Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration	§	
between	§	**Grievant:** [redacted]
Transport Workers Union – Local 555	§	
and	§	**Case No.: PBI-R-0419/11**
Southwest Airlines, Co.	§	

BEFORE: Kathy Fragnoli, J.D.

APPEARANCES:

For the Company:	**Kerrie Forbes, Esq.**
For the Union:	**Jerry McCrummen**
Place of Hearing	**Dallas, TX**
Date of Hearing:	**July 26, 2011**
Date Record Closed	**August 26, 2011**
Date of Award:	**September 8, 2011**
Contract Year:	**2008**
Type of Grievance:	**Discipline – Just Cause**

Award Summary

The Company did not abuse its discretion when issuing the Letter of Termination to the Grievant. Therefore, the evidence supports a finding that the Letter of Termination dated February 22, 2011 was issued to the Grievant for just cause. Accordingly, the grievance is denied.

Kathy Fragnoli, J.D.,
Arbitrator

Issue

The issue to be decided in the case is whether the Letter of Termination dated February 22, 2011 was issued to the Grievant for just cause and if not, what the remedy should be.

Background

[redacted] ("Grievant") worked for Southwest Airlines (the "Company") as a ramp agent from November 2001 until his termination in February 2011. The Grievant worked at the Company's Palm Beach International Station ("PBI"), where he was also a Union representative. The Grievant has a recognized ADA disability with respect to his hearing. He testified that unless he is wearing his hearing aids he cannot hear or understand normal conversation. The Grievant was assisted by a sign language interpreter at the July 26, 2011 arbitration hearing.

On February 11, 2011, the Grievant worked his usual shift. Another ramp agent, [redacted] arrived for her shift at 1:30 p.m. and discovered that the plane that usually departed PBI at 1:35 had not yet landed and another plane was due to arrive, meaning that there would be two planes on the ground at once, which was irregular. [redacted] began asking supervisors and other employees whether the ramp agents from the morning shift could be required to stay longer in order to help with the extra work. She was given conflicting answers and eventually asked the Grievant whether he, as a Union representative, knew whether the morning ramp agents could be told to continue working.

The Grievant told[redacted] that the a.m. crew could not be required to stay. [redacted] was displeased with his response and some sort of argument or heated discussion between the two began but ended without escalating while everyone went on to do their duties.

After the two flights had departed, several of the ramp agents went into the Company's break room including the Grievant and[redacted]. [redacted] approached the Grievant to continue their discussion about whether ramp agents could be required to stay after their shifts end, specifically so that she could correct him about his prior response. After some back-and-forth, the Grievant stood up, knocked a plastic cup of water off the table and grabbed[redacted]' vest near the collar area and shoved and shook her. Two other employees, [redacted] and[redacted], intervened to separate the two.

After she was out of the Grievant's grasp, [redacted] shouted, "You're fired, bitch!" at the Grievant and then immediately reported the incident to ramp supervisor Bowd Beal. Mr. Beal discussed the incident with [redacted], [redacted] and the Grievant. After the Grievant admitted to him that he had "put his hands on" [redacted], Mr. Beal decided to suspend the Grievant pending a fact-finding meeting

A fact-finding meeting took place on February 17, 2011 attended by the Grievant, Mr. Beal, two Union representatives, an interpreter for the Grievant and PBI Station Manager Rosa Martin. At that meeting, the Grievant changed his story and explained that he knocked over a cup of water and then slipped in the water and "fell into" [redacted] He also claimed tha [redacted] had physically confronted him first by poking her finger in his face. This version of events was unsubstantiated and later retracted by the Grievant. At the hearing, he admitted that he did not slip and that [redacted] did not put her finger in his face.

After the fact finding, the Company decided to terminate the Grievant. The February 22, 2011 Termination Letter signed by Rosa Martin stated that the Grievant's conduct on February 11, 2011, was a violation of the Company's Ground Operations Basic Code of Conduct, 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.
>
> 4. Complete coordination with Coworkers and Supervisors is required in order to provide harmonious working conditions.
>
> 8. Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow Employees or their work.
>
> 18. Striking another Employee in a display of anger shall warrant termination.
>
> 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.
>
> 27. Fighting, abusive and disrespectful behavior to a fellow SWA Employee or Customer.

The Termination Letter further stated that the Grievant's conduct was a violation of the Company's Customer Service Principles and Practices, as well as the Company's Mission Statement that says, "Above all, our employees will be provided the same concern, respect, and caring attitude within the organization that they are expected to share externally with every Southwest Customer."

Relevant Contract Provisions

Article 1 - 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 operations 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.

Article 2 - Scope of Agreement

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

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 17 – Safety and Health

A. Scope. Safety and health of the Employees shall be protected…. The Company and the Employee shall maintain safe, sanitary, and healthful conditions at all stations….

Article 20 – Grievance/System Board/Arbitration Discharge and Discipline

Section 1. 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.

Basic Principles of Conduct

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.

4. Complete coordination with Coworkers and Supervisors is required in order to provide harmonious working conditions.

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

18. Striking another Employee in a display of anger shall warrant termination.

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.

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

Position of the Company

The Company argued that Ramp Agents are governed by the Company's written rules and procedures, including the Basic Principles of Conduct; specifically, the provision that states, "Striking another Employee in a display of anger shall warrant termination." Indeed, the Company distributed to its employees a December 7, 2001 memorandum that purported to revise that particular rule to state "Any employee who strikes another Employee in anger will be terminated." This, it claims, was its "line in the sand" regarding workplace violence.

The Company points to the largely undisputed facts: that the Grievant lost control and "forcefully grabbed" another employee in anger and that [redacted] and other employees have represented that they are now afraid to work with him. Termination, the Company insists, was necessary in order to protect the safety of the Company's employees and its workplace.

Other arbitrators have upheld the Company's decisions to terminate employees for violent acts against other employees. The Company relies particularly on the 2009 award of Arbitrator William McKee, Case No. BNA-R-1280/9 [redacted], Grievant), that upheld termination of a ramp agent who used force against another employee, even though the force was described as a

"shove" or a "push" rather than "striking." Arbitrator McKee reasoned that "a single instance of 'striking another employee in anger' is sufficient basis for termination."

The Company maintains that despite the fact that not all employees who have engaged in physical acts against co-workers have been terminated, the specific facts of this case warrant termination, and it requests that the grievance be denied in its entirety.

Position of the Union

The Union does not dispute that the Grievant grabbed [redacted] on February 11, 2011 but it argues that the Grievant's actions were not taken "in anger." Rather, it asserts that [redacted] verbal confrontation of the Grievant "pushed him to the limit." It urges that the incident was out of character for the Grievant, who had never had any problems with his coworkers before the date in question and who had a good record of service.

The Union contends that the February 11, 2011 incident has been blown out of proportion. The Grievant, it argues, lost control only after [redacted] provoked him but has since apologized and shown genuine remorse. It questions the voracity of the testimony of [redacted] and [redacted], who stated that they are afraid to work with the Grievant but represents that the Grievant would request a transfer to another Station if reinstated.

The Union stresses that [redacted] has been treated in a discriminatory manner. It cites a number of instances where employees either were not terminated after using force against co-workers or were reinstated by the System Board or by neutral arbitrators. It also complains that the Company declined to discipline [redacted] for her role in the confrontation—verbal provocation—or for her use of profanity against the Grievant after the incident. The Company, it maintains, has attempted twice to "draw a line in the sand" regarding workplace violence but continues to discipline such conduct in an arbitrary and sporadic manner.

For those reasons, the Union insists that there was no just cause to terminate the Grievant and asks that the grievance be sustained and that Mr. Pagan be reinstated with full back pay, seniority and benefits.

Discussion

Did the Grievant strike [redacted] in anger on February 11, 2011?

The Grievant admitted at the hearing that he grabbed [redacted] after she "pushed him to his limits" and he lost control. Although the Union vehemently argues that the Grievant's actions were not done "in anger," it actually elicited the fact of the Grievant's anger from [redacted] during her testimony at the hearing. Moreover, the idea that the Grievant did not act in anger is inconsistent with the Union's contentions that he had been "pushed to the limit" and that he "lost control."

The evidence establishes that the Grievant grabbed [redacted] "in anger." I am further inclined to agree with Arbitrator McKee that the Company's Principles of Conduct against "striking" another employee incorporate grabbing, pushing, shaking or otherwise using physical force that does or might cause bodily harm. The Grievant's conduct on February 11, 2011 violated the Company's Basic Principles of Conduct, including item #18, which puts employees on notice that such conduct is a terminable offense.

Did the Grievant have adequate notice of the Company's rule against striking another employee in anger?

The evidence establishes that the Grievant was provided a copy of the Company's Basic Principles of Conduct. On January 21, 2010, he acknowledged receipt and understanding of those policies in writing. Thus, there is no question that the Grievant was on notice that his conduct could warrant termination.

Was the Company's decision to terminate arbitrary or capricious?

The Company has put its employees on notice, repeatedly, that fighting with, disrespecting and/or using physical force against other employees in unacceptable. It has specifically warned, numerous times, that striking another employee is grounds for termination. As will be discussed below, the fact that the Company cannot terminate for every instance of striking or using physical force does not mean that it can never do so.

Just as the Company has the discretion to discipline employees for any other violation of its Principles of conduct, it has the discretion to discipline for use of force against a coworker,

including termination. It must do so after consideration of all of the facts and circumstances of each specific case.

Here, the Grievant revealed himself as someone with the ability to lose control and lash out violently when verbally provoked. That type of conduct is more serious than many other kinds of rules infractions and warrants harsher discipline when proven. At the fact-finding meeting, rather than mitigate his actions, the Grievant was dishonest when he denied his conduct and attempted to put additional blame on [redacted]. Based on those facts, the decision to terminate was not arbitrary or capricious.

Was the Grievant treated in a discriminatory or disparate manner?

The Union makes much of the fact that, despite purporting to "draw a line in the sand" regarding workplace violence, there are many instances in which either the Company chose a lesser form of discipline than termination for employees who violated the same Principles of Conduct as the Grievant or where the Company's decision to terminate was overturned at some stage of the grievance process.

As a threshold matter, a decision by the System Board or a neutral arbitrator to overturn the Company's decision to discipline an employee does not indicate that the Company has been lax in enforcing its policies. Rather, such decisions demonstrate the obvious fact that, even where an employer has attempted to enforce its policies strictly or on a "zero tolerance" basis, all disciplinary decisions are ultimately subject to scrutiny under the just cause standard and not every imposition of discipline will be upheld.

The Company could strictly and blindly apply its policies in a "zero tolerance" manner simply to demonstrate its abhorrence for certain conduct and then allow its disciplinary decision to go through the grievance process and let the chips to fall as they may. To do so, however, would be a waste of its own resources, as well as those of the Union. Instead, the Company must carefully consider the facts and circumstances of each incident and decide whether and what discipline is warranted, and whether the discipline it wishes to impose is likely to withstand scrutiny during the grievance process.

The Union has presented a number of examples of instances that, on their face, appear to be somewhat similar to the incident for which the Grievant was terminated. It is impossible, however, for this Arbitrator to understand exactly the contexts and circumstances of each of those instances or to know why the Company made the decision not to terminate on those occasions, based on the amount of documentation about those events.

That is to say, there is no indication that the Company declined to terminate any other employees on exactly the same facts as were proved in this case. Factors such as who the parties to the incident were—their demeanors, genders, relative size and strength, where the incident took place, when the incident took place, the context of the conduct (whether it was horseplay, incident to a relationship outside of work, or an ongoing pattern of antagonization, etc.), whether the parties agree to shake hands and make up, and other things will vary in each case—but any of them can sway the decision as to appropriate discipline in a matter as serious as workplace violence. I cannot know the specifics of each and every instance that the Union has presented so as to make an appropriate comparison.

As to the issue of the Company's decision not to discipline [redacted], I find again that there is no direct comparison between her conduct and that of the Grievant. Her verbal behavior before the physical outburst, while unwelcomed by the Grievant, did not appear to rise to the level of a serious violation of the Company's rules or policies. Employees may engage in verbal disagreements or "shop talk" with one another without expecting to be disciplined. [redacted] statement immediately after the incident, while inappropriate, must be viewed in light of the fact that she had just been assaulted by the Grievant. Again, the Company was not required to discipline her given that context.

On this record, I cannot find that the Grievant was treated in a discriminatory manner such as would make his termination inappropriate.

Did any mitigating circumstances exist to warrant modifying the discipline?

The Union asserts several bases for mitigation in this case. It argues that the Grievant was a good employee, liked by his coworkers with no record of making trouble. It maintains that he is

remorseful and has promised that this kind of conduct will never happen again. It assures that he is not an ongoing threat in the workplace.

When the conduct for which an employee is terminated is as serious as physical violence, typical mitigating factors such as the employee's work record or lack of disciplinary history are generally unavailing. As Arbitrator McKee pointed out, a single instance of striking another employee in anger is sufficient basis for termination. The absence of prior disciplinary problems or violent outbursts is largely irrelevant.

When an employee has shown himself as capable of resorting to violence in the face of verbal provocation, his assurances that it will "never happen again" are unavailing. Indeed, when, as here, a normally mild-mannered employee suddenly "snaps," the employer is within its rights to be concerned about the danger that the employee poses to his or her coworkers. This is why arbitrators typically allow an employer a considerable amount of discretion in decisions to terminate employees who have demonstrated physical violence in the workplace.

In view of the above, there is no evidence of any mitigating circumstances that would warrant modifying or setting aside the termination.

Did Just Cause exist to issue to the Grievant the Letter of Warning dated February 22, 2011?

Article 20.A of the Collective Bargaining Agreement expresses the parties' intent that the Company will not discipline or discharge Bargaining Unit employees without just cause. As this arbitrator previously observed in SWAL/TWU case PHX-P-0887/10 [redacted] in *Enterprise Wire Co. and Enterprise Independent Union, March 28, 1966 (46 LA 359),* Arbitrator Carroll R. Daugherty set out a "common law definition" of just cause commonly referred to as "the seven tests of just cause." In that award, Arbitrator Daugherty presented the seven tests in the form of questions and discussed the issue of just cause as follows:

> Few if any Union-Management agreements contain a definition of "just cause." Nevertheless, over the years the opinions of arbitrators in innumerable discipline cases have developed a sort of "common law" definition thereof. This definition consists of a set of guidelines or criteria that are to be applied to the facts of any one case, and said criteria are set forth below in the form of questions.

A "no" answer to any one or more of the following questions normally signifies that just and proper clause did not exist. (Emphasis added) In other words, such "no" means that the employer's disciplinary decision contained one or more elements of arbitrary, capricious, unreasonable, or discriminatory action to such an extent that said decision constituted an abuse of managerial discretion warranting the arbitrator to substitute his judgment for that of the employer.

1. Did the Company give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

2. Was the Company's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the Company's business and (b) the performance that the Company might properly expect of the employee?

3. Did the Company, before administering discipline to an employee, make an effort to discover whether the employee did in fact violate or disobey a rule or order of management?

4. Was the Company's investigation conducted fairly and objectively?

5. At the investigation did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

6. Has the Company applied its rules, orders, and penalties evenhandedly and without discrimination to all employees?

7. Was the degree of discipline administered by the Company in a particular case reasonably related to (a) the seriousness of the employee's proven offense and (b) the record of the employee and his service with the Company?

As with the [redacted] case, with regard to questions one and two, the evidence made clear and the Union did not dispute that the Company has established rules and policies regarding how employees are to behave and treat one another in the workplace, including express prohibitions against fighting or striking another employee in anger. The Union did not challenge the reasonableness of those rules. The evidence also made it clear and the Grievant acknowledged that he was aware of those rules and policies and that he had violated them. Therefore, the answers to questions one and two are clearly "yes."

With regard to questions three and four, the evidence established that the Company had conducted a thorough and fair investigation prior to assessing discipline to the employee. Therefore, the answers to questions three and four are also "yes."

Question five deals with proof of the Grievant's guilt with regard to his actions. The evidence and testimony clearly established, and the Grievant candidly admitted, that he used physical

force agains [redacted]. As discussed above, the Grievant's conduct is encompassed within the Company's prohibition against striking another employee in anger. Accordingly, the answer to question five is also "yes."

Question six addresses the issue of disparate treatment. As set forth above, there is no basis on which to find disparate or discriminatory treatment in this case. Therefore, the answer to question six is "yes."

Question seven addresses whether the degree of discipline administered was reasonably related to the seriousness of the proven offense and the Grievant's service with the Company. The Grievant's offense was among the most serious of all workplace infractions. The Company has a duty to all of its employees to provide a safe workplace and has repeatedly reminded its employees that the use of physical force in anger is unacceptable. Therefore, the answer to question seven is also "yes."

Throughout these proceedings, the Union has urged that the Grievant was a good employee, with a good record of service, who was liked by his coworkers and for whom the conduct in question was out of character. It is clear that before the incident giving rise to his termination the Grievant was a solid employee. That being said however, as discussed by Arbitrator Daugherty in the previously cited award:

> …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.

In the instant case, there was no evidentiary showing that the Company abused its discretion or that the subject Letter of Termination was unwarranted. Therefore, the evidence supports a finding that the Letter of Termination dated February 22, 2011 was issued for just cause.

Award

The Company did not abuse its discretion when issuing the Letter of Termination to the Grievant. Therefore, the evidence supports a finding that the Letter of Termination dated February 22, 2011 was issued to the Grievant for just cause. Accordingly, the grievance is denied.