IN THE MATTER OF ARBITRATION BETWEEN

SOUTHWEST AIRLINES CO.,	)	
Employer,	)	
and	)	**Grievant A DISCHARGE GRIEVANCE**
TRANSPORT WORKERS UNION, LOCAL 555,	)	
Union.	)	

Arbitrator:	Stephen F. Befort
Hearing Date:	April 18, 2019
Post-hearing briefs received:	June 11, 2019
Date of Decision:	July 12, 2019
	APPEARANCES
For the Union:	Randolph Barnes
For the Employer:	Jonathan G. Rector

INTRODUCTION

Transport Workers Union, Local 555 (TWU Local 555 or Union), as exclusive representative, brings this grievance claiming that Southwest Airlines (Southwest or Employer) violated the parties' collective bargaining agreement by discharging Grievant A without just cause. The Employer maintains that it had just cause to terminate the grievant for violating a work rule requiring employees to screen cargo packages for explosives prior to loading packages onto an aircraft. The grievance proceeded to an arbitration hearing at which the parties were

afforded the opportunity to present evidence through the testimony of witnesses and the introduction of exhibits.

ISSUES

Did the Employer have just cause to terminate the grievant? If not, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

ARTICLE TWO
SCOPE OF AGREEMENT

C. **Reasonable Work Rules.** Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

ARTICLE TWENTY
GRIEVANCE / SYSTEM BOARD / ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE
PROCEDURES

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

Group Grievance language.

RELEVANT WORK RULES

Cargo Operations Manual 3.14.15

In accordance with *Aircraft Operator Standard Security Program (AOSSP)* 8 Cargo Security Measures, Southwest Airlines must screen all cargo to prevent or deter the carriage of unauthorize explosives, incendiaries, weapons, and other items prohibited in cargo onboard passenger aircraft. Qualified Southwest Airlines Cargo Agents or authorized representatives must ensure that all screening is performed in accordance with TSA-approved screening methods and

procedures. The following policies apply to cargo inspection and screening:

- All cargo screening must occur before any shipment is sent to the aircraft for loading.

- Failure to properly screen cargo as trained will be grounds for disciplinary action, up to and including termination.

Ground Operations Employee Handbook; 3.2 – Basic Principles of Conduct

Each employee is expected to be familiar with and adhere to all Company policies and procedures. Any violation of each of the following will be grounds for disciplinary action. Discipline may range from a reprimand to discharge, depending on the particular violation and the circumstances.

42. Failure to screen cargo will result in termination.

FACTUAL BACKGROUND

Grievant A has been employed by Southwest Airlines for the last eleven years as a cargo agent at the Kansas City (MCI) airport. The Employer discharged Grievant A in December 2018 for failing to screen a cargo package as required by Company work rules. Grievant A had no

active discipline on his record at the time of discharge.

Cargo agents, among other things, are responsible for ensuring that cargo shipments loaded onto passenger aircrafts are properly screened for explosive materials. In this regard, the Transportation Security Agency (TSA) mandates that 100% of cargo shipments be screened for explosive materials. This is an important safety mandate designed to prevent and deter the potentially catastrophic consequences of an in-air explosion. The failure of an airline to comply with TSA screening requirements also could result in monetary penalties.

Cargo agents are expected to conduct a visual inspection of each piece of a cargo shipment to look for signs of tampering. In addition, cargo agents use an Explosive Trace Detection (EDT) machine to screen for micro-particles of substances associated with explosive devices. Cargo agents receive extensive instruction on screening techniques, including

comprehensive training prior to placement and three hours of recurrent training every twelve months thereafter.

On December 2, 2018, Grievant A failed to screen a cargo shipment before it was loaded on the aircraft. MCI Station Manager Adam Westermajer testified that he received a report from a cargo supervisor on December 3 indicating that an audit of the previous day revealed that a piece of cargo had not been screened. Wetermajer then reviewed the closed-circuit security feed of the cargo screening area. The video showed that Grievant A was busy with a customer who was having some complications with a shipment when a second customer arrived. The second customer was also experiencing some problems, and, when a third customer entered the area, Cargo Supervisor Rick Johnson stepped in to screen that customer's cargo. The video showed that the second customer's cargo was never screened. At the arbitration hearing, Grievant A testified that he had thought that Johnson was going to take care of the second customer's package, but he acknowledged that the failure to screen was his responsibility.

After the initial investigation, the Employer set up a fact-finding meeting with Grievant A to discuss the apparent failure to screen. During this meeting, Grievant A acknowledged that the package in question was his responsibility, and that he had failed to conduct the required screening. Grievant A similarly took responsibility for the omission during the System Board of Adjustment hearing.

Mr. Westermajer testified that he made the decision to terminate Mr. Grievant A's employment after consulting with Labor Relations and Cargo department leadership. This decision was based upon a finding that Grievant A had violated Basic Principle of Conduct (BPOC) 42 which states that "failure to screen cargo will result in termination." Jim Daugherty, Senior Manager of Cargo Programs, testified that the Employer adopted this work rule in October 2018

due to discovering several recent deficiencies in its screening compliance. Before implementing the work rule, Trudy Christensen, Senior Manager of Labor Relations, notified Union officials of the Employer's intent to adopt BPOC 42. According to Christensen's testimony, the Union did not file a grievance challenging the implementation of the work rule.

The Employer also notified employees of the addition of BPOC 42 through a Read for Work bulletin distributed to all members of the work group. Mr. Grievant A electronically acknowledged his review of BPOC 42 on December 2, 2018, just hours prior to the incident in question.

During the arbitration hearing, the Union called Agent B as a witness. Agent B is a cargo agent working at the MCI facility. Agent B testified that he was terminated for failing to screen a package in November 2018, but that he continues to work presently as a cargo agent at that facility. Agent B testified that a new "safety net" procedure has been adopted at MCI by which once a package is screened the cargo agent stamps that package with a "SWA screened" stamp. The stamped packages are then placed in an area marked "SWA screened freight" before being loaded onto an aircraft. Following an objection by the Employer to the Union's attempt to introduce evidence concerning the basis for Agent B's return to work, the parties agreed to the following stipulation:

> Agent B was disciplined for conduct that is similar to that resulting in the grievant's termination, but the parties also stipulate that they will not offer any testimony or other evidence relating to any settlement that was agreed to regarding Mr. Agent B's grievance.

The Union also called Union Vice President Jerry McCrummen as a witness. McCrummen testified that the Employer has fired four employees for violating BPOC 42 and that he believes that some of these agents have been returned to work. However, he was not able to identify any employee who returned to work who was not subject to a confidential, non-

precedential settlement.

POSITIONS OF THE PARTIES

Employer

The Employer contends that it had just cause to discharge the grievant because of his violation of BPOC 42 for failing to screen cargo for explosives. The Employer points out that the parties' collective bargaining agreement expressly authorizes the Employer to adopt reasonable work rules. The Employer maintains that its work rule requiring agents to screen for explosives is a reasonable safety-related exercise of discretion, and that the Union has not challenged the validity of that rule by filing a grievance. Since it is undisputed that the grievant failed to screen cargo on December 2, 2018, discharge is an appropriate sanction for that serious misstep.

Union

The Union does not dispute that Grievant A failed to screen a piece of cargo on December 2, 2018. But the Union does contest the Employer's contention that such an error automatically requires discharge. The Union argues that the Employer's unilaterally adopted zero-tolerance policy cannot abrogate the agreement's negotiated just cause requirement. In this case, the Employer's discharge decision is not supported by just cause because it fails to consider mitigating circumstances such as the grievant's long and good work record.

DISCUSSION AND OPINION

In accordance with the terms of the parties' collective bargaining agreement, the Employer bears the burden of establishing that it had just cause to support its disciplinary decision. This inquiry typically involves two distinct steps. The first step concerns whether the

Employer has submitted sufficient proof that the employee actually engaged in the alleged misconduct or other behavior warranting discipline. If that proof is established, the remaining question is whether the level of discipline imposed is appropriate in light of all of the relevant circumstances. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS 15-25 (8th ed. 2016). Each of these steps is discussed below.

The Alleged Misconduct

The misconduct alleged by the Employer is that the grievant failed to screen cargo for explosives on December 2, 2018. The Union does not dispute that Mr. Grievant A was responsible for screening cargo that day, and that he failed to screen one package. Accordingly, the Employer has adequately established the existence of the alleged misconduct and the only issue for debate is the appropriate remedy.

The Appropriate Remedy

The Employer contends that the appropriate remedy in this instance is governed by BPOC 42 which provides that "failure to screen cargo will result in termination." The Union, in contrast, argues that termination is an excessive penalty that is not supported by just cause. These conflicting viewpoints warrant a closer examination.

The Work Rule

Article 2. C. of the parties' collective bargaining agreement authorizes the Employer to adopt reasonable work rules:

> Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

The Employer adopted BPOC 42 in October 2018 as a means of bolstering compliance with the

TSA requirement that airlines screen all cargo shipments for explosives. Having found some shortfalls in employee compliance, the Employer decided to put more teeth in the screening requirement by specifying that any screening failure will be punishable by discharge. Before implementing this work rule, the Employer notified Union officials of its intent to adopt BPOC 42, and the Union did not file a grievance challenging the work rule's implementation. The Employer maintains that the rule is a reasonable safety measure designed to deter the potentially disastrous consequences of an in-air explosion. Given these circumstances, the Employer argues that BPOC 42 has the status of a binding workplace rule pursuant to Article 2.C. of the agreement.

The Employer is certainly on sound footing in arguing the importance of airline safety. Clearly, a rule requiring the screening of all cargo would be reasonable. But BPOC 42 goes beyond regulating behavior to adopt a zero-tolerance policy as to the consequences of that behavior. This sets up a potential clash with the just cause requirement of the parties' agreement.

Zero Tolerance v. Just Cause

The Employer claims that the zero-tolerance work rule should govern this matter because the Union waived its right to challenge the reasonableness of the policy by failing to file a group grievance within ten days of the policy's adoption. The Union counters that a unilaterally adopted work rule cannot extinguish the mutually-agreed upon just cause provision. I believe that the Union has the better of this argument.

Pursuant to Article 2.C. of the parties' agreement, a work rule adopted by the Employer is binding only if it is "not in conflict with the terms and conditions of this Agreement." To the extent that the work rule attempts to establish an automatic justification for a particular arbitral remedy, that provision arguably is in conflict with Article 20 which states that discipline should

be premised on a "just cause" standard. A just-cause standard embodies the principle that the appropriateness of a disciplinary remedy should depend upon a consideration of all the relevant circumstances, including the severity of the misconduct, due process considerations, and mitigating factors. *See* ELKOURI & ELKOURI, HOW ARBITRATION WORKS Ch. 15.3.F. (8th ed. 2016).

As the leading text on labor arbitration has summarized, "arbitrators generally do not allow zero-tolerance policies to override just-cause requirements." ELKOURI & ELKOURI, HOW ARBITRATION WORKS 16-15 (8th ed. 2016). In Interstate Brands Companies, 120 LA 356 (Gregory, 2004), for example, the arbitrator was confronted with both an employer promulgated zero-tolerance policy providing for immediate discharge and a negotiated just-cause limitation on discipline. The arbitrator ruled that "a zero-tolerance policy cannot and does not override and trump the express just cause and related protections of the collective bargaining agreement against wrongful discharge." *Id.* at 358-59. The arbitrator went on to overturn the employer's discharge decision based upon mitigating circumstances and the grievant's good work record. Many other arbitration decisions have reached similar conclusions. *See, e.g.*, Northhampton Hosp. Corp., 135 LA 953 (Trotter, 2105); Lincoln Industrial Corp., 132 LA 241 (Cohen, 2013); Kimberly-Clark Corp., 107 LA 554 (Byars, 1996). The logic of these decisions is aptly summarized by a leading arbitrator and scholar:

> Assuming that the parties have not embodied these [zero-tolerance] rules in their agreement, the arbitrator's task remains unchanged. Just cause still applies even if management has promulgated a zero-tolerance rule. Otherwise, management could just announce that all its rules fit into that category and vitiate the just-cause standard. There might be viable explanations and excuses for violating the rules. For example, an employee may be taking prescription drugs for an illness and needs to have them at work. Zero tolerance would mandate discharge, but just cause might not.

ROGER ABRAMS, INSIDE ARBITRATION: HOW AN ARBITRATOR DECIDES LABOR AND

EMPLOYMENT CASES 216-17 (Bloomberg BNA 2013).

Just Cause Analysis

The Employer argues that discharge is appropriate even under a just cause analysis because of the severity of the grievant's violation. It certainly is true that an unscreened explosive could potentially cause catastrophic damage. But this infraction differs from other serious offenses for which immediate discharge is appropriate, such as theft or fighting, in that the conduct in question is not intentional in nature and the likelihood of harm is remote.

Three mitigating factors arguably support a lesser penalty. First, Mr. Grievant A's misstep was not intentional. He clearly intended to screen every package as required. The failure to screen incident on December 2, 2018, occurred in the context of some commotion. Three customers were vying for attention, while two employees sought to meet their needs. Under the circumstances, it was not unreasonable for Mr. Grievant A to believe that his supervisor had screened the cargo of the second customer. The fact that Grievant A has consistently taken responsibility for this omission says as much about his character as it does about his error.

Second, Grievant A has a good work record. He has worked for the Employer for eleven years and had no discipline on his record at the time of discharge. In addition, his performance evaluations are excellent.

Finally, it is important to recognize that the principal purpose of discipline is not to punish, but to correct behavior when possible. Toward that end, arbitrators generally reserve termination for severe misconduct that cannot be rectified through lesser forms of discipline. But as a corollary, it is well-recognized that the use of progressive discipline is preferable when a lesser remedy is likely to correct a grievant's behavior. *See* DISCHARGE AND DISCIPLINE IN ARBITRATION 184-87 (Brand & Biren eds., BNA 2008).

In this instance, I believe that discipline short of discharge is likely to enable Mr. Grievant A's future good performance. His good work record coupled with his demeanor at the arbitration hearing leads me to believe that he grasps the importance of the screening requirement and that he will do whatever it takes to ensure that there will be no screening missteps going forward.

This is a close case. The Employer has the right to expect its cargo agents to screen each and every cargo package. But the grievant is a talented and well-meaning employee who likely will make every effort to avoid any further misstep. I believe that he deserves a second chance.

AWARD

The grievance is granted in part and denied in part. The termination sanction is reduced to an unpaid suspension of fifteen days. The Employer is directed to reinstate the grievant and to make him whole but for the fifteen day unpaid suspension. The Employer also is directed to amend the grievant's personnel file to reflect this determination.

Dated: July 12, 2019

Stephen F. Befort
Arbitrator