cause standard, the employer lacks authority in a bilateral relationship with the exclusive representative of its bargaining unit employees to set a mandate of termination for a conduct violation. The Company unilaterally devised and promulgated BPC #16 without negotiations with the Union concerning the nature, scope or consequences of a violation. Just cause embodies

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[7] Reference Article Five, Classifications, Section One, Ramp Agent/Provisioning Agent, states in pertinent part: The work of Ramp . . . Agents includes the functions . . ., but is not limited to, . . .[paragraph C.] [l]oads and unloads the the cargo compartment of the aircraft with cargo (such as Customers' baggage, . . .), and [paragraph E.] [s]afeguards Customers' baggage, . . . from . . . damage, and/or destruction."

the covenant that an employee will not be summarily discharged without the employer first attending to a number of conditions. One of the traditional elements requires the employer to set the level of penalty for a known violation of work rules to the severity of the offense; i.e., "to make the penalty fit the crime." The just cause standard nullifies the type of unilateral policy in BPC #16 that a violation, presumably of any type or degree, "shall warrant termination" without regard to a case-by-case consideration of the unique circumstances of the incident. The unacceptable language; however, may be considered as a warning of the consequences of a violation that may result in discipline, up to and including termination.

Just cause includes the condition that the employer has consistently enforced its policies, rules and regulations in cases of other employees found to have committed offenses similar to the offense(s) at issue in the instant employee's situation. The test of "similarly situated" necessitates a comparison of the circumstances involved in the prior cases to the case at hand. Difference in treatment of penalty between a comparator employee and the employee at issue may properly occur based upon the individual's length of service, overall work record, prior discipline record, and the degree of seriousness of he comparator's offense. The just cause element pertaining to disparate or discriminatory treatment is an affirmative defense. A claim of disparate must be shown by the moving party, in this case the Union, that the Grievant received harsher treatment than other employees who had committed similar rule infractions under similar circumstances.

The Grievant admitted to the bag's damage. Ramp Agents have a duty to place luggage on the carts in a secure manner. However, occasionally events occur that may cause a bag to topple from a cart while in transit from the aircraft to the baggage carousel. Here, there remains insufficient evidence to show that the Grievant acted with overt negligence with the handling of the customer's bag at issue. The evidence fails to show that the Grievant experienced a noticeable difficulty to arouse his knowledge of anything hampering the movement of the heavy three carts behind him as he proceeded from the aircraft to the carousel. Thus, a charge of BPC #14 against the Grievant for any damage to the bag must take into consideration the inadvertent cause of the damage to the bag. Standing alone, the facts support that the Grievant's careless or unsatisfactory handling of the bag to ensure its stability on the cart is considered a minor offense.

The Company terminated the Grievant's employment for more than the violation of BPC #14. The Grievant also failed in his responsibilities as a Ramp Agent by not properly reporting the discovery of the damaged bag at least by the end of his duty shift on February 8, 2015, to his supervisor. Calling up to the CSA through the baggage chute did not suffice as sufficient notification to the Ramp Supervisor on the Grievant's shift on February 8, 2015. BPC #16 of the Company's conduct rules specifically warns employees that a failure "to <u>immediately</u> report to <u>your Supervisor</u> an ... incident involving ... damage to ... other property in the workplace ..." would warrant termination. (Emphasis provided). As a responsibility inherent in the job as a Ramp Agent, the Grievant had a duty to "immediately" inform Ramp Supervisor Sad of the discovery of the damaged bag wedged under one of the luggage carts he was towing behind his cart, of the personal property items strewn from the ripped open bag and the general damage to the bag. As the Grievant picked up the bag's items from the ground and stuffed them into the yawning gap in the piece of luggage, he displayed awareness of the damage to "other property" as that belonging to a passenger who had been aboard the flight from Baltimore he had immediately unloaded. He placed that bag on the same carousel among the others from the same

flight. The Grievant's explanation that he did not notify Supervisor Sad at all on February 8, 2015, because he lacked a radio does not excuse him from making the notification. He had at a minimum to take action by some means other than radio communication to notify Supervisor Sad "immediately" before he resumed any other unloading tasks at the carousel.

The Company reasonably determined the Grievant misrepresented, omitted and shaded facts pertinent to the Company's investigation. The Grievant became overtly aware of the damaged bag when he pulled it from beneath one of the carts he towed. He observed that the bag had been torn such that items had been strewn from inside the bag. He picked up at least some of those items and inserted them into the damaged opening of the bag. The Grievant made no search of his previous travel from the BWI aircraft to ascertain if any other items had been released from the bag. He contacted no one to look for any such items. Instead of treating a customer's luggage bag entrusted in his employer's care, and by direct extension to his care as a Ramp Agent, the Grievant delivered the damaged bag to the baggage carousel and merely called out to say there was a damaged bag to be dealt with by the CSAs. The Grievant's actions described above, many of them recorded by the airport's video system, demonstrate his failure to both timely report the damage and to the specific designated person – his own supervisor. His failure to abide by BPC #16 casts a question concerning his intent to avoid suspicion of accountability for the damaged bag.

Further questions developed about the Grievant's forthrightness during the investigation into the bag's damage when he gave incomplete and unresponsive answers about what he knew of the bag to Company supervisors' questions. The record supports finding that the Grievant initially informed Supervisor Taylor that the bag "could have come up" from the BWI plane "like that."[8] The Grievant provided no descriptive answers to the narrative questions Supervisor Taylor asked him to determine "what happened" about the damaged bag. The Grievant did not state to Supervisor Taylor when he found the bag, that he found it lodged under one of the carts he towed, that he found the bag damaged in the condition he found it, that he noticed items had fallen from the ripped and shredded bag, that he picked up at least some of those items to return them inside the damaged opening to the bag,[9] that he placed the bag aside at the carousel, that he called up to a CSA to simply state the presence of the damaged bag and then he presumably resumed doing his other baggage handling duties until the end of his shift. The omitted facts were well within the Grievant's personal knowledge at the time of February 8, 2015, and on February 12, 2015, when he made his responses to Supervisor Taylor's questions about the damaged bag. The Grievant was aware that Supervisor Taylor's interview with him sought what

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[8] It was mere happenstance that Supervisor Sad became aware, through no action taken by the Grievant, of the damaged bag through observing the commotion the customer made about the destruction of the bag and the lost items from it. The Grievant's verbal remark to the affect, "there's a damaged bag here" fails on all counts to comport to BPC Principle No. 16.

[9] Ramp Agent Y recalled that at the fact finding meeting the Grievant describe that he picked up items that had spilled from the bag at issue.

the Grievant knew of the bag and what happened relative to its damage. Yet, the Grievant responded in such a manner as to guess that the bag had arrived at JAX damaged. The Grievant's omission of these facts coupled with his response to the affect that the damage occurred through unknown processes adversely compounds questions about his credibility.

The Grievant provided additional information as the investigation developed through the processes from a non-disciplinary internal investigation into a customer's damaged property, to possible discipline to the Grievant for alleged misconduct through the fact finding meeting, through the Systems Board hearing and lastly at the arbitration hearing. However, each time the Grievant had an opportunity to describe "what happened" he stingily gave responses designed to protect himself from blame. His most substantive responses did not occur until after he viewed the video footage and after his termination had been effected. In the latter occasion, the Grievant continued to omit known facts with attempts to qualify his actions to be viewed as blameless for his failure to report his discovery of the damaged bag.

The omissions of known fact the Grievant made throughout the process to investigate the damaged bag demonstrate at the least interference in the Company's investigation. The Grievant's failure to simply describe what he found, what he knew, when, how and what he did after the discovery violated BPC #34. An employer reasonably relies on its employees to respond in a substantive manner to the employer's attempts to gather the facts of a work-related purpose, barring a protected privilege. The Grievant's responses given during the Company's investigation of the damaged bag and latter at the fact finding meeting by withholding what he knew, particularly if that information could be construed to cast blame on him, demonstrate a failure to comply with BPC #34. Considering the record developed, I find the Grievant intentionally interfered, albeit not for any malevolent reason except to shield himself from blame, with both the non-disciplinary investigation of the damaged bag and during the February 18 fact finding meeting. Thus, the February 20 termination memorandum's charge of the Grievant's violation of BPC #34 was for just cause.

In so concluding, I acknowledge the Company's witnesses and testimony were not credible on all points, as previously noted. However, at some point all witnesses were contradicted—sometimes even by another witness from the same party—or otherwise testified incredibly, as also previously noted. In any event, the Grievant's arbitration testimony is ultimately too implausible and inexplicable on several levels, despite the flaws in the Company's testimonial evidence, to find that the penalty of termination failed to meet the just cause standard of reasonableness as to the appropriate level of discipline warranted upon the entirety of the circumstances surrounding the Grievant's BPC violations.

Specifically, I find it inexplicable that the Grievant did not have the presence of mind to mention the salient facts to the Supervisor Sad on February 8 or to Ramp Supervisor Taylor during the February 12 interview. The Grievant's credibility is further compromised during the two-hour fact finding meeting by not describing what he found, what he did, and give an excusable reason why he did not report the damage immediately to Supervisor Sad. It is also specious that the Grievant attempted to explain his lack of knowledge about the damage on the

bag's position of having come off the belt-loader top-down/wheels up. This explanation is incredible inasmuch as he indisputably saw the shredded bag caught under the cart when he arrived at the carousel and had to pick up its contents.[10] The Grievant's attempt to justify his omissions at the fact finding on the Company's alleged failure to ask extremely specific and narrow questions there, such as whether anything came out of the bag or whether the Grievant now took full responsibility after seeing the video, further challenges the Grievant's credibility. An employer's investigatory processes are severely hampered when the interviewee responds to narrative questions with close-ended answers.

Any language difficulties the Grievant may have with communicating in English appear not to be attributable to a lack of comprehension. To the contrary, the Grievant parsed his responses to Company officials with the purpose to avoid blame for the damaged bag. The argument that the Grievant may have misunderstood either the expectations of the BPC principles, Supervisor Taylor's questions, the discussion at the fact finding meeting or at the System Board hearing or had difficulty expressing himself cannot not be found sufficient to excuse his misrepresentations and omissions.[11] The Grievant had worked in the airline industry for nine years total and did not allude in any way in his testimony that he had experienced difficulty with communicating with the English language. He did not testify to having been confused or tricked in any manner in his meetings with Company officials. In counter to the Union's language argument, Ramp Supervisor Taylor testified credibly that the Grievant was "crystal clear" in his remark about the bag coming off the plane damaged and that he [Taylor] had been "very clear" in explaining to the Grievant the nature of the inquiry. Similarly, Mr. Fairbanks testified that he asked the Grievant questions to clarify the Grievant's responses several times throughout the lengthy fact finding before the video was shown.

The Grievant had an unblemished work record. He had been at least a satisfactory employee. The Grievant had a relatively short time as an employee; *i.e.,* less than four (4) years of service. The Grievant's short period of employment with the Company does not mitigate a counterbalance to the seriousness of the violations with a credit to a bank of longevity.

The weight of the evidence shows the Company did not deviate from its ordinary practice when it terminated the Grievant's employment. On September 15, 2009, the Company terminated an employee for failing to immediately report to his supervisor relatively minor

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[10] *Southwest Airlines Co. and Transport Workers Union of America, AFL-CIO, Local* 555, Case No. LAS-R-1151/14 (Lemons, 2014) (finding the grievant's explanation was "neither plausible nor credible" and concluding "[i]t just doesn't make sense in many respects").

[11] The only exception I find is the claim that the Grievant told Mr. Fairbanks at the fact finding that he found the bag at the carousel. As discussed above, the out-of-scale diagram cannot establish any fact with sufficient clarity. Taking all testimony and the diagram together, the Grievant may have been trying to say that was where he first observed the bag to be damaged, meaning when he took it out from under the cart and placed it next to the carousel.

damage to jet bridge stairs. On December 22, 2010, the Company terminated a different employee, a PHL Ramp Agent, for falsely denying his involvement in and not being forthcoming in the investigation of an incident in which a SWA Provisioning truck hit an airport bridge, causing damage to both the truck and the bridge, closure of the bridge, and a power outage. In both cases, as in the Grievant's, negligent damage was cited in the termination notices as well was the failure to immediately report the damage to a Supervisor and for not being forthcoming in the subsequent investigations. Similarly, in the case of the LAS Ramp Agent,[12] the arbitrator denied the grievance where the employee was terminated for failing to report or admit damage to a bag tug for over two hours. The arbitrator also "found several examples of inconsistent or evasive testimony by the [g]rievant," and noted "[s]he had numerous opportunities to report the accident or incident" before she finally did so, very briefly.[13]

In contrast, the two arbitration awards relied upon by the Union are distinguishable from the facts in the Grievant's situation. In the arbitration of the termination of a PHX Provisioning Agent, the employee was found to have caused much greater damage than the damaged bag of February 8, 2015; however, the PHX agent notified the manager promptly after the accident occurred.[14] Similarly, the listing of the 46 separate disciplinary matters of comparator employees cited by the Union in the arbitration showed only three terminations based on both offenses of damage to aircraft and "Failed to Report." The listing further showed only two other terminations taken for employees but for the singular offense of damage to aircraft. All of the other employees on the list received discipline less than termination for the single offense of damage to aircraft for the period of January 1, 2005, through July 10, 2010.[15]

In the arbitration award for the termination of the ATL Provisioning Agent, the arbitrator overturned the Company's action upon finding the employee did not knowingly fail to report the damage to an aircraft because he was unaware that the rear portion of his truck scraped the wing.[16] The arbitrator also considered a number of mitigating circumstances in the ATL case; i.e., the extreme congestion the Company had allowed to occur, and evidence that "profoundly" persuaded the arbitrator that "the [g]rievant did not realize that he had scraped the wing of the aircraft in question."[17] In the Grievant's situation, he had hands-on personal knowledge of the

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[12] Case No. LAS-R-1151/14, *supra* Note 9, at 16.

[13] *Id*. at 9, 11-12.

[14] *Transport Workers Union - Local* 555, *and Southwest Airlines Co.,* Case No. PHX-P-0887/10 (Fragnoli, 2010).

[15] *Id.* at 11-12.

[16] *Southwest Airlines Co. and Transport Workers Union of America, AFL-CIO, Local 555,* Case No. ATL-P-1647/14 (Lemons, 2015).

[17] *Id.* at 9-10.

damaged bag at the moment he found it and knew it was a bag from he had most recently unloaded the aircraft arriving from BWI. The Grievant's situation of February 8, had very different circumstances from having an accident in which he did not hear, feel or see anything at the time to alert him to that fact. The ATL case represents a very dissimilar situation from that of the Grievant's termination and does not present support for the Union's affirmative disparate treatment defense.

The language in PC # 16 cannot alter the mandatory just cause clause in Article Twenty.One.A.[18] The parties have not negotiated as an element within Article Twenty, Section One.A just cause mandate to include that a violation of BPC #16 "shall warrant termination." An element of just cause includes a profound preference to administer progressive discipline steps prior to effecting the termination of an employee's employment. Thus, in each case of perceived misconduct, the employer has a duty to first consider all of the circumstances pertaining to the incident. BPC #16's language is tantamount a zero tolerance position that truncates the just cause standard to undertake consideration of the commensurate penalty for the misconduct. Nevertheless, an employer is not bound to a rigid application of progressive discipline inasmuch as the severity of a penalty must reasonably address the seriousness of the misconduct. There is general agreement that summary discharge may be warranted for severe misconduct.[19] Summary discharge in lieu of progressive discipline of an employees is reserved for very serious offenses, such as "his failure to report an accident."[20] And "dishonesty and other violation of moral turpitude."[21]

The Company presented no evidence to demonstrate any safety rule or regulation the Grievant allegedly violated relative to BPC #28. Therefore, there can be no finding of any safety violation present to support such a charge in the Grievant's termination.

Based on the forgoing, the Company's determination to effect termination of the Grievant's employment in lieu of progressive discipline for the proven violations of BPC #14, #16 and #34 was made for just cause. After my review of the entire circumstances of the situation giving rise to the discharge action, I conclude the Company has met its burden of proof to show termination was the appropriate penalty in this case, under the just cause standard.

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[18] Case No. LAS-R-1151/14 *supra* Note 9 at 12 ("Nothing in this decision should be read as my 'green light' authorizing the Company to commit economic capital punishment whenever it states in a BPOC that termination would be the penalty. . . . the 'old' BPOC 16, . . . did not have the admonition about termination. . . . even had the termination been pursuant to the 'new' BPOC 16, this Arbitrator would still have to go through tradition 'just cause' analysis before a discharge could be upheld, notwithstanding that the rule carried its own suggested penalty.").

[19] NORMAN BRAND, DISCIPLINE AND DISCHARGE IN ARBITRATION 68 (BNA Books 1999).

[20] ELKOURI & ELKOURI, HOW ARBITRATION WORKS, 15-41 (Kenneth May, ed.-in-chief, Bloomberg BNA, 7th ed., 2012).

[21] *Id.* At 15-69.

Award

The grievance is denied.

Date: May 30, 2016

Kathy L. Eisenmenger

Kathy L. Eisenmenger, J.D.

Labor Arbitrator