specials on the Loading Summary. This behavior is unacceptable, and is in violation of the Southwest Airlines Ground Operations Basic Principles of Conduct, including, but not limited to, the following:

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

Based on the above and as a result of your actions, your employment with Southwest Airlines is terminated, effective immediately.

Also, listed below is the active discipline in your file.

- Final Letter of Warning 09/02/2015
- Final Letter of Warning 05/04/2015 (1 Discipline Days Off)
- Final Letter of Warning 01/24/2015 [JX 2, pg. 10]

On December 14 the Union filed the instant grievance protesting the termination and requesting "reinstatement with full backpay, seniority rights, overtime, and benefits." The grievance was denied by the Company and after the System Board deadlocked on January 21, 2016, the Union appealed the grievance to arbitration. Both parties agree that the instant case is properly before the undersigned arbitrator for final decision.

The Ground Operations Manual contains the following, in part:

6.2.1 Prior to Working a Flight
Revised: 04/01/2015

Before working a flight, the Operations Agent must complete the following steps:

1. Log in to OTIS.

2. Check for the assigned flight.

3. Monitor the Coordinator's/Radio Log for releases and weather information and print it when available.

4. Verify the aircraft type, passenger cabin capacity, and number of flight deck and cabin jump seats.

5. Preplan the flight using EWB or a manual *Loading Schedule*.

shall be disciplined to the extent of loss of pay or discharge without just cause.

* * *

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

* * *

I. **Retention.** All letters of reprimand or warning shall be removed from an Employee's file after twelve (12) months have elapsed from the date of such letter.

* * *

L. **Interpretation/Application of Agreement.** . . .

* * *

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.

CONTENTIONS OF THE PARTIES

The Company's Contentions

The Company contends that it has met its burden to show just cause for the termination of the Grievant. The Company presented three Final Letters of Warning that our current in the Grievant's file.

The Final Letter of Warning dated January 24 was issued when the Grievant caused an

inconvenience to passengers who had to be pulled off the flight because she did not communicate with the ramp or customer service agents when WKHLU preplan projected 900 pounds over ATOG. That Final Letter of Warning, which is not contested, was supported by previous instances of performing WKHLU job in a careless, negligent or unsatisfactory manner.

The Final Letter of Warning dated May 4 was issued when the Grievant misboarded a customer bound for San Diego onto a flight to Columbus, causing an incorrect flight manifest. That letter was grieved but the Grievant ultimately accepted a one-day suspension.

The Final Letter of Warning dated September 2 was issued when the Grievant failed to reconcile and missed 18 transfer bags, with the result that arriving passengers did not have their luggage. The Company incurred additional costs to have the luggage delivered and pay out-of-pocket expenses for the disadvantaged passengers.

As Company witness Stachowski testified, the Grievant was not terminated for one isolated incident, but on the basis of WKHLU entire job performance including the three, active Final Letters of Warning. The Company acknowledges that an employee would not normally be terminated for failure to write specials. This was, however, part of the Grievant's duty and responsibility which she failed to do. For the Grievant, considering the discipline in WKHLU file and the history, termination was appropriate.

The Company contends that the Union is trying to muddy the water by saying this happens on a daily basis in several different stations. However, the Union has presented no evidence to show that management knew and failed to take disciplinary action. Therefore, this evidence does not support the fact that the Company is treating the Grievant in an arbitrary and capricious manner by only disciplining WKHLU. In addition, it appears that the specials report that the Ontario station actually pulled showed 18 airport wheelchairs, two customer wheelchairs and two dry cell wheelchairs. However, actually needed were 22 airport wheelchairs and two customer wheelchairs. They were not prepared to handle that as a result of the Grievant's negligence and failure to actually write that information in the remarks section of the dispatch report.

The Company contends that after the Grievant had been terminated for failure to transfer 18 bags, at a time when she had an active letter of discipline for misboarding flights in their file, she was given an additional opportunity, brought back, and provided additional training. However, she continued to make mistakes and clearly, as an ops agent, is not performing their duties and responsibilities. She has repeatedly misboarded passengers, failed to transfer bags, failed to monitor weight and balance and, as a result, had to pull several revenue-paying customers off the plane. On the basis of WKHLU overall job performance, termination is justified.

The Company notes that the Grievant did not testify at arbitration or at the system board. She has not given the Company the opportunity to hear WKHLU story and the arbitrator should draw a negative conclusion from WKHLU failure to address any of the Final Letters of Warning and the Company's decision to terminate WKHLU employment.

For the above reasons, the Company believes it has clearly met its burden under the just cause standard and request that its decision be upheld.

The Union's Contentions

The Union contends that the Company has the burden of proof to establish both that the employee is guilty of misconduct and that the discipline imposed is a reasonable penalty under the circumstances of the case. Here, the Union does not dispute that the Grievant did not follow all the protocol and procedures of the Ground Operations Manual and completing their duties for a flight #3137 on December 1. She did failed to list in the remarks section of the dispatch report all of the specials for that flight.

The Union contends, however, that the Company absolutely failed to show that the penalty of termination was reasonable under the circumstances. By its own admission, the Company cannot identify a single case of any level of discipline being issued for a similar infraction. The Union, to the contrary, provided evidence showing that the very infraction for which the Grievant was terminated occurs on a regular basis. It is clear that the Company has the opportunity to know about the many infractions of not listing specials in the remarks section of the dispatch reports. The Company chooses not to make themselves aware by not making this part of their auditing.

The Union acknowledges that it cannot show another example of an employee with the Grievant's history not being disciplined for this infraction. That is because the Union cannot find any employee, and neither can the Company, who has received any type of discipline, at all, for this infraction. This explains why the Company, instead of proving that the discipline imposed is a reasonable penalty, moved the focus away from the infraction.

The Union contends that prior arbitration decisions establish that the punishment must fit the crime. As Arbitrator Jennings held, one step of discipline does not have to follow the next, no matter the offense. The Company cannot claim that the termination of the Grievant is appropriate if they cannot introduce one example of discipline for the same infraction. The discipline history of the Grievant does not rise to the level of showing she is beyond rehabilitation. Their history shows three minor infractions listed as Final Letters of Warning because the Company did not follow their own principle of "appropriate discipline." The Union asks that the Grievant be given an opportunity to rehabilitate for this minor offense. None of the active discipline letters in their file are for the same infraction. This shows that she has not repeated the same offenses and that she is beyond rehabilitation. The Union argues that discipline cited in those letters is outside the contractual limits of the CBA and may not be considered.

The Union contends that although the letter dated January 24 refers to the flight being 900 pounds over ATOG, in fact it left with no weight and balance issue. There are also questions and speculation around the alleged misboarding of passengers. The Company is trying to hold employees to a standard they do not maintain in that they overlook their own clerical error in not reissuing the May 5 Final Letter of Warning.

The Union contends that the Company chose to ignore the issue of not listing specials in the remarks section of the dispatch report until it happened to the Grievant. The Company presented no evidence that any passenger with inconvenience by their failure to do so on December 1. Further, no passenger was misboarded and sent to the wrong city, no passenger arrived without bags and there were no weight and balance errors on that flight.

For the above reasons, the Union asks that the grievance be awarded and that the Grievant be reinstated to their position as a Southwest airlines operations agent in Phoenix, with full back pay, full seniority and all benefits.

ISSUE

Did the Company have just cause to discharge the Grievant? If not, what shall the remedy be?

FINDINGS

As both parties recognize, there is no dispute over the fact that the Grievant did not manually enter the "specials" in the remarks section of the dispatch report for flight #31372 Ontario on December 1. Doing so was part of their job duties as an operations agent.

Although the Union raised questions about the underlying circumstances of the three Final Letters of Warning that are active in the Grievant's file, no grievances are pending. Therefore, the bases for that discipline must be treated as established for the reasons stated. It was appropriate for the Company to consider those three instances of past discipline in deciding the level of discipline to be applied as a result of the Grievant's actions on December 1.

Any explanation the Grievant might have wished to make with respect to those incidents should have been offered in a timely manner or grievances should have been timely filed and pursued. Further, because the Grievant's testimony would not alter their disciplinary record and because there are no disputes regarding their conduct on December 1, no inference will be drawn from their failure to testify.

However, the Union properly objects to the Company's attempt to rely upon instances cited in those Final Letters of Warning that occurred more than 12 months before the current case. Arbitrator Hill dealt with this issue in the Agent Z case, SWA & TWU Local 555, MKE-R-2463/14 (2015). In that case the Company argued that the language of Article Twenty, Section One-I requires only that the notice of discipline be removed, but "does not prohibit the use or consideration of the prior event for any purpose whatever." Arbitrator Hill rejected that argument stating:

> Three (3) SWA arbitrators (Allen, Jennings and Hill) have ruled on this matter, with all three sustaining the Union. As I held just this recent January (2015) in the Agent B case, *SWA & TWU 555*,

> LAX-R-1562/14 (2015), "my hands are tied by Article 20, Section I." Any reference to other instances are not properly admissible in this proceeding. Accord: *SWA & TWU 555*, (Jennings, 2002) (Agent C Grievant) (Citing Article 20, Section 1 (I) of the labor agreement, and concluding: "if the Company wants an exception whereby an employee's entire work record and disciplinary history could be weighted, it should be so negotiated into the parties' collective bargaining agreement." (Id. at 46); See also, *SWA & IBT Local 19*, 113 LA (BNA) 100 (A. Dale Allen, Jr., 1999) (Stating: "when the parties' collective bargaining agreement contains specific language that places a time limit for submitting such 'stale' evidence, arbitrators refuse admission of such documents and evidence." *Id*. at 102). Any ruling to the contrary would effectively mandate ignoring two prior decisions involving SWA rendered, no less, by well-respected arbitrators (Messrs. Jennings and Allen), as well as my decision in LAX-R-1562/14 (2014), a course of action that I once again elect to forego. [Pgs. 19-20.]

The approach urged by the Company in this case would circumvent both the language of Article Twenty, Section One-I and the interpretations of that language as discussed by Arbitrator Hill above. Therefore, the prior but "stale" discipline listed in the still-current disciplinary letters, and upon which those disciplinary letters were based, will not be considered in assessing what discipline is appropriate in this case.

The Grievant had previously been terminated for missing 18 transfer bags. However, that termination was rescinded and the discipline was reduced to a Final Letter of Warning because the ramp agents responsible for transferring those bags had been given no discipline. That problem possibly is echoed, in part, here. In this case the Company placed the blame entirely on the Grievant for the ONT agents being "unprepared" for the specials arriving on flight #3137 because she had not listed the specials on the inbound dispatch report. According to the Company's sole witness, the ONT station had to scramble for wheelchairs and a meet and assist for a blind passenger. He initially testified that it appeared that they had not printed the specials report. On cross examination, however, he said that the email indicates that the specials report was printed. No evidence was introduced to establish whether the ONT agents failed to print the report in preparing for the arrival of flight #3137 and, if so, whether the ONT agents were disciplined for that violation of the Ground Operations Manual, Section 6.2.1.9. On the evidence that does exist it is possible that the specials report was printed only after flight #3137 arrived and it was discovered that an unusually large number of wheelchairs would be required. If the ONT agents had printed the specials report in a timely manner, the discrepancy they would have had to deal with would have been limited to the difference reported in the email as:

> the Gate Reader Specials report shows 18 Airport wheelchairs, 2 customer wheelchair[s] and 2 Dry cell wheelchairs. What actually came in on that flight from PHX was 22 Airport [wheelchairs] and 2 customer wheelchairs. [CX 2.]

The Grievant was not disciplined for any discrepancy in the Gate Reader Specials report and no evidence was introduced to suggest or establish that she bore sole responsibility for that discrepancy. Nor was the Grievant disciplined for any inaccuracy regarding the reason for the delay out PHX.

The Company acknowledges that the offense that triggered the discipline in this case did not involve a safety of flight issue. The only *potential* safety issue identified by the Company was the possibility that the blind passenger might attempt to exit the aircraft without assistance and be injured. The Grievant's misconduct thus cannot be properly viewed as creating a safety issue.

What has been proven in this case, therefore, is simply that the Grievant did not list the specials for flight 3137 in the "Aircrafts Remarks" section of the dispatch report. The Company witness described this as a clerical error, one that, standing alone, would not warrant termination. The critical question posed here, therefore, is whether this relatively minor offense provides just cause to terminate an employee with three current Final Letters of Warning.

The portion of Arbitrator Jennings award in the Agent Z case, BHM-R-1435/10, cited by the Union, is very much on point. In the Agent Z case, as here, the Company based the level of discipline on the fact that the grievant had received prior letters of warning. Arbitrator Jennings said:

> For informational purposes, progressive discipline by its definition has a definite progression: oral warning, written warning, suspension, and discharge. Labor Attorney Owen Fairweather wrote that such a corrective process as progressive discipline should not be hardened into a routine lockstep process. Instances do occur when the imposed discipline should be lower than the discipline that has been previously applied. Arbitrator Norman Brand stated that an important consideration of progressive discipline is whether an employee who engages in various types of relatively minor misconduct should receive increasingly levels of discipline. The Elkouris indicated that the degree of penalty should be in keeping with the seriousness of the offense. Thus, in progressive discipline cases, the imposed discipline may be lower than previously imposed penalties given the nature of the offense. Finally, during the present arbitration hearing, Director of Employee Relations Bill Venckus testified that the "Company uses progressive discipline for uniforms and attendance. We use appropriate discipline for everything else, meaning at times progressive [discipline] could be appropriate [discipline]."

* * *

Finally, as this Arbitrator ruled in a similar case:

> In disciplinary matters, a penalty that is markedly too harsh for the offense is unreasonable and is an abuse of managerial discretion. A penalty that flows from an incomplete analysis of both the misconduct and the individual employee is arbitrary. [UX 6, pgs. 28-30. Footnotes omitted.]

Arbitrator Jennings then went on to consider the circumstances surrounding Agent Z's use of his cell phone and concluded that under all the circumstances the Final Letter of Warning should be rescinded to an Oral Warning.

The Union offered extensive and persuasive evidence that downline ops agents print and rely upon the gate reader specials report in preparing to work a flight, and not on the redundant notes in the remarks section of the dispatch report. The complete absence of evidence that any agent, at any base, at any time has ever been disciplined for the clerical error of failing to make the redundant notes on a dispatch report emphasizes how minor this error is. If this error, which the Union's evidence demonstrates and the Company stipulated occurs not infrequently, would cause downline agents to be unprepared for specials arriving, certainly the Company would be aware and would have taken steps, through discipline, additional training, or otherwise, to remedy the problem.

Yes, the Grievant has an unenviable record. That does not meant that the subsequent commission of a very minor offense provides just cause for termination, under progressive discipline principles. Rather, that "penalty is markedly too harsh for the offense" and is "an abuse of managerial discretion."

For the above reasons, the Company has not established just cause for terminating the Grievant's employment as is required by Article Twenty, Section One-A. Therefore, the grievance will be sustained. The Grievant did, however, violate BPOC #14 by failing to list the specials in the remarks section of the dispatch report for flight #3137. In accordance with the authority granted by Article Twenty, Section One -L, Paragraph 14, the termination will be modified to a Letter of Instruction. All references to the termination will be removed from the Grievant's file. She is to be reinstated with their seniority restored and made whole in all other respects. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Company.

AWARD

The grievance is sustained. The termination will be modified to a Letter of Instruction. All references to the termination will be removed from the Grievant's file. They will be reinstated with their seniority restored and made whole in all other respects. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Company.

Elizabeth Neumeier, Arbitrator

July 22, 2016