SOUTHWEST AIRLINES/TWU 555 ARBITRATION PANEL

In the Matter of the Arbitration Between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	**Case No. SJC-R-1010/13**
	)	
And	)	
	)	
Transport Workers Union of America, AFL-CIO	)	
Air Transport Division, Local 555	)	**Termination –** [redacted]
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	
_____	)	

BEFORE: **WILLIAM H. LEMONS**
Impartial Arbitrator
4040 Broadway, Suite 616
San Antonio, Texas 78209

APPEARANCES:

For the Company: **MICHELLE MORGAN**

For the Union: **MIKE ROACH**

Place of Hearing: **Dallas, Texas**

Date of Hearing: **September 5, 2013**

Date Record Closed: **October 18, 2013**

Type of Grievance: **Discipline – Just Cause**

OPINION AND AWARD OF THE ARBITRATOR

January 14, 2014

ARBITRATION AWARD

By the terms of the collective bargaining agreement (the "CBA", Joint Exhibit 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 (Joint Exhibit 2). A hearing was held on September 5, 2013, at the Wyndham Dallas Love Field, 3300 W. Mockingbird Road, Dallas, Texas. 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 were excluded during other witness testimony.[1] The parties did agree that their respective "representatives" could testify first, and then remain in the hearing and subject to recall as rebuttal witnesses. (TR. P. 12).

Both sides were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and to present oral arguments, and they did so very ably. The parties agreed that, if necessary, the Grievant's spouse could assist him with any language difficulties that might manifest. (TR. P. 11). None did. In all, the Company introduced eighteen exhibits and the Union introduced twelve exhibits. I have examined each carefully. I carefully read the Official Record in this case, consisting of 259 pages, and have also studied a number of arbitration decisions by other Arbitrators that were provided. Post-hearing briefs were filed and cross-exchanged. These proceedings were declared closed on the date the Arbitrator received the post-hearing briefs – October 18, 2013.

[1] The Arbitrator notes that by oversight, John Bowers may have been present during some of the testimony of Company Witness Debbie Griego, but the Arbitrator notes, after an examination of the testimony, that such made no apparent difference in his testimony.

ISSUE

Was the Grievant [redacted] terminated for just cause? If not, what should the remedy be? (TR. P. 9).

PROCEDURAL HISTORY

No time-frame or grievance process issues having been raised, this matter is properly before me. I need not set forth in this Award pertinent dates in this case given the agreement of the parties and that these dates are set forth clearly in Joint Exhibit 2.

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 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.

B. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

C. 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.

Article 23 – Attendance

E. Unreported Tardy. Any Employee who reports to work within one-half (1/2) hour after the start of his shift and did not notify local management that he was going to be late prior to his shift beginning shall be charged with an Unreported Tardy.

1. Within 1/2 Hour Window. If the Employee did not notify the local management that he was going to be late prior to his shift beginning, but notifies the local management within one-half (1/2) hour after the beginning of his shift, the Employee shall be allowed to report to work, provided he reports to work within one hour and thirty minutes (1:30) past the beginning of his shift. Otherwise he shall be sent home without pay and charged with a No-Show (Unreported Absence).

2. Outside 1/2 Hour Window. If the Employee is more than one-half (1/2) hour late and has given no notice to the local management that he shall report late, the Employee shall be sent home without pay and shall be charged with a No-Show (Unreported Absence).

(Excerpts from Joint Exhibit 1)

STATEMENT OF FACTS

At the time of his termination, [redacted] ("Grievant") worked as a Ramp Agent in San Jose, California, having begun his career with the Company some five and a half or so years earlier. Prior to that, he worked for American Airlines in El Paso, Texas. His duties at San Jose were to assist in bringing in the aircraft, parking the aircraft, loading bags, and off-loading bags and driving them to the baggage claim area.

The record indicates that on April 29, 2013, the Grievant was scheduled to work at Gate 19 from 5:45 a.m. to 2:15 p.m. (TR. P. 44; Co. Ex. 7). Sometime around 6:00 a.m. or a little later that morning, Ramp Supervisor John Bowers realized that he had not seen the Grievant. The other Agents apparently also had not seen him. (TR. P. 44-45; Co. Ex. 9). At around 6:05 a.m. or so, John Bowers assigned another Ramp Agent to work Gate 19. At 6:25 a.m., John Bowers noticed the Grievant near the aircraft talking to the other two Agents. He confronted the Grievant, and when asked where he had been, the Grievant said he hadn't been/wasn't feeling well and pointed to one of the restrooms implying that he had been in the restroom. (TR. P. 47-48, Co. Ex. 9). Sometime during the interchange between the two, John Bowers asked the Grievant why he had not punched in. The Company maintains that the Grievant replied "Oh, I didn't?" (TR. P. 50, Co. Ex. 9). The Grievant really does not effectively refute that such was his response. (TR. P. 147, l. 17 to P. 148, l. 17).

The Grievant testified that because he had separated from his wife, he had been sleeping in his car every night in the San Jose airport parking garage. He woke up, thinking it was Sunday and thus that he had plenty of time to get ready and report to work. He suddenly realized it actually was Monday, and that he had to be at his work station at 5:45 a.m. So he hurriedly

cleaned up, and scurried off to work, although in his haste and confusion, forgot his cell phone. In the Grievant's own testimony:

> *So when I got to the door, then swipe in and walk in. And then I look around. There was nobody in there, so I look at the schedule* (which we later found out was next to the time clock) *and go, oh, I'm on Gate 19. So I walk straight out, go straight out to my gate.* (TR. P. 141).

An investigation was conducted, and a fact-finding meeting convened. Apparently it is not seriously disputed that the Grievant knew and had been trained on the protocols, procedures and Basic Principles of Conduct ("BPOC") applicable to Ground Operations. It was also not disputed (the *effect* of the Final Letter is in controversy) that the Grievant had been issued a Final Letter of Warning on April 9, 2013, allegedly for much the same behavior. The Grievant was terminated effective May 17, 2013. (Joint Exhibit 2).

POSITION OF THE COMPANY

Normally, it is my practice to avoid setting forth in detail the contentions of the parties. They are very completely and more ably set forth in their post-hearing briefs, and to re-state such in an Award is expensive, time-consuming and unnecessary. But I feel it important to at least address what the Company emphasizes in its case as being the salient points:

- In accordance with (indeed, certainly not in with conflict with) the CBA, the Company has promulgated Basic Principles of Conduct. A violation of any one (much less several) of the BPOC is grounds for disciplinary action, which "may range from a reprimand to discharge, depending on the particular violation and the circumstances." BPC #6 states, "Unauthorized absence or leaving work without permission" will be grounds for disciplinary action. BPOC #7 states, "Dependability and punctuality are necessary. You are expected to be in, or at your position and ready to work when you are scheduled." (Joint Exhibit 2);

- The Grievant had been issued a Final Warning Letter on April 9, 2013 – just 20 days prior to this incident – as part of a grievance settlement leading to his reinstatement. Apparently, the Grievant had forged a partial

shift trade between himself and a fellow Agent, and then left work to tend to a family matter after falsely representing to his Assistant Station Manager that he had secured a shift trade. Notably, the violations set forth in that Final Warning Letter included BPOC #6 and BPOC #7. (TR. P. 83-87, Co. Ex. 18);

- The incident in question was reported to Station Manager Robert Alderete, who commenced a thorough, complete and fair investigation. The applicable SIDA badge swipes for April 29, 2013 established that the Grievant first entered airport workspace at 6:21 a.m., and that he exited the break room and entered the aircraft operating area at 6:23 a.m. that morning. The investigation found that, in fact, the Grievant did not punch in that day, although he did punch out. Thus, he was paid for a full eight hours of work. (TR. P. 64-65, Co. Ex. 14). John Bowers provided a written statement regarding his observations. (TR. P. 51, 63; Co. Ex. 9). The investigation revealed that the Grievant had received yet another Final Written Warning for attendance previously on January 8, 2013, and Mr. Alderete examined the Grievant's record for "no-punch" violations;

- Sound Arbitral authority (including one decision by the undersigned) supports the Company's right to terminate any employee for these reasons, and under the facts of this case, management's decision to terminate the Grievant cannot be mitigated.

In conclusion, the Company maintains that it has met its burden of proof to show that the Grievant was discharged for *just cause*, as traditionally interpreted and applied on its property. Therefore, the discharge decision should be sustained and the grievance denied in its entirety.

POSITION OF THE UNION

The Union explains that Grievant was in a difficult position because of domestic relations issues, and that he was doing the best that he could under the circumstances. It contends that rather than torture this unfortunate situation into a violation of some obscure BPOC, this was really a "failure to punch" or "late punch" situation, or at worst, something that should be addressed under the attendance control policy. It maintains:

- The mutually-negotiated language in Article Twenty-Three of the CBA controls over the loose, vague and unilaterally-implemented BPOC. The

Union introduced numerous examples of times when the Company correctly administered the language of the CBA regarding tardies and/or no punches. It says the Grievant had the right to expect to be treated similarly, and thus while he might know what to expect in the case of a violation of the attendance control policy, he was not forewarned of the consequences of a vague and obscure violation of the BPOC;

- The no-punch policy has been in effect since 2003, and the Company has consistently put out information over the years explaining how it worked and what employees can expect. Once it was established that the Grievant was late and had not punched in, he should have simply been issued a no-punch letter and been given an unreported tardy per the CBA. Indeed, the Grievant should have even been sent home that day and not allowed to work;

- The Company has violated its past practices and applied discipline under these circumstances in a very arbitrary and inconsistent manner, as indicated by studying the situations involving employees [redacted] and [redacted] as well as the seven situations from the Dallas grievances that witness Brian Smith alluded to.

The Union, the Grievant's family and the Grievant ask that the grievance be awarded, and that as a result, the Grievant be reinstated immediately, with full back pay, seniority and benefits.

OPINION OF THE ARBITRATOR

Both parties were well represented in this dispute and presented persuasive arguments. The excellent briefs submitted by each side were most helpful in fashioning my decision. In the final analysis, my determination is based upon a careful and meticulous analysis of the testimony of the witnesses, including with particularity the Grievant's recollections and admissions as to what happened that morning, coupled with the testimony of witnesses he called on his behalf, including Witness [redacted] I have compared and contrasted that testimony with the testimony of Witnesses Bowers, Alderete and Jhutty. And, as always, I have carefully listened to the experienced observations of Witnesses Clevenger and Smith, and contrasted that to the testimony of Witness Griego. The essence of this case is whether the Company had just cause to discharge

the Grievant based upon his violations of numerous (#6 and #7) Basic Principles of Conduct. Under these facts as established at our hearing, was this discipline, measured by a presumably-reasonable and neutral finder of fact (that would be me), fair and reasonable when all the applicable facts and circumstances are considered – i.e. did the Grievant get a *fair shake?*

I find on this record that the Company spent a good deal of time and effort to investigate what happened last April 29. The investigation was conducted fairly and objectively. It does not appear that management rushed to judgment or somehow presumed the Grievant to be guilty. Neither John Bowers nor Manjit Jhutty appears to have any animosity toward the Grievant. "[I]f there is no evidence of ill will toward the accused on the part of the accuser and there are no circumstances upon which to base a conclusion that the accuser is mistaken, the conclusion that the charge is true can hardly be deemed improper." *Ford Motor Company,* 1 ALAA para. 67,274, 620 (Shulman, 1954). In fact, it appears more likely than not that both appreciated the Grievant's tenuous domestic relations position, and were trying *to help him in any way that they could.* (TR. P. 89-90). It appears from the testimony of both that they were not trying to run the Grievant off – rather, they would have preferred that he remain a Southwest Airlines employee.

In short, the person responsible for the discipline in this case first obtained substantial evidence/proof that the Grievant was guilty as charged. I find based upon the preponderance of the credible evidence that the version of what happened that day, as described by the Company's witnesses (summarized in the Company's Post-Hearing Brief) is far more likely to be what actually happened, when carefully compared to the Grievant's version of what he says happened. In fact, it is clear from the record in this case that the Grievant at times supports what John Bowers believes to be true, and at other times the Grievant was not altogether candid about what happened, both at his fact-finding hearing, and at times, in his arbitration hearing. The Grievant admits to

being "confused." He was unable (or more likely unwilling) to verify whether he had punched in that morning. In large part, I find that the Grievant's explanation is neither plausible nor credible. It just doesn't make sense in many respects.

Having considered the various factors to be used in making a credibility determination,[2] this Arbitrator finds that the testimony of John Bowers (TR. P. 39-56), the testimony of Robert Alderete (TR. P. 56-83) and the testimony of Manjit Jhutty (TR. P. 83-90), coupled with the testimony of [redacted] (TR. 164-196), far outweighs and is more credible than Grievant's testimony as a whole.

I also find, based on this record, and despite Mr. Roach's best efforts (which I applaud), that this situation was neither an attendance, tardiness nor "no-punch" issue. Ironically, the Grievant took it out of that category by his own actions – his own deception. It is obvious that because he knew he was the recipient of two Final Written Warnings – one for BPOC violations and one for attendance issues – he thought it best to try to sneak into his work area late without being apprehended and incurring a tardy or a no-punch. Had John Bowers known that the Grievant was tardy, he would not have been looking for him or asked him where he had been. Had the Grievant fessed up to what was actually going on, the matter might well have been treated as an attendance,[3] tardiness or no-punch matter.

I specifically find on this record that the Company did not impose, or try to enforce, unilateral work rules that are in conflict with the terms and conditions of the CBA. The particular BPOC at issue in this case, on their face and as applied, appear to be reasonable Company rules

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[2] Hill, M. and Sinicropi, A.V., *Evidence in Arbitration* (Washington, D.C.: Bureau of National Affairs 1980); *See also* West Coast Panel Report: *Decisional Thinking of Arbitrators and Judges,* Proceedings of the 33rd Annual Meeting, National Academy of Arbitrators 121 (BNA Books 1981).

[3] In light of my decision, I need not determine the effect of yet another absence on the Grievant's earlier Final Written Warning and whether the Grievant would have been terminated for attendance points anyway.

and regulations issued by proper authority, which are not in conflict with the terms and conditions of the CBA, and thus are not the types of work rules that must be gained through negotiations. I also find that the Company applied these work rules, and the penalty at issue, evenhandedly and without discrimination. It has not been shown to my satisfaction that other employees were, in fact, treated differently from Grievant, or that others with similar circumstances received more lenient or moderate penalties. *Genie Co.,* 97 LA 542, 549 (Dworkin, 1991). The Company has proved its actions are consistent, and the Union has not established otherwise. The instant situation is very close, for example, to that involving [redacted] (Co. Ex. 1) and other examples cited. As Arbitrator Vernon observes, in this instance, the Grievant has distinguished himself from the other situations that Witnesses Clevenger and Smith so painstakingly tried to weave into a fabric of inconsistency. *Having marched himself to the edge of the cliff* (perhaps even three times), *the Grievant should have realized another misstep would, as he was warned, result in discharge. Southwest Airlines and Transport Workers Union of America Local 555:* [redacted] *Grievance,* at pp. 5-7 (Vernon 2013) (Company Brief, Ex. 3).

As to the Union's contention that the Company should be relegated to the attendance or no-punch violations, this situation is analogous to the *lesser included doctrine* found in some criminal statutes. Suppose a person tragically but negligently causes an automobile accident with another, resulting in that person's death or serious injury. The investigation discloses that in addition to driving erratically, the guilty driver also did not have a current driver's license and that a taillight was out. Are the authorities limited to issuing a citation for driving without a license rather than pursuing felony negligent homicide charges? Of course not. They are free if the facts warrant it to pursue the more serious charge, and let a jury determine guilt, even if there is a risk of acquittal where the license charge would be automatic and non-controversial. Here, that is what happened.

Last, I find under the circumstances of this case that the degree of discipline administered by the Company – here, economic capital punishment – was warranted due to the seriousness of the offenses proven to have occurred, and given the Grievant's record and services with the Company.

To quote Arbitrator Daugherty:

> ". . . leniency is the prerogative of the employer rather than of the arbitrator: and the latter is not supposed to substitute his judgment in this area for that of the company unless there is compelling evidence that the company abused its discretion."

Enterprise Wire Co. and Enterprise Independent Union, 46 LA 359 (March 28, 1966).

To conclude, as much as I have sympathy for the Grievant's particular situation last April, it would appear that he put himself in the present predicament. The Grievant should have been candid with his supervisors, admitted his tardiness and corrected his failure to punch in. But here, for whatever reason, he got too cute and clever. He did not allow the Company to handle the incident as an attendance infraction. (TR. P. 50-51; see also TR. P. 248-249). As Manjit Jhutty told the Grievant when he explained what the Grievant had done wrong in the previous incident (as he was being reinstated and receiving the Final Written Warning):

> *So after I gave him* [the Grievant] *that option* [ClearSkies] *and also told* [redacted] *that, you know, obviously he understood that what he did was wrong. And I told him had he came to us that day and been honest and said, hey, you know, I really need to leave work, I have stuff going on with the family, we would have been more understanding and let him – probably let him go home and take care of his, you know, family.*
>
> *I told him as we go forward, please let us know he needs any help and also don't put himself in the situation such as this. I'd rather him come to us and let us know if he needs anything, and we'll be willing to do whatever we can to try to help him in any way.* (TR. P. 89-90).

I cannot allow the Grievant to benefit from his mendacity – to do so would allow his lie to convert this into an "unreported tardy" with a one point penalty, for example. Witness Clevenger admits that it is the employee's responsibility to report an absence or tardy. (TR. P. 109). The Grievant can't simply ignore that and turn this into a small fine for driving without a license.

I find on this record that the Company had *just cause* for its disciplinary action, and that the penalty of termination was neither arbitrary nor unreasonable. The Grievant got a fair shake. Several times.

AWARD

Having duly heard the proofs and allegations and after consideration, it is my Award that the grievance is denied. The Company did have just cause to discharge the Grievant.

DATED: January 14, 2014.

William H. Lemons

WILLIAM H. LEMONS, Impartial Arbitrator

STATE OF TEXAS)
)
COUNTY OF BEXAR)

I, William H. Lemons, do hereby affirm upon my oath as Arbitrator, that I am the individual described in and who executed this instrument, which is my Award.

William H. Lemons

WILLIAM H. LEMONS