In the Matter of the Arbitration Between

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Southwest Airlines

and

TWU-Local 555

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Hearing held May 23, 2019

Before Richard I. Bloch, Esq., Arbitrator

Appearances

For the Company, Eddie Berbarie, Esq.
For the Union, Robert Bettinger

OPINION

FACTS

On December 29, 2018, grievant [redacted] reported to colleagues and to Southwest (hereinafter, occasionally, "Company") that he had discovered a noose in a baggage cart he had been towing. In response, Southwest called the Houston Police Department which, after investigating, advised the Company they believed [redacted] was responsible for placing the noose in the cart. As a result, [redacted] was terminated.

The Union grieved the termination and, the parties having been unable to resolve the ensuing dispute, it was submitted to arbitration before the undersigned.

ISSUE

Was the termination of [redacted] for just cause, and if not, what should the remedy be?

COMPANY POSITION

Southwest says that, on the morning in question, the grievant placed the noose in the cart, then, pretending to discover it, he advised colleagues of its existence in order to stoke racial turmoil in the workforce. This was profoundly serious misconduct, says the Company, in response to which termination was appropriate.

UNION POSITION

The Union concedes that, if proven, such conduct would warrant termination. It maintains, however, that the grievant is blameless, and that the Company has failed to demonstrate evidence of its claims against [redacted]. The Union requests that the grievance be granted and that the grievant be returned to work with full back pay.

RELEVANT CONTRACT PROVISIONS

ARTICLE TWENTY

NO. 15. ARBITRATION FUNCTION AND JURISDICTION.

The functions and jurisdiction of the arbitrator shall be fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms ... . 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.

ANALYSIS

In a disciplinary case, management must sustain the burden of proving the charged individual has, in fact, committed the charged offense. While arbitrators differ, to some extent, as to the quantum of proof required, it is commonly understood that the employer's obligation is to present clear and convincing evidence of the misconduct at issue. In this case, for the reasons that follow, the finding is that obligation has not been met.

The claim by Southwest is that grievant [redacted], on the morning in question, brought the noose with him and deposited it in the cart. The grievant, on the other hand, acknowledges handling the rope, but denies planting it. He says he saw the rope in the cart, raised it up, then put it back where it was prior to advising colleagues he had found it. It bears emphasizing, in this case, [redacted] does not dispute handling the rope. The critical question is whether, prior to depositing the rope in the cart, he picked it up from the cart or whether, as the Company says, the cart was empty, and that the grievant placed - not replaced - the rope.

In support of its charges, the Company presented into evidence videotapes from security cameras located on the airport field. The Company says the videos demonstrate conclusively that (1) the grievant drove an empty cart up to Gate 46; then, after parking it, walked alongside the cart and dropped the rope in the cart. The grievant, for his part, acknowledges dropping the rope, but says he did so immediately after spotting it and picking it up.[1] The evidence presented at hearing consisted primarily of the video from

[1] [redacted] testified that, on an earlier occasion, he had found another noose, which he had discarded. On that occasion, he was advised he should have left the item where he found it.

the yard on the day in question, including enhancements required during the police department's attempts to scrutinize the video. Based on a review of the video, the HPD officer and the Company assistant station manager came to the conclusion that the grievant had brought the rope to, and deposited it in, the cart. This conclusion was premised on the belief that (1) the video does not show the grievant reaching in the cart to pick up the rope and (2) the cart was empty before the grievant approached it. As is apparent from the necessity of engaging in various enhancement techniques, none of these conclusions is available from merely watching the raw footage. Testifying for the Company, the investigating officer the police lab's finding that, based on "negative mode" and "absolute difference" testing, "the object in question was not there before [redacted] passed at the edge of the cart, then something appeared there, but they couldn't identify what the object was."[2] The photographic evidence was replayed and viewed at the hearing, as well. But, having viewed both the original and the enhanced versions of the video multiple times, the arbitrator concludes that, contrary to the conclusions of the Houston Police Department and the Company, it is not possible to determine either that the grievant did *not* initially lift the rope from the cart or that, previous to [redacted] arrival, the cart had been empty.

The recording shows a string of carts approaching the camera, but the angle is such that one cannot see all areas of the interior space of the cart. And, as is apparent from the evidence and testimony, the cart in question had a 2-inch fence at its edge that could have shielded the rope from view.[3] Efforts by the Houston Police Force to

[2] Tr., at 40.
[3] See Tr., at 88. The rope, according to the record, was about an inch in diameter (*Id.*, at 215.)

enhance the photo through various techniques are unavailing for the same reason. A cell phone photo taken by the grievant shows the rope draped over the side railing of the cart, a position confirmed by the security video. But, while the Company argues the video also shows the cart empty before that, it is by no means clear that the rope might not have been either in a position that could not be accessed because of the angle of the camera or blocked from view by the structure of the cart itself.

The Company also contends there is no recorded evidence of the grievant lifting the rope up prior to depositing it in the cart, but, while true, that claim is insufficient since there is, in fact, a moment when the grievant, standing in the area he says he first lifted the rope, had his back to the camera. It is impossible to find, with any certainty, that he did *not*, at that point, raise the rope, as he claims.

As indicated above, the burden of proof in this case – the requirement of submitting clear and convincing evidence – is substantial. As is abundantly clear from, among other things, the extent to which the police and the Company had to go to attempt to comprehend and interpret the video evidence, and based, as well, on the first-hand viewing of the evidence at (and after) arbitration, the critical evidence is simply unclear by any measure. It follows, therefore, that, in this instance, the evidence against the grievant is not persuasive.

Nothing herein should be interpreted as removing all doubt as to the grievant's activities on the day in question. But it is not the burden of the grievant to remove all doubt. The obligation to prove the case in this dismissal case is management's and, for

the reasons set forth above, that has not been done. For these reasons, the finding is that the grievance will be granted.

AWARD

The grievance is granted. The grievant is to be reinstated with full seniority and to be made whole for lost wages and benefits.

RICHARD I. BLOCH, ESQ.

September 28, 2019