BEFORE

WILLIAM H. LEMONS

ARBITRATOR

In the Matter of the Arbitration between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	Case No. SFO-R-0735/14
	)	
and	)	
	)	
Transport Workers Union of America, AFL-CIO	)	Discipline – [redacted]
Air Transport Division, Local 555	)	
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	

OPINION AND AWARD OF THE ARBITRATOR

September 12, 2014

ARBITRATION AWARD

In the Matter of:

Southwest Airlines Company
Dallas, Texas

and

Discipline - [redacted]

Transport Workers Union of
America, Local 555

APPEARANCES:

For the Company:	Kerrie Forbes Senior Attorney – General Counsel Department
For the Union:	Mike Roach District VII Representative TWU Local 555
IMPARTIAL ARBITRATOR:	William H. Lemons **WILLIAM H. LEMONS, P.C.** 4040 Broadway, Suite 616 San Antonio, Texas 78209

By the terms of the collective bargaining agreement (Jt. Ex. 1) between Southwest Airlines Company, hereinafter referred to as the "Company," and TWU Local 555, Transport Workers Union of America, AFL-CIO, hereinafter referred to as the "Union," William H. Lemons of San Antonio, Texas was selected by the parties to serve as impartial arbitrator (Jt. Ex. 2). A hearing was held at the Wyndham Dallas Love Field, 3300 W. Mockingbird Road, Dallas, Texas, on July 17, 2014. In addition to the appearances noted above, several other party representatives attended the arbitration, as noted in the Official Record. The "Rule" was invoked and witnesses excluded during other witness testimony. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments, and did so very

ably. In all, the Company introduced ten exhibits and the Union seven. During the hearing, we also viewed a video of the departure procedure for flight 3965 on the day in question (Co. Ex. 4). I have carefully examined each of the exhibits. Post-hearing briefs were filed and cross-exchanged on September 5, 2014, and these proceedings were declared closed on that date.

ISSUE

Was the Grievant [redacted] disciplined for just cause, and if not, what should the remedy be? The parties stipulated to this issue, and stipulated that there were no time-frame or process issues and that this matter was properly before me for a final and binding decision (TR. p. 9).

PROVISIONS OF THE LABOR AGREEMENT

Article 2 – 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.

D. **Management Rights**. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

* * *

Article Five – Classifications

Section One
Ramp Agent/Provisioning Agent

A. Loads, unloads, services, guides, and directs company aircraft.

* * *

Article 20 – 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**. 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, 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.

STATEMENT OF FACTS

Often, the testimony in my hearings is hotly disputed, and it is remarkable to me how many facts come to light for the first time during my arbitration hearing. This case was different. [redacted] the Grievant, has worked for the Company for about a year and a half as Ramp Agent in SFO. On the day in question, he was the pushback driver and lead on flight 3965. He

admits, and admitted at his fact-finding meeting, that he failed to perform his required walk-around for flight 3965 on March 13, 2014. His testimony was, and it is not seriously contested, that he did perform the required walk-around on the eight other departures he worked that day. Grievant testified at his fact-finding meeting that at the time, he was getting the gate-checked items from the slide, felt a little bit rushed and as it was getting close to push time, did not want to take a delay.

While the Grievant's work record apparently is satisfactory (U. Ex. 2), he apparently received a Letter of Instruction (strangely, dated March 22, 2013) for "Driving without wearing a seatbelt" on February 28, 2014 (U. Ex. 1). His testimony at the hearing was to the effect that he was not driving that equipment – he had grabbed a ride and was on his way to punch in (TR. P. 56-57). Nonetheless, Grievant recognizes the importance of safety in general, and of performing the required walk-around in particular. He does not challenge that he received proper training (Co. Ex. 1 and 3) in walk-around procedures (Co. Ex. 2).

On March 19, 2014, following a fact-finding meeting on March 14, 2014, Chris Whelan, SFO Manager of Ramp and Operations, gave the Grievant a Letter of Final Warning, and assessed a ten day suspension (Jt. Ex. 2). The Company maintains that the Grievant's actions violated the Company's Ground Operations Basic Principles of Conduct, in the following particulars:

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

28. Failure to comply with safety rules or regulations.

POSITION OF THE COMPANY

By now, all should know that it is my practice to refrain from setting forth in detail the contentions of the parties, as they are very completely and fully set forth in their post-hearing briefs. To restate such in an Award is expensive, time-consuming and unnecessary. I summarize the Company's position (Company Brief, page 1) when I say that it feels this is a case about

carelessness, plain and simple. The Grievant was Gate Lead, and thus was primarily responsible for performing a walk-around safety inspection for each flight. He had been trained on the safety inspection requirements when hired and also during the third quarter of 2013, following the FAA investigation and Letter of Concern. Yet, he completely failed to do a walk-around safety inspection on Flight 3965 on March 13, 2014, and that could have proved disastrous as the aircraft departed with several panels open. The Company maintains that the Grievant was a short term employee with prior safety issues on the ramp, and the disciplinary action was warranted.

In conclusion, the Company maintains that it has met its burden of proof to show that management carefully investigated the incident, that the Grievant was disciplined for "just cause" and that no disparate treatment has been demonstrated. Therefore, the Company says, its disciplinary action should be upheld and the grievance denied in its entirety.

POSITION OF THE UNION

The Union explains that while the Grievant was honest and forthcoming during the investigation of this matter, and did not attempt to deny his guilt or the seriousness of his omission, he had worked eight other flights that day without incident. The Grievant recognizes the seriousness of the infraction, and the importance of the walk-around procedure, but feels that the discipline was excessive. The Union contends that the combination of a Final Letter of Warning ("FLOW"), coupled with a loss of ten days of pay, is indicative of a new, heavy-handed and arbitrary approach directed at members of TWU 555. The severity of this discipline is apparently a change in position that has not been discussed with the Union, and is not consistent with prior cases where lesser action has been taken.

The Union maintains that the Company really should differentiate between personal safety issues (the Grievant's seat belt problem and other safety-related incidents) and matters affecting

aircraft or passenger/crew safety. It contends that proof that some employees have elected in the past to not challenge a FLOW in order to settle the back-pay issues does not demonstrate that the Union is acknowledging that this discipline is warranted. Thus, the disciplinary action was arbitrary and capricious, and this Arbitrator should modify or remove the penalty. The Union vehemently asks that grievance be granted.

OPINION OF THE ARBITRATOR

Both parties were well represented in this dispute and presented persuasive arguments. The excellent briefs submitted by each party were most helpful in fashioning my decision. Ms. Forbes played the cards she was dealt as well as anyone could. She just didn't have a very good hand. In the final analysis, my determination is based upon a careful and meticulous analysis of the testimony from the hearing, coupled with a detailed analysis of the various disciplinary actions taken in similar situations (Co. Ex. 7 [redacted] 10-15-13], Co. Ex. 8 [redacted] 10-22-13], Co. Ex. 9 [redacted] 0-22-13] and Co. Ex. 10 [redacted] 12-16-13] compared with U. Ex. 4 [redacted] 10-14-13], U. Ex. 5 [redacted] 05-19-14], U. Ex. 6 [redacted] 09-16-11], U. Ex. 7 [redacted] 10-01-13] and U. Ex. 3 [Ten examples of other actions taken from 10-24-08 to 10-17-13]. To this analysis, I add my consideration of the decisions of my fellow Arbitrators Elizabeth Neumeier (TPA-R-2106/13-[redacted] June 9, 2014) and Marvin Hill (PHX-R-1850/13[redacted] February 10, 2014) (DTW-R-0360/14[redacted] July 16, 2014) (SFO-R-0575/14[redacted] July 22, 2014).

All in all, any determination of *just cause* requires me to make two determinations and answer one visceral question. Was the employee guilty of misconduct warranting discipline or discharge? If so, was the discipline imposed a reasonable penalty under the circumstances of the case? Once the Company makes out a *prima facie* case, the Union must plead and prove

mitigating factors such as seniority, good work record, lack of notice of rules, disparate treatment, etc. The underlying question: Did the Grievant get a *fair shake?*[1]

I think he did not. It is my conclusion that the Company did not sustain its burden of proof to show that the level of discipline assessed was correct under the circumstances. Let me explain.

Evidence of Guilt. The record is that the Grievant does not deny the fact that he was guilty as charged. The Union does not challenge this. I thus conclude that the Company has shown evidence of guilt in this case by a preponderance of the credible evidence.

Due Process. I feel that the Company's investigation and handling of this matter was entirely complete and appropriate.

Appropriate Penalty. Nothing in this decision should be read as my condoning carelessness or authorizing employees to forego the use of procedures on which they have been so highly trained. That is not the culture on this property. I am also very impressed with management's reaction and response to the FAA investigation and concerns expressed by that agency. My decision is limited to these facts, this employee and the evidence before me. Lastly, my decision has nothing to do with an Arbitrator trying to substitute his judgment for management's when it comes to management rights or work rules.

As stated by one arbitrator, "Absolute consistency in the handling of rule violations is, of course, an impossibility, but this fact should not excuse random and completely inconsistent disciplinary practices." *Georgia Pacific Corp.*, 80 LA (BNA) 1321 (Milentz, 1983). Accord: *Century Products Co.*, 101 LA (BNA) 1 (Fullmer, 1993) (stating "the question is whether the Company could rationally consider the Grievant's offense to be different from [another employee's]"); *Metro Washington Airport*, 111 LA (BNA) 712 (Simmelkjaer 1998); *Department*

[1] Southwest Airlines and TWU Local 555 [redacted] Grievance (Hill, 2012) (Exhibit 1 to the Company's Post-Hearing Brief); *Ritchie Industries, Inc.*, 74 LA 650, 655 (Roberts, 1980).

of the Air Force, 101 LA (BNA) 660 (Block, 1993) (stating "if there was disparate treatment, it must be based on a comparison between the records of the situations of the three grievants on the one hand and the situations of others . . . "); *King Soopers, Inc.*, 101 LA (BNA) 107 (Snider, 1993) ("While complete consistency is not required, arbitrators have refused to uphold random and completely inconsistent disciplinary practices," citing Elkouri & Elkouri, *How Arbitration Works*, at 684-85); Century Products Co., 101 LA (BNA) 1 (Fullmer, 1993) ("The question is whether the Company could rationally consider the Grievant's offense to be different from [the other employee's]"); *Genie Co.*, 97 LA (BNA) 542 (Dworkin, 1991) ("In order to prove disparate treatment, a union must conform the existence of both parts of the equation. It is not enough that the employee was treated differently than others; it must also be established that the circumstances surrounding his/her offense were substantially like those of individuals who received more moderate penalties.") Arbitrator Snider, *supra*, correctly summarized the principle this way:

> The issue is . . . whether a reasonable basis exists for the vast disparity between the Grievant and [others] based upon [1] the individual circumstances of the employees or [2] upon differences in the nature of the conduct.

Arbitrator Neumeier described three situations involving discipline for failing to perform a proper walk-around, and used those as a basis for sustaining the grievance and reducing the penalty to a Letter of Instruction. (TPA-R-2106/13 [redacted] June 9, 2014). The FLOW was removed, and the Grievant made whole for the two-week suspension. Those three situations are in evidence in this case. (U. Ex. Nos. 7, 8 and 9). Similarly, Arbitrator Hill found the discipline assessed to be excessive, and reduced the FLOW to a "letter of concern," although leaving the ten-day suspension intact. (SFO-R-0575/14 [redacted] July 22, 2014). The Company challenged the Union to cite one instance post-FAA investigation where a lesser discipline was imposed under similar circumstances. That is exactly what happened in U. Ex. 5.

And so I find that the level of discipline assessed Grievant in this case appears to be out of line with the level assessed to others under similar circumstances. Under the circumstances of this case, I find that the penalty assessed by the Company was unreasonable. I am not reducing the FLOW to a Letter of Instruction as was done in the [redacted] case, as [redacted] had 19 years of service and no prior safety issues. And unlike the situation with [redacted] I think that it would be in everyone's best interests that this Grievant's Final Letter of Warning remain in his file as an indication of just how seriously the Company views the matter. And as a reminder of just how seriously he should view it. Otherwise, the Grievant will be made whole for all losses due to his 10 day unpaid suspension by payment of eighty (80) hours straight-time pay.

AWARD

The grievance is sustained for the most part. The Company did not have just cause to discipline the Grievant, [redacted] by issuing both a Final Letter of Warning and a 10 day unpaid suspension. Otherwise, the referenced Final Letter of Warning dated March 19, 2014 shall remain in the Grievant's file to the full extent authorized by the CBA. As I find the Union was the prevailing party in this matter,[2] the expenses of the arbitration will be borne by the Company, in accordance with Article Twenty, Section 1(C) of the CBA.

William H. Lemons

WILLIAM H. LEMONS
Impartial Arbitrator

DATED: September 12, 2014, in San Antonio, Texas.

[2] In large part, my decision is driven by my failure to understand why the Company did not adjust the discipline prior to arbitration, as it did with Employees [redacted]