

\*\*\*\*\*

**IN THE MATTER OF ARBITRATION**

**OPINION AND AWARD**

**between**

**SOUTHWEST AIRLINES**

**Discharge of [REDACTED]  
DEN-R-0278-13**

**and**

**TRANSPORT WORKERS UNION  
LOCAL 555**

**Gil Vernon, Arbitrator**

\*\*\*\*\*

**APPEARANCES:**

**On Behalf of the Union: Mike Roach – Local 555**

**On Behalf of the Employer: Michelle Morgan, Attorney III –  
SWA**

**I. ISSUE**

The Parties agreed that the issue to be decided by the Arbitrator should be framed as follows:

“Was there just cause for the discharge of the Grievant and, if not, what shall be the remedy?”

## **II. BACKGROUND AND FACTS**

Grievant, prior to his termination, was a ramp employee at the Employer's Denver (DEN) airport operation. He had been employed there for approximately two and one-half years.

There is no dispute that on Christmas (December 25, 2012) around 5:15 p.m. Grievant was operating a 'tug' towing a baggage cart in connection with loading aircraft N231 at Gate C32. There is also no dispute that as he did so the right front tire of the tug entered an open 'fuel pit' (a cylindrical opening in the concrete which contains a valve to which fuel pumps are attached when aircraft need fueling from underground tanks). The fuel pit has a heavy metal lid about 15" in diameter which is to be closed when not in use. A hose was attached to the pit valve at the time Grievant drove the tire into it. A schematic of the gate (Company exhibit 14) shows that if aircraft N231 was parked in its proper position the fuel pit would be just under the trailing edge of the right way but a few feet in from the wing tip but not as far as the flaps.

The front tire of the tug was easily backed out of the pit and the fuel connect nozzle was not damaged except for a scuff. Grievant called a supervisor to report the incident. As is standard procedure, Grievant and his supervisor filled out a 'SOPI' report. The narrative section of Grievant's report read:

"I was told by ramp supervisor Steve Debates to move BOS bags from my flight at C32

which was broken to gate C34. I downloaded the through load out of the front bin and started moving to the back to download those bags. As I began to go to the back. I saw the cone that marks the fuel pit. I drove around the cone allowing plenty of room between my tug and the cone which I assumed was marking the fuel pit. All of a sudden I hit something. I didn't know what it was so I immediately got out of the tug and walked around to see what it was. I found that I had struck the fuel pit so I immediately notified the fueller and called my zone supervisor Steve Debates. He came to the gate and saw the scene (sic), swore, kicked the snow, and walked away. Since I was not instructed otherwise I continued to move BOS bags to C34 as previously instructed.

It is important to note that it is undisputed the safety cone which was supposed to mark the fuel pit was tipped on its side (not standing up) and out of position. The Arbitrator concludes as well that it was also in poor condition as it was dirty and scuffed so its normal 'high vis' surface was significantly compromised.

Based on this and the Supervisor's report, Drew Danielson, DEN Manager of Ramp Operations, started an accident investigation. His investigation included reviewing the videotape of the gate. When he reviewed it, Mr. Danielson concluded that after driving around the fuel cart Grievant cut under the aircraft wing and then into the fuel pit. It was his conclusion as well from the video that the fuel pit was under the aircraft wing. This was of such significant concern to Mr. Danielson that he commenced a fact-finding meeting on January 24, 2013.

Subsequent to the fact-finding meeting, Grievant was terminated. The notice read in pertinent part as follows:

A fact-finding meeting was held on 1/24/2013, to discuss a possible violation of the Southwest Airlines Basic Principles of Conduct and an incident of damage on 12/25/2012. Present at this meeting were you, TWU Representative [REDACTED], ramp Agent [REDACTED], Ramp Supervisor Dan Carson and myself.

You have received training in our Company policies and procedures and you are well aware of our safety rules and regulations. Further, you have admitted to knowing and signing the Basic Principles of Conduct.

After a thorough and complete investigation of this matter and after considering the issues discussed at the fact-finding, we have determined that you drove under the wing of aircraft N231 at gate C32 and ran over the fuel pit that was in use causing damage to the fuel pit. Such conduct is in violation of Company policy and procedures covered in Ramp training and the Ground Operations manual. In addition, your actions were in violation of the following Ground Operations Basic Principles of Conduct, including, but not limited to:

#12 Abuse or destruction of Company property.

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

#28 Failure to comply with safety rules or regulations.

You have received a Letter of Warning on 2/14/2012 and a Final Letter of Warning on 4/18/2012 for damaging company property.

Based on the above, and as a result of your actions, your employment with Southwest Airlines is terminated effective immediately.

Subsequently, a grievance was filed and when it couldn't be resolved it was appealed to arbitration. A hearing was held on May 23 and July 15, 2013.

Following receipt of a transcript, post hearing briefs were filed on August 23, 2013.

### **III. OPINION AND DISCUSSION**

There are a couple points the Arbitrator wishes to address at the outset. These issues (one related to the Company's case and one from the Union's case) were first noticed by the Arbitrator at the hearing. One of the issues seeped out of the testimony by Company witnesses and it generally relates to Grievant's past

record and more particularly to the fact he was on a “final letter of warning”. A notion arose that because Grievant was on a final letter of warning that it only took a little bit of proof to justify termination.

The Arbitrator wants to be clear as to the proper role of a employee’s past record in a discipline case. Discipline is a two-step process. The first is proof and the second is penalty. The Employer’s initial burden relates to the evidence and they must demonstrate factually that misconduct occurred which is material enough to justify imposing some form (or step) of discipline. Once misconduct is established then and only then does the Grievant’s past record become relevant. It is relevant in deciding what the next step of discipline should be.

In this case, the final letter of warning is relevant, possibly very relevant to a decision as to whether termination was appropriate. The misconduct at issue (in this case the Grievant’s operation of the tug) may be the proverbial ‘straw that broke the camel’s back’ but the Employer still must—by the same measure of proof applicable in any just cause discipline—satisfy the Arbitrator that it is a ‘straw’ that justifiably is to be put on the employee.

The argument raised by the Union which must be addressed by the Arbitrator at the outset are their contentions concerning Grievant’s prior discipline. To make the point directly, it is too late at the termination stage to complain about the severity or propriety of prior progressive discipline.

These preliminary points help focus the issues in this case. The first is whether Grievant drove under the wing of the aircraft (something clearly prohibited by the rules and something inherently risky and unsafe) and/or whether he was negligent in the operation of the tug resulting in him driving the right tire into the fuel pit). Only if one of these aspects of the charges against him are sufficiently supported by the evidence is his final warning and prior record to be considered.

Concerning whether Grievant drove under the wing, the principal evidence is the videotape. The camera view is from the terminal looking toward the aircraft showing the jet bridge and mostly the right side (in the direction of travel or the first officer's side). It is very grainy and of a low-resolution video. It was dusk turning to night time. Frames of the video may not be continuous, as is the case with many surveillance/security cameras. Because of storage space concerns the camera may not take enough frames per second to appear continuous and life-like as it would on a television show. As a result the movement that is depicted is halting and 'jerky'. There was snow in some areas and dark slush in other areas of the ramp so safety lines are not clearly visible. Significantly, the tipped-on-its-side cone was roughly the same color as the slush.

Most of all the depth of field in the video footing is so poor that the Arbitrator can simply not tell with any certainty if Grievant went under the wing

tip or just around the tip as he testified. There is no other evidence presented such as still photographs showing the relationship of the fuel pit to the wing on the night in question. While the fuel pit would normally be just under the wing it cannot be determined just where the aircraft was parked. In normal conditions, pilots and ramp crews are good at hitting the mark but there was slush/snow on the ramp (enough so plows were out) that night and a foot or two concerning the final parking position of the aircraft may have made a difference with respect to whether Grievant drove under the wing. There is also doubt raised about Grievant's path of travel because it is (based on the poor quality of the video) arguable that he followed the same path of the provisioning truck and a bag runner. Another example of how poor the depth of field was on this tape, in particular, is the provisioning truck. It appeared like it could be under the wing of the aircraft. This can't be possible because the truck is higher than the wing. In sum, whether Grievant drove under the wing cannot be determined by any degree of certainty.

There is also the matter of the cone. The importance of its proper placement is critical for aircraft protection at Denver because the position of the fuel pit varies among at least some gates at DEN. Grievant says it was out of position. Of course, this is subject to scrutiny because it is self-serving. What is known with greater certainty is that it was so discolored it blended in with the park surface of the ramp. Poor positioning of the cone would contribute to Grievant's path of

travel as it is an important guidepost particularly under these conditions where ramp lines were partially obscured.

The position of the cone and the fact it was on its side not only raises significant doubt about his path of travel but it significantly casts doubt or at least materially mitigates any negligence on Grievant's part, especially given the conditions, for simply driving into a hole.

The evidence simply leaves the Arbitrator unconvinced as to whether Grievant drove under the wing and leaves significant doubt as to whether he was negligent in other respects. No discipline was warranted.

The Arbitrator recognizes the Parties spent a lot of time examining the discipline or non-discipline for other fuel pit incidents involving other employees. However, these are not relevant here because there was no misconduct. Had there been material misconduct, these other cases would be instructive if the employees there had had similarly poor records as Grievant.

The remedy is reinstatement and pay for time lost subject to the appropriate offsets. Grievant should realize he comes back on thin ice and his vigilance as to safety is the key to his continued employment.

**AWARD**

The Company did not have just cause to discharge the Grievant. He is entitled to reinstatement and back pay subject to offsets as outlined in the Opinion.

(Signature on Original)

---

Gil Vernon, Arbitrator

Dated this 11<sup>th</sup> day of September 2013.