

**IN THE MATTER OF ARBITRATION BETWEEN**

SOUTHWEST AIRLINES CO.,	)	
	)	
Employer,	)	
	)	<b>DISCHARGE</b>
and	)	<b>GRIEVANCE</b>
	)	
	)	
TRANSPORT WORKERS UNION,	)	
LOCAL 555,	)	
	)	
Union.	)	
	)	
	)	

Arbitrator: Stephen F. Befort

Hearing Date: May 22, 2019

Post-hearing briefs received: July 11, 2019

Date of Decision: August 15, 2019

APPEARANCES

For the Union: Randolph Barnes

For the Employer: Joel Bagby

**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 [REDACTED] without just cause. The Employer maintains that it had just cause to terminate the grievant for violating a work rule requiring employees to report immediately any accident causing damage to Company property. 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.

- 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.

## **RELEVANT WORK RULES**

### **Provisioning Manual 9.1.6 Vehicle Accident**

Notify Provisioning Leadership immediately if an accident occurs while operating a Company vehicle, including accidents involving vehicles that are off airport property and Employees who are off duty.

### **Provisioning Manual 10.5 Driving Rules and Policies**

Station Leadership may discipline Employees who operate vehicles or equipment recklessly and abuse these items. Employees must follow these procedures when operating vehicles:

- Immediately report employee injury or equipment damage to a Provisioning Supervisor.

### **Employee Handbook – 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.

14. Performing your job in a careless, negligent, or unsatisfactory manner.
16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.
28. Failure to comply with safety rules or regulations.

## **FACTUAL BACKGROUND**

The Employer hired [REDACTED] as a Ramp Agent in 1995. At the time of his discharge, he worked as a Provisioning Agent based in Las Vegas, Nevada. Provisioning agents, among other duties, are responsible for transporting cabin equipment and commissary items to aircraft prior to departure. [REDACTED] had no active discipline on his record at the time of discharge.

On the evening of January 8, 2019, another provisioning agent discovered that provisioning truck # 20 had incurred damage to a bumper that had not been reported. Provisioning Supervisor Cory Riddle drafted a damage report, and the truck, after being inspected, was removed from service. On the following day, Assistant Provision Manager Bryan Sweeney began investigating the apparent accident which included interviewing agents who had recently driven truck # 20 and a review of the airport's video of the provisioning work area.

When Mr. Sweeney returned to work on the morning of January 10th he found a two-page handwritten letter on his desk. The letter stated:

On 1-8-2019 at approximately 17:30 I was assigned a "warehouse flight" to work. . . . Having a few minutes before my flight I noticed the trucks parked on the line (unoccupied) were in disarray. . . .

I took it upon myself to correct this situation. When moving the 4<sup>th</sup> truck, I didn't notice how closely I was parked up against truck # 20 on my passenger side. As I pulled out, some part of the truck I was moving caught the bumper of # 20 and bent the bumper. . . . When I went to look at # 20 I was very surprised at how the bumper bent. At this point my flight was on the ground, so incorrectly and with no plan, I chose to work the inbound. I was so distraught and angry with myself – I couldn't believe how stupid and out of character my decisions to this point were. . . . So apparently suffering from some sort of mental incapacitation I didn't report the damage till now. Today, the following day, I have worked my regular shift, knowing I needed to report my actions. . . .

I'm embarrassed and didn't want to interrupt the operation today, so I waited till now after my last flight to turn this in. . . .

With all my apologies,



1-9-2019

The Employer has adopted a work rule that requires employees to report immediately to a supervisor any accident causing personal injury or property damage. As initially drafted, the

work rule provided for a range of possible sanctions. In June 2013, however, the Employer adopted a revised Basic Principle of Conduct (BPOC) that now provides as follows:

16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.

The Employer trained [REDACTED] and other employees on the revised policy.

Labor Relations Manager Jennifer Taylor testified that the Employer adopted the amended rule because too many employees were failing to report accidents and because timely notification of accidents serves important safety interests. Taylor also testified that the Union did not file a class grievance challenging the validity of the revised BPOC 16, although the Union did respond in a position letter asserting that BPOC does not trump the collective bargaining agreement's just cause provision.

As a result of Sweeney's investigation, the Employer invited [REDACTED] to attend a fact-finding meeting. During that meeting, [REDACTED] acknowledged that he caused the damage to truck # 20 and that he did not report the accident until the following day. [REDACTED] made similar admissions at the post-discharge System Board hearing. The Employer issued a termination letter to [REDACTED] dated January 15, 2019 alleging that his conduct had violated the following three provisioning principles:

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

16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.

28. Failure to comply with safety rules or regulations.

At the arbitration hearing, the Union elicited testimony from the grievant and from Union Vice President Jerry McCrummen. [REDACTED] testified he initially was uncertain whether he had

caused the damage to truck # 20, but that he eventually concluded that he was responsible after overhearing other employees talking about the truck damage on the next day. He also testified that during this time he was “emotionally and mentally fatigued” due to the death of Southwest Air’s founder, Herb Kelleher. For his part, McCrummen testified that [REDACTED] had excellent performance evaluations, that he had received Southwest’s Presidential Award, and that he was one of seven company employees to be selected to serve on the Employer’s Presidents Council. Finally, McCrummen testified that while the Employer has consistently terminated employees for violating the reporting requirements of the revised version of BPOC 16, some of those employees have been reinstated via arbitration decisions.

## **POSITIONS OF THE PARTIES**

### **Employer**

The Employer contends that it had just cause to discharge the grievant because of his violation of BPOC 16 for failing immediately to report an accident. 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 employees to immediately report an accident 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 clearly established by his own admissions that the grievant failed to immediately report an accident that took place on January 8, 2019, discharge is an appropriate sanction for that serious misstep. The Employer asserts that it has consistently terminated agents for failing to immediately report damage to company property, and that sanction is not unreasonable or arbitrary under the circumstances of this case.

## **Union**

The Union does not dispute that [REDACTED] failed to report immediately an accident causing damage to a vehicle on January 8, 2019, but it claims that this misstep is partially explained by the grievant's initial uncertainty as to whether he had caused the damage and his grief over Herb Kelleher's death. In addition, the Union contests 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 exemplary 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 report immediately an accident that occurred on January 8, 2019. This allegation presents two questions: 1) was the grievant involved in an accident that resulted in personal or property damage, and, if so, 2) did the grievant fail to report the accident in an immediate fashion?

As to the first question, ██████ on three occasions acknowledged that he had caused property damage by accidentally driving a vehicle into truck # 20. He made this admission in his handwritten letter to Mr. Sweeney, and then again at the fact-finding meeting and at the System Board hearing. At the arbitration hearing, on the other hand, ██████ testified that he was not certain initially that he had caused the damage to truck # 20. On cross-examination, however, ██████ testified that he took responsibility for the damage because he concluded that he likely caused the damage. Accordingly, the evidence supports a finding that ██████ either knew or should have known that he was involved in an accident that caused the damage to truck # 20.

In terms of the second question, the Employer alleges that ██████ waited 36 hours before reporting the accident as measured by the time between the accident on the evening of January 8 and Sweeney reading ██████ handwritten letter during the morning of January 10. The Union, in contrast, claims that ██████ reported the accident 24 hours later when he left the letter on Sweeney's desk. In either event, the evidence demonstrates that ██████ did not immediately report the accident once he knew or should have known of its occurrence.

Accordingly, the Employer has adequately established the existence of the alleged misconduct and the only remaining issue is the appropriate remedy.

### **The Appropriate Remedy**

The Employer contends that the appropriate remedy in this instance is guided by BPOC 16 which provides that a failure to immediately report an accident resulting in personal or property damage "shall warrant termination." The Union, in contrast, argues that termination is an excessive penalty that is not supported by just cause.



## **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 amended BPOC 16 in 2013 as a means of bolstering compliance with the existing requirement that employees promptly report accidents resulting in damage. The Employer maintains that the revised rule calling for discharge for noncompliance is a reasonable safety measure designed to ensure that the Employer promptly receives information about a work environment that is potentially damaged or unsafe. Given these circumstances, the Employer argues that BPOC 16 should have the status of a binding workplace rule pursuant to Article 2.C. of the agreement.

While the Employer has shown that BPOC 16 is reasonable in terms of requiring prompt accident reporting, the language of that provision goes beyond regulating behavior to adopting what could be read as a zero-tolerance policy as to the consequences of that behavior. If read in that manner, BPOC 16 potentially could clash with the just cause requirement of the parties' agreement. Such a conflict is avoided in this instance, however, as the Employer acknowledges that BPOC 16 does not obviate the need for just cause analysis of the appropriate remedy. 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).*

### **Just Cause Analysis**

The Employer argues that discharge is appropriate under a just cause analysis for several reasons. First, BPOC 16 serves significant safety objectives. A failure to report an accident may mask a serious hazard to the safety and well-being of co-workers and the public. Second, as a valid work rule, BPOC 16 appropriately makes termination the presumptive remedy for a failure to make an immediate report. Finally, the Employer points out that it has a consistent practice of terminating employees who have violated BPOC 16.

The Union counters that two mitigating factors support a lesser penalty. First, [REDACTED] has a long and excellent work record. He has worked for the Employer for 24 years and had no discipline on his record at the time of discharge. In addition, his performance evaluations are excellent, and he has received special recognition by being appointed to the President's Council and by being selected to receive Southwest's Presidential Award.

Second, the Union maintains that this is a suitable case to apply progressive discipline. In this regard, 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 [REDACTED] 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 accident reporting requirement

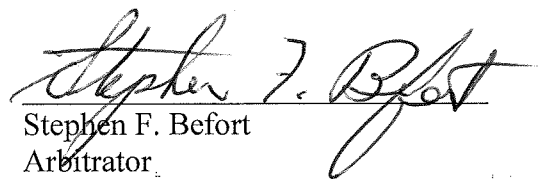
and that he will do whatever it takes to ensure that there will be no similar missteps going forward.

In the end, I believe that discharge is too severe of a penalty and that [REDACTED] deserves a second chance at continued employment. But, I also believe that the Employer should not be responsible for compensating the grievant for the employment break triggered by his violation of BPOC 16.

**AWARD**

The grievance is granted in part and denied in part. The Employer is directed to reinstate the grievant but without back pay. The Employer also is directed to amend the grievant's personnel file to reflect this determination.

Dated: August 15, 2019

  
Stephen F. Befort  
Arbitrator