BEFORE

ARBITRATOR BARRY E. SIMON

In the Matter of the Arbitration Between	)	
	)	
TRANSPORT WORKERS UNION, LOCAL 555,	)	
	)	
Union,	)	Case No: MCO-O-0049/19 Grievant: Grievant A
	)	
and	)	
	)	
SOUTHWEST AIRLINES COMPANY,	)	
	)	
Employer.	)	

OPINION AND AWARD

The above identified matter was heard before the undersigned Arbitrator on March 25, 2019 in the DoubleTree Hotel Love Field, Dallas, Texas. Representing Local 555 of the Transport Workers Union, hereinafter referred to as "TWU," or "the Union," was:

Jerry McCrummen
Vice President
TWU Local 555

Representing Southwest Airlines, hereinafter referred to as "the Company" or "the Employer," was:

Cynthia S. Fox, Esq.
Senior Attorney Labor & Employment

Sworn testimony was given before the Arbitrator, and recorded and transcribed by a Certified Shorthand Reporter. In lieu of closing arguments, the parties filed post-hearing briefs that were received by the Arbitrator on May 22, 2019, at which time the record was closed.

Background: At all times relevant to this dispute, Grievant A, hereinafter referred to as "Grievant," was employed by the Company as a Freight Agent at Orlando, Florida (MCO), having been first hired in October 1983. As such, he is a member of the bargaining unit represented by the Union pursuant to a collective bargaining agreement effective February 19, 2016 through February 18, 2021, hereinafter referred to as "the Agreement."

It is undisputed that Grievant, while working at the Orlando Cargo Facility on December 25, 2018, Christmas Day, received a package destined for San Juan, Puerto Rico (SJU) and placed it in the warehouse without screening it on either the explosive trace detection (ETD) device or by x-ray. Grievant's actions were recorded by closed circuit television cameras.

By notice dated December 27, 2018, Grievant was directed to attend a Fact-Finding Meeting on December 31, 2018 to discuss his "alleged failure to screen the shipment." He was placed on a paid suspension pending the meeting and the subsequent results. By notice dated December 31, 2018, Grievant was directed to attend a Results of Fact-Finding Meeting on January 7, 2019. At that meeting, Grievant was presented with a Results of Fact-Finding – Termination of Employment report, authored by Cargo Customer Service Manager Dennis Raab, and reading as follows:

> A fact-finding meeting was held on December 31, 2018, to discuss your alleged failure to screen a shipment on December 25, 2018. Present at this meeting were: you, others, and myself.
>
> After completing the investigation into this matter and after review of the testimony, documents, and video provided at the fact-finding, we have concluded that you failed to screen the shipment belonging to Airway Bill # 3072 3840 on December 25, 2018. This shipment was then loaded on to a Southwest Airlines aircraft and subsequently flew from Orlando to San Juan unscreened. Such conduct is not consistent with the policies and expectations of Southwest Airlines. 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.

28. Failure to comply with safety rules or regulations.

32. Each Employee is expected to be familiar with and adhere to all federal security requirements and all Company policies and procedures. Any failure to comply with the security procedures will be grounds for disciplinary action. With regard to certain security violations, governing bodies of airport security (FAA, DOT, TSA, etc.) may impose penalties. Southwest Airlines has the right to assess appropriate discipline outside of these penalties.

42. Failure to screen cargo will result in termination.

Based on the above and because of your actions, your employment with Southwest Airlines is hereby terminated, effective immediately.

The Union filed a grievance on behalf of Grievant on January 10, 2019, seeking his reinstatement without loss of pay, seniority or benefits. After the Company's denial of the grievance, it was progressed to the System Board of Adjustment, which met on February 7, 2019, and was deadlocked. The grievance was then progressed to arbitration before the undersigned Arbitrator. The parties have stipulated that the grievance is properly before the Arbitrator and that he has jurisdiction to render a final and binding Award.

Statement of Issue:

Did the Company have just cause to terminate Grievant A? 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.

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.

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.

* * *

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

* * *

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

* * *

15. **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.

Position of the Employer: The Employer asserts that its number one priority is safety and security, and that the Transportation Security Administration, since 2008 has required it to screen 100% of its cargo. It explains that TSA may impose civil penalties on both the Company and individual employees to enforce this regulation. It notes that the potential consequences of not screening cargo, and possibly allowing explosive devices onto an aircraft, are catastrophic. For this reason, says the Employer, employees are trained on screening procedures and are subject to appropriate corrective action when they do not comply with the 100% screening requirement. It submits, therefore, that its adoption of Basic Principle of Conduct (BPOC) Number 42, providing that the failure to screen cargo will result in termination, was a reasonable exercise of its contractual right to manage, and that its promulgation was not grieved by the Union.

The Employer argues that the overwhelming weight and preponderance of the credible evidence establishes that Grievant failed to screen the shipment by any of the four required screening methods. It explains that a daily audit established that there was one less electronic trace detection sample than the number to ETD shipments logged in on December 25, 2018. It says it found that the shipment from N&E Delivery Services, an indirect air carrier (IAC), was logged in by Grievant as a 16 ounce item. Regardless of weight, the Employer insists that an item presented by an IAC must be screened by either ETD, x-ray, physical screening or canine screening. According to the Employer, cargo items are logged in by the system with a minimum weight of 16 ounces to ensure that every item is screened.

The Employer insists the video evidence shows that Grievant performed no screening of the item before he bagged and tied it and placed it in the warehouse for loading onto Flight #2749. It

cites the testimony of Dennis Raab that Grievant, at the Fact-Finding Meeting, admitted that he had not screened the item. It says Grievant, at the Fact-Finding Meeting or at the System Board, did not allege he had performed a visual inspection, and acknowledged at the arbitration hearing that he had changed his story and was now saying he did one. The Employer asks the Arbitrator to determine it had just cause to terminate Grievant based upon the information it had at the time it made that decision.

Even if the Arbitrator were to accept Grievant's testimony that he performed a visual inspection, the Employer denies this would have constituted one of the four required screening methods. It explains that a physical screening involves an inspection of everything inside of the box, whereas a visual inspection involves only looking for signs of tampering outside the box. The Employer further asserts that a visual inspection, according to the Cargo Manual, is appropriate only for non-cargo items, or items weighing less than 16 ounces that are either COMAT or from an unknown shipper, and this shipment was a cargo shipment from a known freight forwarder. Additionally, the Employer claims the video shows Grievant had performed no inspection whatsoever before bagging the package and securing it for loading.

The Employer asserts it conducted a timely investigation of the matter and provided due process to Grievant. It says it gave him an opportunity to answer the Company's questions and add any information he had. It notes that the Union stipulated that all technical procedures were met. The Employer states it reviewed all relevant evidence, but had no reason to examine the shipment itself. It says there is no dispute that the shipment was not COMAT or presented by an unknown shipper, and it says the actual weight of the package was irrelevant.

The Employer concludes it had just cause to terminate Grievant for failing to screen cargo. It says the record established that he violated stated and reasonable work rules, and that the discipline imposed was reasonable under the circumstances. Although Grievant was a 35-year employee, the Employer points out that he has had a least two security related violations while working as a Cargo Agent, and that he had been issued a written instruction and a warning as prior discipline in 2013 and 2017, respectively. If it had not terminated Grievant, the Employer says there would be no deterrent to encourage compliance with the cargo screening requirement. The Employer argues that the Union has not met its burden to prove the Company had acted arbitrarily, capriciously or disparately in terminating Grievant.

For the reasons stated, the Employer asks that the grievance be denied.

Position of the Union: The Union first contends Grievant screened the package using the approved visual method. It says this method is contained in the Company's Aircraft Operator Standard Security Program (AOSSP) that has the approval of the Department of Homeland Security. The Union maintains the visual inspection, according to the AOSSP, may be performed for internal shipments/COMAT or pieces weighing less than 16 ounces. The item in question, according to the Union, weighed 0.15 pounds.

The Union argues that termination was arbitrary, inappropriate and excessive in Grievant's case. It contends the Company's zero-tolerance policy conflicts with the Agreement's just cause provisions, which it says supersede the unilaterally imposed policy. Just cause, says the Union, requires management to consider mitigating and extenuating circumstances, such as Grievant's

thirty-five plus years of seniority and the lack of any active discipline in his file. It submits that the purpose of issuing discipline is to correct or modify behavior. If there is a chance that an employee can be rehabilitated, says the Union, management should apply the lowest penalty to ensure that the same infraction is not committed again.

The Union states the Company failed to report the alleged failure to screen to Homeland Security. It refers to a 2017 settlement between the Company and TSA that required the Company to take appropriate measures to ensure 100% compliance with cargo screening. It is this settlement, says the Union, that resulted in the installation of closed circuit cameras in the cargo facilities. If Grievant's alleged violation was so egregious that it warranted his termination, the Union questions why management determined it was not necessary to report it to Homeland Security. It characterizes the Company's efforts at enforcement as fear and intimidation, creating a hostile work environment.

The Union presented a copy of a stamp affixed to packages confirming that the package had been screened. It says this stamp is used at other stations, and had been used at Orlando but was discontinued. The Union contends this would allow Ramp Agents to ensure that unscreened packages are not loaded onto aircraft. Instead of utilizing this checks and balances system, the Union complains that termination is the Company's approach to ensuring compliance.

The Union argues that Grievant's termination was applied in a discriminatory manner. It cites the testimony of Manager of Labor Relations Brian Steen that agents have been brought back to work after being terminated for failing to screen packages. The Union contends there was discipline in Grievant's file that should have been removed as it was beyond the contractually allowed retention period. It questions whether that discipline was used by the Company in making

its decision to terminate Grievant. Reviewing the "Seven Tests of Just Cause," as set out by Arbitrator Carroll R. Daugherty, the Union concludes that management failed to meet five of the seven tests.

Finally, the Union contends that Grievant would be welcomed back by agents and supervisory personnel at MCO. It cites the testimony of Cargo Customer Service Manager Dennis Raab, who issued Grievant's termination, that Grievant was a good employee and that he would welcome him back to work. It notes that this incident occurred on Christmas Day, and that Grievant had sufficient seniority to observe the holiday. Instead, says the Union, Grievant volunteered to work so no other agent would have to be forced to work.

Concluding that the Company did not have just cause to terminate Grievant, the Union asks that the grievance be sustained, that Grievant be immediately reinstated to his position at MCO without loss of seniority, and that he be made whole for wages and benefits lost.

Discussion: The Arbitrator understands the importance of the proper inspection of cargo being loaded into passenger aircraft. The Company has the right to promulgate rules regarding what is to be inspected and the methods for conducting such inspections. Furthermore, the Company has the right to discipline employees for failing to conduct inspections in accordance with these rules. The Arbitrator is certain that these are principles in which the Union concurs. The Arbitrator also understands that the parties' Agreement requires all disciplinary actions to be for just cause, as that term is applied in the context of labor-management relations. By incorporating Article 20, Section 1.A in the Agreement, the Employer has agreed to this principle.

It is undisputed that Grievant did not perform any of the inspections that satisfy the requirements that the Company contends should have been performed on this parcel. According to the Company, the only acceptable inspections were electronic trace detection, x-ray, physical or canine. The Union's defense in this case is that Grievant performed a visual inspection of the parcel, and that such an inspection was authorized because the parcel weighed less than 16 ounces. The Employer has denied that such an inspection is acceptable for this parcel.

In reviewing the evidence of record, it is the Arbitrator's conclusion that he does not have to make a determination as to whether a visual inspection was permissible. This is because, even if such an inspection was permissible, the evidence fails to establish that Grievant performed a visual inspection. Under the AOSSP, a visual inspection investigates the following indicators of unsafe cargo:

> Hazardous materials labels or other markings that would indicate the shipment cannot be accepted for transport
>
> Visual signs of tampering, which include, but are not limited to:
>
> > Fresh scratch marks on screws, plastic housing
> > Inordinate (unusual) weight or balance
> > Unusual smells
> > An odd piece that does not match the rest of the shipment
> > Other signs of tampering or modification
>
> Exposed wires
>
> Leaks that may render the cargo unsafe to transport

The video evidence shows Grievant accepting the parcel and placing it in a yellow bag before bringing it into the warehouse. Grievant simply picked up the parcel and placed it in the bag. He did not turn it over and examine all sides, nor did it appear that he smelled the parcel. Furthermore,

it is significant that Grievant did not allege he satisfied the inspection requirement by performing a visual inspection until the arbitration hearing. He acknowledged, however, that he stated at the Fact-Finding Meeting that he did no screening of any kind. [Tr. 221] Additionally, he acknowledged that he did not testify at the System Board of Adjustment that he did any visual screening of the shipment. [Tr. 222] If he had performed a visual inspection, and believed such an inspection satisfied the AOSSP requirements, he certainly would have offered that explanation at the two opportunities to do so prior to arbitration. The Arbitrator, therefore, accepts his earlier statements as an admission that he did not perform an inspection of any kind in connection with the parcel. As an additional factor, Grievant entered this item in the ETD Screening Detail Report, which should not have been done if ETD screening had not been performed. This incident came to management's attention because there were more items on the report than tests run on the ETD device. The Arbitrator, based upon the totality of the record before him, finds that Grievant did not perform an inspection on the parcel in question.

Having found that Grievant did not perform the required inspection of the parcel, the Arbitrator's next consideration is whether the discipline administered to Grievant was appropriate. The parties have stipulated that Grievant was trained on the proper screening methods, and the Company has published its rule advising employees that their failure to screen cargo will result in termination. The Employer, therefore, has a rule with a legitimate business purpose, has made its employees aware of the rule, and has additionally made them aware of the consequences for failing to comply with the rule.

To Grievant's credit, the record reflects that he had in excess of 35 years of service at the time of this incident. He also had no active discipline at the time. Although the Employer introduced evidence of discipline Grievant had received in 2013 and 2017, the Arbitrator made it clear that discipline issued outside of the Agreement's retention period cannot be used as a basis for the discipline imposed in this case. Such evidence was accepted solely as a rebuttal to the Union's contention that Grievant is a good employee. The evidence submitted by the Union included numerous commendations Grievant had received over the years, particularly during 2018. One such commendation was his being named "Cargo Agent of the Quarter, Team MCO" for the 1st Quarter of 2018.

Of considerable significance is the testimony of Dennis Raab, the Manager who issued Grievant's termination notice. On cross-examination, he was asked if Grievant's reinstatement would be disruptive at the MCO cargo facility, and he replied that it would not. He was also asked if he thought Grievant would be welcomed back, and Raab answered, "I would welcome him back." [Tr. 93] A managerial employee who believed that his decision to terminate another employee should be upheld would not be expected to make such a statement.

Finally, the Union has presented evidence showing that termination for cargo screening violations is not an absolute. In two instances occurring in 2018 at Albuquerque and Seattle, Letters of Warning were issued to employees who failed to properly screen cargo. In a third instance involving a Saint Louis employee whom the Company concluded had "blatantly failed to screen (one) 1 piece at 3 pounds, and . . . falsely entered the screen in as an ETD," the employee was reinstated after three months "due to many circumstances surrounding the . . . grievance."

In consideration of all of these factors, the Arbitrator finds that the Employer had just cause to discipline Grievant for failing to screen the cargo, but that permanent dismissal was excessive. Accordingly, he will direct that Grievant be reinstated to service with seniority rights unimpaired, but without compensation for time lost. Grievant must understand that he will be expected to diligently comply with the Company's procedures for the inspection of cargo if he is to continue as a Southwest employee. If he has any questions about those procedures, he should ask management to clarify them for him.

Award: The grievance is sustained to the extent that Grievant is to be reinstated to service with seniority rights unimpaired, but without compensation for time lost. Inasmuch as the grievance was neither sustained nor denied in full, the cost of arbitration shall be borne equally by the parties.

Barry E. Simon, Arbitrator

Dated: June 19, 2019
Arlington Heights, Illinois