BEFORE
ROBERT W. McALLISTER
ARBITRATOR

IN THE MATTER OF THE ARBITRATION BETWEEN SOUTHWEST AIRLINES COMPANY AND SOUTHWEST AIRLINES RAMP OPERATIONS PROVISIONING ASSOCIATION	No. IND-R-0339/91 [redacted] Termination
DATE OF HEARING:	June 8, 1992
PLACE OF HEARING:	Southwest Airlines Headquarters Dallas, Texas
APPEARANCES:	
For the Company:	John Chaussee, Esq.
For the Union:	Marvin Menaker, Esq.
DATE OF AWARD:	August 12, 1992

I. FACTS

The Grievant, [redacted], was hired by the Company in March 1989 and worked at its Indianapolis Station as a ramp agent. As a result of an incident which occurred on November 15, 1991, the Grievant was terminated effective November 20, 1991. The termination notice states in pertinent part:

> The reason for your termination are violations of the Basic Rules of Conduct-Reasons for Reprimand or Discharge as outlined in the Southwest Airlines Ground Operations Manual, Section 1.45.00 numbers three, nine, twenty-one, twenty-three and thirty-one.

II. ISSUE

Did the Company have just cause to terminate the Grievant for violating Basic Rules of Conduct three, nine, twenty-one, twenty-three, and thirty-one? If not, what is the appropriate remedy?

III. RELEVANT CONTRACT LANGUAGE

Article 20 Grievance System Board/Arbitration
Article 24 Discharge and Discipline

Basic Rules of Conduct - Reasons for Reprimand or Discharge

3. Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow employees or their work.

9. Unacceptable or immoral behavior on Company property.

21. Abusive and disrespectful behavior to a fellow SWA employee or Customer.

23. Conduct on or off the job which is detrimental to the Company's interest.

31. Other General Requirements of Your SWA job.

IV. POSITION OF THE COMPANY

The Company maintains the record establishes the Grievant directed four (4) statements at fellow employee, [redacted],

which were harassing and threatening in nature. The Company insists these four consecutive statements constituted sexual harassment which had a devastating effect upon the victim. The Company stresses the remarks were made despite the fact Sears left the Operations Room. According to the Company, the statements were unsolicited, inappropriate and disturbing to Sears.

The Company argues [redacted] felt threatened as any reasonable woman who is the victim of harassment would construe the Grievant's comments. The Company also stresses the testimony of [redacted] who it maintains clearly stated she felt threatened and became extremely upset. Moreover, the Company emphasizes that even during the hearing, [redacted] felt threatened which it contends demonstrates the serious nature of the Grievant's misconduct has had a long term impact on [redacted].

The Company points out it takes no pleasure in terminating an employee. But, the Company notes it reached the decision to terminate the Grievant only after a thorough investigation. The Company argues that reinstatement of the Grievant would set a bad precedent and might subject it to financial liability. The Company insists it followed established rules and policy in the termination of the Grievant and seeks a denial of this grievance under Federal law and equity.

V. POSITION OF THE UNION

The Union believes the parties participated in the hearing under the provisions of Article 24 which incorporates the principle of just cause. It stresses the absence of any other discipline in the Grievant's record and submits that if some infraction is found, the Arbitrator should look at a full range of penalties.

According to the Union, the alleged infractions must be viewed separately. It maintains the comment, "Not getting out much." even assuming some sexual connotation, is no big deal. Likewise, the Union dismisses the notion that telling [redacted] she was from "the old school" is not an infraction. Turning to the statement that [redacted]' needed "to be taught a lesson on life" or even under her version does not indicate what the lesson is. Moreover, the mentioning of "hard core" asserts the Union was stated in a manner linked with [redacted]' ability to watch a TV program like "Hard Copy." The Union suggests that if the Employer wants to guard against similar incidents, perhaps it should prohibit watching TV during working hours.

It is the Union's belief the record shows [redacted] solicited comment when she stated "Oh, that's gross." The Union acknowledges the Grievant's remarks were inappropriate, but maintains that if each employee was disciplined for each inappropriate remark uttered, the end result would be unacceptable.

The Union questions [redacted]' claim she felt threatened. Rather, the Union contends [redacted] reached this conclusion only after she thought about the situation. Moreover, the Union challenges [redacted]' claim she could no longer work and points to testimony indicating [redacted] had expressed a desire to go home early prior to her exchanges with the Grievant. Noting that [redacted] testified she was still upset, the Union points to her response to the Grievant's comment about "hard core" contending [redacted]' response then and now was not a reasonable response. The Union dismisses the Company's concern over liability as hogwash reminding the Arbitrator that the Company's work rules are controlling.

VI. DISCUSSION

[redacted] is an Operations Agent at the Company's Indianapolis Station. At about 7:15 P.M. on November 15, 1991, several employees were in the Operations Room. A television set was showing a segment of "Hard Copy" featuring Axel Rose of the rock group "Guns and Roses." [redacted] testified she had her back turned to the set and heard someone say, "Look, two women kissing." S[redacted] stated she responded, saying "gross." John Johnston, Ramp Supervisor at Indianapolis, wrote out a Report of Irregularity on November 16, 1991 (Co. Ex. 3). At the hearing, Johnston indicated he made notes when he interviewed [redacted] and the Grievant the evening of November 15. He maintained Co. Ex. 3 is an accurate and full report. Significantly, Johnston wrote at Page 1:

> She ([redacted]) said that [redacted] was watching some TV program that showed what looked to her like two women were kissing. She made the comment that what she had just seen was "gross." She stated her comment was not directed to anyone in particular. [redacted] then told me [redacted] asked her what was wrong with what she had just seen.

On July 17, 1991, [redacted] was asked to write out a description of her converstation with the Grievant. [redacted] wrote in pertinent part:

> On Friday evening, myself, [redacted], [redacted] and [redacted] were in Operations. The television was on and a group called Guns and Roses were on. The lead singer has long hair. It showed him kissing some girl, and [redacted] said, "Look at that, two girls kissing."

The Grievant testified he watched the program for three or four minutes without comment when he heard [redacted] comment, "Ooh, that's so gross, How can you watch something like that?"

In a statement written on November 15, the Grievant indicated [redacted]' comment was "ooooh, that is so gross." (Co. Ex. 2) Johnston's report (Co. Ex. 3) states the Grievant told him [redacted]' remark was, "How gross." Although there is discrepancy over the exact words uttered by [redacted], there is no indication in Co. Enhibits 2, 3, or 4 that [redacted] had her back to the TV and was not watching the program.

It is undisputed the Grievant told [redacted] that what he had seen was not gross or asked [redacted] "what was gross about it." [redacted] testified thatbefore she could answer, the Grievant suggested, "You don't get out much, do you?" [redacted] said she responded, "I do just fine." At this point, [redacted] asserted the Grievant asked her if she was "into the hard core stuff." [redacted] maintained this exchange took place in the break room adjacent to Operations after the Grievant followed her into that area. The Grievant offered a different explanation for being in the break area, claiming he was on his way to the warehouse to get his headset and gloves.

[redacted] had gone into the break area to get a glass and, after the exchange with the Grievant, walked into the warehouse to get some juice. After getting the juice, [redacted] said she turned around and was confronted by the Grievant who told her, "I believe you need to be taught a lesson." Following this remark, the Grievant is described as walking away. [redacted] testified she was "scared and shaken." On cross examination, [redacted] asserted she took the Grievant's last remark as a "threat in a sexual manner."

At the hearing, the Company argued the statements made by the Grievant were harassing and threatening in nature, thereby

constituting sexual harassment. Moreover, the Company maintains those remarks have had a devastating effect upon [redacted].

[redacted], an Operations agent at the Indianapolis station, was in the Operations room on November 15, 1991, but neither watched television nor heard any remarks. [redacted] recalled that she was sitting in Operations when [redacted] came in from the break room. [redacted] said [redacted] sat down and explained that she had gone into the back room to get a drink having already gotten a cup. When getting the cup, [redacted] testified [redacted] told her the Grievant spoke to her saying in effect that she had not been exposed to much hard core. [redacted] said [redacted] indicated she told the Grievant she wanted to keep it that way. According to [redacted], [redacted] explained she went into the warehouse to get a can of juice where the Grievant followed and told her she "needed to be taught a lesson." [redacted] maintained [redacted] then asked her what she thought about it. [redacted] said she did not know what to think and suggested to [redacted] that she ([redacted]) would have asked the Grievant what he meant. [redacted] said [redacted] responded saying she was too upset and could not ask. Significantly, [redacted] further testified without rebuttal that [redacted] was not crying, was not shaking, and showed no physical signs of being upset.

The Company urges the Arbitrator to adopt the objective standard which asks whether a reasonable person of [redacted]' sex would perceive the actions of the Grievant to be threatening."[1]

[1] Ellison v. Brady, 294 F.2d 872 (9th Cir. 1991).

thereby creating a hostile working environment. In other words, the Company seeks an analysis from S[redacted]' perspective. With this in mind, it is evident that the Grievant did not agree with [redacted]' comments about the Guns and Roses segment of "Hard Copy." Clearly, whether or not [redacted] believed two women were kissing, she had a right to voice her opinion. Likewise, the Grievant had a right to disagree. Obviously, the Grievant viewed [redacted]' opinion as, at best, conservative. According to [redacted], she left the Operations room and walked into the adjacent break room to get a cup. It is at this point [redacted] testified the Grievant asked her, "What was gross about it?" By [redacted]' account, the Grievant spoke again before she could answer and stated, "You don't get out much, do you?" As already indicated, [redacted] told the Grievant that she did just fine. Clearly, the Grievant's last question did not deserve a response because the object of his question was personal to [redacted] and none of his business. Just as clearly, the Grievant's conduct up to and including this exchange was not threatening, abusive, immoral, or disrespective.

[redacted] testified that after telling the Grievant she did just fine, he asked her if she was into "the hard core stuff." At the hearing, [redacted] said that comment bothered her, and she walked away. Asked why it bothered her, [redacted] responded, "Because of what was on TV. I thought of 'hard core' being a sexual term." [redacted] then stated she was "shocked." In her statement of November 17, 1991, [redacted] did not mention being shocked. Instead,

> That bothered me that he asked me that, so I said 'no' and then walked into the storage room for some apple juice.

[redacted] maintains the Grievant followed her into the warehouse area that she described as the storage room. Supervisor Johnston's irregularity report indicates the Grievant told him he had no intention of following [redacted] because he was going to "T-Point." The Grievant testified he has reason to go into the warehouse area four to six times per shift. According to the Grievant, his headset and gloves were in the warehouse. It is undisputed that once in the warehouse, the Grievant spoke once more to [redacted]. [redacted] testified the Grievant told her, "I believe you need to be taught a lesson." (See also Co. Ex. 2).

By logical elimination, the above analysis reduces the focus of this case down to the last two utterances of the Grievant. [redacted] states she was disturbed by the Grievant's "hard core" question and, perhaps, was "shocked." But her later reaction appears to be a long delayed afterthought, not an immediate reaction. Despite being disturbed by the question, [redacted] was capable of telling the Grievant "no" and to proceed into the warehouse to procure a can of juice. The Company apparently concluded the Grievant confronted [redacted] in the warehouse by telling her, "You need to be taught a lesson." (Co. Exhibits 1 and 3) This conclusion serves to highlight the Company's over-reaction to [redacted]' complaint. [redacted]' testimony and her written statement indicate the Grievant told her, "I <u>believe</u> you need to be taught a lesson." (emphasis added)

[redacted] maintains this comment was "a threat in a sexual manner." The record shows the brief exchanges between the Grievant and [redacted] began with her outspoken expression of distaste for what she had just viewed. Thereafter, the sequence of their

exchanges was consecutive and occurred within minutes, if not less time. The Company simply has not shown that a reasonable woman would have a basis to believe the Grievant was referring to anything other than [redacted]' reaction to Axel Rose and her conservative attitude on sexual mores. The reasonable woman standard is an objective, not subjective standard.[2]

Herein, the evidence supports a finding that [redacted] had a right to be disturbed and/or displeased with the Grievant's probing questions about her views and attitude on sexual mores. However, neither [redacted] nor the Company has been able to explain what words the Grievant uttered could reasonably be considered a threat. Although [redacted] did not ask the Grievant what he meant by his lesson remark, she asserted that what he meant was obvious to her. The questions then become: what was obvious, what was the threat? Clearly, it was not physical because [redacted] admitted the Grievant did not touch her, did not raise his voice or suggest any sexual activity. Significantly, Co. Ex. 1 alleges the Grievant is a large, muscular man who could be intimidating. But, this record contains no evidence the Grievant physically did anything to allow a reasonable woman to be fearful of her own physical well being. Moreover, [redacted] acknowledged the Grievant walked away from her once he expressed his opinion that she should be taught a lesson.

[2]See Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486; Ellison v. Brady, supra; and Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57.

Being concerned or disturbed when one's personal beliefs are challenged is understandable. However, [redacted]' claimed fear of a threat is not supported by analysis of the words spoken to her or by any alleged non-spoken actions. There is no evidence of the latter (physical intimidation). The words, "I believe you need to be taught a lesson," cannot be converted into a threat unless there is a showing by the Company that a reasonable woman would have the same reaction. In this matter, the Company has relied upon [redacted]' testimony of her reaction and eschewed expert testimony dealing with the claimed reaction. There is a broad range of viewpoints among women as a group, but, as stated in Ellison v. Brady, supra, "many women share common concerns which men do not necessarily share."[3] But, in this case, a gender sensitive analysis forces the Arbitrator to find that a reasonable woman would not have found the totality of the circumstances, including the opinions expressed by the Grievant, to be threatening in nature. To be sure, the Grievant's comments and opinions were inappropriate and demonstrated an insensitivity and disrespect for [redacted]' obvious rejection of the mores demonstrated by the Guns and Roses "Hard Copy" program.

The Union challenged the credibility of [redacted] on several grounds. Through the testimony of J[redacted], it established, despite [redacted]' denial, that she had family visitors and did, in fact, attempt to switch assignments with [redacted] in order to go home early. Nonetheless, the findings of this case were not based

[3]See also footnote at p. 879 in Ellison, Abrams, Gender Discrimination and the Transformation of Working Norms, 42 VAN. L. Rev. 1183.

upon a disbelief of [redacted]' testimony. The Arbitrator concluded from that testimony that as of the date of the hearing, [redacted] believed every word she spoke.

The Company has urged the Arbitrator to reach outside the contract and adopt Federal standards in deciding this case. This request must be rejected because my jurisdiction is specifically limited to the terms of the parties' agreement. Nevertheless, had Federal standards been applied, the outcome would be no different since the Company did not establish through probative evidence that the Grievant's conduct was sufficiently severe and pervasive so as to alter the conditions of employment and create an abusive working environment.

In conclusion, the above analysis requires a finding the Company did not meet its burden of proof and establish the Grievant used threatening or abusive language, engaged in immoral behavior, was abusive or acted in a manner detrimental to the Company. Lastly, the assertion by [redacted] that she continues to fear the Grievant is rejected on the same grounds employed in reaching a contrary view of the reasons advanced for the Grievant's termination.

As noted above, the Grievant showed a lack of sensititivity to [redacted]' expressed rejection of the conduct exhibited in the "Hard Copy" program involved herein. It must, however, be remembered that [redacted] invited response by publically expressing her views. Nevertheless, once she made her position clear to the Grievant, he should have had the good sense to break off any further comments. Although there was testimony alluding to prior misconduct on the Grievant's part, as well as statements

indicating the same in Co. Ex. 1, the Company failed to show the Grievant was issued any discipline prior to his termination.

VII. AWARD

The Company did not have just cause to terminate the Grievant. The penalty imposed must be held to be unreasonable and is, hereby, reduced to a reprimand based on his insensitivity to a fellow employee's personal views. The Grievant is to be reinstated to his former position with full back pay for all time lost until his reinstatement, less interim earnings, and with no loss of seniority.

August 12, 1992

Robert W. McAllister
Arbitrator