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IN THE MATTER OF ARBITRATION **OPINION AND AWARD**

between

SOUTHWEST AIRLINES **Case No. BNA-P-2454/13 (Final warning of [redacted])**

and

Transport Workers of America Local 555 **Gil Vernon, Arbitrator**

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APPEARANCES:

On Behalf of the Union: Mark Waters, District IV Representative – Local 555

On Behalf of the Company: Juan Suarez, Associate General Counsel – Southwest Airlines

I. ISSUE

The issue before the Arbitrator can be framed as follows:

"Did the Employer have just cause to issue a "final warning" to [redacted] on December 18, 2013 and, if not, what is the remedy?"

II. BACKGROUND

The Grievant [redacted] was hired by the Company in 2004 and at the time of the discipline in dispute was employed as a Provisioning Agent at Southwest's Nashville ("BNA") Station. His record was free of discipline.

In his position Grievant operated a "provisioning truck" which is used to drive on the tarmac or ramp to replenish the supply of snacks, drinks, and non-perishable items on aircraft to eventually be served to customers during flights. Essentially a large box truck, it is equipped with a "cattle guard" which is a framework of steel pipe fitted around the grill and headlights to protect them. When the cattle guard is impacted, it comes unlatched and pops up.

These trucks enter and leave restricted access areas (SIDA). When entering, the driver must stop at a guard gate and after showing proper credentials is allowed to enter by a guard who opens a sliding cyclone fence gate. When closing, the gate slides between two posts just before it comes to rest. These posts have plates that guide the gate into place.

It is undisputed that on the day in question (December 4, 2013) Grievant came to a stop at the gate to enter the secured area. After he was cleared and the gate opened, as he started to pull forward the driver's left corner of the cattle guard struck the guide plate causing the cattle guard latch to open. The cattle guard was

bent and the fender was damaged such that the fender was pushed into the driver's door making it difficult to open.

The truck remained operable. The Grievant finished his assignment and then reported the accident. The truck was sent to a Company mechanic who fixed the cattle guard by heating it, reshaping it and welding it. He unjammed the door so it was fully operable. No parts were used and about four hours of time was expended.

Subsequent to the Company's investigation (and the 'fact finding' meeting), it issued the following disciplinary notice (a "final" warning):

> A Fact-Finding meeting was held on December 12, 2013, at 1:00 pm, at my office to discuss a possible failure to follow safety procedures while operating a Company vehicle that led to your vehicle incident causing minor damage to Provisioning truck #5, which occurred on Wednesday, December 4, 2013. Present at this meeting were you, TWU Representative [redacted], Provisioning Supervisor Paul Desimone and myself.
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> During the meeting, you explained that you were driving through the guard-gate and hit the fence guide plate on the driver's side, causing minor damage to the truck bumper railing. You indicated that you did not realize ho close the truck was to the fence. Furthermore, you indicated that you should have straightened your truck wheels.
>
> Clearly, you failed to follow safety procedures; specifically, you misjudged the distance of your truck and the gate fence. Furthermore, you were not completely aware of your surrounding areas due to misjudging your distance in regards to the fence. You have acknowledged that this incident could have completely been avoidable by correcting your truck wheels.
>
> After a review of everything brought forward in the Fact-Finding meeting, I have determined that you violated he Basic Principles of Conduct; including, but not limited to the following:
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> 14. Performing your job in a careless, negligent, or unsatisfactory manner.
> 28. Failure to comply with safety rules or regulations.

> [redacted], you are responsible for the safe operation of assigned equipment as you complete your job duties. You must be aware of your surroundings and follow safety procedures at all times. Based on the facts mentioned above, this will serve as Final Letter of Warning. Any future incidents of this nature may lead to further disciplinary action, up to and including termination of your employment. As safety is everyone's responsibility, please let me know if I can help you in anyway.

Subsequently, a grievance was filed protesting the discipline. The matter was ultimately appealed to arbitration. Post hearing briefs were filed after receipt of a transcript.

III. OPINION AND DISCUSSION

There is no debate in this record that Grievant was responsible for the accident in question. Clearly, he was careless. His explanation for the accident was plausible given the minor degree of damage. He said his wheels were turned left—rather than straight—and when he began the forward movement of the truck it tracked into the guide plate rather than straight (free and clear) through the gate. Grievant said, in his accident report, that his speed was one-mile-an-hour or less. This is plausible as there was no damage to the fence. It is apparent speed was not a factor as a vehicle as large as the truck seemingly would have bent the guide plate or the post or some other part of the gate/fence.

The question debated in the record is whether the disciplinary penalty of a "final warning" was for just cause. The answer to this question lies in substantial part in what it means to get a "final warning". On its face, it is quite serious. It is

normally the last stop prior to termination in progressive disciplinary systems. It means that the 'next straw will break the camel's back'. It is not a trivial matter and puts the employee's career with the Company at a precipice. A future event of any substantial proportion can tip it over the edge.

While this is all true, as a general matter the Union is reading this final warning with too much trepidation. They suggest that any minor incident of carelessness (like failure to properly stock a provisioning truck) will result in termination. However, that is not the way the letter reads. It says, "Any incidents of this nature may lead to further disciplinary action . . ." Read in a plain and reasonable fashion, this would mean an incident involving the careless at-fault operation of a vehicle or similar equipment could result in discharge.

This is not to minimize the severity of a final warning but is meant to put this particular warning into proper context under these particular facts. While the Union reads it too strictly, a final warning is not trivial and consequently no one should think grieving such a warning is trivial. Arbitrators are on the record repeatedly in termination cases when an employee has tried to dispute a prior progressive discipline step (long after given) that such discipline must be accepted as factual if it wasn't grieved within the time limits of that progressive step.

One of the grounds upon which the Union challenges the discipline is alleged disparate treatment. This, as the Employer points out, is an affirmative

defense and it is not enough to carry the burden of this defense by pointing out that other accidents by other employees garnered different discipline. Indeed, there are lots of variables in such matters such as past record, employee contrition, accompanying aggravating circumstances and a host of others that do not necessarily exhibit themselves on the face of a discipline notice.

There is some latitude extended the Employer in these matters (as stated by Arbitrator Sinicropi in an airline industry case cited by the Employer in its brief). Indeed, Arbitrators implore that employers not be rigid or simply mechanical in the issuance of penalties. Instead, parties are encouraged to look at the facts and circumstances of each case and each employee. If Arbitrators are too quick to seize upon fine distinctions between different cases and reduce suspensions because there are mere differences in penalties, it pushes the employer toward rigidity that is antithetic to just cause rather than satisfies it.

In this case, the disparate treatment argument is not convincing. However, there is another factor that gives the Arbitrator pause to enforce this penalty as just. This criterion is the simple notion that a penalty must be commensurate with the seriousness of the misconduct under all the relevant circumstances.

In making this assessment of penalties, Arbitrators must be mindful of her or his proper role. The penalty must not be evaluated as if it were the Arbitrator's decision in the first place. The Parties did not negotiate a clause that would make

the Employer a prosecutor and the Arbitrator like a judge who decides in the first instance what sentence should be imposed upon a guilty finding. The just cause system is somewhat appellate in nature as it is the Company who retains the right to issue discipline in the first instance. There might be a number of penalties that in any one set of circumstances could be considered reasonable. Said another way, some penalties may be more reasonable than others but several options might be fundamentally reasonable. Thus, the Arbitrator should decide if the penalty meted out by the Employer fits within the range of reasonableness.

Fitting all these notions of just cause to these circumstances and this employee, the Arbitrator cannot escape the conclusion that a final warning—one that communicates that the Employer has nearly lost all faith and trust in an employee so much so that he is barely an asset and rather is nearly an unacceptable risk—is too severe and beyond reasonable. Grievant had nearly ten years of service and a clean record. Just as importantly this was simple negligence rather than gross negligence and the damage was minor and not atypical of the day-to-day blemishes common in the operation. These are so common the manager couldn't come up with any instances where such minor mishaps resulted in serious discipline. If final warnings were as common for these kinds of instances, it seems the manager could have named some when asked.

If the Employer were right in issuing a final warning for a first offense under these circumstances it would effectively validate a 'two-strikes-and-out' progressive discipline scheme for relatively minor accidents. This is not reasonable. On the other hand, this is not to say that a final warning is never valid for a first offense. It should be reserved for circumstances where the underlying incident was more serious, more convincingly shook the Employer's faith and trust and/or where the employee failed to understand his culpability and failed to demonstrate a willingness to correct his behavior. There are some employees who might need a stark penalty like a bucket of cold water to wake them up. However, Grievant recognized the damage, reported it and did not try to evade his responsibility in any way. In all these respects, the Arbitrator rejects the Employer's argument that it would have had grounds to terminate the Grievant for this and that a final warning was acceptable as a matter of leniency.

In view of the foregoing and because the Company did not have just cause for a final letter of warning, the discipline is reduced to a simple letter of warning. This is not to say a mere written warning is always appropriate in all similar cases. There may be circumstances where a suspension is appropriate. A written warning was arrived at because the Arbitrator cannot impose time off where the Employer imposed none.

AWARD

The discipline is reduced as set forth in the Opinion.

(Signature on Original)

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Gil Vernon, Arbitrator

Dated this 15th day of September, 2014.