

<u>IN THE MATTER OF ARBITRATION</u>		
BETWEEN)	
)	
SOUTHWEST AIRLINES COMPANY)	
(Company))	
)	
-and-)	PHX-R-0302-03
)	██████████
TRANSIT WORKERS UNION)	Termination
LOCAL 555)	
(Union))	
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Arbitrator: Diane Dunham Massey mutually selected by the Parties.

HEARING

Hearings were held in the above matter on October 10 and 20, 2003, at the Holiday Inn Select in Dallas, Texas. The witnesses were sworn and excluded from the Hearing. Post-hearing briefs were received by the Arbitrator by November 24, 2003. The Parties were given full opportunity to present testimony and evidence at the Hearing.

APPEARANCES

For the Union

Jerry McCrummen	Union Advocate
██████████	Ramp Agent, witness
██████████	Grievant, Ramp Agent, witness
Rick Soliz	Union Representative, Ramp Agt, witness
██████████	Operations Agent, witness
██████████	Ramp Agent, witness
██████████	Ramp Agent, witness
Mark Waters	District Representative, witness
██████████	Ramp Agent, witness
Charles Cere	Union Vice President, witness
██████████	Ramp Agent, witness
██████████	Ramp Agent, witness
Richard Gano	District Representative
Patti Adams	TWU, District Rep., witness
Gary Drummond	Int'l TWU Rep., Advocate

APPEARANCES (continued)

For the Company

Keila Selders	Attorney for the Company
Dave Kissman	Grand Oper. Reg. Dir., PHX SWA, witness
Tricia Houser	SWA Paralegal
Albert Stephens	Station Manager PHX, witness
Harry Hawkins	Station Manager PHX, witness
Jason Lee	Supervisor PHX, witness
Johnny Innamarato	Provisioning Agent PHX, witness
Ruthie Chancellor	Sr. Dir. Empl. Resources, witness

ISSUE

At the beginning of the Hearing, the Parties agreed to the following statement of the issue:

Was the Grievant, [REDACTED], terminated effective July 14, 2003 for just cause? If not, what is the appropriate remedy?

BACKGROUND

The Grievant was a Ramp Agent at the Phoenix Station. He was sent a Memorandum, dated July 14, 2003, from Phoenix Station Manager, Al Stephens. It reads in relevant part:

A Fact-Finding Meeting was held in my office on Thursday, July 10, 2003 at 1345 hours, regarding your behavior toward Supervisor Jason Lee.

It was established that you were agitated with Supervisor Lee at the onset of your interaction on July 8, 2003. Supervisor Crowder heard you make disparaging remarks about Supervisor Lee. These remarks were laced with profanity. When Supervisor Lee did not perform to your satisfaction, you began to verbally assault him. Your behavior was observed by others, including Ramp Agent [REDACTED], who you told "Tell that Mother Fucker, this is an eight cart flight". This reference was to Supervisor Lee. Your tirade included slamming equipment around and when you said to Supervisor Lee, "You can't handle anything, you lazy fuckin piece of shit", he told you that you were out of line and that your (sic) were to leave the zone. You questioned his authority, and he reiterated to you to leave the zone. You left, however,

you returned to the zone on two occasions, even after you were given a directive to leave.

I asked you if you had used profanity, and you stated that you “never use profanity,” because you made a deal with Dave Kissman a year and half ago that you would not cuss anymore at work and that you have not cussed. [REDACTED], three individuals, including Supervisor Lee heard you using profanity. You have provided conflicting statements regarding your behavior toward Supervisor Lee. You were insubordinate when you returned to the zone after Supervisor Lee told you to leave. You have been counseled in the past regarding incidents of this nature. Your evaluation on July 22, 2002 by Supervisor Hawkins was succinct as to the consequences of continued inappropriate behavior.

[REDACTED], it is apparent to me that you are unwilling or unable to control your anger and this recent profanity laced tirade toward Jason is symptomatic of that. It is a clear violation of the following Basic Principles of Conduct:

- #8 Restricting work, using threatening or abusive language, intimidating, coercing or interfering with fellow Employees or their work...
- #15. Insubordinate conduct or refusing to follow a work order or any act of insubordination...
- #26. Fighting, abusive and disrespectful behavior to a fellow SWA Employee or Customer...

This unacceptable behavior was brought to your attention in the past and you were advised of the consequences if it continued. Your employment with Southwest Airlines is hereby terminated effective immediately.

The Union grieved the discharge of the Grievant claiming that it was without just cause. The grievance was appropriately processed and remains unresolved. The Parties stipulated that the matter is properly before this Arbitrator for Opinion and Award. The Parties also agreed to allow the Arbitrator to retain jurisdiction to interpret the remedy if one is so ordered.

RELEVANT PROVISIONS OF THE AGREEMENT

ARTICLE TWENTY GRIEVANCE / SYSTEM BOARD / ARBITRATION DISCHARGE and DISCIPLINE

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.

5. System Board/Function and Jurisdiction. The functions and jurisdiction of the Board shall be fixed and limited by this Agreement. It shall have no power to change, add to, or delete its terms. It shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Board which is not within its 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 board'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 Board finds that the penalty assessed by the company was arbitrary or unreasonable, it may modify or remove that penalty.

POSITION OF THE COMPANY

The Company makes the following arguments and contentions in support of its position:

The Company has met its burden of showing just cause for the termination of the Grievant. The Grievant engaged in serious misconduct when, unprovoked and in the presence of other employees and Company customers, he was insubordinate, verbally abusive, threatening, disrespectful and intimidating toward a Supervisor.

The Grievant worked as a Ramp Agent in the Ground Operations Department at the Phoenix Station. He was also an alternate Union Representative. All Ramp Agents are well aware of, and are subject to, the basic principles of conduct found in the Company's Ground Operations Manual. Employees recognize that violation of those principles will be grounds for disciplinary action, up to and including discharge. Further, the Company has a "Policy Concerning Harassment or Discrimination", which protects employees from an environment of hostile, threatening, or intimidating behavior. The

Company also has a Mission Statement, which is an intrinsic part of Southwest's corporate culture. The Grievant testified that he was aware of all these applicable policies.

On July 8, 2003, the Grievant worked with Ramp Supervisor Jason Lee. The Grievant and Supervisor Lee had worked together only one other time before, on July 7, 2003. Supervisor Lee had recently transferred into the position of Supervisor in the Ground Operations Department.

On the day in question, Supervisor Lee offered his assistance to the Grievant with unloading the flight at Gate C-19. The Grievant was responsible for running the bags. The Grievant refused his offer and told Supervisor Lee to help out at Gate C-17 instead. The Grievant advised Supervisor Lee that eight (8) baggage carts were needed to unload the rear of the aircraft. Supervisor Lee was able to locate only five (5) of the eight (8) needed carts. Thereafter, Supervisor Lee noticed the Grievant driving around in circles on a tug, screaming at the top of his lungs, "I told him eight (8) carts." Later, Ramp Agent [REDACTED] advised Lee that the Grievant had told him to tell Lee that eight (8) baggage carts were needed for the flight.¹ Ramp Agent [REDACTED] secured the three (3) additional carts.

The Grievant started telling Supervisor Lee how worthless he was because he had to send someone else to find the carts. At the time, the Grievant was slamming the baggage carts around that Lee had set up. It appeared to Supervisor Lee that the matter was beginning to escalate. Then Supervisor Lee advised the Grievant that he would reposition the baggage carts himself to which the Grievant responded to Lee, "You can't handle anything you lazy fucking piece of shit!" Supervisor Lee responded to the Grievant that he was out of line and instructed the Grievant to leave the gate. The Grievant responded, "You can't do that." Lee advised the Grievant that he was the Supervisor working the gate, and was asking him to leave the gate. The Grievant left and Supervisor Lee immediately called for a Manager.

A few minutes later, the Grievant returned to the gate. According to the Grievant, he had returned to talk to Ramp Agent [REDACTED], who was working in the rear of the bin in the aircraft. When Supervisor Lee observed that the Grievant had

returned to the gate, he again instructed the Grievant to leave the area. The Grievant responded that if he left, he was not coming back. The Grievant left again. A few minutes later, the Grievant returned to the gate a third time. The Grievant was acting the angriest and out of control at this time. The Grievant was on a tug, drove up to the gate, jumped off the tug, came up behind Supervisor Lee and immediately got into his face. The Grievant started pointing his finger in Lee's face and began screaming obscenities at him. The Grievant also told Supervisor Lee that he was going to write him up for creating an unsafe work environment.² Supervisor Lee told the Grievant for the third time to leave the gate area, after telling the Grievant "You do what you have got to do." Supervisor Lee stated that the Grievant's behavior left him feeling insulted, threatened, intimidated and disrespected.

Another employee, Provisioning Agent [REDACTED], observed the incident. Employee Innamarato observed the Grievant walk away from Lee then return using "a lot of vocal cuss words," like "mother fucker." He also recalled hearing the Grievant say, "I am not going to fucking do it." Employee [REDACTED] noted that the Grievant's actions and language were not normal for the work environment and that he was personally offended. [REDACTED] also stated that he believed there was going to be a physical altercation between the Grievant and Supervisor Lee based on the Grievant's behavior.

After the Grievant left the gate for the third time, he was suspended with pay, pending a fact-finding meeting, which convened on July 10, 2003. During the fact-finding meeting, the Grievant denied, among other things: 1) getting into Supervisor Lee's face; 2) putting his finger in Lee's face; 3) telling Ramp Agent [REDACTED], "Tell that mother fucker this is an eight cart flight"; and 4) screaming profanity and obscenities at Lee, including calling him a, "lazy piece of fucking shit." The Grievant stated that he would not have done those things because of a deal he had made earlier with Regional Director, Dave Kissman. Based on the findings of the investigation, it was recommended that the Grievant be terminated because of his unacceptable behavior. The Grievant was terminated based on the following considerations:

¹ Apparently, the Grievant told Ramp Agent [REDACTED], "Tell that mother fucker this is an eight cart flight."

1. The Grievant's unprovoked verbal abuse and insubordination was beyond reasonable or excusable.
2. There was no basis to mitigate or lessen the termination.
3. After another very similar incident, Regional Director Kissman had previously told the Grievant that his behavior on the Ramp was unacceptable and that he would not tolerate it again. The incident occurred in April 2002. At the time, the Grievant was also encouraged to seek anger management counseling, which he failed to do. Finally, Regional Director Kissman agreed with the termination action after considering information that Supervisor Harry Hawkins had shared with him in the recent past.

Discharge of the Grievant was appropriate and reasonable. The Grievant was repeatedly and persistently insubordinate. The Grievant knew, or should have known, based on Supervisor Lee's directives about how he was expected to conduct himself. The offense of insubordination is so serious that the Grievant should have had constructive knowledge that his disobedience would lead to the severest discipline.

The Grievant also verbally accosted, threatened and intimidated Supervisor Lee. The Grievant's verbal abuse of Supervisor Lee was deliberate, scurrilous vilification. It was intended to demean and degrade Lee. The Grievant's actions were as powerful a repudiation of Supervisor Lee's authority without the Grievant actually striking him. Nothing could be more disruptive to an orderly work place.

Moreover, the Grievant's misconduct certainly had a negative impact on the Company's public image. The Grievant's egregious behavior was in full view of customers on the plane. The Company acted appropriately to protect its customers, its employees and its reputation when it terminated the Grievant.

The CBA expressly limits the Arbitrator's authority in discharge cases. The CBA provides that the Arbitrator may only modify a penalty in the event that she finds the Company acted arbitrarily or unreasonably. That has not been the case here.

The Grievant was a Union Representative, and as such, he did not set an example for other employees. To allow the Grievant, as a Union Official, to behave in

² The Grievant is a Union Representative and he was allegedly acting in that capacity. However, the Grievant never wrote up Supervisor Lee for creating an unsafe work environment.

such a manner would be an invitation to anarchy. Thus, in that light, the Grievant's behavior becomes more egregious.

The Grievant's testimony concerning the actual event is not credible. The Grievant certainly has motivation to misrepresent what occurred. The weight of the evidence supports the Company's version of the event. Moreover, it is undisputed that the Grievant was dishonest during the fact-finding meeting. The Grievant admitted, at the Arbitration Hearing, saying things to Supervisor Lee that he vehemently denied saying at the fact-finding meeting.

The Grievant was not subjected to disparate treatment. Arbitrators have long held that a wide range of factors should be considered along with circumstances when determining the appropriate penalty for misconduct. The Union produced evidence of thirteen other incidents, which it claims supports the proof of disparate treatment. The facts in many cases are totally inapposite. In the remaining cases, there are significant distinctions between the situation involving the Grievant and the other noted individuals. The Grievant's case involved a combination of inappropriate behavior, repeated and persistent refusal to obey a reasonable Management directive, coupled with unprovoked, abusive, threatening, intimidating and disrespectful behavior and language toward a Supervisor. There is no other situation that is valid for a legitimate comparison. The Union has failed to carry its burden of establishing a case of disparate treatment.

The grievance should be denied. Discharge would have been the appropriate action even if the Grievant had been an exemplary employee. But he was not. The Grievant's prior performance evaluations were appropriately considered in reaching the conclusion that there was no basis for mitigating the penalty in this case. There was just cause for the discharge of the Grievant.

POSITION OF THE UNION

The Union makes the following arguments and contentions in support of its position:

On July 8, 2003, there was an incident between the Grievant, who was a Ramp Agent, and Ramp Supervisor, Jason Lee, where both parties used profanity. The incident took place in July, where the temperature in Phoenix was at least 108 degrees and under the stressful circumstances of having multiple flights down to be worked at the same time. The auxiliary power unit (APU) of the aircraft at the gate was running, which required the use of hearing protection. Hence, employees would need to yell in order to be heard over the noise. The incident took place on the flight line where, without a doubt, the heat and noise played a significant role in the exchange. There was no physical altercation between the Grievant and Supervisor Lee.

Jason Lee had been a Ramp Supervisor for less than two (2) months and he was inexperienced in dealing with the manual work environment of Ramp Agents. Supervisor Lee had worked in the Customer Service area prior to being transferred to the Ramp.

Supervisor Lee asked the Grievant to leave on three (3) different occasions and each time the Grievant complied with his request. When the Grievant returned to the gate both times, he returned in a business capacity. The first time he returned, he came back to speak to his Union Representative, not to Supervisor Lee. The second time he returned, he returned in the capacity of Union Representative to advise Supervisor Lee that he would be writing him up for creating an unsafe work environment. When Supervisor Lee made his request more direct, the Grievant left the gate areas and did not return.

After the incident, the Grievant was not afforded the opportunity to speak to Supervisor Lee about the incident and to offer an apology.

There was no discipline in the Grievant's file for the twelve (12) months prior to his termination. The Grievant had been disciplined in the past, but that discipline was no longer active. The Grievant had a very good attendance record at the time of his termination. Moreover, the Grievant had accommodation letters in his personnel file for situations, which occurred within the prior twelve (12) months to his termination.

The Company, in the past, has attempted to negotiate for a longer discipline retention provision. The CBA provides for a twelve (12) month retention. Regardless, the Company has not been successful in expanding that active period. It should not be allowed to do so in this case.

The Company points to the Grievant's evaluations as a consideration for determining not to mitigate his penalty. Yet, the Company did not follow the proper guidelines for the correct administration of the evaluation process. Any unsatisfactory rating in attitude should have required a ninety (90) day follow-up. The Grievant never received any follow-up on the evaluation. Moreover, evaluations are not to be used as basis for discipline. This has been an issue in the past.

The Company did not meet its burden of proving that the Grievant was insubordinate and acted in a threatening manner. The Company attempted to show through an inexperienced Ramp Supervisor and through a Provisioning Agent who was 30 feet in the air that a particular situation occurred. Provisioning Agent [REDACTED]'s version is less than credible. He seemed confused at the Hearing about what had occurred. Provisioning Agent [REDACTED] did not have the same recollection of the event as the Grievant and Supervisor Lee.

Supervisor Lee also indicated that it would be chaotic if the Grievant were allowed to return to work at the Ramp. Yet, there is no evidence that the Grievant ever threatened anyone at the Phoenix Station. Further, there were 158 Ramp Agents and one (1) Operations Agent in Phoenix that signed a support letter for the Grievant. There was no solicitation for signatures, but the 158 signatures confirmed that it was their desire to see the Grievant reinstated to his position because he was a reliable employee.

Company officials had a prior bias against the Grievant. Supervisor Harry Hawkins testified that he was afraid that if he wrote up one sentence against the Grievant that the Grievant would be fired by Management. Unfortunately, because of the manner that Supervisor Hawkins dealt with several alleged incidents, the Grievant had no opportunity to correct any alleged deficiencies that he may have had. The Company had not appropriately responded to behavior so that the Grievant could modify what was allegedly unacceptable in the Company's eye. Moreover, Supervisor Jason Lee had a preconceived notion of the Grievant's disposition, having spoken to other, more experienced, Ramp Supervisors. Supervisor Lee ignored the advice of more experienced Ramp Supervisors and chose to confront the Grievant. The first time that Supervisor Lee met the Grievant, the meeting was more of a challenge or confrontation than an introduction. The initial confrontation occurred on July 7, 2003,

which was the day before the incident, which precipitated the Grievant's termination. Supervisor Lee's confrontational behavior set the tone for the later contact, which occurred between the parties.

The Grievant did not direct any profanity at Supervisor Lee. The Grievant's words were not "fighting words" which were intended to incite a violent response. Moreover, his exchange was not personalized to Supervisor Lee. The Grievant did use profanity, but it was not directed at Supervisor Lee. If Supervisor Lee had not taken offense at the Grievant's handling of the carts as he was repositioning them, and did not ask the Grievant to leave the gate, there would never have been the verbal exchange between the two.

Supervisor Lee claimed he did not use any profanity during the exchange with the Grievant. This is not true. The Company's own witness, Provisioning Agent [REDACTED], testified that Supervisor Lee did, in fact, use profanity. In a write-up by Ramp Agent [REDACTED], he stated, "Jason (Supervisor Lee) then told me to tell (the Grievant) to "go find the other 3 fucking carts himself". Agent [REDACTED] responded by telling Supervisor Lee to tell that to the Grievant himself.

The use of profanity and colorful language on the ramp is the norm, not just by the Agents, but by also by the Supervisors and Managers as well. Shoptalk is possibly of a different variety and volume than in an office, and on the Ramp it is loud, colorful and, most of the time, profane.

The Grievant did not disobey an order, because an order was never given. The Grievant was asked to leave the zone three (3) times and each time he left promptly, in a timely manner and returned to the gate twice. There is a big difference between giving a direct order to leave and asking someone to leave. Supervisor Lee never advised the Grievant that he considered him to be insubordinate and he never told the Grievant not to return until the third time. It is imperative that an Agent realizes that he is being insubordinate and understands the consequences of his actions before Management can take the extreme step of termination.

The Grievant suffered disparate treatment. The Union demonstrated that Supervisors and Managers have also directed profanity at Agents whom they manage. Despite the fact that Managers and Supervisors should be held to a higher standard, the Union has shown many instances of unacceptable behavior and dialogue between

Management and Agents. Management employees have never been disciplined in the harsh manner in which the Grievant was disciplined for very similar kinds of conduct.

The Grievant's discharge does not satisfy the seven tests of just cause. The Company, by its own admission, considered improper factors, mental notes and prior outdated discipline in determining the level of discipline for the Grievant. The degree of discipline was totally inappropriate and excessive based on the nature and the circumstances of the Grievant's conduct. Moreover, the treatment was significantly different than the treatment of other Managers and Agents who were involved in similar transactions. The discipline may be warranted, but the punishment must fit the crime. No one else was hurt and there was no physical violence. There was a loud and angry exchange between two men while working in a hot and stressful work environment.

The grievance should be sustained. The Grievant should be reinstated to his former position immediately with full back pay, inclusive of all overtime for which he was eligible, with no loss of seniority and benefits. The Union requests the Grievant be made whole in all respects.

OPINION

THE FACTS

The weight of the evidence indicates:

At the time of his discharge, the Grievant had been a Ramp Agent at the Phoenix Station for about eight years. Ramp Agents are responsible for transporting cargo to and from the aircraft. The Grievant also served as an Alternate Union Representative.

Working as a Ramp Agent for the Company in Phoenix can be particularly demanding both physically and emotionally. The Phoenix Station handles more flights than any other Company Station. The Company has set a very high standard for rapid turnaround time; that is, the time it takes for a plane to pull into the gate, unload and reload passengers and baggage and pushes from the gate. The Company's average turnaround time is fifteen to twenty minutes which is approximately half of the industry average. The challenge of a Ramp Agent's job in Phoenix is further amplified by the

fact that Phoenix's summers are extremely hot and long. On the date of the incident, the temperature was 108 degrees. Communication in the gate area is difficult, because the aircraft auxiliary power unit (APU) is running and employees are wearing hearing protection so they must shout over the noise in order to be heard.

On July 8, 2003, Ramp Supervisor Jason Lee was the Grievant's Supervisor. The Grievant was responsible for running the cargo to other flights or to the terminal. Supervisor Lee had been on the Ramp for less than two months; previously, he had been a Customer Service Supervisor. The Grievant and Supervisor Lee had worked together once, on the day before the incident in question. Supervisor Lee was aware that the Grievant had spoken disparagingly of him in the break room. On the day before, Supervisor Lee introduced himself to the Grievant and requested that the Grievant come directly to him if he had anything to say about him.

On July 8th, Supervisor Lee approached the Grievant and offered to assist unloading the flight at Gate C-19. The Grievant told Supervisor Lee to help out at Gate C-17 instead.³ Supervisor Lee observed a lack of carts for Gate C-17, so he got on his tug and secured five more baggage carts for the rear of the aircraft. Supervisor Lee and Ramp Agent, [REDACTED], began unloading the flight. The Grievant came to Gate C-17, shouting "I told him eight carts!"⁴ At about the same time, the Grievant said to Ramp Agent [REDACTED], who was working the front bin, "Tell that mother fucker this is an eight cart flight." Ramp Agent [REDACTED] advised Supervisor Lee that it was an eight-cart flight. Supervisor Lee then asked Agent [REDACTED] to find three more baggage carts which [REDACTED] did.

The Grievant returned to the area. Supervisor Lee stated that the Grievant said "I told you eight carts" to which Lee responded, "then get me some more." Supervisor Lee claims that the Grievant said how worthless Lee was because he had to get someone else to find the remaining carts. The Grievant testified that he said, "All it takes is effort." Supervisor Lee told the Grievant that he would reposition the baggage carts himself, because the Grievant was slamming the carts around. At about that

³ Supervisor Lee claimed that the Grievant rejected his offer of help and "ordered him around" by telling him to go to Gate C-17. The Grievant asserted that he merely told Supervisor Lee to go to G-17 because he was trying to coordinate work.

⁴ Supervisor Lee asserts that the Grievant was driving around in circles on his tug and screaming at the top of his lungs.

point, the Grievant called Supervisor Lee “a lazy fucking piece of shit.”⁵ Supervisor Lee advised that the Grievant was out-of-line and asked him to leave. The Grievant responded “You can’t do that.” Supervisor Lee then told the Grievant that he was the Supervisor working the gate and that he was asking him to leave. The Grievant then left and Supervisor Lee radioed a Manager.

A few minutes later, the Grievant returned to the area. According to the Grievant, he was returning to the rear of the aircraft to speak to fellow Ramp Agent [REDACTED], who was his Union Representative. Supervisor Lee approached the Grievant and told him to leave the area and that he was delaying the flight more than it already had been delayed. According to Lee, the Grievant responded that if he left, he was not coming back. The Grievant left again.

The Grievant returned to the area a third time within a few minutes. This time, according to Supervisor Lee and Provisioning Agent [REDACTED], the Grievant appeared agitated when he jumped off of his tug and approached Supervisor Lee. In a heated manner, the Grievant, who apparently incorporated obscenities in his language, told Supervisor Lee that he was going to write him up for creating an unsafe working environment. Provisioning Agent [REDACTED] observed that the Grievant looked so agitated that he feared that a fight was going to ensue. Apparently, Supervisor Lee did not look as agitated although he commented, “I don’t have to put up with this bullshit.”⁶ Supervisor Lee then told the Grievant to do whatever he had to do and told the Grievant to leave. The Grievant left and did not come back. Thereafter, the Grievant was suspended and, later, after a fact-finding meeting, terminated.

THE ARBITRATOR’S OBSERVATIONS ABOUT THE INCIDENT

The Grievant’s conduct, as proven, was unacceptable. However, the Arbitrator is not in complete agreement with the Company’s analysis of the situation for several reasons.

⁵ The Grievant claims that he muttered it under his breath which is difficult to believe since Supervisor Lee heard his comment over the noise of the APU.

⁶ Supervisor Lee denies that he cursed, but Agent Innamorato testified that he did curse although not to the degree that the Grievant cursed. There is also hearsay evidence, which was not given full weight, that Supervisor Lee also used the term “fucking” when speaking to the Grievant.

The Environment

The Ramp at the Phoenix Station is a very unusual work environment for several reasons. The turnaround time mandates that Ramp Agents work fast and hard at times. The noise level from the APU's and hearing protection requires that employees must shout in order to communicate effectively. Ramp Agents must be physically assertive in order to endure the demands of the job. On the day in question, it was 108 degrees.⁷ Loading aircraft, under such conditions, must be particularly intense. There is not much of an emotional gap between shouting under pressure and/or frustration and shouting in unacceptable anger.

On one hand, such conditions require greater emphasis on personal control since the working conditions are so challenging. Yet, realistically, it appears that the volatile circumstances understandably spawn more eruptions, particularly in the heat and around aircraft when it is being loaded. These observations are not to be interpreted that the Arbitrator finds the Grievant's conduct to be acceptable. It absolutely was not. However, there are extenuating circumstances, which in the opinion of this Arbitrator, need to be considered.

⁷ The Arbitrator notes that almost every example of someone losing their composure occurred in the summer heat.

The Language of the Ramp

There is no doubt that the Grievant's language was unacceptable during his discussion with Supervisor Lee. But, even as the intensity of the working conditions is different on the Ramp, so is the language. The evidence indicates that the language on the Ramp is more "coarse" than it might be in almost any other working environment. Language used on the Ramp on a regular basis would be considered absolutely inappropriate in other Company operations such as Customer Service. The evidence indicates that Supervisor Lee responded, at one point, to the Grievant, "I don't need to take this bullshit." Yet, it seems that no one considered Supervisor Lee's response to be unacceptable or abnormal.

Thus, the Arbitrator considers the "language of the shop" to be an extenuating factor, not so much to find that the Grievant's utterances were acceptable, as to recognize that there is not so much distance between routine or accepted language and prohibited language on the Ramp.

Threats

The evidence indicates that the Grievant's responses to Supervisor Lee were not and should not have been considered as personally threatening. The Grievant is a big man and his presence alone could certainly be intimidating. Nonetheless, the Grievant said nothing, specifically, that should have caused Supervisor Lee to fear for his safe being. The Grievant's behavior was loud, heated and forceful, but the totality of the circumstances must be considered in evaluating the Grievant's behavior, i.e., the heat and noise. The Grievant did not speak any words or take any actions which could have been interpreted as inviting a physical altercation. Thus, the Arbitrator concludes that the Grievant did not, in effect, verbally or physically threaten Supervisor Lee.

Insubordination

The Grievant was charged with being insubordinate. If an employee is found to be insubordinate to a Supervisor's orders, then it can be a dischargeable offense. However, the Arbitrator does not find that to be the case here for several reasons.

Supervisor Lee's orders, i.e., to leave the work area, were not entirely clear. After the Grievant was told to leave the first time, he did not return the second time to engage in another discussion with Supervisor Lee. Instead, he came back to speak to his Union Representative, who was working at another location on the aircraft. There was no evidence, at that time, that the Grievant intended to continue the situation with Supervisor Lee. In fact, the evidence indicates that the Grievant was not near Lee and that Supervisor Lee approached the Grievant and asked him to leave.

Supervisor Lee acknowledged that the first two times that he instructed the Grievant to leave, he actually "asked" the Grievant to leave. The Grievant was never given an order and told the consequences for failing to follow the order. Nor was the Grievant ever advised by Supervisor Lee that Lee considered the Grievant to be insubordinate.

The third time that the Grievant returned, he did return to engage in conversation with Supervisor Lee. The Grievant claimed to be returning in his capacity as a Union Representative but the Arbitrator does not find that to be a reasonable explanation for his actions. The Grievant was agitated and disrespectful. Nonetheless, the Grievant again left as soon as Supervisor Lee told him to do so and he did not return.

Supervisor Lee's order was intrinsically vague. He simply told the Grievant to leave. It was a sound strategy to diffuse the situation, but one must wonder what he intended the Grievant to do and for how long. The work area was an area that he was assigned to for running bags. The Grievant certainly should have been concerned that someone might have construed his actions as walking away from his area of responsibility. A legitimate order might have been to tell the Grievant to go and wait in the office until further direction or to go to another gate and stay there until summoned.

In evaluating the totality of the circumstances, the Arbitrator does not conclude that the Grievant refused to follow Supervisor Lee's orders. The Grievant was not

given a clear order and not advised of the consequences of his failure to follow that order. Thus, the Arbitrator does not find the Grievant to be subordinate. That is not to say that the Arbitrator does not find that the Grievant was disrespectful and behaved inappropriately towards his Supervisor. However, the first and most serious charge, i.e., violation of Rule #15 – insubordinate conduct or refusing to follow a work order or any act of insubordination, is not supported by the evidence.

The Grievant's Misconduct

The Arbitrator finds that the Grievant used words which were inappropriate in an environment where inappropriate words are sometimes used. The Grievant yelled in an environment where yelling is normal. The Grievant lost his composure in the 108 degree heat. The Grievant did not, however, refuse an order. Regardless, there can be no doubt that the Grievant's behavior should be considered serious misconduct. Nonetheless, the Arbitrator is not persuaded that it is conduct that mandates summary discharge under the circumstances.

Dischargeable Offense

For reasons that will be discussed in greater detail later in this Opinion, it is important to determine whether the Grievant's misconduct would normally result in summary discharge. In other words, some misconduct is considered so egregious that employees should be discharged on the first offense, absent compelling mitigating circumstances. If an offense is worthy of summary discharge, then certain work history factors are relevant in determining the appropriate penalty. If the misconduct is less egregious then different factors are more relevant.

The Union offered multiple examples of employees or supervisors behaving inappropriately wherein those employees/supervisors were not discharged or even severely disciplined. The Union offered the evidence primarily to demonstrate that the Grievant was disparately treated. The Union's approach is certainly sound and logical. Regardless, the Arbitrator considered the evidence in order to glean how certain behavior was perceived by the Company and its normal response to that misconduct. If similar misconduct was met with severe discipline or discharge by the Company, then it is logical to conclude that the Grievant's actions were worthy of summary discharge.

On the other hand, if the Company responded with lesser penalties towards others in similar circumstances, then it would appear that the Company tends to progressively discipline Ramp Agents when they become heated and act inappropriately.

There was evidence of incidents involving other employees and supervisors. One Ramp Agent told a Supervisor to “shut the fuck up” in an office environment. He was given a three day suspension and a Letter of Warning. In another instance, both the Supervisor and Ramp Agent “cursed and hollered” at one another with the Supervisor making physical contact with the Agent. The Agent was escorted off the property by airport police. The evidence indicates that both received Letters of Warning for their misconduct. There was also evidence of two other Ramp Agents receiving Letters of Warning for using profanity towards supervisors.

There is evidence that Supervisors have pushed the boundaries of civility with Ramp Agents. One Supervisor told a group of Ramp Agents that “they were worthless mother fuckers” along with incorporating other unacceptable cursing to the group. Apparently, the Supervisor in question was issued a Letter of Warning. Another Manager initially used profanity and, later, apparently kicked a wall and slammed a door in front of several Ramp Agents in reaction to something that the Agents had done. He was neither terminated nor demoted for his behavior which the Ramp Agents complained about.

The Union also cited several incidents that occurred in the Phoenix Station. One Supervisor, apparently, went out of control, directing profanity at a Ramp Agent. The individual, who is still a Supervisor, received a Letter of Instruction. Another Union witness testified about three incidents in which he reported inappropriate behavior by his Supervisors. In one instance, the Supervisor admittedly said, “...you fucked me, why did you fuck me?” and “I’ll get even” and berated the employee in front of other Ramp Agents. The Supervisor did apologize, but was not demoted or terminated for the incident. The same employee testified that he was called a “lazy ass” several times by another Supervisor. The Company later acknowledged to the employee that the Supervisor’s actions were improper. However, there was no evidence that severe disciplinary action was taken against that Supervisor at the time.

The Arbitrator concludes, based on the evidence, that the Company generally responds to heated, inappropriate language with progressive discipline normally

starting with a Letter of Warning. The misconduct by others cited by the Union is not radically different than the Grievant's misconduct which is found to be angry behavior, disrespectful and improper language towards a Supervisor. Thus, the Arbitrator finds that conduct similar to that of the Grievant's has not, historically, been considered so egregious to warrant summary discharge. Such conduct is more properly, in the mind of this Arbitrator, met with lower levels of progressive discipline escalating with the increased number of occurrences by the individual.

Proper Considerations in Assessing the Penalty

In the instance of misconduct so egregious as to justify summary discharge, it is appropriate for Management to review an employee's overall work history, whether or not it includes active discipline, to determine whether there are any mitigating circumstances which would justify a lenient penalty and the opportunity for that employee to correct his behavior. There is certainly no point in issuing corrective discipline if an employee has a history of incorrigible behavior or poor work performance. Yet, it may be appropriate to give an exemplary employee a second chance. In this case, the Company reviewed the Grievant's work history and concluded that there were no mitigating factors. Had this been a situation where summary discharge was appropriate⁸, then the Company's considerations may have been consistent with the intent of the CBA. The Grievant's misconduct, as proven, is insufficiently egregious to warrant summary discharge based on the evidence of the Company's handling of prior similar incidents. To consider the Grievant's overall history record in the instance of misconduct which does not warrant summary discharge would be arbitrary and capricious and in violation of the CBA.

In the case of misconduct that warrants a penalty less than discharge, the severity of the infraction and prior active discipline should be considered. Although the Grievant had been disciplined in the past for similar situations, the Grievant had no active discipline at the time of his discharge. Article 20, Section I, of the CBA provides:

⁸ Had there been a proven act of insubordination, a physical threat or contact, the Arbitrator's conclusions about summary discharge probably would have been different.

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.

The contract language is clear. Management cannot consider any prior discipline that the Grievant received because all of his discipline occurred more than twelve months before the incident in question. Thus, with respect to the Grievant's disciplinary record, it is essentially clean.

Other Incidents That Were Considered

Management did consider other impermissible factors in electing to discharge the Grievant. In his grievance response, Phoenix Regional Manager David Kissman stated:

Grievance denied. Termination of grievant was just due to the violation of Basic Principles that occurred on July 8, 2003. Based on this, **and a previous similar incident documented, warranted termination.**

(Emphasis added.)

The Arbitrator surmises that Manager Kissman was referring to the incident for which the Grievant was disciplined which occurred more than twelve months before. At that time, the Grievant had assured Manager Kissman that he would not curse anymore at work and Management suggested the Grievant work on Anger Management.⁹ Manager Kissman also advised the Grievant that he would not tolerate the Grievant's behavior in the future and that future comparable misconduct would mean termination.

The evidence indicates that Manager Kissman was being compassionate by allowing the Grievant to return to work after the last incident and that the Grievant expressed his gratitude. The Arbitrator commends Manager Kissman's attempt to correct the Grievant's unacceptable behavior. Nonetheless, the CBA must be followed and as soon as that incident and the ensuing discipline became inactive, Manager Kissman violated the CBA by continuing to consider it as a factor in deciding to discharge the Grievant. Manager Kissman is constrained from using his style of

⁹ The Grievant did not attend Anger Management counseling which is unfortunate since he might have learned the skills which would have prevented the incident which caused him to be terminated.

employee relations, no matter how commendable, if it clashes with the clear terms of the CBA.

Station Manager Al Stephens noted in the Memorandum which advised the Grievant of this termination:

You have been counseled in the past regarding incidents of this nature. Your evaluation on July 22, 2002 by Supervisor Hawkins was succinct as to the consequences of continued inappropriate behavior.

Again, it is apparent from the documentation that the Company was considering inapplicable factors when it chose to terminate the Grievant. A performance appraisal cannot be used as a step in the progressive disciplinary procedure.¹⁰ Formal discipline is intended to advise an employee of unsatisfactory conduct and warn that employee of the consequences of further similar conduct. While a performance appraisal may reinforce disciplinary communication, it cannot stand alone as the basis for more severe discipline such as in this case. Thus, the Company violated the CBA by using the Grievant's performance appraisal to buttress its decision to terminate the Grievant in the absence of any active discipline.

Finally, Supervisor Harry Hawkins testified that he had been aware of several incidents in which he chose to talk to the Grievant instead of disciplining him in the twelve months prior to his termination. Although it is clear that Supervisor Hawkins liked the Grievant and wished to avoid costing the Grievant his job, in a sense, he did the Grievant a disservice. Informal counseling is not discipline. For that reason, the Grievant may have been lulled into thinking that the Company was softening its stance on his inappropriate behavior. Further, unlike formal discipline, an informal discussion deprives the Grievant of the ability to grieve and to give him the opportunity to tell his side of the story. There is really no just mechanism under which the Arbitrator can consider incidents for which the Grievant was not disciplined.

There is other evidence that Management looked the other way when the Grievant was behaving inappropriately. In his Memorandum concerning the event in question, Supervisor Lee observed:

¹⁰ The Union asserts that the Company did not follow its own procedures for correcting behavior when an employee is ranked as unsatisfactory on his performance appraisal. It is unnecessary to reach any conclusion in this case on the Union's argument.

As I was leaving the coordinators office [REDACTED] had mention (sic) to me that I really must have made (the Grievant) mad. I asked him what he had heard. He just said oh that's just (the Grievant) he's always like that. I asked Andrea and Scott (Supervisors) in the office what I should do. They all said the same thing, just let it go "He is like a live wire"....¹¹ (Company Exhibit #1)

Manager Stephens also recounted an incident in which the Grievant displayed inappropriate behavior while at work. Thus, it appears that Management chose to look the other way when the Grievant got agitated and behaved inappropriately. It would be reasonable for someone like the Grievant to believe that his behavior was not so egregious as to warrant severe discipline. If an employee is not behaving appropriately, it is incumbent upon Management to address that behavior with the employee with formal discipline if it becomes necessary. It is arbitrary to let bad behavior slide until the Grievant has finally crossed the line one too many times and then discharge him. The Arbitrator recognizes that Management was not maliciously motivated. Instead, it does seem that Management was genuinely attempting to avoid discharging the Grievant because they recognized his strengths as a good worker.

Hence, at the time of his discharge, the Grievant had no active discipline upon which to justify proceeding to discharge rather than a lesser discipline. It seems to this Arbitrator that Management had made an effort to treat the Grievant and his problems with understanding and a desire to help him change. However, Management wandered from the terms of the CBA and, in so doing, the termination became arbitrary and capricious and in violation of the CBA.

¹¹ This conversation occurred before the incident for which the Grievant was discharged.

The Grievant's Stance through the Investigation

The Grievant initially denied his unacceptable conduct at the fact-finding meeting. It was not until the Arbitration Hearing that the Grievant chose to take responsibility for what had occurred. Thus, in the beginning, the Grievant was deceptive about his behavior and he did not apologize to Supervisor Lee for his unacceptable actions.¹² This is of serious concern for the Arbitrator and for that reason, it will impact the remedy.

The Grievant's Failure to Seek Help

In the past, Manager Kissman recommended that the Grievant seek help with his problem with his temper. The Grievant elected not to do so. In the mind of this Arbitrator, the Grievant's failure to attempt to correct his problem so he could be a commendable employee almost destroyed his case. If the Grievant expects a long successful career with the Company, he must get help. Under the terms of the CBA, the Grievant must conduct himself appropriately for twelve months. The Arbitrator has very serious doubts about whether he can do so without help. The Company is not required to retain an incorrigible "live wire" in its employ indefinitely.

On the other hand, the Company is obligated to give the Grievant the appropriate feedback concerning his conduct.

Prior Arbitration Awards

The Company introduced three prior arbitration awards concerning other employees who were terminated for unacceptable behavior on the job. Each can be distinguished from this case. In the matter of ██████████, Mr. ██████████ had just returned from a six-month suspension imposed by another arbitrator. ██████████'s misconduct was proven and it needed only to be sufficient to be the final step of

¹² The Grievant asserts that he was not afforded the opportunity to apologize to Supervisor Lee. The Arbitrator does not find the Grievant's assertions to be persuasive. If a person wishes to apologize, a means to accomplish the apology can be found.

progressive discipline. Arbitrator Fox found that it was and upheld the discharge. That is not the case here. The Grievant was not in the last step of the progressive disciplinary process.

In the matter of Kathi Patterson, Ms Patterson was a Reservation Agent who worked in an office environment which was particularly quiet due to the phone activity in close working quarters. Ms. Patterson was repeatedly loud with abusive language and disrespectful to her Supervisor. In three of the four months preceding her discharge, Ms. Patterson had received disciplinary action for attendance and excessive idle time. Arbitrator Stephen Crable found termination to be for just cause. The case can be distinguished because the working environment was the opposite extreme of the environment that the Grievant worked in and because Ms. Patterson had, in fact, received, discipline in the prior months before her discharge.

Finally, the Company submitted the arbitration in which ██████████'s termination was upheld. Mr. ██████████ was an Operations Agent. The incident is complicated but essentially, the repeated misconduct of Mr. ██████████ in an office environment, which continued through the fact-finding meeting, was far more egregious than that of the Grievant. Thus, the Arbitrator finds that her ruling in this case is not inconsistent with the rulings of prior arbitrators.

CONCLUSIONS

The discharge of the Grievant was in violation of the disciplinary retention guidelines of the CBA and, therefore, not for just cause. However, nothing in this Arbitration Award should be construed to mean that the Grievant's behavior is acceptable. Moreover, it is clear from the evidence that the Grievant has a serious problem. He may be a good Ramp Agent, but unless he gets his temper under control, he will not be working as a Ramp Agent for the Company for much longer. The Grievant's failure to get help affects the remedy in this case.¹³ The Grievant is wise to take the suggestion from Manager Kissman to attend Anger Management Counseling. The Grievant is getting his job back, not because he did nothing wrong, but because Management, in its compassion, strayed too far from the requirements set forth in the

CBA, thereby violating its terms. The Union was astute in enforcing the letter of the Agreement.

Upon receipt of this Award, the Grievant shall be reinstated to his former position of Ramp Agent. The termination of the Grievant shall be converted to a three-month suspension. The Grievant is entitled to back pay commencing on October 14, 2003. The Grievant is entitled to seniority and benefits as if he had never been terminated. However, the Grievant is considered to be on notice that the next such similar incident within the contractual time limits may be grounds for termination. Anger Management counseling is highly recommended.

For the reasons here and above setforth:

AWARD

The grievance is sustained, in part. The Grievant, [REDACTED], was not terminated effective July 14, 2003 for just cause. Effective immediately, the Grievant is to be reinstated to his former position and the termination is to be converted to a three-month suspension. The Grievant is entitled to seniority, benefits and back pay pursuant to the terms setforth in the CONCLUSIONS section above. Pursuant to the Parties' agreement at the Arbitration Hearing, the Arbitrator shall retain jurisdiction for the purposes of interpreting the remedy.

Signed this 20th day
of December, 2003, in
Houston, Texas
* * * *

Diane Dunham Massey
Arbitrator

¹³ It is imperative that the Grievant get the message that it is his obligation to straighten out his unacceptable behavior.