MATTER OF GRIEVANCE ARBITRATION
BETWEEN

SOUTHWEST AIRLINES

AND [redacted], HOU-R-Ø361/91

THE RAMP, OPERATIONS AND
PROVISIONING ASSOCIATION

John Chaussee, Esquire
For the Company

Marvin Menaker, Esquire
For the Union

John F. White, Arbitrator. This proceeding results from a [redacted] grievance protesting the termination of Ramp Agent [redacted] on the same date.

The hearing took place at Dallas, Texas on April 6, 1992. Both Parties appeared, gave testimony, cross examined witnesses and otherwise participated in the hearing. Arbitrability is not disputed. Both Parties timely filed briefs which have been duly considered.

THE ISSUE

Was the termination of [redacted] for just cause? If not what shall the remedy be?

PROCEDURAL MATTERS

The Stipulation

The Parties stipulated that in the event a back pay remedy should be found to be in order, the Arbitrator will retain jurisdiction for the purpose of resolving any issue going to back pay that the Parties themselves find they are unable to resolve. It was further stipulated that in the event the Arbitrator is called upon for that purpose he shall be guided by back pay precedents established by the N.L.R.B. as approved by the U.S. Circuit Courts and the U.S. Supreme Court.

Union Exhibit 3 Ruling

Company Counsel objected to the introduction of Union Exhibit 3 on hearsay grounds. Being the Union's copy of a

Company memorandum made in the course of regular business activity it is excluded from coverage of the hearsay rule. (Rule 803 (6), Federal Rules of Evidence.) The hand made note on it is disregarded in favor of the testimony of [redacted].

THE FACTS

The Grievant, employed by the Company as a Ramp Agent at Houston, Texas since [redacted], was discharged on [redacted] His three and a half years of employment stamped him as a good worker with a poor attendance record. The latter is cited as the cause of his termination. ARTICLE TWENTY - THREE, ATTENDANCE PROGRAM, Section 4. Control Procedure, cited as controlling in this matter, reads as follows:

> Absences and tardiness on scheduled workdays, overtime, training, trades or holidays will be recorded occurrence(s) in the following manner:
>
> | | |
> |---|---|
> | No-Show (Unreported Absence) | 2 |
> | Reported Personal Absence (Personal Business) | 1 |
> | Reported Illness (Two (2) statements per three (3) months) | 0 |
> | Reported Illness (No doctor's statement or after utilizing two (2) doctor's statements per three (3) months) | 1 |
> | Unreported Tardy | 1 |
> | First Two (2) Reported Tardies | 1/4 |
> | Reported Tardy after the first two (2) reported Tardies | 1/2 |
>
> An employee receiving a chargeable occurrence for absenteeism/tardiness will receive the following disciplinary action as the occurrences accumulate.
>
> | | |
> |---|---|
> | 0 - 1 3/4 | No action taken |
> | 2 - 3 3/4 | Counseling |
> | 4 - 5 3/4 | Letter of Instruction |
> | 6 - 7 3/4 | Warning Letter |
> | 8 - 8 3/4 | Final Warning |
> | 9 or more | Termination of Employment |

Also to be noted under the same Article is Paragraph 6:

> For each three (3) consecutive months period during which an employee works without any chargeable occurrence, two and one half (2 1/2) occurrences will be deleted from the employee's accumulation until the total reaches zero (0). At the end of each calendar year, the record of any employee who has accumulated four (4) or fewer occurrences will have his record reduced to zero (0) occurrences.

According to the Parties the attendance control system was in existence prior to the time the Company recognized the Union. It was included in the current agreement, their first, which runs from May 16, 1990 to December 31, 1994.

The Termination

The relevant facts concerning the Grievant's termination are undisputed. By [redacted] he had accumulated 6 and 1/2 points. Two disciplinary steps remained, a final warning

at the level of 8 to 8 and 1/2 points followed by termination on reaching 9 or more.

Following that he was tardy on [redacted], raising the level to 7 and 1/2 points or 1/2 short of the total calling for a final warning. Then on the following [redacted] he incurred a 2 point penalty for an unreported absence, thus raising his point level to 9 and 1/2. Hence that violation raised his total past the final warning level to more than the number specified for the penalty of discharge.

A fact finding meeting to take up the matter was convened on the following [redacted]. At the outset Arthur J. Allison, Assistant Manager at Houston's Hobby Airport said he handed the Grievant a written final warning. Dated the same day it reads in part, "Should you incur one more chargeable occurrence, your employment with Southwest Airlines will be terminated." Then about 30 minutes or so later, according to Ramp and Operations Manager Jeffrey B. Murrin, Grievant was handed a written termination notice bearing the same date.

Evidence of Past Application of the Rule

Amarillo Operations Agent [redacted] testified that as a Union District Representative he processes grievances for the Union which go past the local level.

He offered background testimony concerning the Union's copies of three Company memoranda introduced in the record as Union Exhibits 1, 2 and 3. In the same order these concern the disposition of grievances of employees [redacted] and

[redacted].

According to the uncontroverted testimony of [redacted] the Company from time to time deviated from the contract requirement that nine or more points results in termination.

He testified that Dallas Ramp Agent [redacted] also skipped past the final warning to the 10 point level. He was then handed a final warning but, unlike the Grievant, was not terminated but told instead that he would be if he incurred any more points before he improved his record. References about record improvement refer to the above quoted Article Twenty-Three, Paragraph 6 which describes the way it is done.

The record shows that Uler was charged two points for a no show violation on [redacted] which raised his total from 8 and 1/4 to 10 and 1/4 points. However, the September 12 final warning letter, according to Meech, did not specifically state that it was a final warning nor that another penalty would cause his termination. The Company representative conceded there was "a marginal question" as to the clarity of the final warning letter and settled the matter with the Union on October 15, 1991 by reinstating [redacted] with the understanding that the accumulated 10 1/4 points would remain, and, "Should [redacted] experience any chargeable occurrence for absenteeism/tardiness, before record improvement is made, his employment will be terminated."

Union Exhibit 3, is a final warning notice issued by the Dallas Station Manager Audy Donelson to employee [redacted]. Meech testified that [redacted] was slightly above the nine point termination level when he received it. It states in part, "This is your final warning. Until your attendance record is improved, if you experience one (1) more chargeable occurrence, you will be terminated."

The Positions of the Parties

The Company asserts that the Grievant failed to heed at least three notices about his need to improve his attendance,

that the Union's effort to show disparate treatment in the Grievant's case is flawed since the circumstances regarding the three instances relied on differ markedly from the Grievant's record, that he is said to have leap frogged past the final warning plateau to the termination level, an occurrence clearly contemplated by the Agreement and negotiated into it. Hence it saw the termination as being in order and took that step. The Company further contends it was procedurally proper to issue the final warning along with the termination. That being the case, to negate the termination despite the grievous nature of the Grievant's attendance record would be inappropriate and inequitable.

On the other hand the Union contends the termination was not for just cause since service of the final warning letter followed by termination without any additional misconduct constituted double jeopardy. It also points to Union Exhibits 1, 2 and 3 as instances in which other employees were retained after reaching the termination level, and in order to establish just cause for discipline the employer must demonstrate, among other things, that other employees were treated the same for like and similar violations.

CONCLUSIONS

There can be no doubt the progressive discipline system included in the Parties' Agreement is designed to bring about any needed reform of employee work habits in a fair manner. It would not be in keeping with its purpose to hold that since the Grievant had been put on notice during the early steps and had leap frogged the final warning stage that termination became appropriate without need for further warning. To so hold would undercut the guarantee of a last chance opportunity to shape up that is spelled out in the Agreement. It could very well result in an employee's discovering that what he took to be a right guaranteed by the Parties' Agreement would not be available to him at all.

In that regard if leap frogging past the final warning

stage is clearly contemplated by the Agreement as contended, then one might reasonably expect a concept that novel and important to be specifically affirmed and explained therein lest it be mistaken for an unintended quirk.

To accept the Company's argument is to hold that it has retained an undisclosed right under the Agreement to waive full application of a procedure it designed in order to promote necessary reform in a fair manner.

According to Union Exhibits 1, 2 and 3 as well as the uncontroverted testimony of [redacted], the three earlier incidents were resolved by the parties in a manner which demonstrates their joint understanding of the intent of their Agreement is to provide employees with not only a clear and final warning but the opportunity to heed it and reform. It is also plain that they did not treat leap frogging past the final warning stage to the termination bracket as nullifying an employee's right to a final warning.

The earlier settlements of the three cases show that the right to a clear and meaningful final warning must be recognized as a prerequisite to an attendance termination and respected as a contract right.

In addition to being bound by the clear language of the Parties' Agreement the Arbitrator must duly respect any evidence going to how they agreed to apply it in unusual situations.

Accordingly it is found that the Grievant's termination was not for just cause since he was denied his right to a meaningful and functional final warning in violation of the Parties' Agreement. Merit is also found to the Union's argument that the Grievant suffered disparate treatment.

In view of the above findings it is deemed unnecessary to entertain and carefully examine the Union's contentions regarding the double jeopardy question.

AWARD

The Grievant will be reinstated to his former position of Ramp Agent with the understanding that unless his record of attendance improves he may be later terminated in the event he has one more chargeable attendance occurrence.

In view of his questionable dedication to his job responsibilities, as suggested by his poor attendance record, a back pay award is concluded not to be in order. Otherwise all of his former rights and privileges will be restored.

Dated at Fort Worth, Texas this 14th day of May 1992.

John F. White

John F. White, Arbitrator