BEFORE

WILLIAM H. LEMONS

ARBITRATOR

In the Matter of the Arbitration between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	**Case No. STL-R-2433/12**
	)	
And	)	
	)	
Transport Workers Union of America, AFL-CIO	)	**Discipline –** [redacted]
Air Transport Division, Local 555	)	
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	

OPINION AND AWARD OF THE ARBITRATOR

June 30, 2013

ARBITRATION AWARD

In the Matter of:

Southwest Airlines Company
Dallas, Texas

and

Discipline of [redacted]

Transport Workers Union of
America, Local 555

APPEARANCES:

For the Company:	Mr. Bill Venckus Director – Employee Resources Ground Operations
For the Union:	Mr. Mark Waters District IV Representative – TWU Local 555
IMPARTIAL ARBITRATOR:	William H. Lemons **WILLIAM H. LEMONS, P.C.** 4040 Broadway, Suite 616 San Antonio, Texas 78209

By the terms of the collective bargaining agreement (Jt.Ex. 1, hereafter referred to as the "CBA") between Southwest Airlines Company (hereinafter referred to as the "Company") and TWU Local 555, Transport Workers Union of America, AFL-CIO (hereinafter referred to as the "Union"), William H. Lemons was selected by the parties to serve as impartial arbitrator (Jt.Ex. 2). A hearing was held at the Wyndham Dallas Love Field, 3300 W. Mockingbird Road, Dallas, Texas, on April 9, 2013. In addition to the appearances noted above, several other party representatives attended the arbitration. The "Rule" was invoked and witnesses excluded during other witness testimony. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments, and did so very ably. In all,

the Company introduced four exhibits, the Union introduced three exhibits, and I have examined each carefully. There was no court reporter and no stenographic record was made. Post-hearing briefs were filed on May 10, 2013. These proceedings were declared closed on the date the Arbitrator received the post-hearing briefs.

ISSUE

Was the Grievant disciplined for just cause? If not, what is the appropriate remedy? The parties stipulated to this issue, that there were no time-frame or process issues, and that this matter is properly before me. It is important to note that the question of arbitrability is not before me. The parties also seem to agree that no fact-finding meeting was required under these circumstances. Finally, as the issue is not before me, nothing in this decision should be construed to reflect whether and how STL T-point Agents should, or should not, work terminators.

PROVISIONS OF THE LABOR AGREEMENT

Article 2 – Scope of Agreement

C. **Reasonable Work Rules**. Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

D. **Management Rights**. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

Article 5 – Classifications.

O. **Ramp Agent/Provisioning Agent**. Works according to Company regulations and procedures and instructions from supervisors issued in accordance with this Agreement.

Article 20 – Grievance/System Board/Arbitration
Discharge and Discipline
Section One
Procedures

A. **Purpose**. No employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

C. **Cost of Arbitration**. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

H. **Other Disciplinary Procedures**. Letters of warning or reprimand not involving loss of pay or discharge shall be issued no later than five (5) working days from the time the Company has full knowledge of the incident.

L. **Interpretation/Application of Agreement**. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

14. **Arbitration/Function and Jurisdiction**. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

POSITION OF THE COMPANY

I summarize the Company's position (Company Brief, pages 1-3) when I say that the Company feels this is simply a case about the Grievant violating several of the Basic Principles of Conduct ("BPC") that it promulgated in accordance with the CBA. These are listed in the Letter of Warning dated December 16, 2012 (Jt.Ex. 2) as:

> 2. An Employee on duty and in uniform reflects the SWA attitude to our Customers on a personal basis. It is imperative that you remember that your appearance, attitude, and conduct, whether on or off duty, may be a reflection on SWA, and that you act accordingly.
>
> 4. Complete coordination with Coworkers and Supervisors is required to provide harmonious working conditions.
>
> 8. Restricting work, using threatening or abusive language, intimidating, or interfering with fellow Employees or their work.

It maintains that the Grievant engaged in misconduct, and the Company's requirement that Employees refrain from such misconduct is reasonable and directly related to the business of a major commercial airline. The Company further insists that it investigated this matter before disciplining the Grievant, that its investigation was fair and objective and that the evidence and testimony at the arbitration hearing was substantial and compelling. In conclusion, the Company maintains that it has met its burden of proof to show that the Grievant was disciplined for "just cause." Therefore, the Company's discipline should be sustained and the grievance denied.

POSITION OF THE UNION

The Union explains that the Company in the first instance failed to prove that the Grievant was guilty of any of the three BPC's as charged in the Letter of Warning. That if anything, Supervisor Paul Fay violated the Company's mission statement. The Union further contends that the Company did not investigate the incident carefully, and that it lacked due process in

investigating and administering the discipline in question. The Union points to the sloppy way in which the discipline was assessed, and asks that the grievance be sustained and that the Letter of Warning be removed and rescinded.

STATEMENT OF FACTS

Much of the testimony at the hearing in this matter was hotly disputed, at least insofar as to who said what to whom. The following facts were presented during the hearing. Around 9:00 p.m. or so on Saturday evening, December 15, 2012, the Grievant, two Ramp Agents ([redacted] and [redacted]) and two Ramp Supervisors (Tuan Dingh and Dominic Walker) were watching television at the STL T-point. Ramp Supervisor Paul Fay apparently entered the area, and instructed the Agents to assist with downloading a terminating aircraft. Apparently the Grievant either did not have his shoes on, or they were on and lose. He began tying his shoelaces. At this point, there was a confrontation between Supervisor Fay and the Grievant. Unfortunately, the record is very inconclusive as to who said what to whom and what was said.

OPINION OF THE ARBITRATOR

Both sides did a fine job presenting their versions of this dispute, and their spokespersons presented persuasive arguments. In the final analysis, my determination is based upon a careful and meticulous analysis of what the Company's witnesses could testify they knew about, compared to what the Grievant's witnesses testified they observed and what was said. In short, it is a credibility determination. As described hereinafter, this Arbitrator has determined that the Company did not have just cause to discipline the Grievant. Hence the grievance will be sustained. The essence of this case is whether the Company proved the guilt of wrongdoing, proved that it observed basic due process in investigating and administering this discipline and that the imposed penalty was appropriate. The answer to the first inquiry is no.

Evidence of Guilt. There are a number of things in the record that make me conclude that it is more likely than not that the Grievant was not guilty of violating the three BPC's that are listed in the Letter of Warning dated December 16, 2012 (Jt.Ex. 2). That is fatal to the Company's case. I find on this record that BPC #2 is not remotely applicable. I also find that the Grievant did not violate BPC #4 – if anything, Supervisor Fay was equally as guilty of not providing *harmonious working conditions* when he, in effect, grabbed the Grievant by the ear like he was used to doing with students, and took him to see the principal. More on that later.

I also find on this record that the Grievant did not violate BPC #8 in the manner alleged. He was tying his shoes and on his way to assist with the terminator when the confrontation with Supervisor Fay took place. The Grievant did not restrict work. The record is not clear whether, in fact, the Grievant used threatening or abusive language. Live testimony from [redacted] and [redacted], coupled with the statement of [redacted] (Union Ex. 3) effectively refute Supervisor Fay's accusations. The testimony of Ramp Supervisor Tuan Dingh was at best inconclusive. This Arbitrator would have found it helpful to hear the live testimony of Steve Taylor and Dominic Walker, or at least have had the opportunity to see Dominic Walker's written statement. I will infer from the absence of the testimony and that statement that such would not have been favorable to the Company's position.

In summary, on this record I find it more likely than not that the Grievant was not guilty of – did not commit – the violations of the BPC's that appear on his Letter of Warning. I must conclude, on this record and given the unique circumstances of this case, that the Company has not shown evidence of guilt by a preponderance of the credible evidence.

Due Process. The Union complains that the Company did not play fair in this case, and has suspicions about the investigation and entire process leading up to the Grievant being given the Letter of Warning. I share some of those concerns. It would seem that parts of the investigation were incomplete. In the first place, it is correct that to some extent Supervisor Fay is both the Prosecutor and the Prosecutor's main witness to what happened. Supervisor Fay had been employed by the Company but twenty months when this occurred. It would have been helpful if he had backed off, asked another neutral management official to participate or assist, and at least gathered a more complete written record of this incident before taking action. I don't find that Supervisor Fay's unilateral record of what happened, as expressed in his Letter of Warning, is particularly probative.

Some of the 350+ arbitrations that I have conducted over the years have involved persons in management positions who have come from either military or law enforcement backgrounds to the civilian workforce. Some years ago, I heard a case where a retired Air Force General had ordered a security guard to clean out a commode. He was told "no." What might have been an insubordination case in the military is not the same in civilian life. And so with all respect to Supervisor Fay, it may be that while he could in the past order a high school student to empty his locker, and not to look at him that way, and ask him if "he had a problem with me telling him to do that" (or "don't look at me like I have three heads"), the rules have changed. While management does have the right to direct the workforce, and to instruct STL T-point Agents whether, when and how they should work terminators, such has to be done in accordance with the CBA and established rules of industrial relations.

While I have some concerns about fundamental fairness, such do not rise to the level where they would affect my decision about guilt or the appropriateness of the penalty. Because I have found on this record that there was insufficient evidence of guilt, I need not go there.

Appropriate Penalty. Nothing in this decision should be read as my condoning restricting work, using taunting or abusive language, or for that manner deliberately and slowly tying one's shoelaces in order to provoke a skirmish. To allow such would be counter to the culture on this property. I simply find on this record that the Company did not sustain its burden of proof of establishing the Grievant's guilt by a preponderance of the credible evidence. The Grievant's situation is easily distinguished from Arbitrator Helburn's decisions in the [redacted] and [redacted] termination cases. There, the decisions on the "idle time" and "Attendance Control Program" violations were a matter of math, and "mercy" could have no role or place to play in his decisions. Here, I am not exercising "mercy" – I simply find that guilt was not established. I also find that the three examples reflected in Company Ex. 1 demonstrate nothing, other than perhaps that in the past, there have been fact-finding meetings involving Letters of Warning. My decision is limited to the facts before me and these particular circumstances.

Because I have found inadequate evidence of guilt, I cannot simply impose another lesser or different penalty on Grievant. In my Award below, I direct that the Letter of Warning dated December 16, 2012 be removed from the Grievant's personnel file, and that it not be used in future disciplinary matters.

AWARD

The grievance is sustained. The Company did not have just cause to discipline the Grievant, [redacted]. The Letter of Warning shall be rescinded and all references to it shall be purged from his personnel file and other records.

William H. Lemons

WILLIAM H. LEMONS
Impartial Arbitrator

DATED: June 30, 2013, in San Antonio, Texas.

STATE OF TEXAS)
)
COUNTY OF BEXAR)

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

William H. Lemons

WILLIAM H. LEMONS