ARBITRATOR'S DECISION AND AWARD

In the Matter of the Arbitration

between

SOUTHWEST AIRLINES CO.

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 555

Grievance TPA-R-0973/17
Termination
(Agent A)

BEFORE:	Arthur T. Voss, Arbitrator
APPEARANCES:	
FOR THE COMPANY:	Dan Kusek, Senior Manager Labor Relations-Ground Ops
FOR THE UNION:	Cortney Heywood, Vice President TWU Local 555
PLACE OF HEARING:	Dallas, Texas
DATE OF HEARING:	July 13, 2017
BRIEFS SUBMITTED:	August 25, 2017
RECORD CLOSED:	August 25, 2017
DATE OF AWARD:	September 5, 2017

I INTRODUCTION

This arbitration between Southwest Airlines Co. (the "Company" or "Southwest") and the Transport Workers Union, AFL-CIO, Local 555 (the "Union") was held on July 13, 2017 at the Doubletree by Hilton Hotel located at the Dallas Love Field Airport, Dallas, Texas. A stenographic recording of the testimony was taken by ABC Court Reporters, Certified Shorthand Reporters. The recording was transcribed and submitted by the court reporter to the Arbitrator and the parties under cover letter dated July 25, 2017. The parties stipulated that the grievance procedure steps under their collective bargaining agreement (CBA) had been properly followed and that the matter was before the Arbitrator for final and binding arbitration. At hearing the parties were provided the opportunity to present oral and documentary evidence, and all witnesses testified under oath as administered by the Arbitrator. By mutual agreement the parties submitted post hearing briefs on August 25, 2017 and the record in this proceeding is closed as of that date. The Arbitrator before issuing this award has reviewed the transcript of the hearing testimony, the documents admitted at hearing as exhibits, and the post-hearing briefs filed by the Company and the Union.

II ISSUES TO BE DECIDED

The parties agreed to the issues to be determined in this case. They are:

> Was the Grievant, Agent A, terminated by the Company for just cause? If not, what should the remedy be?

III BACKGROUND AND EVIDENCE

The Grievant, Agent A, was, until her termination, a TPA ramp agent. At the time she was discharged on April 12, 2017 she was approaching her fourth year of employment with the Company.[1] Not long before she was terminated the Grievant had been the subject of a racial slur or slurs posted on social media by a Southwest employee who was one of Grievant's co-workers. Grievant reported this to the Company. The testimony at hearing indicates that the co-worker was discharged by the Company for this activity. Likely as a result of the Grievant's complaint against her co-worker, a Southwest employee forwarded to the Company an email containing

[1] The evidence reflects that the Grievant's hire date was September 23, 2013.

screen shots of three social media posts allegedly made by the Grievant.[2] The first of these screen shots is a photo of an undated Instagram post admittedly posted by the Grievant[3] and reading:

> Girls cheat more than guys they just get caught less because side niggas don't talk as much as side bitches. (Co. Exh. 1)

The second screen shot received by the Company purports to be an email chain posted to Instagram reading:

> Damn fam. She aint gonna like dat u wildin!!
> Nigga wtf is this??
> The nigga who gonna be helping yall with rent with you outta work ass smh
> Nigga I'ma kill u, u in my crib???
> Smh see dats what probably got yo ass fired that attitude my nigga.
> (Co. Exh. 2)

The screen shot does not disclose who may have created this Instagram post or when it was posted. At the bottom of the screen shot is an undated comment, posted by the Grievant using her Instagram "sc_girl12" handle, showing three smiling emoji and the words "Happy Thur". The third Instagram post forwarded to the Company (Co. Exh. 3) is a photo of the Grievant in her Southwest uniform, showing her name and the Southwest logo. This photo reflects that it was posted by the Grievant using her Instagram handle but does not disclose the date of the posting.

After receipt of these Instagram posts on March 20, 2017 the Company's Employee Relations department conducted an investigation, including an interview with the Grievant, concluding that the Grievant had violated the Company's harassment and social media policies. This information was sent to TPA station leadership and a fact finding meeting was held with Grievant and her Union representatives on April 5, 2017. On April 12 MRO TPA, Scott Muller, issued a Results of Fact Finding memorandum terminating the Grievant effective that date. The memorandum issued to the Grievant reads:

> A fact-finding meeting was held on Wednesday, April 5th, 2017 to

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[2] The evidence is unclear who sent the email and attached screen shots were sent to the Company. It appears likely it came from the co-worker of whom the Grievant had complained to Southwest.

[3] Grievant's Instagram "handle" was "sc_girl12". The post reflects that it originated from an individual using this handle.

discuss an Employee Relations investigation concerning a possible violation of the Southwest Airlines Policy on Harassment, Sexual Harassment, Discrimination and Retaliation and Social Media Policies.
In attendance were Ramp Agent Agent A #105974, TWU Representative A, TWU Representative B, and
myself.
After completing the investigation into this matter and considering the results of the Employee Relations investigation and the evidence and testimony presented in the fact finding, it has been determined that you made posts via social media containing inappropriate racial slurs that you shared with or directed at a Coworker. Your actions are in violation of the Policy on Harassment, Sexual Harassment, Discrimination and Retaliation, as well as the Social Media Policy. Further, your actions are in violation [of] the Southwest Airlines Basic Principles of Conduct including but not limited to the following:

25. Southwest does not want to interfere in the personal affairs of Employees, however, conduct on or off the job which is detrimental to the Company's interest including unacceptable or immoral behavior on Company property, or any adverse conduct that reflects on the Company, whether on or off duty, may be cause for immediate dismissal.
27. Fighting, abusive and disrespectful behavior to a fellow Southwest Employee or customer.
33. Harassment and sexual harassment is strictly prohibited.

As a result of the fact-finding meeting, your employment is hereby terminated.

A grievance filed by the Union was denied on April 26. A System Board of Adjustment hearing held on May 25 resulted in a deadlock and the matter was appealed to arbitration.

Denice Gutierrez is a Company Senior Employee Relations Investigator. She testified that Employee Relations investigates all allegations of harassment and discrimination under Southwest's policy and that she was the employee assigned to investigate the Grievant's alleged conduct. She stated that the screen shots of the Instagram posts reflected in Co. Exhs. 1-3 were sent to her on March 20 as an attachment to an email received from a Southwest employee, who related that he had seen the posts on Instagram. She testified that she "would not be surprised" if that individual was the employee of whom the Grievant had complained and who was terminated by Southwest. Gutierrez testified that after receiving the email with attachments she

interviewed the Grievant. She stated that the Grievant acknowledged there that she had posted Co. Exh. 1 under her Instagram handle. She testified that she did not know who posted Co. Exh. 2 to Instagram but that the Grievant said "she could have" and did not deny the posting. She stated that it was not possible to discern when any of the three Instagram posts were made as the exhibits do not reflect any posting dates. At the conclusion of her interview with the Grievant, Gutierrez concluded that the Grievant had violated the Company's policy against prohibited derogatory, offensive and hostile conduct, specifically the prohibitions against:

> .written comments, including email, text messages or social media online posts; and,
> .epithets or slurs are always offensive and will not be tolerated for any reason, even if an Employee mistakenly believes such epithets to be a funny part of a joke or prank. (Jt. Exh. 4)

Gutierrez testified that she then forwarded her conclusion to TPA station leadership.

Scott Muller is and has been for 11 years the Company's manager of ramp and operations at the TPA station. He stated that the Company's policy is that all complaints involving its harassment and discrimination policy are investigated by Southwest's Employee Relations department rather than at the local level. He testified that, after her March 22 interview with the Grievant, Gutierrez emailed her investigation findings to TPA station leadership. Muller stated that he held a fact finding meeting on April 5, attended by the Grievant and her union representatives. Muller identified Joint Exh. 5, the Grievant's training transcript and testified that it showed the Grievant, after being hired in September 2013, received initial training in Southwest's Employee Policies and "It's a matter of Respect" training, followed by annual training on each thereafter. He testified that the Employee Policy and It's a Matter of Respect training sessions, including social media policy, are each 50 minutes in duration. He stated that after the fact finding meeting he determined that the Grievant had posted racial epithets on social media. On cross examination Muller testified that the employee training sessions include social media training and that he believes the training includes an example of "a social media incident". On questioning he was unable to recall any specifics or details of the social media training content. When asked if he would be surprised if he had

testified at the Grievant's system board that the training does not include social media he answered "no".

Vance Foster is a Company labor relations manager at Dallas headquarters responsible, *inter alia*, for advising station management on appropriate discipline for Company policy violations. He identified Joint Exh. 3, the Company's social media policy, and specifically prohibitions against:

> .Content that may be viewed as untrue, disrespectful, malicious, obscene, violent, harassing, bullying, defamatory, threatening, lewd, intimidating, discriminatory, or retaliatory.
> .Content that may be viewed as damaging Southwest's public perception.
> .Content that may be viewed as a violation of other Southwest rules or policies.

Foster testified as to two arbitration awards. The first by Arbitrator Hill dealt with a 2-year employee whose termination was upheld for directing at work racial slurs at a supervisor. The second, by this Arbitrator, confirmed the termination of a 10-year employee who in the workplace directed racial slurs at a co-worker and challenged him to fight. Foster identified Co. Exh. 6 containing frequently asked questions concerning the Company's social media policy and Co. Exh. 7 entitled "Social Media Reference Guide".[4] Foster identified Co. Exh. 8, a ground operations instructor training guide, that states the instructor is to have trainees locate links to and review the Company's policies on harassment and discrimination and on social media. Foster stated that the Grievant's training transcript reflects that she had access to all of these policies, that she had been instructed to locate them and that she had mastered the material.

The Grievant testified that she is a ramp agent and 4-year Company employee. She testified that she has not had a manager or supervisor "go over" the social media policy with her and that she has never seen the materials depicted in Co. Exhs. 6, 7 and 8. She testified that she posted on Instagram the post reflected in Co. Exh. 1, but that she did not know when the post was made. She stated that she had "not to my knowledge"

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[4] Co. Exhs. 6 and 7 introduced at hearing bear dates subsequent to the Grievant's termination. The Arbitrator permitted these exhibits to be introduced as evidence with the understanding that the Company would supply with its post-hearing brief the versions that were effective at the time the Grievant was terminated. The Company has provided those exhibits, and they shall replace those previously submitted.

posted the Instagram post reflected in Co. Exh. 2, but that she had commented on the post as reflected at the bottom of the exhibit. She stated that the Company's investigation of her Instagram posts arose from the fact that she had complained to the Company about posts directed to her by employee W. On cross examination, the Grievant acknowledged that she was aware the Company had a social media policy. When asked about Co. Exhs. 1 and 2 she testified:

> Q. Company's 1 and 2. So the two posts that have the N-word.
> A. [Company] 2, I don't know because I didn't do that. But this post, Company 1, it was not directed at anyone. It was just talking about cheating. And I thought the whole fact of girls cheating more than guys was kind of true, like in my opinion. (Tr. 107)

Upon questioning by the Arbitrator the Grievant stated that her post reflected in Co. Exh. 1 was an "old post" done by her as early as 2013 and as late as 2015, and that she had "no idea" when she made the post showing her in her Southwest uniform and depicted in Co. Exh. 3.

Cortney Heywood was first employed by the Company as a ramp agent in 1999 and is currently the Vice President for TWU Local 555. He testified that it is "entirely possible" that the Instagram post shown in Co. Exh. 2 did not originate with the Grievant and that he believes it did not. He based his opinion on the fact that her Instagram "handle" is not reflected at the top of the post and that, as reflected in Union Exh. 1, it is possible on Instagram to comment on a post without the commentator having originated the post. He testified that that exhibit reflected that he was able to get a screenshot of the post and show that he had commented on it even though it originated with another poster. He identified Union Exh. 2 involving an arbitration where a ramp agent was terminated for using racial slurs toward an African-American coworker. Heywood noted, notwithstanding the racial slurs were made in the workplace, that the grievant's termination was reduced by the arbitrator to a disciplinary suspension without backpay. He identified another case in which the grievant was initially terminated by the Company for leaving a sexually harassing note on a co-worker's car. Heywood noted that this conduct was also in the workplace and that the system board of adjustment unanimously decided to reinstate the grievant and award him 10 days of back pay. Heywood testified that in his 18 years of employment with Southwest he has never been

trained on the Company's social media policy. He stated that it is instead presented to trainees as a "check-the-box option" when they log into the Company's website (SWALife) and are not permitted by the site to proceed until the box has been checked. He testified that the Union and Company have had "lengthy conversations" in which the Union has urged that if the Company is "going to place such emphasis on these policies, there should be some sort of increased training". He stated that his research indicated that the post reflected in Co. Exh. 1 did not originate with the Grievant but rather was a circulating "meme" that she had reposted, and that he was of the opinion, for the reasons discussed above, that the Grievant did not post the material represented in Co. Exh. 2.

Agent B has been a Company employee for 10 years and is a ramp agent in Dallas. He testified that during his employment he has never in training seen or been presented with the materials reflected in Joint Exh 3 or Co. Exhs. 6, 7 and 8. He stated that there is no training on that policy "other than the check box when we're going into SWALife".

Agent C is a 17-year employee and has been a TPA ramp agent for the most recent five years. He testified that the Company's social media policy, set forth in Joint Exh. 3, and the materials contained in Co. Exhs. 6-8 have never been shown to him in a training session.

Agent D is a TPA ramp agent since 2013 and a Union alternate district representative. He testified that he receives training on Southwest's policies but that he has never seen the materials contained in Joint Exh. 3 and Co. Exhs. 6-8 during any training sessions he has attended.

Ed Beaune is a 4-year employee and his current position is that of a labor manager. He testified that he is familiar with the Company's policies. He stated that a video entitled "It's a Matter of Respect" is viewed by ramp agents in training, contains the Company's social media policy and that the trainee must complete this portion of the training, or "module", in order to be recorded as having finished or completed the training.

IV DISCUSSION AND AWARD

Article Twenty A. of the parties' CBA states:

> **Purpose.** No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

The Company asserts that the evidence demonstrates that "[T]he Grievant violated the Southwest Airlines (SWA) Harassment Policy and Social Media Policy when she published racially charged posts containing the "n" word on her social media account (Instagram)"[5] The Company points to the following sections of the harassment policy which it alleges the Grievant's Instagram posts contravened:

> Southwest Airlines prohibits any and all types of harassment...against Employees by...fellow Employees.... Such behavior [based on race, color] is inappropriate, offensive, and will not be tolerated.
> EXAMPLES OF TYPES...OF CONDUCT THAT IS PROHIBITED:
> . written comments, including...social media online posts;
> . epithets or slurs are always offensive and will not be tolerated for any reason, even if an Employee mistakenly believes such epithets to be a funny part of a joke or prank. (Joint Exh. 4)

The Company also maintains that Grievant's Instagram posts violate those portions of its Employee Social Media Policy reading:

> Social Media has generally been defined to refer to 'the many accessible electronic tools that enable anyone to publish and access information.... Examples of external social media include Facebook, Twitter, YouTube, Pininterest, Instagram and Snapchat.
> Even if the social media communication does not reference Southwest directly or is posted anonymously, depending on the content of the communication, such statements can negatively impact Southwest, its Employees and/or its Customers. *For that reason, certain social media content that in any way is later related to Southwest, reflects poorly upon Southwest, or impacts the workplace, is a violation of this policy and may result in discipline, up to and including termination.*
> ****
> THE FOLLOWING ARE EXAMPLES OF SOCIAL MEDIA CONTENT THAT, IF LATER RELATED TO SOUTHWEST, REFLECTS POORLY UPON SOUTHWEST, OR IMPACTS SOUTHWEST'S WORKPLACE IS PROHIBITED
> . Content that may be viewed as...disrespectful, harassing...intimidating, discriminatory, or retaliatory;
> . Content that may be viewed as damaging Southwest's public perception;
> ****

[5] CO Brief, p. 1.

. Content that may be viewed as a violation of other Southwest rules or policies. (Joint Exh. 3)

The Company argues that "[We] know these posts were viewed by at least one Southwest Employee and very likely by many others".[6] Southwest asserts that the Grievant's termination is supported both by arbitral precedent and "the Company's past practice of having a zero tolerance for the use of the "n" word".[7]

The Union argues that the Grievant did not violate the Company's harassment policy because her Instagram post reflected in CO Exh. 1 containing a racial term (niggas) (i) did not originate with the Grievant but was a repost by her of a meme circulating on social media, (i) was not intended by her and and should not be interpreted as directed at any person or group, (iii) is a post commenting upon infidelity among the sexes rather than a racial pejorative, and (iv) the Grievant's termination was improper because she was subjected to retaliation for reporting the social media racial slurs against her by her co-worker. With respect to the Grievant's claimed violation of Southwest's social media policy, the Union argues that (i) the Company has failed to meet its burden of proving conduct by the Grievant that violated the policy (ii) the Grievant was not provided requisite notice of the policy as required by just cause, and (iii) the Grievant was impermissibly retaliated against for reporting the social media racial slurs directed at her by her co-worker. The Union maintains that even if the Grievant's social media posts were a "technical" violation of either the harassment or social media policies her termination constituted excessive discipline.

The Grievant reported to the Company a co-worker who had directed harassing social media posts at the Grievant. The co-worker was terminated for this activity. The co-worker apparently was the source of the Company becoming aware of the Grievant's Instagram posts, and her subsequent termination for same. The Company's harassment policy contains the following language concerning retaliation:

RETALIATION IS PROHIBITED
Retaliation typically involves adverse actions against an individual

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[6] CO Brief, p. 1. The "at least one Southwest Employee" reference apparently refers to the Grievant's co-worker who was terminated.

[7] CO Brief, p. 1.

> engaged in protected activity... [A]dverse employment actions toward someone who filed a complaint under this policy or someone who participated in an investigation under this policy is strictly prohibited. (Joint Exh. 4)

Southwest's social media policy similarly states that "[A]ny type of retaliation for reporting, assisting, or participating in an investigation regarding social media concerns is strictly prohibited". (Joint Exh. 3) Its social media guide states that "Southwest prohibits taking adverse action against any Employee for reporting a possible violation of the Social Media Policy or for cooperating in an investigation". (CO Exh. 7, p.2) Unless apparent on its face, the Union bears the burden of demonstrating that the Company's stated reasons for termination are a subterfuge for retaliatory action. The Union's retaliation contention is predicated on the reasoning that the co-worker, in furnishing the Grievant's alleged Instagram posts to the Company, was retaliating against the Grievant. It then suggests that the co-worker's (alleged) retaliation should be imputed to the Company, concluding that the Company engaged in "sanctioned retaliation" toward the Grievant.[8] Though ingenious, the argument is a stretch in the factual context of this case. When the Company receives information, regardless of the source, suggesting a violation of a policy it is obligated to investigate and determine whether discipline is warranted. In this case it was furnished materials that on their face warranted further investigation. It later decided that the Grievant had made Instagram posts that violated both policies, and, appropriately or not, determined that she should be terminated. The Union's efforts to saddle the Company with the alleged motivation of the co-worker are misplaced. The Arbitrator finds that the Union has not demonstrated by any relevant standard of proof that Southwest's termination of the Grievant was because she reported, or participated in the investigation of, her co-worker.

Violation of Harassment Policy

The Company's termination of the Grievant rests, as stated in her termination memorandum, on its contention that in the Instagram posts reflected in CO Exhs. 1 and 2:

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[8] Union Brief, p. 11.

> ....it has been determined that you made posts via social media containing inappropriate racial slurs that you shared with or directed at a Coworker. Your actions are in violation of the Policy on Harassment.... (Joint Exh. 2)

The Arbitrator finds that the Instagram post reflected in CO Exh. 2 cannot be relied upon by the Company to support the Grievant's termination and may not be considered as grounds for her discharge from employment. There is no evidence that the Grievant was the post's originator. The post does not include the Grievant's Instagram handle showing her as the poster nor disclose who posted it or when it was posted. Company witness Gutierrez testified that when interviewed the Grievant did not deny or admit that she had made the post. The Grievant testified that she had no recollection of having made the post and was of the belief that she had not. The Arbitrator determines that the Company has not satisfied its burden of demonstrating that this post was that of the Grievant. Although the Grievant admits to having reacted to the post with the comment "Happy Thur", preceded by three emojis, her reactive comment alone is not harassment within the meaning of the Company's policy.

It is admitted that the Instagram Post shown in CO Exh. 1 was made by the Grievant. It reads:

> Girls cheat more than guys they just get caught less because side niggas don't talk as much as side bitches.

It is undisputed that the content of the post was not original to her but was rather a social media meme reposted by her because she considered it humorous. A social media repost may violate the Company's policy, notwithstanding its content is not original to the poster. In the first instance, however, it must be determined that a post, original or not, is harassing in nature, regardless of the poster's intent. The Arbitrator concludes that for a post to constitute harassment there must be from its content a reasonable inference that it, intentionally or unintentionally, has the likely effect of threatening, intimidating, or offending a person, group or entity. A social media post by itself and by its very nature may within its four corners constitute harassment. This is not the case with the post depicted in CO Exh. 1. Without extrinsic evidence that it has had such effect on a person, group or entity, the Grievant's post is not susceptible to a reasonable conclusion that it is harassing in nature. The Company offered no testimony

or evidence that any person or entity considered himself or itself harassed by the post. It is beyond argument that the use of the term "niggas" in the Grievant's post is offensive and distasteful, but its use in the context here is not harassment. The Arbitrator agrees with the Union's contention that this post, and specifically the use of the pejorative in contains, does not fall within the proscription of the Company's policy against harassment.

Violation of Social Media Policy

As the Company did not carry its burden of demonstrating attribution to Grievant of the Instagram post shown in CO Exh. 2, and for the reasons previously discussed, the Company may not rely on that post as evidence of Grievant's violation of the social media policy. And, for the same reasons discussed above with respect to the harassment allegation, the Arbitrator concludes that the Company's termination of the Grievant for violating its social media policy was not motivated by retaliation.

The Union maintains that the Grievant was not provided adequate notice of the social media policy. In deciding whether the Company has met its burden of demonstrating just cause, an essential element that must be present is that of "notice", or whether the employer provided the employee forewarning or foreknowledge of the possibility or probable consequences of the employee's disciplinary conduct.[9] Although there is some conflict, the overwhelming weight of the testimony is that the Company's social media policy training is not accomplished through classroom training sessions or one-on-one discussions. The Grievant, as did four other Union witnesses, testified that she received no such policy training and had not been given a copy of the policy in training sessions. Notice of the policy is instead provided when the employee logs into the Company's website, SWAlife. Upon log in, the employee is prompted to acknowledge a pop-up box informing them that there is a policy, available by link on the website, with instructions to read it. Only by "checking" the pop-up box is the employee permitted to continue use of the website. The Union vigorously argues that the absence of "hands on" training in social media policy and that the informational method employed by the

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[9] Just Cause, The Seven Tests (Koven & Smith, 3rd ed.), p. 37.

Company constitutes a failure of notice to the employee violative of just cause standards. The Company, as evidenced by this case, places significant importance on employees adhering to the policy. It would be preferable to treat the subject in training sessions and provide a copy of the policy in a training session, with opportunity afforded employees to ask questions concerning the policy. Nevertheless, the Arbitrator's function is to determine whether the Company's method of providing notice to the Grievant deprived her of an essential element of just cause. The Grievant testified that she was aware of the existence of a Company social media policy. In her four years with the company she undoubtedly had numerous opportunities to familiarize herself with the policy when logging on to the SWAlife website, where she could not proceed until acknowledging existence of the policy and that she would read or had read it. The Company has the right to determine how policy training will be performed. In a case, such as this, where the employee must acknowledge the policy's existence and instructions to read it, the Arbitrator cannot conclude that the training method used by the Company constitutes inadequate notice of the policy. The Union also urges that the policy itself is not sufficiently definitive and is inadequate to place the employee on notice of the possible consequences for its violation. The policy identifies various social media tools, including Instagram, and provides a number of examples of prohibited media content that, if related to the Company, "may result in discipline, up to and including termination. Among these is content that may "be viewed as untrue, disrespectful, malicious, obscene, violent, harassing, bullying, defamatory, threatening, lewd, intimidating, discriminatory or retaliatory".[10] A prohibition against employee social media activity that impacts the Company does not easily lend itself to more than general proscription, as is the case with Southwest's policy. Each case must be examined on its own facts. The Arbitrator finds that the Company's social media policy provides adequate notice of prohibited activity and the possible consequences to the employee of engaging in it.

A second requisite element of just cause is that of "proof" or whether the Company has demonstrated by substantial evidence or proof that the Grievant violated the social

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[10] Joint Exh. 3.

media policy.[11] The posting of social media is principally activity by the employee while not at work performing his or her duties. Arbitrators have held that conduct away from the workplace does not justify disciplinary action unless the behavior harms the Company's reputation or product.[12] The connection between the off-duty conduct and the injurious effect on the Company's business should be reasonable and discernible, not merely speculative. The conduct must be such as could logically cause in some fashion harm to the employer's affairs. Southwest largely adopts this principle by stating in its social media policy:

> Even if the social media communication does not reference Southwest directly or is posted anonymously, ***depending on the content of the communication, such statements can negatively impact Southwest, its Employees and/or its Customers.*** For that reason, **certain social media content that in any way is later related to Southwest, reflects poorly on Southwest, or impacts the workplace** is a violation of this policy and may result in discipline, up to and including termination.[13] (emphasis added)

There follows in the policy examples of prohibited social media content that may adversely reflect on Southwest or negatively impact the workplace. The relevant examples, as potentially applicable to the facts of this case, are content that may be viewed as "disrespectful" or "discriminatory", and content "damaging Southwest's perception".

The Company has provided two arbitral awards for the Arbitrator's consideration. The first, by this Arbitrator, upheld the termination of an employee who at the workplace had directed racial slurs at a co-worker and challenged him to fight.[14] The second, by Arbitrator Hill, sustained the termination of an employee who at the workplace directed racial slurs at his supervisor.[15] Neither of these cases is on point as applied to the facts of this one.

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[11] Just Cause, The Seven Tests, *supra*, p. 277.

[12] How Arbitration Works (Elkouri & Elkouri, 6th ed.), p. 939.

[13] Joint Exh. 3.

[14] Southwest Airlines Co and Aircraft Mechanics Fraternal Association, Case No. SWA-3720 (2016).

[15] Southwest Airlines Co. and TWU Local 555, Case No. HOU-R-2674/15 (2016).

The Company's position rests on its contention that the Grievant's post was seen by the co-worker whom she had reported and "likely" by other employees who were aware of her Southwest employment. It argues that the connection between Southwest and the post is further demonstrated by another post, admittedly made by the Grievant, that shows her in her Southwest Uniform. The Uniform post is separate and apart from the first, and there is no evidence or indication as to when it was posted. As the Union observes:

> We don't know if the uniform photo was added before or after the other alleged post. This is important to consider because of the notion that were it to have been posted afterwards, then a potential exists that nobody who had seen the cheating post (that Agent A has admitted to) saw the post of her in uniform at the time they saw the questionable post...[16]

The Company's contentions notwithstanding, to find a violation of the social media policy, it must be apparent with reasonable certainty that a post in some fashion has had a negative impact on the Company. The Grievant's post does not mention Southwest, nor does its content have a thing to do with the Company. On its face it is tasteless humor in which the term "nigga" appears as incidental to the post's content. The fact that an unrelated, undated post shows the Grievant in uniform does not alter the conclusion that the offending post does not, as required by the policy, reflect poorly or negatively on Southwest or adversely impact the Company's workplace or its customers.

AWARD

The grievance is sustained. The Company did not have just cause to terminate the Grievant for violation of its harassment and social media policies. The Grievant shall be reinstated to her position as a TPA ramp agent and is awarded back pay from date of her termination until her reinstatement. The Company to bear the costs of arbitration as provided in Article Twenty of the parties' CBA.

Dated September 5, 2017

Arthur T. Voss
Arbitrator

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[16] Union Brief, pp. 13-14.