

In the Matter of the Arbitration

between

SOUTHWEST AIRLINES COMPANY
Cleveland, Ohio

-and-

TRANSPORT WORKERS UNION OF AMERICA
Local No. 555

OPINION AND AWARD

OF THE

ARBITRATOR

Termination

APPEARANCES

For the Company:

Beverly K. Carmichael;
James H. Story;

Chief Counsel
Station Leader, Cleveland

For the Union

Garry Drummond;
Randy Barnes;
[REDACTED];

International Representative
Station Representative, Cleveland
Grievant

PERTINENT CONTRACT PROVISION (JX-1)¹

ARTICLE TWENTY-FOUR

DISCHARGE AND DISCIPLINE

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

B. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without being advised in writing, within twenty-four (24) hours following such discipline, of the reason or reasons for such disciplinary action.

* * *

¹ JX, CX and UX refer respectively to Joint, Company and Union Exhibits. The use of * * * indicates omitted language.

BACKGROUND

██████████, the grievant, was a Ramp Agent at Southwest Airlines' (hereafter "Company") Cleveland, Ohio station. He had been employed over five years at the time of discharge, with prior service in the U. S. Army. ██████████ had been honorably discharged with the rank of SSG, E-6. The grievant's annual performance evaluations showed him superior or satisfactory in all categories. ██████████ was named Ramp Agent of the Month for May 1998 and had four commendation letters in his file for incidents when he and other agents provided outstanding service.

██████████ also was involved in a September 23, 1998 incident when, unhappy with the way ██████████ spoke to an individual who had called him and with the way the call had been transferred, he went to speak to her. She refused to do so. ██████████ said that he was not like everybody else, that he would hurt her. The termination that resulted from this incident was reduced during the grievance procedure to a Letter of Warning because of a technicality. ██████████ testified that ██████████ had provoked the incident by talking disrespectfully to him and threatening him by putting her finger in his face. The grievant claimed that he spoke not to ██████████ but to a group that included her, saying something like "I'm not like you all -- you could get fucked up." He testified that he meant that he could destroy ██████████'s career by writing her up.

██████████ also testified that he did not receive a copy of the Letter of Warning with rules of conduct attached. However, he acknowledged that his signature was on a copy of the letter produced by the Company and stated that Station Leader James Story was very clear as to the expectations for ██████████'s future behavior when the grievant was returned to work.

The incident that resulted in ██████████'s discharge occurred on February 28, 1999.² Ramp Agent ██████████ submitted the following Irregularity Report:

While working FLT #360, ██████████ approached me to get the Selectee Sheet & we started talking. He said that he didn't want to work that FLT because ██████████ was also working it. He said that she is the reason why we cannot make personal phone calls at work—we must use a pay phone for that. He accused her of harassment saying that she's trying to give him a hard time. (Not his exact words but along that line.) He then said although noone here (in CLE) likes him, people like ██████████ are taking things from his personal life & incorporating them in his work

² Hereafter, all dates are 1999 unless otherwise noted.

life. He said that that was “means for being shot in the head.” (Exact words!) (CX-1).

██████████, the subject of the threat, filed the following Irregularity Report:

While working Flt 1455 ██████████ came up to the gate and was hanging out at the podium talking with ██████████. ██████████ came to get the boarding passes from me and said he had something to tell me later. After the flt left I went to speak to ██████████. He told me that ██████████ was talking to him about how I never speak to him, that I don't even say hello to him. Then he said that I initiated the phone memo about personal calls as a form of harassment against him. He said it was harassment on my part. He then told ██████████ that “██████████ and others here try to bring my personal life into things here at work – as far as I'm concerned that's means to be shot in the head.” I asked ██████████ if he was positive that is what he said. ██████████ said yes – we both then discussed how that was scary not just for me but for anyone here, because he said “██████████ & others here” (CX-2).

The grievant's written version of what occurred, dated March 1, states:

I was working FLT 360 & walked up to check my C-Check list with ██████████ & started talking about how tense it is working with her. Because of the incidents that has (sic) occurred, I also informed him that ██████████ thought she had it bad, & talking about killing her boyfriend. I said knowone (sic) was worth all that, that with everything that has happened in my life here & outside of work I hav'nt (sic) even thought of shooting myself in the head (CX-3).

██████████ testified that he was working flight #360 and that he and ██████████ were in the jetway. He was tense and went to tell ██████████ that he was tense working around ██████████, at which ██████████ grinned. ██████████ went on to say that he and ██████████ spoke about conversations the grievant had had with ██████████ the day before and that morning. The day before ██████████ had asked ██████████ to beat up her boyfriend, saying that she would kill him after the grievant refused. ██████████ responded that he would pray for them, that it was not worth all that and that he had not shot himself in the head despite all the bad things that had happened to him. ██████████ said that ██████████ had heard the conversations with ██████████ the previous day and again two hours before flight #360. The grievant denied threatening ██████████, reiterating that his reference was to shooting himself and to his talk with ██████████.

On cross examination, ██████████ said that he blames himself for the discharge because he let ██████████ get to him, but again denied making a threat. The grievant thought ██████████ was a good guy and that ██████████'s Incident Report showed a misunderstanding, until

the System Board met. ██████ said that he got along with everybody, even ██████, and has never accused her of harassing him. He claimed that he said nothing to ██████ about incorporating things in his personal life and had no idea why ██████ would have asked him to beat up or kill her boyfriend.

The Irregularity Reports from ██████ and ██████ led the Company to suspend ██████ pending further investigation. A fact-finding meeting preceded the termination. Story spoke to ██████, who believed ██████ was serious in his threat. ██████ also told Story that there were two different conversations and that he was certain of his report of the threat, which did not occur when the grievant spoke with ██████. Story saw no reason to doubt ██████'s report, as the Station Leader was unaware of any relationship between ██████ and ██████ or ██████ and ██████. ██████ was at the fact-find meeting, but ██████ was not, although Story had her statement.

Randy Barnes, Station Representative, was at the fact-finding meeting with ██████. Barnes recalled that ██████ said that ██████ pressured the grievant, who then made his comment about shooting her in the head. ██████ was called in after ██████ left, was allowed to read ██████'s statement, and denied the threat. ██████ then explained his conversations with ██████, as noted above. After ██████ finished, Story said that he would meet with the Directors and that he would have a decision in 2-3 days. However, in 20 minutes Barnes was called back and ██████ was there with another statement saying that in his opinion, ██████ had been talking about ██████ and not ██████.

By memo dated March 4, ██████ was informed of his termination, which was based on the Company's acceptance of ██████'s version of the events in question. ██████ was said to have violated the Company's Mission Statement and the following four Basic Rules of Conduct:

8. Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow employees or their work.
24. Southwest does not want to interfere in the personal affairs of its Employees, however, conduct on or off the job which is detrimental to the Company's interest including unacceptable or immoral behavior on Company property or any adverse conduct that reflects on the Company, whether on or off duty, may be cause for immediate dismissal.

25. Fighting, abusive and disrespectful behavior to a fellow SWA Employee or Customer.
31. Harassment and sexual harassment is strictly prohibited. Please review the policy as stated in Guidelines for Leaders. (JX-2).

██████████ grieved the discharge on March 4, with the grievance denied on March 10 by Story. The grievance was further appealed to Jan Golden, Vice President Designee, who denied the appeal on April 5. The matter was then heard by the System Board, which deadlocked. Thereafter the undersigned was selected to arbitrate the grievance. The matter was heard in Dallas, TX on August 30. The parties stipulated that the grievance was properly before the arbitrator. Witnesses were sequestered, affirmed before testifying and cross examined. Testimonial and documentary evidence was received. The grievant was present throughout the hearing and testified in his own behalf. The record was closed on October 17 with receipt of post-hearing briefs.

ISSUE

The stipulated issue is:

Was the grievant discharged for just cause and if not, what is the appropriate remedy?

COMPANY POSITION

For reasons set forth below, the Company avers that the discharge was for just cause and thus the grievance should be denied.

1. The Company guarantees its employees a safe work place and courteous and respectful treatment. ██████████'s threat to shoot ██████████, heightened because it was made to a third party, was totally inconsistent with the Company culture, as expressed in the Mission Statement. Had the same threat been uttered by a customer in an airport or in a place of worship or a school, it would likely have resulted in an arrest and criminal charges. The grievant cannot expect such a threat to be devoid of consequences.

2. ██████████ had received a previous warning less than six months earlier that uttering threats would result in termination, although no warning was necessary in this instance because of the nature of the threat. The grievant's behavior violated the

Company's Basic Rules of Conduct, which [REDACTED] was aware of because of his discussion with Story on his return to work after his previous discharge was set aside. The incident was not trumped up and bias by Story and [REDACTED] was not shown. Story had been supportive of [REDACTED], encouraging him to aspire toward supervision. [REDACTED]'s promotion was not a reward for his testimony as he was the only bidder.

3. [REDACTED] is not credible. He meshed two conversations into one to try to distance himself from [REDACTED]'s report, while [REDACTED] was certain that the threat was against [REDACTED]. [REDACTED] spoke of not thinking of shooting himself in the head—a strange response to [REDACTED]'s alleged request to kill her boyfriend. The grievant wrote that [REDACTED] talked about killing her boyfriend, but testified that she talked of beating him up. [REDACTED] testified that he said that he would pray for [REDACTED], but left this out of his written statement. His offer of prayer was not consistent with comments made in the August 28, 1998 Irregularity Report concerning the previous incident. [REDACTED] said that the grievant blamed [REDACTED] for the phone restrictions, but [REDACTED] said that he did not mention this to [REDACTED]. [REDACTED] said that everybody liked him, but he also said that everybody disliked him. He said that he was a nice person and could not explain why [REDACTED] asked him to beat up her boyfriend. [REDACTED], who might have supported [REDACTED]'s version of the incident, did not testify, thus his story cannot be corroborated. His illogical responses and incentive to lie to get his job back show that he cannot be believed.

4. [REDACTED] is not only a bully but also a potential killer who has engendered justified fears among his co-workers. [REDACTED] feared him after he threatened her in August 1998 and was so afraid after the latest incident that the Company paid the costs of her relocation to another state. [REDACTED] bragged that he had been trained to kill in the army and thus intimidated co-workers. He also intimidated [REDACTED] and deterred him from testifying at the arbitration hearing.

5. The grievant was not given disparate treatment. Barnes' assertions that similarly situated employees received more lenient treatment were without support. While disagreements take place, no Cleveland Station employee has ever acted as [REDACTED] did in August 1998 or on February 28.

6. [REDACTED] performed satisfactorily early in his employment, but after a 1995 incident involving alcohol and yet another threat, the grievant behaved erratically.

Commendation letters that [REDACTED] received were not for individual efforts, but for work as part of a group effort. He received a Ramp Agent of the Month award, but that award is given on a somewhat rotational basis to motivate employees. There is no reason to mitigate the discharge.

7. Three supporting arbitration awards were submitted.

UNION POSITION

For reasons noted below, the Union asserts that the discharge was not for just cause and that the grievance should be sustained and [REDACTED] reinstated and made whole in all ways.

1. The Company has failed to meet its burden of proof as it relied on hearsay evidence. Neither [REDACTED] nor [REDACTED] testified at the arbitration hearing, depriving [REDACTED] and the Union of an opportunity to face his accusers.

2. The Company has not shown that [REDACTED] was intimidated by [REDACTED], that the grievant was a "potential killer" or that [REDACTED] was fearful of [REDACTED]. Barnes' testimony showed that the grievant has served his country and his Employer well, with Army Good Conduct Awards, Company commendation letters and positive evaluations.

3. Barnes and [REDACTED] gave un rebutted testimony that they had complained about [REDACTED]'s attitude and tendency to be involved in verbal confrontations. Evidence about the August 28, 1998 incident was incomplete, but Barnes testified that employees told him that the grievant had not shown signs of violence or anger towards [REDACTED].

4. Story investigated the incident of February 28, decided on discharge and then heard the grievant's appeal. Story was unlikely to change his mind and grant the appeal, thus the process was unfair to [REDACTED].

5. [REDACTED] was the only witness/participant who testified about what happened. His testimony was corroborated by Barnes. On the other hand, [REDACTED] was not called to corroborate Story's testimony, but had she testified she could not have been expected to say other than she was joking when she asked [REDACTED] to harm her boyfriend.

6. [REDACTED] testified that he had not even thought of shooting himself in the head despite the bad things that had happened to him. Was he discharged for threatening himself?

7. A partial copy of Combustion Engineering, Inc., 42 LA 806 (1994) was submitted showing Arbitrator Carroll Daugherty's seven tests of just cause. The Union agrees that answers to questions about the grievant's knowledge of the rules of conduct and the relevance of the rules should be answered affirmatively. The Union claims that questions about the sufficiency of the Company's investigation, the evidence produced, the administration of evenhanded discipline and the relationship of the discipline to the proven infraction must be answered negatively.

8. Seven additional awards were introduced in support of Union contentions that the investigation was inadequate, that the Company's reliance on hearsay evidence was a violation of ██████'s due process rights and that the hearsay evidence was insufficient to meet the Company's burden of proof.

DISCUSSION

For reasons set forth below, the grievance is denied. The denial is based on an analysis of the testimony and, in part, on some of the hearsay evidence produced by the Company. The use of hearsay evidence deserves significant discussion. ██████ was the only direct participant in the February 28 incident whom the Company expected to call as a witness. Story testified that ██████ had flown to Dallas to prepare for his testimony, that he was positive about his role in this case and that as late as three days before the Monday, August 30 hearing he was prepared to again travel from Cleveland to Dallas. Yet on August 27 ██████ said that he did not want to come because of a commitment to attend a baby christening. Story further testified that arrangements had been made previously to permit ██████ to testify and also attend the christening. According to Story, the explanation for ██████'s change of heart was supplied by Ramp Supervisor Chad Kaczmerak, who overheard ██████ and a ramp agent discussing an alleged threat from ██████ that if ██████ came to Dallas, the grievant would pay somebody to take care of him. Story found ██████ shaking, told him he did not have to testify and thereafter observed ██████'s obvious relief.

Story's testimony is not proof that ██████ threatened ██████, but it raises the possibility and that is an intolerable situation. The grievant cannot be allowed to escape responsibility for his threat of ██████ by thereafter intimidating a witness. I have not

considered the alleged intimidation as evidence of ██████'s involvement on February 28, but I have, as a consequence, considered the hearsay evidence. That is not to say that the unsupported hearsay has been used to justify the denial of the grievance. In Beverly Enterprises, 100 LA 522 at 528 (1993) Arbitrator William Berquist noted that where hearsay evidence is used, the "truth of the hearsay evidence" should be corroborated by other substantive evidence. That is so in this case.

It is also worth pointing out that there are significant differences between the cases cited by the Union and the instant case. In Beverly Enterprises the grievance was sustained because there was no seemingly valid reason for management witnesses not to testify, the grievant was found credible and the arbitrator believed the grievant's refusal to work was justified by concerns for his safety. In the instant case, there may have been a valid reason for ██████ not to testify, the grievant is not deemed credible and the safety exception to the "work now, grieve later" rule is not relevant.

In Interstate Brands, 97 LA 675 (1991) Arbitrator William Ellmann reduced a discharge to a month's suspension because the rule the grievant was accused of violating was vague and not only could the grievant not confront his accusers, but also he was given no details about his supposedly errant behavior. In contrast, ██████ knew exactly what he was accused of and had access to ██████'s statement.

In Strochmann Bakeries, 98 LA 873 (1990) Arbitrator John Sands sustained a discharge grievance primarily due to the lack of an investigation. As noted below, I do not find a faulty investigation in ██████'s case.

In Duke University, 100 LA 316 (1993) Arbitrator Hartwell Hooper reduced a discharge to a suspension without pay. Hooper found too much hearsay in management's case but based the suspension on the grievant's own admissions. It is largely ██████'s testimony in this case that dooms him.

In Southwest Airlines, 80 LA 628 (1983) Arbitrator Otis King upheld a discharge, but ordered back pay from the date of the discharge to the date of the arbitration hearing. While King found proof of the allegation at the hearing, back pay was ordered because the grievant had been discharged based on a hearsay letter and no opportunity for the grievant to respond. There were no such due process failings in the instant case.

Finally, in an unpublished case, Southwest Airlines (██████████ termination, 1999) Arbitrator John Barnard sustained a discharge grievance because the action had been based on a customer's letter containing no specific charges and there was no testimony about specific charges at the arbitration hearing. Barnard correctly observed that the grievant could not defend himself under the circumstances. Again, the difference between that case and ██████████'s should be obvious.

The discussion now turns to the February 28 incident, with emphasis on ██████████'s credibility. Even the hearsay evidence establishes the conversation between ██████████ and ██████████ about ██████████. ██████████'s statement was written shortly thereafter and contains significant detail. ██████████ provided no reason why ██████████ would make up such a story, other than to say he was confused about what had happened. ██████████'s report establishes that ██████████ told her about the discussion with the grievant and what he believed was the "means for being shot in the head" statement. ██████████'s use of almost the exact words ██████████ used shows that ██████████ communicated what he believed he heard to ██████████. No evidence was presented that would convince a reasonable person that ██████████ and ██████████ were motivated to conspire against ██████████. Barnes' testimony shows that ██████████ repeated the threat in the fact-finding meeting, although Barnes placed the threat in a different context than did ██████████.

To a degree, ██████████ confirmed the hearsay evidence, although he, too, put a different "spin" on the events in question. The grievant testified that he had a conversation with ██████████ while working flight #360, as ██████████ had written. ██████████ stated that ██████████ heard him tell ██████████ that he would not think of shooting himself in the head despite all the bad things that had happened to him. With this statement ██████████ implicitly acknowledged that ██████████ had heard him talk about a shot in the head. ██████████'s version of what occurred is rejected for two primary reasons. First, his story is in the nature of an affirmative defense. The Company was not obligated to call ██████████ as a witness since, from its perspective, she did not hear ██████████'s conversation with ██████████ or ██████████'s subsequent discussion with ██████████. ██████████ was seemingly the only individual who could have corroborated the grievant's testimony about her request to hurt her boyfriend and his response. Without her testimony, ██████████'s story depends solely on an assessment of his credibility, which is found to be woefully lacking for a variety of

reasons. It is the lack of credibility that forms the second reason for rejecting ██████'s explanation.

If ██████ asked ██████ to beat up or shoot her boyfriend, the grievant's response seems illogical. Why would he respond by talking about not shooting himself? Furthermore, in his statement ██████ wrote that ██████ asked him to kill her boyfriend, but in his testimony ██████ said that ██████ talked of beating up her boyfriend. The distance between beating up her boyfriend and not shooting himself seems even greater. There is also the inconsistency between the grievant's written statement and his testimony.

██████ claims to have said no more to ██████ than he was nervous working around ██████, yet he also testified that he blames himself for the termination because he let ██████ get to him, following this with assurances that this was not an admission that he had threatened her. Again, the grievant makes no sense. If ██████ got to him, but he said nothing of a threatening nature, why does he have to blame himself? Additionally, ██████ testified that he got along with everybody, even ██████, who supposedly made him nervous. The grievant also testified that he knew not everybody in the Cleveland Station liked him, supposedly because he did not attend Company functions. He testified that he told ██████ that he would pray for her, but in his statement, written only three days after the incident, ██████ said nothing about prayer.

A major test of credibility is the ability of the witness to be consistent and logical. It is far easier to be consistent and logical when one is telling the truth than when an individual is being untruthful, as the latter involves the added burden of both manufacturing and remembering the fabricated details. Not all of ██████'s direct testimony was consistent with statements made under cross examination. There are discrepancies between his testimony and his earlier written statement. And some of ██████'s testimony is simply illogical. He has failed the test of credibility miserably, and thus his version of the events in question cannot be believed, leaving the alternative set forth in ██████'s Irregularity Report. That version names ██████, is specific in detail and was written the day of the incident when ██████'s recall should have been keenest. Furthermore, ██████ confirmed the conversation he had with ██████ while they were working flight #360 and admitted, albeit in a different context, that he made a

statement about a shot in the head. Therefore, the Company has substantiated the charges contained in the March 4 termination memorandum.

The Union has advanced additional arguments, which can be addressed within the framework of Daugherty's Seven Tests of Just Cause.³ The Union concedes that ██████ was on notice that threatening behavior could result in discharge. The grievant acknowledged awareness of the Rules of Conduct. More critically, after his 1998 discharge was set aside, Story discussed the rules with ██████, who testified that he was clear about Story's expectations. When ██████ voiced his concern that it would be easy for another employee to levy charges against him after his return, Story noted that if he followed the rules, there would be no problem. This occurred less than five months before the February 28 incident. ██████'s testimony that he did not receive a copy of the warning letter related to the August 1998 incident is not believable in view of the letter with his signature on it

The Union also acknowledges that the Rules of Conduct are relevant to the safe and efficient performance of business. These rules are obviously relevant in a company with a far-reaching reputation for concern for both employees and customers. Included in the Company's Mission Statement is the following:

We are committed to provide our employees a stable work environment with equal opportunity for learning and personal growth. Creativity and innovation are encouraged for improving the effectiveness of Southwest Airlines. Above all, employees will be provided the same concern, respect, and caring attitude within the organization that they are expected to share externally with every Southwest Customer (CX-7).

No organization should have to live with an employee who cares so little for others and who has so little self control that he or she would threaten to kill another, thus creating concern not only in the potential victim, but also in others who are aware of the threat.

Despite the Union's assertion to the contrary, the Company made a good faith effort to investigate the incident before discharging ██████. Story had ██████'s Irregularity Report and spoke to him twice to assure himself that ██████ had not confused

³ The arbitrator's use of the Daugherty framework is solely a response to the Union contentions and not an endorsement of Daugherty's approach. For an excellent discussion of Daugherty's framework see John E. Dunsford, "Arbitral Discretion: The Tests of Just Cause," Arbitration 1989: The Arbitrator's Discretion During and After the Hearing (Proceedings of the 42nd Annual Meeting, National Academy of Arbitrators), BNA Books, 1990, p. 23.

his conversation with [REDACTED] with [REDACTED]'s conversations with [REDACTED]. Story also had [REDACTED]'s statement. As part of the investigation, there was a fact-finding meeting that allowed [REDACTED] to read [REDACTED]'s statement and to respond to the charges against him. Thus Story heard from the primary participants in the incident and allowed the grievant to have his "day in court," as is consistent with accepted notions of due process.

The investigation was fair and objective. Story was prosecutor and judge, but he was not then a witness. Furthermore, the matter was discussed with his superiors before the decision to discharge was made. The Union claims that [REDACTED] was not afforded due process because Story thereafter heard the grievance protesting the dismissal. While Story heard the grievance, Golden and the System Board heard subsequent appeals. Even if Story could not be open-minded about the grievance, there were two additional opportunities for a fresh look at the matter before arbitration. There were no due process lapses that would require the discharge to be set aside.

As noted above, the Company had substantial evidence. Story had no reason to disbelieve [REDACTED], who was certain of the accuracy of his report. Story did not believe [REDACTED], surely in part because of the earlier incident. While this case requires a credibility judgement on Story's part, simply because there were only two direct witnesses and two competing versions, Management is not required to cede the case. Rather, what is required is careful consideration of all the evidence, reasoned credibility judgments if necessary and a conclusion that finds support from a fair investigation.

The Union also claims that [REDACTED] was treated more harshly than other employees who have committed similar offenses. Suffice it to say that neither Story nor Barnes testified to a single work-related incident that involved a statement that somebody would be shot in the head or killed by other means. Those work-related incidents that were mentioned by both men were all less serious than that involving [REDACTED]. Therefore his discharge is not evidence of disparate treatment.

Finally, Daugherty asks if the degree of discipline is appropriately related to the seriousness of the offense and the employee's past record. [REDACTED]'s commendation letters and positive evaluations do not mitigate against the discharge. Nor has the August 28, 1998 incident been considered other than as evidence of a past warning. [REDACTED] threatened another employee with possible death. Whether [REDACTED] was easy or difficult

to get along with is beside the point. No employee deserves to work under the conditions that [REDACTED] created by his comments to Bayer. Nor do those not the object of the grievant's ire deserve to work in the environment created by the knowledge of his threat and his statements that he had been trained to kill in the army—statements that he said he could not remember making, but that he did not deny. The Company was under no obligation to speculate about whether [REDACTED] was really serious. Southwest Airlines could not fulfill its Mission Statement with such an employee in its work force. Once the Company was satisfied that there was sufficient evidence to justify the discipline, it had no choice but to terminate [REDACTED]'s employment.

AWARD

The grievant was discharged for just cause. The grievance is denied.



I. B. Helburn, Arbitrator

Austin, Texas
October 25, 1999