SOUTHWEST AIRLINES, CO/TWU LOCAL 555
SYSTEM BOARD OF ARBRITRATION

In the Matter of the Arbitration

between

TRANPORT WORKERS OF AMERICA, AFL-CIO
LOCAL 555
and

SOUTHWEST AIRLINES, CO.

OPINION

and

AWARD

Re: Termination of
[redacted]
SAN-O-0602/11

Before: Randall M. Kelly
Arbitrator

Appearances:

For the Union:

Kevin Carney	District VI Representative
[redacted]	Grievant
Curtis Clevenger	Local Union Grievance Specialist
[redacted]	San Diego Union Ramp Representative
	San Diego Operations Agent
	San Diego Provisioning Agent
	San Diego Ramp & Provisioning Agent

For the Employer:

Kevin Minchey, Esq.	Attorney, General Counsel Department
Linda Smith	Paralegal
Pamela Sue Childers	Drug & Alcohol Compliance Lead
Dr. Donald M. Willson, Jr.	Medical Review Officer
Nina Maalouf	Customer Service Manager, SAN
Scott Powell	Manager of Ramp & Operations, SAN
William Venckus	Director of Employee Relations-Ground

Procedure:

A hearing in the above matter was held on May 12, 2011 at the Wyndham Dallas Love Field, Dallas, Texas, before the undersigned who was selected to serve as arbitrator pursuant to the provisions of the Collective Bargaining Agreement between the parties and the Railway Labor Act. The parties waived the System Board of Adjustment and proceeded directly to arbitration. The

parties stipulated that the matter is properly before me. At the hearing, both parties were given full opportunity to present their evidence, testimony and argument. The parties filed post-hearing briefs on June 17, 2011 and the record was declared closed upon receipt.

Stipulated Issue:

Did the Company have just cause to discharge the Grievant, [redacted] on March 22, 2011? If not, what shall be the remedy?

Background Facts and Circumstances of the Dispute:

The Grievant, [redacted] was employed as an Operations Agent in San Diego. For 28 years, he was a good employee. On March 8, 2011 (all dates hereinafter are 2011 unless otherwise indicated), he was scheduled for and submitted to a random drug test pursuant to Department of Transportation Regulations (U. Exh. 6) and Company policy (Jt. Exh. 3). On March 14, the test results came back positive for a metabolite of cocaine. After interviewing the Grievant, who could offer no medical reason that the metabolite might be in his system, and testing the split sample, the Company Medical Review Officer, Dr. Donald Willson, reported the positive finding to the Company.

Manager Scott Powell convened a contractually required Fact Finding hearing on March 15. On March 22, Powell terminated the Grievant having "determined that the results of your drug test taken on 03-08-11 were in violation of Southwest Airlines Policies on a Drug-Free Workplace" (Jt. Exh. 2).

The Grievant filed a grievance that same day and the Union pursued the grievance through the contractual grievance procedure to arbitration. As noted, the parties waived the System Board of Adjustment and proceeded directly to arbitration. The parties stipulated that the matter is properly before me. The matter not being resolved, it is properly before me for final and binding arbitration pursuant to the terms of the Collective Bargaining Agreement between the parties.

OPINION

The operative facts are not in dispute. The Grievant was one of the longest tenured employees in the San Diego station, having started there 28 years ago. He has not been assessed any current discipline and his file is replete with commendatory letters and an Agent of the Month Award (U. Exhs. 1-5). Several employees and supervisors from the San Diego station testified or supplied statements in support of him as a friend and co-worker and expressing shock at his termination (U. Exhs. 7-10).

The Company, as an airline, is subject to US Department of Transportation Regulations including regulations requiring random drug testing of employees in safety sensitive positions. The Grievant, as an Operations Agent, was in a safety sensitive position (SWA Exhs. 6-7).

He was selected for a random drug test on March 8 and submitted a sample that same day (SWA Exh. 3). The sample was sent to the Company's designated testing laboratory for analysis. The laboratory found the sample positive for a metabolite of cocaine (benzoylecgonine). The DOT cutoff for cocaine metabolites is 150 ng/ml (U. Exh. 6) and the Grievant tested 168 ng/ml (SWA Exhs. 2-4). The laboratory referred the matter to a Medical Review Officer (MRO), Dr. Donald Willson. Under DOT Regulations, any positive test result has to be communicated to the testee in confidence by the MRO and the MRO asks the testee if there are medical reasons he or she might have a metabolite of a drug in his or her system. Dr. Willson testified that he called the Grievant at work on March 14 at approximately 6:22 a.m. local time. Dr. Willson told the Grievant that he had tested positive for cocaine and asked if he knew how the cocaine got in his system. According to Dr. Willson, the Grievant did not provide a medically acceptable reason. Dr. Willson did not specifically provide a list of Substance Abuse Professionals since that is available through Clear Sky. Dr. Willson reported the finding of a verified positive test result to the Company Designated Representative, Pamela Childers (SWA Exh. 1).

Dr. Willson also testified that cocaine is typically snorted, smoked or injected. It is "improbable" that it would be ingested as part of a liquid since it would be hydrolyzed in the stomach so there would be no "rush". The metabolite stays in someone's system for two to four days.

Customer Service Manager Nina Maalouf testified that she saw the Grievant as he got off the phone with Dr. Willson. She testified that he had difficulty speaking with her and she "knew something was wrong." She asked him if everything was okay and he said that "he had done something that [was] going to change the rest of his life."

Manager Scott Powell removed the Grievant from service with pay and scheduled a fact finding, as required by contract. After the fact finding, Tom Ludvik terminated the Grievant for violation of the Company Drug and Alcohol Policy (SWA Exh. 8).

As noted, the Union and the Grievant do not challenge the validity of the test or any of the procedures employed. Indeed, the Grievant testified that he really does not know how the cocaine got in his system. He testified that he has never knowingly used cocaine. He speculated that someone "spiked" his drink with cocaine when he was at a bar in Bakersfield for a State wrestling convention (the Grievant is a referee) the weekend before. He testified that he had a strong hangover the next day; a type that he had never experienced before.

Positions of the Parties

The Company position is that it was required by DOT Regulations to conduct random drug testing of its employees in safety sensitive positions and by its commitment to the safety of the flying public and its own employees. The Regulations require that the employer remove an employee testing positive for drugs from his or her safety sensitive position, but leave it up to the decision of the employer what discipline to take. The Company, after careful consideration, adopted its Policy On A Drug-Free Workplace and Alcohol Abuse and Policy Implementing the DOT/FAA Anti-Drug and Alcohol Misuse Prevention

Programs for Covered Employees (Jt. Exh. 3). Both of those policies clearly state that, "Employees who test positive in any of the mandatory drug tests WILL BE TERMINATED FROM SOUTHWEST EMPLOYMENT."

In its brief, the Company asserts:

> The Company also demonstrated that the rule in its Policy requiring termination of any Employee in a safety-sensitive position who tests positive for drugs is reasonable and directly related to the safe and effective operation of the Company's business. In order to achieve the highest safety standard possible, the Company has determined that the consequences for testing positive on a random drug test must be termination. Even the union agreed that the only failsafe way to ensure that an Employee who tests positive for drugs does not pose a safety threat in the future is to terminate the Employee.

The Company points to Article Two of the collective bargaining agreement that vests it with the authority to make rules and regulations.

> Moreover, the termination rule in the Policy is not inconsistent with the terms and conditions of the Agreement. The union never offered a general challenge to the termination rule as being in conflict with the just cause provision of Article Twenty or any other provisions. Nor has the union challenges every termination for positive drug results. In short, the Company demonstrated that the rule in its Policy requiring termination for a positive drug test is reasonable and consistent with the Agreement.

> Finally, the Company has put forth substantial and compelling evidence that termination was the appropriate and just discipline in this case. Drug use is indisputably detrimental to Southwest's ability to functions as a safe operator. Moreover, carrying passengers safely from one airport to another is the primary function of Southwest's business and since drug misuse seriously threatens this function, termination of an Employee for a positive random drug test result is not an excessive or unreasonable penalty. Rather, the unequivocal threat of job loss is Southwest's most effective way of impressing upon Employees the serious safety risks associated with drug use and is the penalty best calculated to eliminate drug use among its employees. The termination sanction is at the essence of Southwest's program, and is considered by Southwest to be an essential tool for the promotion of the airline's safe operation. Southwest adopted a very strict anti-drug Policy and is entitled to enforce that policy to forward its business interests.

The Company then cites two arbitration awards. In *In re Northwest Airlines and IBT* (Arbitrator Peter R. Meyers, 1996), the grievant was a flight attendant who tested positive on a random drug test. The System Board found that it was not the arbitrator's role to order the company to allow long-term employees to show up for work with drugs or alcohol in their system on one or more occasions before they face discharge. "Rather, he held that the offense of drug or alcohol use in the airline industry 'is so serious that the Company can consider discharge of the employee even on the first offense.'" The Company quotes Meyers:

> The Company, therefore, has the authority, both in general and in the Grievant's particular case, to determine what level of discipline is appropriate for violations of the rules, regulations, and policies governing alcohol and drug use. If the Company wanted to extend leniency and order a lesser form of discipline than discharge for this Grievant, it had the right. If the Company wanted to allow the Grievant to attend a [substance] abuse program and remain an employee of the Company, the Company had that right. However, as stated above, this Board is not going to second-guess the Company in that decision.

The Company also cites *In re Southwest Airlines and TWU 556* (Arbitrator John H. Abernathy, 1995) as "upholding the termination of a flight attendant who tested positive for cocaine on a random drug test after finding that the language in the Policy 'prescribes only one level of penalty and does not give managers (or arbitrators) any leeway in designing other penalties."

The Company rejects out of hand the Grievant's "story" of having his drink "spiked", especially in light of what he told Maalouf after receiving news of the positive test result. Indeed, the Company is correct that whether the Grievant voluntarily or involuntarily ingested cocaine is irrelevant under the Policy and federal regulations.

Finally, the Company asserts that the Grievant's termination cannot be mitigated. "The Union never argued or presented evidence that the Company treated [redacted] differently than it treated any other Employees. In contrast,

the Company presented evidence that it had terminated other Employees for testing positive on random drug or alcohol tests, and in some of those cases, the union did not grieve the terminations." According to the Company witness, Bill Venckus, the Director of Employee Relations for Ground Operations, the only time the Company brought back an employee who failed a random drug test was when the Company missed disciplinary time frames. In other situations where the employee was brought back, that was a result of a non-precedent, non-referable settlement.

The Company also specifically rejects the Union argument that the Grievant's long and good work record should merit consideration here. According to the Company, "they do not justify a lesser discipline in this case because of the strict language in the Policy and the severity of the violation" citing several arbitration awards, including one of my own (*In re Southwest Airlines and IAM District Lodge 142:* [redacted] (Kelly, 2003).

As to the Union argument that the Grievant should have been offered a substance abuse program and periodic testing, the Company responds by referring to the arbitration *In re The City of Pharr, Texas,* 125 L.A. 1729 (Jennings, 2009). In that case, Arbitrator Jennings rejected a similar argument from a police officer because he had committed such a serious offense that the employer was justified in stating it has "no legitimate interest" in assisting the employee "achieve rehabilitation." Under that reasoning, the Company is not required to give the Grievant or any other employee with safety-sensitive duties a second chance. The Company already gave the Grievant a chance by informing him of his options under the Clear Skies program.

The Union position starts with the premise that the just cause standard has been part of the parties collective bargaining agreement since at least 1986; prior to the implementation of drug testing in 1989. Even with the advent of drug and alcohol testing, the parties did not change the contractual standard. It is undisputed that the Company unilaterally promulgated and implemented its

Drug and Alcohol Use Policies to comply with DOT Regulations. The Union never agreed to the terms of the Policy, in particular, it never agreed that an employee testing positive on a first random drug test would be immediately terminated. According to the testimony of Union Grievance Specialist Curtis Clevenger, every time an employee was terminated for failing a random drug test the Union challenged the termination on an individual basis. Sometimes the Company agreed to reinstate the employee.

The Union cites an arbitration award between the *State of Alaska, Department of Transportation and Public Employees Local 71,* (Arbitrator Thomas F. Levak, 1997). In that case, Levak reinstated a 23-year safety sensitive employee with a good record who had failed a random drug test for cocaine. Levak reasoned:

> By agreeing to the just cause standard, the Employer promised to consider, before determining that an employee should be discharged, the employee's disciplinary record or any mitigating or extenuating circumstances. In the instant case, the Employer's unilaterally promulgated Policy necessarily operates to break that agreement and promise in advance of any controlled substance test case. The Policy therefore is void since the rule contained therein conflicts with the contractual just cause standard. And in the instant case, of course, the Department specifically violated its agreement and promise when it failed to give any consideration to the Grievant's long service record, his disciplinary record, and his exceptional skills.

The Union then points out that that is what the Company did here. Management did not consider the Grievant's long and excellent record at the Company.

Discussion and Conclusions

This is a classic clash of competing concepts of just cause. On the one hand, the Company has adopted a "no fault" drug policy for employees in safety sensitive positions and firmly believes that this policy is necessary to ensure the safety of the flying public and its employees. On the other hand, the Union believes that the contractual just cause standard does not require immediate

termination for a first positive drug test and, indeed, that the traditional tests of just cause such as progressive discipline must prevail. The Company believes that its policy complies with the just cause standard. The Company also asserts that the arbitrator should not overturn its decision unless the decision is found to be arbitrary and capricious.

This brings me to an analysis of my basic approach to the entire concept of just cause. Just cause is a well established, time honored and almost universal standard for evaluating discipline in the workplace. However, it is not a static concept and in recent years, arbitrators have come to a new understanding of its application and meaning. The seminal work regarding this evolution is a paper by Richard Mittenthal and M. David Vaughn in the 2006 Proceedings of the National Academy of Arbitrators; *Just Cause: An Evolving Concept* in Arbitration 2006: Taking Stock in a New Century; Proceedings of the Fifty-Ninth Annual Meeting, National Academy of Arbitrators (BNA Books, 2007) 32-50. In that paper, Mittenthal and Vaughn posit that the concept of just cause has evolved through the negotiations of the parties and the thinking of arbitrators, "particularly the discretion that arbitrators exercise in determining the 'justness' of the penalty."

They point out that the "earlier standard" for evaluating "justness" gave deference to the decision of management and that "so long as management did not abuse its discretion, the penalty chosen should stand." This was the so-called McCoy standard for Whitney McCoy. This approach is well illustrated by the cases cited by the Company. In each of them, the arbitrator deferred to the decision of the employer on the level of penalty.

Mittenthal and Vaughn then point to another school of arbitrators who took a "broader" position. "They described the test not from the standpoint of whether there had been an 'abuse of discretion' but rather whether the penalty was 'unfair' or 'arbitrary' or 'capricious.' And the latter words appear in time to

have been encapsulated in the term 'unreasonable.'" This they call the Platt standard after Harry Platt.

> The difference between the McCoy and Platt standards is substantial. The "reasonableness" test requires a different analysis and often a different result because it calls for a review of the penalty from the arbitrator's perspective rather than the employer's perspective. The arbitrator, under the Platt standard, is the "reasonable person" and his or her view of what is "unreasonable" will ordinarily trump the employer's view. The burden of proof on this issue has obviously been altered. Thus, a discharge that may have in the past been affirmed because there was no "abuse of discretion" by the employer might now be reversed as being, in the arbitrator's judgment, "unreasonable."

The authors emphasize that this is not meant to be a subjective judgment and even under this standard, an arbitrator cannot set aside a discharge solely on the basis of leniency without any justification based on stated mitigating circumstances.

Mittenthal and Vaughn conclude that the "reasonableness" standard was, "in time, embraced by almost all arbitrators." They attribute this to an arbitrable analogy to a judge in a criminal matter. "It is hardly surprising that arbitrators were drawn to the traditional role of the judge in ensuring that the 'punishment fits the crime' as well as the person responsible for 'the crime.'" Further, they point out that arbitrators believe that punishment should be rehabilitative rather than punitive.

Significant for present purposes, the paper continues with a discussion of rule making and tables of offenses and penalties; such as "zero tolerance" policies.

> Employers often underscore the seriousness with which they view a particular type of misconduct. They describe such behavior as sexual harassment, for example, as a "zero tolerance" offense and state that discharge will be imposed for a first offense. But any unilateral rule, however strongly stated, cannot substitute for proof of "just cause" and cannot diminish the arbitrator's role in determining whether discharge is a "reasonable" penalty. Only where the parties have specifically agreed to

the discharge penalty for a particular offense is the arbitrator powerless to review the appropriateness of the discharge.

That is what we have here; a unilateral implementation of a "zero tolerance" policy for a first positive drug test. The Union did not agree to this policy. If it had, I would have no choice but to affirm the discharge decision. Compare this to the Attendance Control Policy which was negotiated and thus eliminates the arbitrator's discretion as to penalty once the offense is established.

Now, to the case at hand. I start with the premise that the Grievant failed a properly administered random drug test; a test mandated by DOT Regulations. As the Company points out in its brief, those Regulations do not mandate any particular penalty for failing a random drug test. In fact, the Regulations provide as follows:

§ 40.23 What actions do employers take after receiving verified test results?

(a) As an employer who receives a verified positive drug test result, you must immediately remove the employee involved from performing safety-sensitive functions. You must take this action upon receiving the initial report of the verified positive test result. Do not wait to receive the written report or the result of a split specimen test.

(d) As an employer, when an employee has a verified positive, adulterated, or substituted test result, or has otherwise violated a DOT agency drug and alcohol regulation, you must not return the employee to the performance of safety-sensitive functions until or unless the employee successfully completes the return-to-duty process of Subpart O of this part.

§ 40.305 How does the return-to-duty process conclude?

(a) As the employer, if you decide that you want to permit the employee to return to the performance of safety-sensitive functions, you must ensure that the employee takes a return-to-duty test. This test cannot occur until after the SAP has determined that the employee has successfully complied with prescribed education and/or treatment. The employee must have a negative drug test result . . . before resuming performance of safety-sensitive duties.

> (b) As an employer, you must not return an employee to safety-sensitive duties unit the employee meets the conditions of paragraph (a) of this section. However, you are not required to return an employee to safety-sensitive duties because the employee has met these conditions. That is a personnel decision that you have the discretion to make, subject to collective bargaining agreements or other legal requirements.

It is interesting that the Regulations leave the decision whether to return and employee to a safety-sensitive position or not (subject to the terms of a collective bargaining agreement), the thrust of the Regulations is to the effect that the employee will eventually be returned to his or her job. There are rigorous regulations governing return to work and as recently as 2009, the DOT strengthened those regulations by requiring not only SAP certification and a return to duty drug test (Section 40.305), but at least six unannounced follow-up tests within the first 12-months (Section 40.307) and beyond. But the most significant change was to mandate that those tests be visually observed; a provision one court called "embarrassing and demeaning" in sustaining the requirements. Interestingly, that court also commented that the DOT notes that many covered employers have adopted a two-strikes and out policy. The court also noted that airline employees are subject to being permanently barred for a second positive test result (29 U.S.C. §45103(c)). *BNSF Railway v. DOT*, Case 08-1264 (D.C. Cir. 2009).

Clearly, the regulatory scheme established by the DOT encourages rehabilitation for employees in safety-sensitive positions who test positive once. Indeed, the Regulations (§40.287) require that the employer of an employee who tests positive provide that employee with a listing of Substance Abuse Professionals (SAPs) "readily available to the employee and acceptable to you [the Employer]." The employee cannot perform any DOT safety-sensitive duties until and unless he completes an SAP evaluation, referral and education/ treatment processes set forth in the Regulations (§40.285). Return to duty is subject to a return to duty drug and alcohol test and random testing thereafter.

In the airline industry, if that employee testes positive for drugs or alcohol again, he or she is permanently barred from working in the industry.

Mitigation and the other elements of just cause are applicable. In this regard, I would distinguish my award cited by the Company as stating that mitigation cannot excuse a serious offense. In that matter, the grievant's only defense was that the Company failed to give her timely notice of her fact finding. In that situation, mitigation had nothing to do with the matter.

Given the Grievant's long and excellent career without any discipline and the DOT's regulatory scheme including strict return to duty requirements and a ban from the industry upon a second failed drug test, I find that the Grievant's discharge was not for just cause. He is to be reinstated to his prior position with no loss of seniority upon completion of the return to duty requirements of the DOT Regulations and subject to its terms thereafter.

AWARD

I, the undersigned, to whom was submitted a certain issue between the parties hereto, having duly heard the proofs and allegations and after due consideration, do hereby award as follows:

1. That for reasons set forth herein, the discharge of the Grievant, [redacted] was not for just cause; and

2. The Grievant is to be reinstated to his prior position with no loss of seniority upon completion of the return to duty requirements of the United States Department of Transportation Regulations and subject to its terms thereafter.

Signed this 27th day of July, 2011

Randall M. Kelly
Arbitrator

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, Randall M. Kelly, do hereby affirm upon my oath as Arbitrator, that I am the individual described in and who executed this instrument, which is my Award.

Randall M. Kelly