Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration	§	
Between	§	**Grievant:** [redacted]
	§	
Transport Workers Union – Local 555	§	
	§	
And	§	**Case No.: PHX-P-0887/10**
	§	
Southwest Airlines, Co.	§	

BEFORE: Kathy Fragnoli, J.D.

APPEARANCES:

For the Company:	**Juan Suarez**
For the Union:	**Kevin Carney**
Place of Hearing	**Dallas, TX**
Date of Hearing:	**August 20, 2010**
Date Record Closed	**November 5, 2010**
Date of Award:	**November 26, 2010**
Type of Grievance:	**Discipline/Discharge**

Award Summary

The grievance is granted in part and denied in part. The Grievant is returned to his employment with the Company with seniority and benefits unimpaired but without back pay. The period of July 7, 2010 through December 5, 2010 shall be reflected as a disciplinary suspension without pay.

Since this is a split decision, it is ordered that the costs associated with this arbitration shall be shared equally between the Company and the Union.

Kathy Fragnoli, J.D.,
Arbitrator

Issue

The issue to be decided in the case is whether the Termination letter dated July 13, 2010 was issued to the Grievant for just cause and, if not, what the remedy should be.

Background

[redacted] ("Grievant") was hired by Southwest Airlines ("Company") on August 27, 2007. Prior to his employment with the Company, the Grievant was honorably retired from the United States Marine Corps on December 1, 2002 while holding the rank of First Sergeant. At the time of the events leading to this arbitration, he was assigned to work as a provisioning employee at Sky Harbor Airport in Phoenix, AZ, where he was required to drive provisioning trucks on the airport ramp in order to replenish the supply of snacks, drinks and non-perishable items provided to customers during flights.

On July 6, 2010, the Grievant was involved in an incident on the airport ramp in which the provisioning truck he was driving collided with an aircraft parked at the gate resulting in severe damage to the trailing edge of the aircraft wing and damage to the provisioning truck safety rail.

On July 13 2010, a letter titled *Results of Fact Finding Meeting - Termination* was issued to the Grievant, which states in pertinent part:

> A fact-finding meeting was held on July 9, 2010 to discuss the aircraft damage incident that you were involved with on July 6, 2010. In attendance at the meeting were you, TWU Representatives [redacted] and [redacted], me and Assistant Provisioning Manager Trey Newman.
>
> During the meeting, you stated that on July 6, you had completed working the aft Galley at C-13 and were waiting for the aircraft at C-11 to clear. You proceeded left toward C-17 on your way back to the warehouse. At that time, you noticed an aircraft pushing from C-19. You saw what you believed to be a clear path between C-17 and C-19 and drove toward an opening. You stated that baggage carts were pulled in your way, and you veered left to avoid them. You were driving in the safety zone and hit an aircraft wing.
>
> [redacted], your actions on this day were clearly unsafe and in blatant violation of Company safety rules. You should not have been driving in the safety zone or have driven so close to an aircraft wing. You jeopardized your own personal safety and the safety of those servicing and boarding the aircraft, and you caused a negative financial impact on our Company.

Based on the information discussed at the fact-finding meeting, I have determined that your actions violated the Provisioning Manual (Safety, Driving Rules, and Policies), and the Basic Principles of Conduct, including but not limited to the following:

- The driver of any vehicle is responsible for its safe operation.
- When driving past the aircraft, clear the wings by at least 10 feet and the tail section by at least 50 feet.
- Drive defensively and be aware of your surroundings.

12. Abuse or destruction of Company property.
14. Performing your job in a careless, negligent, or unsatisfactory manner.
27. Failure to comply with safety rules and regulations.

Therefore, your employment with Southwest Airlines is terminated effective immediately.

A timely grievance was filed protesting the Grievant's termination and having been unable to resolve the matter during earlier steps of the grievance procedure, the issue was advanced to arbitration for final and binding resolution. The Grievant was fully and fairly represented by Transport Workers Union, Local 555, he was present during the arbitration hearing and he testified on his own behalf. Both the Union and the Company presented documentary evidence and sworn testimony in support of their respective positions and at the conclusion of the arbitration hearing, the parties agreed to the submission of post-hearing briefs not later than November 5, 2010; after which the record was closed.

Relevant Contract Provisions

Article 1 - Purpose of Agreement

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.

Article 20 - Grievance/System Boards/Arbitration, Discharge and Discipline

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.

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

G. Fact-Finding Procedures. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures:

1. No Suspension. In circumstances where no suspension is imposed:
    a. The Employee shall be advised, in writing, with a copy to the local representative of the Union, of the nature of the factfinding not later than ten (10) calendar days from the time the Company becomes aware of the incident concerning which the factfinding shall be convened.
    b. The fact-finding shall be held within five (5) calendar days from the date such notice is given to the Employee and the local representative of the Union; and
    c. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the factfinding, and a copy of the decision shall be delivered to the local representative of the Union.

H. Other Disciplinary Procedures. Letters of warning or reprimand not involving loss of pay or discharge shall be issued no later than five (5) working days from the time the Company has full knowledge of the incident.

I. Retention. All letters of reprimand or warning shall be removed from an Employee's file after twelve (12) months have elapsed from the date of such letter.

L. Interpretation/Application of Agreement.

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.

Provisioning Manual – Section 3 – 1

Driving and Safety

Driving On The Ramp

1. Aircraft, emergency vehicles, and pedestrians have the right-of-way at all times. Never move equipment across the path of boarding or deplaning passengers or taxiing aircraft.

6. Drive defensively and be aware of your surroundings.

8. When driving past an aircraft, clear the wings by at least 10 feet and tail section by at least 50 feet

Provisioning Manual – Section 3 - 6

In the event of an accident, no matter how minor, do not move the vehicle. Immediately notify your Manager and/or Supervisor

Provisioning Manual - Section 12 - 1

Safety

Safety is the very foundation of the aviation industry. Our number one priority is to ensure the personal safety and well being of each and every Southwest Airlines' Customer and Employee. Southwest Airlines' Policy can be stated very simply: "Safety Is No Accident." This means no accident, regardless of the size or impact. Our objective is to achieve a zero-accident rate.

Positive and responsible action is required of every Employee in order to achieve our objective. If accidents and incidents are eliminated, there will be no injuries, Employee suffering, lost time, equipment damage or financial loss. All the benefits of a safe operation will accrue to Southwest Airlines, our Customers, and our Employees.

Safety Responsibilities

Employee Responsibility

All Employees shall comply with applicable safety rules and wear safety equipment when required, which includes hearing protection and Company issued High Visibility Vests. In addition, Employees must promptly report malfunctioning or inoperative equipment to their Supervisors and/or Managers.

Safety - Provisioning Manual Section 12-5

- The driver of any vehicle is responsible for its safe operation.
- Reckless and abusive operation of vehicles or equipment will not be tolerated. Any Employees violating this rule are subject to disciplinary action.
- When operating a vehicle, maintain a 25-foot minimum separation between you and the vehicle ahead of you.
- Do not drive or park equipment under any part of an aircraft. The only exception to this rule is during lavatory service.
- When driving past aircraft, clear the wings and tail section by at least ten (10) feet.

Provisioning Manual - Company Policies & Procedures

Basic Principles of Conduct

Each Employee is expected to be familiar with and adhere to all Company policies and procedures. Any violation of the following will be grounds for disciplinary action. Discipline may range from a reprimand to discharge, depending on the particular violation and the circumstances. The following list is meant to be representative only and in no way is it intended to be a complete list of all violations of our Basic Principles of Conduct.

12. Abuse or destruction of Company property.

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

27. Failure to comply with safety rules or regulations.

Position of the Company

The Company explained that provisioning agents are governed by the written rules and procedures outlined in the Provisioning Manual. The Company asserted that the Provisioning Manual includes the Provisioning Customer Service Principles and Practices as well as the Basic Principles of Conduct, which outline expected employee behavior as well as the potential consequences for failure to comply. The Company pointed out that the Provisioning Manual is published to provisioning agents and emphasized that the Grievant acknowledged his receipt of the Basic Principles of Conduct as recently as January 24, 2010.

The Company argued that on the date in question while the Grievant was returning to the provisioning warehouse to restock his vehicle, he chose to pursue an improper route rather than

utilizing the approved and recommended service road to return to the warehouse. According to the Company, the Grievant unsafely drove his vehicle inside the safety zone of an aircraft parked at Gate C-17 and collided with the outboard trailing edge of the aircraft wing, causing extensive damage to the aircraft and to the provisioning truck safety rail.

The Company acknowledged the Grievant's claim that a ramp agent towing baggage carts had crossed in front of his provisioning truck and stopped directly in his path making it necessary for the Grievant to veer his vehicle that ultimately caused the collision with the aircraft wing. The Company pointed out, however, that neither the Grievant nor the Union was ever able to identify the ramp agent who had allegedly pulled the baggage carts in front of the Grievant's vehicle. At the same time, the Company also pointed out that the Grievant admitted the route he took on the date in question was not the safest route and "but for" his decision to take that unsafe route, the accident would not have occurred.

According to the Company, this incident was not the first time the Grievant had been counseled regarding his failure to adhere to safe driving rules. As evidence of that prior counseling, the Company pointed to several performance reviews that had been conducted with the Grievant during 2007, 2008 and 2009 during which the Grievant had been reminded to work safely on and off the flight line.

The Company maintained that a proper fact-finding meeting had been conducted with the Grievant while his Union Representative was present and that the Grievant was provided an opportunity to explain his version of the facts. The Company argued that during the fact-finding meeting, the Grievant admitted the vehicle he was driving on the date in question had collided with the aircraft wing and he also acknowledged that he should have taken a safer route.

In conclusion, the Company argued that the Grievant failed to adhere to established safety rules regarding the aircraft safety zone when he drove too close to the aircraft. In addition, the Company asserted that the Grievant was travelling at an excessive speed for the existing conditions that contributed to the accident. The Company insisted that the Grievant was negligent in his actions on the date in question and that the Termination Notice dated July 13, 2010 was issued to him for just cause. For those reasons, the Company urged that the grievance be denied in its entirety.

Position of the Union

The Union challenged the Company's assertion that the Grievant could have returned to the provisioning facility using the North Service Road because no such service road exists that leads directly from Gate C-13 to the provisioning facility. At the same time, the Union pointed to the bulletin titled "Service Road Hazard" and argued that the use of the North Service Road itself presented a driving hazard. The Union maintained that the route taken by the Grievant on the date in question was the same route commonly used by other employees to reach the provisioning warehouse and that the Grievant should not have been faulted for taking that route.

The Union pointed to other instances in which Southwest employees have collided with Company aircraft causing aircraft damage and have not been terminated as a result. According to the Union, accidents resulting in aircraft damage have occurred in the past as evidenced by a Company bulletin titled *Provisioning Operational Update, August 23-29* which documented that 45 aircraft damage accidents involving Provisioning Department employees had occurred since 2007. The Union asserted that incidents of first time aircraft damage do not normally result in termination of Southwest Airlines employees and since this was the first incident of the Grievant having collided with a Company aircraft, likewise he should not have been terminated as a result.

The Union acknowledged that the Grievant's Performance Evaluations contained some ratings of "N - Needs Improvement" with some vague comments concerning his need to be concerned about safety. However, the Union argued that a rating of "N" is considered an acceptable rating by the Company and does not constitute disciplinary action. In addition, the Union emphasized that the Grievant's file does not contain any active element of discipline.

In conclusion, the Union did not dispute that the Grievant was involved in an accident involving aircraft damage on the date in question. However, the Union maintained that Company policies provide that discipline for an incident such as this could range from a reprimand to termination and argued that in view of the circumstances in this particular case, the penalty of termination was too severe.

The Union pointed out that the Grievant immediately reported the accident to his supervisor and he made no attempt to cover up his involvement. Therefore, the Union insisted that just cause did not exist to issue to the Grievant the notice of termination dated July 13, 2010 and it urged that the grievance be sustained and that the Grievant be made whole in all respects.

Discussion

Was the Grievant responsible for the collision and aircraft damage on the date in question?

The evidence established that on July 6, 2010, the Grievant had completed his provisioning assignment at the aircraft parked on Gate C-17 and drove his provisioning truck in the direction of the provisioning warehouse in order to restock his provisioning truck with soft drinks and snacks. The evidence also established that while the Grievant was driving between the right wing tip of the aircraft parked on Gate C-17 and the left wing tip of the aircraft parked on Gate C-19, he allowed his provisioning truck to enter the safety zone of the aircraft parked on Gate C-17, whereupon the left vertical safety rail of the provisioning truck struck the right wing trailing edge of the aircraft parked on that gate.

During the arbitration, the Grievant did not dispute that he was driving the provisioning truck when it collided with the aircraft. He also did not dispute that the collision caused severe damage to the right outboard wing trailing edge of the aircraft as well as incidental damage to the vertical safety railing on the provisioning truck.

Based on this information, the evidence clearly established that the Grievant was responsible for the collision and aircraft damage on the date in question.

Did any mitigating circumstances exist that contributed to the collision?

At the Company's investigation and during the arbitration hearing, the Grievant acknowledged that he was driving the provisioning truck between the aircraft parked on Gates C-17 and C-19 and he insisted that his truck was outside the safety zone. However, according to the Grievant, another Southwest employee drove a tug pulling two baggage carts directly in front of his truck and stopped with one of the baggage carts blocking the Grievant's right-of-way. The Grievant maintained that he was required to veer his truck to the left in order to avoid striking the baggage cart and when he veered, his truck collided with the aircraft wing.

Provisioning Manager Steve Land testified during the arbitration hearing that he had considered the Grievant's explanation about the baggage and he explained that he was skeptical that the accident could have been caused by another employee pulling the baggage cart in front of the Grievant's vehicle as the Grievant had claimed. Mr. Land explained that the Grievant had called him promptly after the accident had occurred and that he (Mr. Land) had reported to the scene of the accident within 10 minutes. According to Mr. Land, the Grievant's explanation did not seem logical for the reason that the space around the aircraft would not have allowed for the baggage

carts to have been moved into the Grievant's path as the Grievant had claimed. In addition, according to Mr. Land, he had asked the Grievant to identify the employee who had pulled the baggage carts in front of his truck and the Grievant could not identify that employee.

During cross-examination, the Grievant stated that his truck was traveling at three or four mph when the baggage carts were pulled 10 to 15 feet in front of his truck. Although the Grievant maintained that he was forced to veer to the left in order to avoid striking the baggage cart, he acknowledged that he had not applied the brakes when he saw the baggage cart. In addition, the Grievant acknowledged that he had not attempted to speak to the driver pulling the baggage carts for the reason that the driver had disconnected the baggage carts and pulled them away by hand.

After considering the Grievant's explanation of the circumstances, as the Company had not been persuaded, I also am not persuaded that the events occurred as the Grievant had claimed. The ramp area is an open area and had the other employee pulled in front of the Grievant's truck as the Grievant claimed, he should have seen the tug and baggage carts moving in his direction and anticipated the obstruction. Also, as thoroughly briefed by the Company, if the Grievant was traveling at three or four mph as he had claimed, he would have had plenty of time to stop his truck without the necessity of veering into the aircraft safety zone. Further, the Grievant candidly acknowledged during cross-examination that he had not even attempted to apply his brakes, which leads to the suspicion that he carelessly drove directly into the parked aircraft rather than being forced to veer his truck in reaction to an emergency situation. Of further consideration is the fact that neither the Grievant nor the Union was able to provide the name of the tug driver or any other witness who could support the Grievant's claim that the baggage cart had been pulled directly in front of his vehicle.

In view of the above, there is no evidence to support a finding that any mitigating circumstances existed that contributed to the collision.

Was the Grievant subjected to Disparate Treatment?

Grievance Specialist Curtis Clevenger testified on the Grievant's behalf and stated that in preparation for the arbitration hearing, he had researched past employee disciplinary action that had been assessed to Southwest employees who had been involved in aircraft accidents during the period of 2004 through July 2010. According to Mr. Clevenger, a large number of grievances had been filed by TWU represented employees who had received disciplinary action for aircraft damage incidents during that period and he was attempting to determine the normal disciplinary action taken against those employees. Mr. Clevenger stated his research had

revealed that although Southwest employees had received disciplinary action for such incidents during that period, they were not normally terminated. In support of Mr. Clevenger's testimony, the Union presented 46 separate disciplinary letters that had been issued during the period of 2005 through July 2010 which are summarized as follows:

DATE	EMPLOYEE	ACFT. DAMAGE?	RESULT
01/14/2005	[redacted]	Yes	Final Warning – 3-Day Suspension
01/14/2005		Yes	Final Warning - 3-Day Suspension.
01/26/2005		Yes	Final Warning – 5 Day Suspension
04/01/2005		Yes	Final Warning – 3 Day Suspension
05/25/2005		Yes	Final Warning – 3 Day Suspension
06/01/2005		Yes	Final Warning
08/08/2005		Yes	Final Warning – 3 Day Suspension
08/24/2005		Yes	Final Warning – 2-Day Suspension
10/26/2005		Yes	Final Warning – 3-Day Suspension
10/26/2005		Yes	Letter of Instruction
01/20/2006		Yes	Letter of Warning
03/08/2006		Yes	Letter of Warning
04/13/2006		Yes	Final Warning
05/08/2006		Yes	Final Warning
11/29/2006		Yes	Termination
03/01/2007		Yes	Letter of Warning
12/14/2007		Yes	Termination – Failed to Report
12/29/2007		Yes	Letter of Warning
12/14/2007		Yes	Termination – Failed to Report
12/14/2007		Yes	Termination – Failed to Report
01/29/2008		Yes	Letter of Warning
02/06/2008		Yes	Termination
04/29/2008		Yes	Final Warning – 3-Day Suspension
05/13/2008		Yes	Letter of Instruction
07/11/2008		Yes	Final Warning
08/14/2008		Yes	Letter of Warning
10/03/2008		Yes	Final Warning
10/06/2008		Yes	Letter of Warning
10/24/2008		Yes	Letter of Warning
11/21/2008		Yes	Final Warning – 3-Day Suspension
03/18/2009		Yes	Letter of Warning
05/21/2009		Yes	Letter of Warning
05/21/2009		Yes	Letter of Warning
07/23/2009		Yes	Final Warning – 3-Day Suspension
07/27/2009		Yes	Final Warning – 1-Day Suspension
08/12/2009		Yes	Letter of Instruction
11/05/2009		Yes	Final Warning
11/05/2009		Yes	Letter of Warning

DATE	EMPLOYEE	ACFT. DAMAGE?	RESULT
11/09/2009	[redacted]	Yes	Letter of Warning
11/18/2009		Yes	Letter of Warning
11/18/2009		Yes	Letter of Warning
11/27/2009		Yes	Final Warning
12/04/2009		Yes	Letter of Instruction
12/22/2009		Yes	Final Warning
03/23/2010		Yes	Letter of Warning
7/12/2010		Yes	Final Warning

Mr. Clevenger explained that the subject 46 disciplinary letters had come into the Union's possession because the affected employees were Union members who had filed grievances over the disciplinary actions. Mr. Clevenger also testified that he was aware of many other Southwest employees who had been involved in aircraft damage accidents who were not terminated as a result. As an example, Mr. Clevenger described an incident in which two Company supervisors violated Company rules when they towed an aircraft without wing walkers and the wing tip of the aircraft being moved collided with the fuselage tail of another aircraft causing extremely severe aircraft damage to both aircraft. Mr. Clevenger acknowledged that he did not know the degree of disciplinary action, if any, that may have been assessed to those supervisors but he testified persuasively, and the Company did not dispute, that neither of them had been terminated as a result.

During cross-examination, Mr. Clevenger acknowledged that to his knowledge, 11 Southwest employees had been terminated as the result of their involvement in aircraft damage incidents during the period of 2004 through 2010. At the same time, Mr. Clevenger explained that six of the employees had been terminated because they had failed to report the aircraft damage. He also stated persuasively, and the Company did not dispute, that 9 of those 11 employees had subsequently been reinstated. Further, Mr. Clevenger explained that of the two employees who had remained terminated, one employee had an extremely poor record with many elements of disciplinary action in her file and the other was a probationary employee.

During his testimony, the Grievant acknowledged that he had previously been counseled concerning the issue of safety. However, he maintained that none of those counseling sessions had involved aircraft damage and none had resulted in disciplinary action.

The Company pointed out that many of the cases cited above involve employees in job categories other than the Grievant's job category of Provisioning Agent. Therefore, the Company argued that the Grievant should only be compared with other Provisioning Agents and

not with employees of other job categories. In support of its argument, the Company offered *Southwest Airlines/TWU Local 555 case #LAS-P-0659/06, [redacted], 2006,* which was heard before Arbitrator Daniel F. Jennings. In his award, Arbitrator Jennings had this to say on that subject:

> Turning to the instant case, the Company testified that Provisioning Agents have different responsibilities, drive different trucks, have different Supervisors, and different work rules than do Ramp Agents. Thus, based on that testimony and following the logic of Arbitrator Nicolau in *Northwest Airlines*, 89 LA 943, that "different circumstances permit different treatment," this Arbitrator is convinced that Provisioning Agents are in a different category than Ramp Agents. As such, the discipline meted to the Grievant is to be compared to the discipline meted to other Provisioning Agents.

This Arbitrator generally agrees with the Company's argument and the reasoning of Arbitrators Nicolau and Jennings that in most cases, different circumstances permit different treatment. However, in view of the enormous volume of previous disciplinary notices submitted by the Union in the instant case, this Arbitrator cannot ignore the overwhelming evidence which shows that the Company rarely terminates employees who are involved in aircraft damage incidents, regardless of their job category.

In view of the undisputed evidence and testimony as outlined above, the evidence clearly establishes that the Grievant was subjected to disparate treatment when his employment was terminated effective July 13, 2000.

Did Just Cause exist to issue to the Grievant the Notice Of Termination dated July 13, 2010?

Article 20.A of the Collective Bargaining Agreement provides that "No employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause." Said differently, the Collective Bargaining Agreement expressed the parties' intent that the Company would not discipline or discharge Bargaining Unit employees without first establishing a "fair reason" for taking such action. In the well known and respected arbitration award between *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 cause 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?

In the instant case, with regard to questions number one and two, the evidence made clear and the Union did not dispute that the Company has established rules and policies requiring all employees to work carefully and avoid accidents. At the same time, the Union did not challenge the reasonableness for 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 answer to questions one and two is clearly a "yes."

With regard to questions number 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 answer to questions three and four is undoubtedly a "yes."

Question number five deals with proof of the Grievant's guilt with regard to his actions. The evidence and testimony clearly established, and the Grievant did not deny, that the provisioning

truck he was driving on the date in question collided with the trailing edge of the right wing causing substantial damage to the aircraft wing as well as to the provisioning truck guard rail. Accordingly, the answer to question number five is also a "yes."

Question number six dealing with equality of treatment addresses the issue of disparate treatment. As previously discussed, the evidence and testimony provided during the arbitration hearing clearly established that other Southwest employees have previously been involved in incidents involving aircraft damage and, with the exception of two employees, those other employees were assessed a penalty of less than termination or, in the instance of nine other similarly situated Southwest employees, their terminations were reversed. Since no arbitration awards were submitted to show that any of those nine terminations were reversed as the result of an arbitrator's decision, I am persuaded that the Company voluntarily reversed those terminations. Whether that is true or not, the answer to question number six must be a "no."

Question number 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. It goes without saying that activities involving heavy equipment and aircraft operating on the airport ramp require a constant state of heightened attention. Moreover, any act of carelessness or inattention to the activities taking place on the ramp can be terribly unforgiving with devastating consequences. Therefore, it cannot be said that severe disciplinary action was not warranted as a consequence of the Grievant's actions on the date in question. Further, although the Grievant's file contains no element of active discipline, the evidence established that he had been counseled on numerous occasions concerning the necessity to work safely. Accordingly, absent the "no" answer to question number six, the answer to question number seven would be a "yes."

It is clear from the evidence and testimony that the collision between the provisioning truck and the aircraft created a dangerous situation and disrupted the Company's service. The collision also caused substantial damage to the aircraft as well as the provisioning truck that resulted in substantial costs to the Company in the form of repair costs and the loss of equipment service while the aircraft was being repaired.

There was no dispute that the Grievant promptly reported the accident to his supervisor and accepted some responsibility for the accident, which goes in his favor. On the other hand, however, there was also no dispute that the Grievant was aware of the Company's rules and policies concerning safety and that he deliberately moved the provisioning truck after the collision, which violated the stipulations of the Provisioning Manual. As a consequence, his

movement of the truck interfered with the Company's investigation and made it impossible to accurately determine the veracity of his dubious claim that he had been driving outside the safety zone and was forced to veer his truck to avoid hitting a baggage cart.

In the previously cited award by Arbitrator Daugherty, Mr. Daugherty further discussed the importance of evaluating the answers to the seven tests this way:

> The answers to the questions in any particular case are to be found in the evidence presented to the arbitrator of the hearing thereon. Frequently, of course, the facts are such that the guidelines cannot be applied with precision. Moreover, occasionally, in some particular case an arbitrator may find one or more "no" answers so weak and the other, "yes" answers so strong that he may properly, without any "political" or spineless intent to "split the difference" between the opposing positions of the parties, find that the correct decision is to "chastise", both the Company and the disciplined employee by decreasing but not nullifying the degree of discipline imposed by the Company, e.g., by reinstating a discharged employee without back pay.

In view of the foregoing, the evidence supports a finding that the instant case falls within the same category as outlined by Arbitrator Daugherty in the previous paragraph above. Therefore, I find that the Grievant's actions constituted just cause for the Company to issue to him severe disciplinary action. However, in view of the disparate treatment to which the Grievant was subjected, the evidence in this particular case supports a finding that the penalty of termination is too severe.

Award

The grievance is granted in part and denied in part. The Grievant is returned to his employment with the Company with seniority and benefits unimpaired but without back pay. The period of July 7, 2010 through December 5, 2010 shall be reflected as a disciplinary suspension without pay.

Since this is a split decision, it is ordered that the costs associated with this arbitration shall be shared equally between the Company and the Union.