IN THE MATTER OF AN ARBITRATION
BETWEEN

TRANSPORT WORKERS UNION LOCAL 555	**§**	**CASE LAS-P-1029/10**
	§	
	§	**GRIEVANCE OF** [redacted]
and		
SOUTHWEST AIRLINES CO. DALLAS, TEXAS	**§**	
	§	
	§	

William L. McKee, Arbitrator

For the Union:
Jerry McCrummen
Vice President, TWU Local 555

For the Company:
Kerrie V. Forbes
Senior Attorney

A hearing on this matter took place in Dallas, Texas on November 5, 2010. Upon receipt of post-hearing briefs the hearing closed.

I. ISSUE

The Parties stipulated that the issue to be decided in this arbitration is as follows:

> Was the Grievant, [redacted], discharged for just cause? If not, what is the appropriate remedy?

II. RELEVANT RULES/STANDARDS

The Company and the Union are parties to an Agreement Representing Ramp, Operations, Provisioning and Freight Agents, covering the period July 1, 2008 to June 30, 2011 (the "CBA"). Article Twenty, Section One of the CBA, governing procedures for discharge and discipline, provides that covered employees can only be disciplined or discharged, to the extent of loss of pay, for just cause. Article Two of the CBA sets forth the scope of the agreement, and states in relevant part:

> **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.
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> **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.

In accordance with its right to impose and enforce reasonable work rules, the Company has created and published numerous written policies and rules prohibiting discriminatory and harassing conduct. Among those policies are the *Southwest Airlines Policy Concerning Harassment, Sexual Harassment or Discrimination*, which provides:

> Southwest Airlines prohibits any and all types of harassment, including, sexual harassment of, and discrimination against its Employees by other Employees or outside parties. Harassment or discrimination based on race, color, religion, age, sex, sexual orientation, gender identity, pregnancy, marital status, national origin, disability, veteran status, or other protected status, negatively affects morale, motivation, and job performance. Such behavior is inappropriate, offensive, and will not be tolerated; and it is contrary to the Southwest Spirit and the Southwest Culture. . . .
>
> Epithets and slurs are always offensive and will not be tolerated for any reason, even if an Employee mistakenly believes them to be a funny part of a joke.

The Company also publishes *Basic Principles of Conduct* for Southwest Provisioning Agents, which list various standards and examples of conduct that can be the subject of discipline, including:

> . . .
> 2. An Employee on duty and in uniform reflects the SWA attitude to our Customers on a personal basis. It is imperative that you remember that your appearance, attitude, and conduct, whether on or off duty, may be a reflection on SWA, and that you act accordingly.

8. Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow Employees or their work.

. . .

25. Southwest does not want to interfere in the personal affairs of 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.

26. Fighting, abusive and disrespectful behavior to a fellow SWA Employee or Customer.

. . .

32. Harassment and sexual harassment is strictly prohibited. Please review the policy as stated in the Guidelines for Leaders.

III. FACTS

The events underlying the Grievant's discharge occurred in the late night and early morning hours of July 26-27, 2010. At the time [redacted] off-duty from her position as a Provisioning Agent at the Company's Las Vegas (LAS) facility, where she had worked for over 15 years. Other than a few minor attendance issues, [redacted] had no history of disciplinary problems. She regularly received "Satisfactory" and "Excellent" ratings on her performance reviews, and, based on testimony presented at the hearing, she was generally well-regarded by her co-workers.

The Grievant was scheduled to work on the morning of July 27, 2010. During the previous evening, as [redacted] testified, she was drinking wine and socializing with her daughter and a friend. At some point in the evening, [redacted] decided that she did not feel up to working the next day. She testified that she began feeling "queasy" and thought she might have food poisoning. Despite feeling unwell, [redacted] testified that she continued drinking wine and took two prescription drugs, Ambien and Xanax. [redacted] further testified that the drug

and alcohol combined with food poisoning to cause her to behave erratically and to lose all memory of the evening.

At 9:15 p.m., the Grievant telephoned the LAS Provisioning Office from her cell phone, wanting to speak to a night Supervisor in order to request the day off as a vacation day ("DAT"). When no one answered, she left a voicemail message requesting a DAT. After making that request, [redacted] apparently hung up to disconnect the call. However, one minute later, at 9:16 p.m., she called the Provisioning Office again – whether intentionally or unintentionally. Again, the office's voicemail picked up. This time, the voicemail recorded almost two minutes of a conversation between [redacted] and a male companion named [redacted].

The recording of this second voicemail cut in with [redacted] saying "I'm trying to think of what I can do." Then she stated "All those [redacted] at night – and I don't say that usually – they're on their phone and won't answer. They're all [redacted]." The exchange between the Grievant and her companion immediately before and after that statement makes it clear that those words referenced whomever she was trying to reach in the Company's Provisioning Office. [redacted] and her companion then shifted into a brief conversation about excuses for not showing up for work, including a reference to finding an injured grasshopper in the garden. The voicemail cut off in the middle of this casual chatter without any further reference to the Company or the Grievant's desire for a DAT.

Fifteen minutes after that message was recorded, [redacted] again called the Provisioning Office. This time she was able to speak with a night Supervisor, Lamont Hill, who told her that he could not give her the DAT. The Grievant told Mr. Hill that she would come to work the next day. However, a few hours later (shortly after midnight) [redacted] called the Provisioning Office

again and left a message on the recorder that she was sick and would not be in for her shift in the morning.

The next morning, Supervisors in the Provisioning Office played the messages left on the office voicemail the night before, including the message that recorded the Grievant's offensive language. By chance, an African-American bargaining unit member overheard [redacted] played-back message and asked the Supervisors what they were going to do about it. One of the Supervisors reported the incident to Company management, which convened a fact finding meeting at which [redacted] was represented by a Union designee.

After that meeting, the Company decided to terminate the Grievant's employment for violation of the various workplace rules and policies set forth in Section II, above, and in accordance with the Company's "zero tolerance" approach to discriminatory or harassing conduct. The Union grieved [redacted] termination as set forth in Article Twenty of the CBA. On September 22, 2010, the System Board of Adjustment deadlocked on the matter, and the case proceeded to the arbitration hearing held on November 5, 2010.

The Company's argument in support of its decision to terminate [redacted] is straightforward: the language [redacted] used, which was recorded on the Company's voicemail, was a flagrant violation of the Company's policies and rules against discrimination and harassment. Her repetition of the racial slur amounts to an "egregious" violation, one that undermines the Company's well-documented policy of fostering a tolerant and inclusive work environment. Although she was not at work or on duty when the violation occurred, her words were communicated to the workplace by virtue of the call to the Provisioning Office, where African-American employees heard the voicemail and were upset by the Grievant's language.

The Company cites its legal and ethical obligation to protect its employees from a racially hostile work environment as grounds for enforcing its anti-discrimination and anti-harassment rules and policies on a "zero tolerance" basis, and notes that it has terminated other employees for using racial slurs like the one the Grievant was recorded using.

The Union argues that the termination was unjust for several reasons. First, it claims that [redacted] conduct was excused for several reasons: (a) she was under great stress following the deaths of three people close to her (including her husband and her best friend) in the months preceding her termination; (b) she was under the influence of alcohol and prescription drugs at the time she made the offensive statements; (c) she did not intend for her statement to be recorded and overheard by her coworkers; and (d) she has apologized to her coworkers and shown remorse for her actions.

Next, the Union claims that the Company violated the just cause requirement of the CBA by failing to consider the Grievant's work history and tenure before deciding to terminate her. Third, it asserts disparate treatment by submitting other cases in which employees received less drastic sanctions for using the N-word at work. Finally, the Union claims that the Company's evidence was inadmissible, unreliable and less credible than the evidence the Union presented at the hearing.

IV. FINDINGS

Arbitrators in labor-management disputes typically consider several factors in making determinations under the "just cause" standard. The employer generally has the burden of proving that the grievant (1) had adequate notification or awareness of the employer's standards;

(2) committed the violation(s) for which he or she was disciplined; and (3) was not disciplined in an arbitrary, capricious or discriminatory manner.

Here, there is no dispute about the existence of the Company's rules and policies, which prohibit the kind of language [redacted] used in her recorded conversation. The Union does not dispute that the Grievant was personally made aware of these rules and policies. Thus, the Company established that [redacted] had adequate notification and awareness of the Company's standards in relation to the use of racial slurs and abusive or hostile treatment of co-workers.

The rules and policies at issue in this case are serious. The Company is correct in pointing out that it has multiple obligations – both ethical and legal – to prevent its employees from using racial or otherwise discriminatory language to create a work environment that certain of its employees find unwelcoming. Moreover, the Company has put significant effort, for a long period of time, towards cultivating a public image as a cohesive, inclusive, and welcoming place to work and to do business. The Company is within its rights to hold its employees to a high standard of conduct in this regard, so as to protect its employees, its culture, and its carefully crafted image.

That said, however, an arbitrator cannot uphold the Company's decision to issue discipline under the guise of a "zero tolerance" policy without careful consideration of the just cause standard. Rather, the gravity of the Grievant's conduct must be weighed against the fact that she was off-duty as well as the primary mitigating factors of her long service and performance history. Here, the combination of these factors weighs against upholding [redacted] termination, despite recognition of the Company's serious interest in enforcing its anti-discrimination and anti-harassment policies.

This determination does not rest upon most of the Union's proposed justifications of [redacted] conduct. For example, [redacted] culpability is not absolved because she was under the influence of alcohol and/or prescription drugs. Being under the influence of intoxicants is no excuse for this type of conduct. However, in the voicemail recording the Grievant can be heard carrying on a generally coherent (if sometimes silly) conversation. Indeed, at the very instance when she utters the offensive epithet, the Grievant admonishes herself for using it, saying "I don't say that usually," then goes on to say it again.

[redacted] ability to stay focused on her goal of obtaining a DAT for the next day during most of the late evening hours also indicates that she was generally in control of her faculties, although she may have been influenced by what she consumed and her health. Thus, I find that the Grievant knew what she was saying, knew that what she was saying was offensive, and intended to say it due to her frustration at not being able to speak to a Supervisor in the Provisioning Office to request a vacation day.

However, my interpretation of the voicemail recording also leads me to conclude that [redacted]. [redacted] never intended for her words – which were uttered in an off-duty, non-work setting but communicated to the workplace – to be directed at the workplace or overheard by her coworkers. The context of the voice message reveals that [redacted] had no idea her phone was still on or that her words were being recorded. At the very least, there is insufficient evidence to prove she had this level of knowledge or intent.

The Company's rules and policies do not set out any requirement of intent. Indeed there may be certain situations that could arise where the consequences of an employee's actions and/or other aggravating circumstances outweigh the element of intent. However, an arbitrator

may consider [redacted] intent, and in this case and with these specific facts I find that the lack of intent – combined with the Grievant's length of employment, performance history, and positive relationships with co-workers of various races – mitigates against upholding the discharge sanction. This seems to be a rare situation in which a person was caught using hate-related words that do not square with her well-regarded reputation among co-workers of various races.

At the hearing, Chris Hines, a Provisioning Supervisor and the Company's lead witness, testified that "she normally is a caring person." Hines seemed most upset with [redacted] due to his belief that she intentionally directed her comments at the minority Supervisors on the night shift. However, comments inadvertently left on voicemail are not ***directed at*** anyone. Still, [redacted] obviously was ***referencing*** those whom she believed to be the source of her frustration: night Supervisors distracted by their personal phone conversations. Although the distinction here may seem subtle, it is well to recognize that the purpose of workplace rules is not to govern what workers think but what they do. The Grievant was caught thinking out loud, to her shame, and Hines was correct when he wrote in an Irregularity Report that the error was "egregious".

On the night in question, Lamont Hill was the closing Supervisor in Provisioning but also the Supervisor to whom [redacted] ultimately spoke with over the phone. Hill, an African-American, denied her DAT request that evening and conceivably could be one of the Supervisors who might hold a personal grudge for what was said in the voice recording. Although he testified that the Company made the right decision in terminating the Grievant, Hill also acknowledged that, because of their good working relationship, he was surprised she would make such a statement and that he accepted [redacted] apology for making the blunder.

Jose Hernandez, a Provisioning Supervisor on the next morning's shift, also testified that the Company's termination decision was correct, but he similarly recognized that the Grievant was a good worker and that the phone message could have been left accidentally. Another morning Supervisor, Wayne Fitzpatrick, was present when the message was played in the presence of [redacted], an African-American worker on the shift. Like Hill and Hernandez, Fitzpatrick testified that the Company's action was justified but agreed that the call could have been an accident.

[redacted] testified that he was shocked by the message he overheard early in his shift the following morning and that he asked the Supervisors present if they were going to write her up. According to [redacted], he continues to feel that [redacted] deserves to receive some form of discipline short of discharge. His testimony was unchallenged when he stated that the African-American Supervisors with whom he discussed the matter were similarly shocked by the statement since it was so out of character for the Grievant.

Conclusion

Although just cause considerations dictate that the discharge should be overturned, there should be a significant penalty for careless, even reckless, off-duty behavior that places the Company and co-workers at risk. The decision of the System Board of Adjustment in the relatively recen [redacted] case provides precedent for a such a penalty – reinstatement with full benefits and seniority but without back pay. Like in the [redacted] case, [redacted] also will be reinstated with a Final Letter or Warning.

V. AWARD

For the reasons set forth above, the Company did not have just cause to terminate the Grievant, [redacted] is to be reinstated immediately with a Final Letter of Warning and full benefits and seniority but without back pay.

For purposes of Article 20, the Company is designated the losing party at arbitration.

January 9, 2011

William L. McKee, Ph.D.
Arbitrator