IN THE MATTER OF AN ARBITRATION
BETWEEN

TRANSPORT WORKERS UNION	§	
LOCAL 555	§	
	and	
		Case No. SEA-O-0482/10
SOUTHWEST AIRLINES COMPANY	§	**Termination of** [redacted]
DALLAS, TEXAS	§	

William L. McKee, Ph.D.
Arbitrator

An arbitration hearing on this matter took place in Dallas, Texas, on July 13, 2010. On receipt of post-hearing briefs, the hearing closed.

REPRESENTATIVES

FOR THE UNION:
Mr. Jerry McCrummen
Vice President
TWU Local 555

FOR THE COMPANY:
Mr. Eric Carr
Senior Attorney

I. STIPULATIONS

The parties stipulated the issue[1] to be decided, as follows:

> Did Southwest Airlines Company have just cause to terminate [redacted]
> If not, what is the appropriate remedy?

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[1] The Union raised an additional issue related to the Grievant's receipt of attendance points in another incident that culminated in a negotiated last-chance agreement. At the request of the parties, I issued a bench ruling that the Union's issue would not be arbitrated. This decision was based on the evidence presented and the language of [redacted] last-change agreement with the Company and effectively disposed of the matter for the purposes of that portion of the grievance before me.

II. BACKGROUND AND POSITIONS

Grievan[redacted]began working for Southwest Airlines ("the Company") in February 1996. At the time of his termination,[redacted]was employed as an Operations Agent at the Company's Seattle, Washington, Station ("SEA"). Aside from his accumulation of points under the No-Fault Attendance Policy negotiated by the Company and the Union, as discussed below, there is no evidence on this record that[redacted]had any negative disciplinary history. Evidence presented at the hearing included numerous commendations from his file.

As an Operations Agent, the Grievant was subject to the policies and procedures set forth in the Collective Bargaining Agreement ("CBA") between the Company and TWU Local 555, including the Attendance Program in Article 33. Under the Attendance Program, an employee is assigned points for various attendance infractions. Personnel actions for attendance issues are based on the number of points an employee has accumulated. The (no-fault) Control Procedure for attendance infractions is as follows:

Less than one point	No action taken
1-2 1/2 points	Letter of Instruction
3-4 1/2 points	Warning Letter
5-6 1/2 points	Final Warning
7 or more points	Termination of Employment

According to Article 33, Section II.A., an employee is assigned one point for an Unreported Tardy. An Unreported Tardy is an instance in which the employee "reports to work within one-half (1/2) hour after the start of his shift and did not notify local management that he was going to be late prior to his shift beginning." CBA Article 33, Section I.E. Pursuant to Article 33.A., an employee is not deemed to be tardy until two minutes after his scheduled starting time.

By March 30, 2010, [redacted] had accumulated 6 1/2 points for attendance issues, including points that were charged to him as a result of a grievance settlement between the Union and the Company in February 2010. As a result of that settlement, [redacted] was placed at 6 points and was issued a Final Warning Letter as required under the CBA. The Grievant subsequently accrued another one-half point on March 9, 2010, for a Reported Tardy, leaving him only half a point away from the termination level specified in the CBA's Attendance Program.

On March 30, 2010, [redacted] was scheduled to begin work at 6 a.m. This meant, according to Company and Union witnesses' interpretations of the terms of the CBA, that he was required to report no later than 6:02:59 a.m in order to avoid being deemed tardy. Operations Agents reporting to work at SEA generally must "clock in" on a KRONOS 4500 clock through a two-step procedure. First they must swipe their magnetically-coded employee badge through the clock. Then, once the clock reads the badge, they must place a finger on the biometric fingerprint scanner to confirm their identity.

According to [redacted] he arrived in time to start his March 30 shift but, when he attempted to swipe his badge, the time clock would not read it, and he had to swipe his badge a second time. After the second swipe he was directed to the fingerprint scan, but by the time the clocking in process was completed the clock read 6:03:01 a.m. – two seconds past the "grace period" for timely clocking in. [redacted] asserts that, were it not for the time clock's failure to read his badge on the first swipe, he would not have been tardy on March 30.

At the end of his March 30, 2010, shift, the Company notified the Grievant of his charged tardy and informed him that a fact-finding meeting would be held on April 2, 2010, to discuss his

attendance issues. After the fact-finding meeting, [redacted] was terminated on April 6, 2006. The Union and the Grievant timely filed a grievance, and the matter progressed to a deadlocked System Board procedure. The parties stipulate that this matter is now properly at arbitration.

At the hearing and in its post-hearing brief, the Company argued that it had just cause to terminate the Grievant based on the terms of the Attendance Program and the undisputed facts regarding [redacted] history of attendance problems. Claiming that the Company did not have just cause for termination, the Union grieved the termination,. The crux of the Union's argument was that the Grievant was not in fact tardy on March 30, 2010, but, instead, a malfunctioning time clock prevented him from clocking in by the appointed time.

III. FINDINGS

Arbitrators in labor-management disputes typically consider several factors in making determinations under the just cause standard. The employer generally has the burden of proving that the grievant (1) had adequate notification or awareness of the employer's standards, (2) committed the violation(s) for which he was disciplined, and (3) was not disciplined in an arbitrary, capricious, or discriminatory manner. Depending on the circumstances involved, evaluations of the last provision may address these additional factors:

(a) the seriousness of the conduct and its potential consequences;
(b) the consistency of management's treatment of similar conduct;
(c) absence of malice or other inappropriate motivations to single out the grievant for inconsistent treatment;
(d) the presence of mitigating circumstances such as the length and quality of the grievant's employment record or, alternatively, aggravating circumstances that magnify the violation ; and
(e) the employer's compliance with its own requirements for addressing the conduct at issue.[2]

[2] Adapted from an unpublished paper presented by Arbitrator John Sands at the 2006 Fall Educational Conference of the National Academy of Arbitrators.

From the evidence presented, I find that the Company cannot satisfy its burden to show that it had just cause to terminate [redacted] It is true that the negotiated Attendance Program is unambiguous and is widely published to the Company's Operations Agents. Further, the Grievant was assigned attendance points in accordance with the mutually-negotiated Program and was counseled and warned at the requisite stages. He was or should have been aware of his status and his need to avoid accruing additional points as of the date of the incident that led to his termination. However, the Company failed to prove with "reliable evidence" that [redacted] was in fact tardy in reporting for his shift on March 30, 2010.

Employee attendance is a critical issue in the airline industry. Among arbitrators it is well understood that a company cannot remain competitive unless its employees show up on time and ready to work. The presence of a negotiated Attendance Program in the CBA lends further credence to the jointly-recognized importance of regular attendance and punctuality. However, employees and the Company have responsibilities that must be fulfilled for the Program to operate in the manner contemplated. Employer responsibilities fall under the category of mitigating circumstances noted in item (e) above, particularly in the sense that the absence of harmful Company error is an essential element of a CBA's provision for just cause discipline.

At the hearing, the Union presented evidence that the manufacturer of the KRONOS 4500 time clock recommends that the clock's card reader should be cleaned "once a week or more" in order to prevent buildup of dirt on the card read head, which can prevent the clock from functioning properly. The Union then established, through the testimony of the SEA Station Manager, that at the time of [redacted] termination, the time clock was not being cleaned on a

weekly or any other regular basis as recommended in the clock's maintenance manual. Common sense, backed up by testimony at the hearing, established that the badges worn by mechanics, baggage handlers, and Operations Agents are prone to contact with dirt and grease.

Uncontroverted testimony also suggested that, shortly following the incident at issue, the time shown on the clock was inconsistent with other clocks in the facility. Moreover, less than two months before the incident occurred Company saw the need to replace the clock with a new one due to defects in its operation. The above evidence obviously is circumstantial in nature, but it cannot be dismissed out of hand. Similarly, the Grievant's claim that he was required to swipe his card twice to be allowed entry was not documented or witnessed, but neither did the Company produce any documentation or eyewitness testimony as independent support of its charge tha[redacted]clocked in late on March 30, 2010.

Based on the above information, I find that the Company's evidence of the Grievant's tardiness does not rise to the level of proof needed to justify the termination of a 14-year employee. The Company correctly points out that [redacted] put himself in a perilous situation by accruing enough attendance points that placed him on the verge of termination. On March 30, 2010, he reported to work with so little time to spare that the few seconds required to swipe his badge a second time put him outside of the grace period for clocking in. Ultimately, however, if the Company intends to use readings from a time clock to determine issues as serious as employee termination, it is the Company's responsibility to maintain the clock and otherwise reasonably ensure that clock readings are accurate. Perfection is not required, but he Company fell short of a reasonable showing in this case.

While the Company implied that a "no-fault" Attendance Policy should be interpreted to mean that Company fault, as well as that of the employee, should not play a part in the Program's application, the language of the Program and the published remarks of experienced arbitrators suggest otherwise on this point. Article 23 (Attendance) states the following in pertinent part:

> A. Purpose
>
> The purpose of this program is to control the attendance of Employees in a constructive manner and within the framework of progressive disciplinary procedures.

"No fault" is not defined in Article 23, but the direct implication of the language in Section A and other sections of the Contract is that the Attendance Program and its Control Procedures apply specifically to Bargaining Unit employees.

Moreover, the established understanding among arbitrators is that no-fault attendance policies are designed to remove employee fault from consideration in disciplinary measures that address their absences. This understanding is expressed precisely in the following sentence from *The Common Law of the Workplace: The Views of Arbitrators*[3]: (St. Antoine, Theodore J., National Academy of Arbitrators, 2d ed., 2005, 382).

> No-fault plans provide fixed disciplinary standards for excessive absenteeism regardless of whether the absences are the employee's fault. The better rule is that such plans do not override an express just cause provision.

In the following passage the authors of *The Common Law of the Workplace* also provide guidance about the issue of consideration in this matter.

> Most arbitrators find no-fault plans reasonable in principle but may reject their "perverse application" in exceptional cases on the grounds of a conflict with just cause requirements. *id.*, 282.

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[3] A volume intended by the National Academy of Arbitrators "to sum up some of the leading arbitral principles developed over the last half century." *id.*, ix.

IV. CONCLUSION AND AWARD

For the above reasons I find that [redacted] termination was not for just cause. Having found that the Company did not have just cause to terminate the Grievant, [redacted] is to be reinstated immediately at 6 ½ attendance points and made whole for all lost wages and benefits associated with his termination.

With respect to Article 20 of the CBA, the Company is the losing party in this matter.

September 14, 2010

William L. McKee, Ph.D.
Arbitrator