

SYSTEM BOARD OF ADJUSTMENT

IN THE MATTER OF ARBITRATION

OPINION AND AWARD

between

SOUTHWEST AIRLINES

Grievance No. MCO-P-1422/11 (Termination of



and

TRANSPORT WORKERS OF AMERICA

Gil Vernon, Arbitrator

APPEARANCES:

On Behalf of the Union: Mike Cernosek – TWU District II Representative and Jerry McCrummen – TWU Vice President

On Behalf of the Company: Rachel D. Ziolkowski, Attorney – Gruber, Hurst, Johansen, Hail and Shank and Kerrie Forbes – SWA Senior Attorney


I. ISSUE

The issue presented by the grievance before the Board can be framed as follows:

“Did the Company have just cause to terminate Grievant for the reasons set forth in its July 27, 2011 letter, and if not, what is the appropriate remedy?”

II. BACKGROUND

The grievance before the Board protests the Company's discharge of

 The matter was not resolved in the grievance procedure and ultimately appealed to arbitration. A hearing was held January 17, 2012.

Following receipt of a transcript of the proceedings, post hearing briefs were submitted February 27, 2012.

The basic facts surrounding the termination are not disputed. The Grievant, prior to his termination, was employed as a Provisioning Agent. He had been with the Company nearly three and one-half years. As a Provisioning Agent he stocks aircraft with necessary snacks, beverages and supplies. On the morning of July 23, 2011 at approximately 7:00 a.m. he was provisioning an aircraft that had yet been pulled to the gate. It was parked remotely out on the 'tarmac' within sight of the terminal. Yet, according to a witness who measured the distance with a truck odometer, it was two-tenths of a mile away. Grievant was in the process of provisioning the aircraft which was empty of passengers and crew and unpowered with his lift truck when in the box of the truck he felt an "immense" pain in his stomach. He had already closed the door of the aircraft, pulled the rails back, closed the aircraft door and was intending to lower the truck and go to the terminal when his "... stomach just completely knotted up and I just had to go. And it was

an emergency situation because I never felt like this before in my life, and it was either going to be on myself or the floor or find the container to put, you know, to take care of the situation”. Grievant did not believe the restroom on the aircraft was an option because without power that particular lavatory—which has a vacuum extraction device for the bowl contents—will not flush. Without power, the cabin of the airplane is unlighted as well. Moreover, the evidence shows that the water on this aircraft was drained the night before and had not yet been replenished. Grievant opted to defecate in one of the nearby garbage bags. While he was in the process of pulling his pants up, a supervisor climbed the ladder and pulled back the closed curtain.

The supervisor’s written statement read as follows:

On July 23, 2011 while driving in the cargo van conducting Safety checks I noticed truck 10 [REDACTED] was lifted up against the A/C working Originating flight 1558 at the park area. I noticed a loose beer on the ground in front of the truck so I pulled over to pick it up figuring it must have fallen from one of [REDACTED] kits while dumping out the excess water. I looked up and noticed the front roller door on the box was down. I then walked around to the back and the curtain was closed. At this point I climbed the ladder and when I went to open the curtain [REDACTED] slammed it closed and said “please, please no, no you can’t come in here”. I asked him what was going on and to open the curtain...he then said, “I’m doing what [REDACTED] does every morning”, that is when I smelt (sic) the overwhelming stench of human waste. I partially observed [REDACTED] through the curtain fumbling with a gray trash bag and he was half undressed. I was so disgusted that I said we will be talking about this and I climbed down the ladder and went to the cargo van where I briefed Helen as to what had just taken place.

Following an investigation, the Company sent Grievant the following letter:

On July 26, 2011, a fact-finding meeting was held to discuss the incident where you were observed by a Supervisor using the box of the provisioning truck as a restroom on July 23, 2011. Present at the meeting were you, Provisioning Agent [REDACTED] TWU Representative [REDACTED] Provisioning Supervisor Dave Ledet, and me.

You admitted that you defecated in a trash bag in the box of your truck. You stated that you were sick, and had no time to reach a restroom. You went on to say that, you lowered your truck half way and decided you did not have enough time to make it to a restroom. According to you, you chose not to use the lavatory on the aircraft because it did not have any flushing ability since the power was not hooked up. Further, when questioned about the comment you made to the Supervisor when he asked what you were doing, you denied saying anything to the effect of I am doing an [REDACTED]. You also stated in the meeting that when you returned to the warehouse, you informed your Supervisor you were sick, however you chose not to go home.

According to the Supervisor on duty, your truck was in-fact, in the fully raised position and when asked what you were doing you said that you were doing what [REDACTED] does. In addition, you never told him that you were feeling ill that day.

After a review of everything brought forth in the fact-finding meeting and discussion with the Supervisors on duty, I have determined that you have been less than truthful. Further, I have determined that your actions violated the Basic Principles of Conduct including but not limited to the following:

12. Abuse or destruction of Company property. Converting to your own use, including sale or purchase of any Company property from the premises without proper approval of the Company.

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

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, maybe cause for immediate dismissal.

Because of your actions, the truck had to be completely stripped, power washed, and the product discarded. In addition, your actions were not in compliance with the FDA Food code, Florida Department of Health Food Hygiene and the OSHA Sanitation Regulations that Southwest Airlines are governed under; therefore putting the Company at risk.

Based on all of the above, your employment is terminated effective immediately.

III. OPINION AND DISCUSSION

The Company failed to convince the Arbitrator that Grievant engaged in deliberate misconduct.

The Company's case rests on the manager's belief that what Grievant did was done with intent, that he was not sick, that there was no excuse for his conduct and that he had options and chose to use the truck as his personal bathroom. The evidence, however, does not support the manager's belief or conclusion that this incident constitutes just cause for termination.

That Grievant worked the day before and the rest of his shift without reporting he was sick or requesting to go home does not conclusively undermine the urgency Grievant says he faced on the truck. Such matters can be episodic and are not necessarily incapacitating.

As uncomfortable as the topic is to discuss, it does not convert the act into something intentional and deliberate. It does not convert speculation into conclusive evidence. Indeed, it is hard to imagine how or why any ordinary person in Grievant's position would elect to take his course of action unless he compellingly believed he had no choice. The manager even found it significant in determining he wasn't sick that Grievant had not soiled his clothing. Holding the Grievant to such a test to prove he wasn't sick is simply unreasonable.

Putting one's mind to his possible motivations—apart from extreme personal

necessity—perhaps Grievant’s actions could have been part of a sick practical joke he intended to play on some other employee. However, the evidence doesn’t show this to be the case. He disputed making the comment about another employee when first confronted. Moreover, the meaning of this comment, if made, was not developed in the record.

As for the manager’s belief Grievant had ‘other’ options, she evidently didn’t clearly understand the technical nature of the lavatories on this series of airplanes. The airplane do not allow for lavatory use in an unpowered state. The manager’s suggestion that Grievant could have either arranged to flush the toilet after the plane was moved to the gate several hours later, lined the lavatory stool with a garbage bag or removed the bowl contents some other way is not a reasonable expectation under the circumstance. Additionally, because there were no lights on the plane the lavatory door would have likely been open and it opens into the galley.

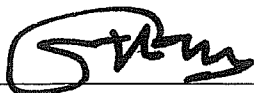
The Company stresses too that provisions on the truck had to be destroyed (thus invoking Rule 12) and that Grievant (it was learned at the hearing) returned to the aircraft to finish stocking it in an obviously unsanitary and inappropriate way. These assertions do not, however, support the Company’s position. The manager claimed on direct examination that all the product had to be thrown away, but acknowledged on cross-examination that revenue items liquor, beer and wine

were not dumped. Her rationalization for this distinction didn't curb her original exaggeration. The facts show as well that Grievant double bagged the waste, washed his hands with bottled water and two kinds of soap including a sanitizing type used on the airplane, and donned latex gloves before completing stocking of the airplane. He washed his hands and put on gloves much like he would have if he had used any aircraft lavatory, not to mention the aircraft in question had no running water. Additionally, it is noted the Company did not inspect the truck or product for any contamination. Certainly its actions in cleaning the truck were prudent but it doesn't follow from this that the Grievant's actions were deliberate or a matter of personal choice, and therefore it cannot be considered misconduct. Discipline under these circumstances was, therefore, not for just cause.

As a remedy, Grievant is entitled to reinstatement and back pay for lost wages and restoration of benefits subject to offsets for other earnings. The Arbitrator will retain jurisdiction in the event the Parties can't agree on precise amounts.

AWARD

The grievance is sustained as just cause did not exist for discipline.



Gil Vernon, Arbitrator

Dated this 8th day of March, 2012.