ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

September 19, 2016

SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Grievance: DEN-R-2568/15 (Abilio Villaverde)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Company: Amit K. Misra, Esq., P.C.

The Union: Cortney Heywood, Vice President, TWU, Local 555

Statement of the Award: The Company did not violate the CBA by denying probationary employees the right to Union representation during investigations resulting in discipline short of loss of pay or discharge. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Union.

BACKGROUND

Southwest Airlines Company (Company or Southwest) and the Transport Workers Union Local 555 (Union) are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011, and continuing through the dates relative to this grievance. On November 6, 2015, Abilio Villaverde, the elected Union Ramp Representative at the Denver station (DEN) and District 8 alternate, filed the following grievance:

> Employee Statement of Grievance: The Denver leadership is violating the CBA, by not allowing the local Union representatives to represent probationary agents during investigations that can lead to discipline short of loss in pay or discharge. This is a violation of the CBA and TWU Work Rules Interpretations.
>
> Remedy or settlement Sought: Cease and desist this type of violation, plus remove all discipline letters that are in violation of both the CBA and TWU Work Rules Interpretations. [JX 1, pg. 11.]

After the Company denied the grievance, the System Board deadlocked on January 27, 2016. The Union subsequently submitted the case to arbitration. Both parties agree that the case is properly before the undersigned arbitrator for final decision.

The Union offered testimony from Villaverde and District 8 Representative Tennyson Berry. The Company offered testimony from Senior Manager of Labor Relations Trudy Christensen.

The basic facts underlying this case are undisputed. Probationary employees in Denver have made requests to management and Union representatives that they be represented when they are called into the office for an investigation. After management refused those requests, Villaverde and DEN Union leadership had several discussions with assistant station manager Michael Vassar and station manager Clayton Apple.

Villaverde testified about one incident when probationary agent [redacted] walking to the manager's office, said "I need you." He told her to tell them that she wanted a Union representative. She did so and was told no. She received a Final Letter of Warning. Villaverde further testified about nonprobationary agent [redacted] who was summoned to the admin office and given a letter to sign. She asked for a Union representative but Villaverde was not permitted to attend, even though he was available. [redacted] filed a grievance, DEN-O-2265/15, stating:

> I was denied my union representative after request. I was threatened coerced and intimidated by an uncomfortable work environment. [UX 1, pg. 1.]

Manager of Labor Relations Bob Watkins issued the following response to that grievance and the District 8 Representative Berry accepted the resolution.

> We agree that if a discipline letter is to be issued and an Agent requests that a Union Representative be present, they will be allowed representation prior to issuing the letter as long as a representative is available. [UX 1, pg. 2.]

Villaverde testified that because the resolution does not refer to [redacted] but refers to "an agent," that grievance resolution applies to all agents.

Senior Manager of Labor Relations Christensen testified that the investigation process involving a probationary employee does not reach a fact-finding stage. If the Company determines that some level of discipline is warranted, the probationary employee is brought in for a meeting. If the probationary employee asks for a Union representative, in most cases, they are permitted to have a Union representative or another employee as a witness. However, that is as a courtesy to make the probationary employee feel more comfortable in the meeting, and it is not required by the CBA. She said that there is variation across the 96 stations in the system.

Christensen testified that the Company has three contracts with TWU: in-flight, dispatch and meteorologist. Those three contracts contain specific language that allows probationary employees to have union representation. Under the TWU Local 555 agreement at issue here, a probationary employee can be disciplined or terminated without just cause and there would be no purpose in having a factfinding. She acknowledged, on cross examination, that a probationary employee has the right to the grievance procedure for contractual items, as set forth in the Work Rules Interpretations.

District 8 Representative Berry testified on rebuttal about probationary agents in Oakland who were summoned to the office for factfindings about aircraft damage incidents. They received Final Letters of Warning. He said that there were also probationary agents who received factfindings in Portland, but he did not know the result.

Christensen further testified that in Oakland, probationary agent [redacted] was given a notice of the meeting, a notice of the results meeting, and a Letter of Warning. (CX 1.) However, if the notices had been for a factfinding, they would have stated "factfinding" as the subject on the notice. In the past, the Union has called time frames for inaccurate notices that did not state factfinding. Hence, the Company has a practice to use the word factfinding when it means factfinding. The notices of meetings to agent [redacted] state "You may have your Union Representative present" and, in Oakland, if the employee asks for a Union representative, the representative is allowed in the meeting. A similar meeting notice was issued to probationary agent [redacted] in 2016. (CX 2.) No Union Representative attended either meeting, although the Union Representative was copied on the disciplinary letters.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

ARTICLE ONE
PURPOSE OF AGREEMENT

A. The purpose of this Agreement is, in the mutual interest of the Company, the Union, and the Employees, to provide for the operation of the Company under methods which shall further, to the fullest extent possible, the well-being of Southwest's Customers, the efficiency of operations, and the continuation of employment under reasonable working conditions. It is recognized to be the duty of the Company, the Union, and the Employees to cooperate fully to attain these purposes.

B. No Employee covered by this Agreement shall be interfered with, restrained, coerced, or discriminated against by the Company, its officers or agents, because of membership in, or lawful activity on behalf of, the Union; nor shall the Company, its officers or agents, or the Union, its officers or agents, unlawfully discriminate against any Employee because of race, color, creed, national origin, sex, religion, handicap, age, disability, sexual orientation, gender identity or veteran status.

ARTICLE TWO
SCOPE OF AGREEMENT

A. **Recognition.** The Union is recognized by the Company as the sole and exclusive bargaining agent for the Employees of the Company based in the United States, its territories and possessions, who comprise the class and craft of Ramp, Operations, Provisioning, and Freight Agents. The Union reserves the right to defend and protect any covered Employee.

B. **Covered Employees.** This Agreement extends to and covers all Employees in the classifications described in Article Five who normally and regularly spend a majority of their work time in the performance of the duties described in Article Five....

ARTICLE FIVE
CLASSIFICATIONS

SECTION ONE
RAMP AGENT/PROVISIONING AGENT

The work of Ramp, and Provisioning Agents includes the

functions which have been historically performed by such agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract. Agents required to perform such duties must be current and qualified within that classification.

* * *

SECTION TWO
OPERATIONS AGENT/FREIGHT AGENT

The work of an Operations Agent includes the functions which have been historically performed by Operations Agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract. Agents required to perform such duties must be current and qualified within that classification.

* * *

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.

B. **Representation Requirements.** The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

* * *

G. **Fact-Finding Procedures.** No covered Employee shall be subject to discipline involving loss of pay or discharge without

first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures:

* * *

L. **Interpretation/Application of Agreement.** In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub- paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

* * *

14. 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.

WORK RULES INTERPRETATIONS (TWU)

7. Will probationary Employees be allowed to process a grievance?

Probationary Employees are not entitled to the grievance process in matters of discipline involving loss of pay or discharge; however, probationary Employees may grieve alleged violations of work rules outlined in the contract.

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends that once agents are signed off of training and working on their own, they are established as "current and qualified" and, thus, are "covered employees" within the meaning of Article Two of the CBA. As covered employees, they are entitled to the grievance process up to and until there is a loss of pay or discharge. Any further restriction is an attempt by the Company to add to the CBA.

The Union contends that the management team in DEN has previously allowed TWU 555 Representatives to be part of the fact-finding process. Manager of Labor Relations Christensen testified that she is aware that, across the system, management allows probationary employees to have Union representation, when requested.

The Union contends that the Company's claim that fact-finding meetings are only for loss of pay or discharge is categorically false, and a misrepresentation of the language of the contract. The Company frequently holds fact finding meetings in cases that result in "no action taken" or in disciplinary letters without days off. In BNA-P-2454/13 [redacted] and BNA-R-0137/14 [redacted] arbitrators dealt with cases that did not involve loss of pay or discharge.

The Union contends that the only provision of the CBA that excludes probationary employees deals with loss of pay or discharge. Until that point probationary employees retain all other contractual rights. This is reflected in the Work Rule Interpretations that specify probationary employees may "grieve alleged violations of work rules outlined in the contract."

Finally, the Union contends that this case is not about whether a probationary employee is entitled to a factfinding, but is about whether they are entitled to have a Union representative present (if they so choose) during any fact-finding meeting. There is absolutely no reason that probationary employees should not be entitled to representation when being questioned about events that could lead to a loss of pay, termination, or possibly a lower level of discipline. They are entitled to the grievance process outside of loss of pay or discharge, the same as every other covered employee.

For the foregoing reasons, the Union requests that the grievance be sustained and that all probationary employees, covered by the agreement, within the work group, received the appropriate level of contractual compliance from the Company.

The Company's Contentions

The Company contends that a "factfinding" is specifically defined under Article 20.I.G and other disciplinary meetings are not factfindings. The right to have a Union representative present only applies to a factfinding, which is a step in the process of investigating and disciplining a nonprobationary employee. Lesser types of discipline may require a meeting with

the employee, but those meetings do not constitute factfindings.

The Company may provide probationary employees with Union representation at disciplinary meetings as a courtesy, without assuming the obligations of an Article 20.I.G factfinding. Unrebutted Company testimony established that there is variability across the system in providing Union representation during disciplinary meetings, as a courtesy.

The Company contends that no reasonable interpretation of Article 20.I.G provides probationary employees the right to factfindings or to Union representation. Article 20 contains a "Purpose" subsection stating that "No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause." The Article goes on to explain the procedures for grieving a discharge or other discipline. To give probationary employees rights under Article 20.I.G would render the rest of Article 20.I , including the purpose subsection, meaningless. Further, in contracts with the Union for other workgroups, the parties have expressly provided for union representation rights to probationary employees.

The Company contends that the Work Rules Interpretation 20.7 confirms that Article 20 excludes probationary employees, and that, as a general rule, probationary employees do not have the right to file grievances. The Interpretation provides an exception to that general rule for probationary employees to grieve contractual items.

The Company contends that it would be nonsensical to provide probationary employees with Article 20.I.G fact-finding rights, when the Company may terminate them without just cause. That Article provides due process procedures to protect the just cause rights of nonprobationary employees. Probationary employees have no just cause rights and, therefore, interpreting Article 20 to provide probationary employees with due process rights would be an absurd result.

The Company contends that th[redacted]grievance does not create a precedent requiring Union representation for probationary employees. That decision was made at Step 3 of the grievance process and the grievance involved a nonprobationary employee who was not subject to a factfinding and was not disciplined with loss of pay or discharge. Thus, the [redacted] grievance decision does not affect Article 20.I.G factfindings. Even if that grievance decision requires the Company to allow a nonprobationary employee at the Denver station the right to an available Union representative, there is no basis for interpreting that decision to provide probationary employees with any rights.

The Company contends that Article 17.G does not provide a probationary employee the right to Union representation during disciplinary investigations. That article relates to investigations of safety or health matters and requires the Company to include a Union Safety Committee member in such investigations. Article 17.G does not provide any employee, probationary or nonprobationary, any right to representation.

For the above reasons, the Union failed to meet its burden to establish that the Company violated the CBA. Therefore, the Company requests that the grievance be denied in its entirety.

ISSUE

Did the Company violate the CBA by denying probationary employees the right to Union representation during investigations resulting in discipline short of loss of pay or discharge? If so, what shall the remedy be?

FINDINGS

Probationary employees, while in probationary status, do "normally and regularly spend a majority of their work time in the performance of duties described in Article Five." Therefore, they are "covered employees" as defined by Article 2 of the CBA. Pursuant to Section A of Article 2, the Union is their recognized sole and exclusive bargaining agent and the Union "reserves the right to defend and protect any covered Employee."

The Work Rules Interpretations covering Article Twenty specify that "probationary Employees may grieve alleged violations of work rules outlined in the contract." The only purpose for including such an Interpretation is to clarify that the work rules outlined in the CBA apply equally to probationary and nonprobationary employees. Further, those work rules, as they are applied to probationary employees, are enforceable through the contractual grievance procedure contained in Article 20 of the CBA.

The CBA also contains language specifically providing for the right to have a Union representative present under certain circumstances. That language is found in Article 20, Section One, subsection G, which sets forth "Fact-Finding Procedures," and provides:

> No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures...

Here, the Union seeks an interpretation holding that because subsection G refers to "covered Employee" the scope of those Fact-Finding Procedures includes probationary employees, including the right to have a Union representative present.

The interpretation sought by the Union fails to take into account other language contained in Article 20, Section One. Subsection A contains the substantive limitation that the "just cause" requirement for discipline only applies to an employee "who has passed his probationary period." The Fact-Finding Procedures contained in subsection G are designed to ensure that the subsection A Purpose is fulfilled. That is, that no nonprobationary employee is disciplined to the extent of loss of pay or discharge without just cause. Probationary employees do not have that same level of protection and, therefore, there is no similar need.

The evidence presented at arbitration establishes that at some bases, on some occasions, local management has permitted probationary employees to have a Union representative or employee witness present during investigatory interviews and meetings, including meetings at which they are presented with discipline. The unrebutted testimony of Company witness Christensen established that the Union has successfully insisted that, when a factfinding is required under Article 20, Section One, the notice to the employee must specify that the employee is being called to a factfinding, and not simply to a meeting with management. The Union offered no evidence that probationary employees have similarly received notices of factfindings, as distinguished from meetings. Given the detailed procedures included in subsection G, the difference between a factfinding and a meeting cannot be ignored.

The Union's reliance upon the grievance settlement in the [redacted] case is similarly misplaced. That case involved a nonprobationary employee and the reference to "agent" must be read in that context. The Union offered no testimony that the parties discussed the inclusion of probationary employees in the resolution of the [redacted] case, or that there was a "meeting of the minds" on that issue.

Nothing in Article 20 prohibits the Company from providing probationary employees with factfindings, in accordance with the Section One, subsection G procedures. If the Company does so, then the procedures must be fully followed, including the right of such a probationary employee to have a Union representative present. However, as discussed above, there is no such requirement currently contained in the parties' CBA.

For the above reasons, the Union has not established that the Company violated the CBA by denying probationary employees the right to Union representation during investigations resulting in discipline short of loss of pay or discharge. Therefore, the grievance will be denied.

AWARD

The Company did not violate the CBA by denying probationary employees the right to Union representation during investigations resulting in discipline short of loss of pay or discharge. In accordance with Article Twenty, Section One, Paragraph C, the costs of the arbitration shall be borne by the Union.

Elizabeth Neumeier

Elizabeth Neumeier, Arbitrator

September 19, 2016