Abernathy #3

IN THE MATTER OF THE ARBITRATION BETWEEN:

EMPLOYER

AND

UNION

HEARING SITE: Executive Offices City 1, State 1

HEARING DATE: March 3, 1994

ARBITRATOR: John H. Abernathy

EXHIBITS

Joint

1. 1989-1994 Ramp and Stores Agreement Employer
1. Employer Rules of Conduct for UNION Represented Employees
2. Proposed level 5 Notice of Investigative Review Hearing
3. Decision of March 15, 1993 Investigative Review Hearing
4. Third step grievance decision
5. Level 4 disciplinary action, June 2, 1992 given to the Employee
6. Level 3 disciplinary action given to Employee, April 11, 1991
7. Employer's Non-Punitive Discipline Program
8. Report of incident by Person 1, February 11, 1993
9. Diagram of E-3/E-4 gate area
10. Chapter 5-12, Ground Safety and Health, Paragraph 4-G
11. Job Qualification Record of Employee
12. Accident Report, November 20, 1990, the Employee and Person 2
13. October 7, 1986 letter dated October 7, 1986 re: negotiations
14. Memo of Person 3 re: Letter 87-2
15. Discipline of Person 4
16. Discipline of Person 5
17. Discipline of Person 6
18. Discipline of Person 7
19. Discipline of Person 8
20. Examples of discipline for near misses
21. Pay records of the Employee starting February 21 and ending March 6, 1993
22. Pay records of the Employee starting March 7 and ending March 20, 1993
23. Attendance record of the Employee, 1991
24. Attendance record of the Employee, 1992
25. EMPLOYER System Board decision by Person 9, January 21, 1988
26. Supporting Case #1

27. Supporting Case #2

Union

1. Notice of Investigative Review Hearing, Employee, February 25, 1993
2. Report of Non-Punitive Disciplinary Action, Employee, March 15, 1993
3. Report of Investigative Review Hearing, March 15, 1993
4. Third step grievance decision
5. Attendance record of the Employee, 1991
6. Attendance record of the Employee, 1992
7. Reduction of discipline from Level 3 to Level 1, July 15, 1991
8. Memo from Person 10 to Person 11, May 21, 1992
9. SafetyGram, September 18, 1993
10. Labor Management Committee Minutes, February 4, 1994
11. Incident Report, October 30, 1993
12. Diagram of E-3/E-4 gate area
13. Report of Non-Punitive Disciplinary Action, Person 12 for violation of Rule 30

BACKGROUND

The Employer and the Union are parties to a labor agreement, known as the Ramp and Stores Agreement that sets forth a procedure for filing grievances and appealing unresolved grievances to a System Board of Adjustment (Joint Exhibit 1). The Union grieved the Employer's discharge of bargaining unit member Employee and appealed that grievance to arbitration. I was selected as arbitrator to hear the case and render a binding decision.

I held a hearing on this matter on March 3, 1994 in the Employer's Executive Offices in City 1, State 1. At the hearing the parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents and make arguments in support of their positions. I tape recorded the hearing solely as an extension of my personal notes and not as an official record. The parties also filed post-hearing briefs. On receipt of the briefs the matter stood fully submitted to me for a decision.

SUMMARY OF FACTS

This case concerns the termination of the Employee, who was employed at the Employer's City 2, State 2 line service station as a ramp serviceman from 1990 until his termination in March 1993. During the relevant time period, the Employee worked a part-time shift from 8:00 p.m. to midnight. During the period of his employment, the Employee, along with all other bargaining unit employees, was subject to the Employer's Rules of Conduct (Employer Exhibit 1). These rules specify various offenses and the range of discipline that may result for each category of offense. The levels of discipline are established as part of the Employer's Non-Punitive Disciplinary System (NPDS), described in Employer Exhibit 7. This program includes five levels of discipline, with Level 1 equivalent to a traditional letter of warning or reprimand, Level 2 equivalent to a 1 to 4-day suspension, Level 3 equivalent to a 5-19 day suspension, Level 4 equivalent to a 20 or more day suspension and Level 5, discharge. The Union agreed to the basic concept and principles of the NPDS in Letter of Agreement 82-2 (Joint Exhibit 1, page 122). Subsequently the Union also agreed to Letter of Agreement 87-2R, dated November 25, 1987 (Joint Exhibit 1, page 135), which provides that an Investigative Review Hearing will be conducted prior to issuing a report of non-punitive discipline at Levels 4 and 5 and that if an employee has received a report of non-punitive discipline at Level 4, the discipline shall be reduced to a Level 3 after a period of one year, assuming that the employee has received no further disciplinary action in the meantime.

Pursuant to these rules, the Employee received discipline three times prior to the incident leading to his discharge; first in November 1990 for violation of Rule 30 of the Employer's Rules of Conduct the Employee received Level 3 discipline. This rule prohibits:

> "Any negligent or unsafe action which results in, or has the potential of resulting in, injury to the employee or others, or damage to Employer property or the property of others."

The range of discipline for violation of this rule is Level 1 to discharge. This discipline subsequently was reduced to a Level 1 on July 15, 1991, in resolution of a grievance filed by the Union.

Second, on February 10, 1991, the Employee was involved in an incident in which he allegedly parked a truck too close to the wingtip of an aircraft. Management again charged him with violation of Rule 30 and proposed discipline at Level 4. An Investigative Review Hearing was held April 5, 1991. On April 11, 1991, the hearing officer upheld the proposed Level 4 discipline (Employer Exhibit 6). The Union did not grieve the assessment of Level 4 for the Employee's offense in this case. According to the Letter of Agreement, the discipline was reduced to a Level 3 after one year.

Third, on May 13, 1992, the Employer issued a Notice of Investigative Review Hearing for alleged violation of Rule 32, Failure to Maintain an Acceptable Level of Dependability. The Employer proposed that the discipline be assessed at Level 4. The Investigative Review Hearing was held May 29, 1992. On June 2, 1992, the hearing officer upheld the proposed Level 4. The Union did not grieve this disciplinary action.

Then, on February 11, 1993, the incident took place that resulted in the Employee's termination. According to the Employer, at about 12:10 a.m. on the night in question, the Employee attempted to back Food Truck 245 away from the City 2 ramp area between gates E-3 and E-4 without using a guideman as required by Employer regulations. He apparently was using the truck to commute to the employee parking lot. Employer Flight 644 bound for City 1 was awaiting a 12:15 a.m. departure at Gate E.

The plane already was loaded with passengers, baggage and cargo. According to the Employer, as Employee backed up, the truck came dangerously close to the left wing leading edge of Flight 644. Mechanics Person 13, Person 14 and Person 15, who were on the ground in the area, immediately recognized the danger. They began yelling and waving and Person 13 flashed his flashlight to try to get the Employee to stop the truck before he hit the plane. The Employee saw them and stopped the truck three to four feet from the wing's leading edge. He then changed direction and starting backing up again (without a guideman) toward the airplane's wing. The three mechanics again saw the truck heading for the airplane and again began to yell and waive their arms to try to get him to stop, but the Employee did not stop.

Person 13 finally threw his flashlight at the truck and hit it in an attempt to get Employee's attention. Employee did stop the truck, at which point he had backed the truck to within only four to six inches of the airplane wing. Person 13 told the Employee that he was about to "tear off the wingtip" and that he (Person 13) would act as guideman. The two men then safely cleared the wingtip and gate area and Employee left the area without comment.

The Employee testified that he moved the truck without a guideman because his lead ramp serviceman had told him to take the truck to the kitchen, even though the Employee told him that he did not have a partner on the night in question. The Employee testified that he could see the wingtip in the right hand mirror of his truck and that he was slowly backing up when the mechanic approached and told him that he would guide him back. It was the Employee's belief that he was acting in a safe manner and that the mechanic simply over reacted to the circumstance.

The mechanics reported the incident to Maintenance Foreman Person 1 who in turn advised the Employee's supervisor, Person 16, in a written report (Employer Exhibit 8). Supervisor Person

16 investigated the matter, interviewing and obtaining written statements from mechanics Person 13, Person 14 and Person 15 and the Employee. All of the written statements are included in Employer Exhibit 8. Person 16 concluded that the Employee had violated Rule 30 and proposed that discipline be assessed at Level 5, discharge.

On February 25, 1993 management issued the Employee a Notice of Investigative Review Hearing, indicating that a hearing would be held on March 4, 1993 to consider proposed disciplinary action at Level 5 (discharge) on the basis of the alleged violation of Rule 30 (Union Exhibit 1, Employer Exhibit 2). Attached to the notice was a Report of Non-Punitive Disciplinary Action (Union Exhibit 2, Employer Exhibit 2). The hearing was held as scheduled on March 4, 1993. The Employee was not present. He testified that he intended to be at the hearing but mistakenly believed that it was to be held the day after the actual date. His Union representative was present at the hearing.

The hearing officer, Manager of Customer Service, Person 17, upheld the proposed Level 5 in a written decision dated March 15, 1993 (Union Exhibit 3, Employer Exhibit 3). The discharge was effective March 16, 1993. The Union appealed the discharge to Step 3 of the grievance procedure. On August 10, 1993, the Employer denied the grievance. Thereafter the matter proceeded to the present arbitration

STATEMENT OF THE ISSUE

Did the Employer have just cause for the termination of Employee Employee?

If not, what is the appropriate remedy?

RELEVANT CONTRACT LANGUAGE

ARTICLE X - SENIORITY

F. An employee covered by this Agreement shall lose his seniority status and his name shall be removed from the seniority list under the following conditions:

2. He is discharged for cause;

ARTICLE XVII - DISCIPLINARY ACTION

A. An employee who is to be questioned by Employer Representatives in the investigation of an incident which may result in disciplinary action being taken against him may request a Union Representative to be present. Such Union Representative will not interfere with the Employer's questioning of an employee. However, at the conclusion of the Employer's questioning the Union Representative will be free to ask questions or clarify facts. The above does not apply to inquiries of employees by Supervisors in the normal course of work.

B. No employee shall be discharged without a prompt, fair and impartial investigative hearing at which he may be represented and assisted by Union Representatives. An employee will also be entitled to an investigative review hearing if he so requests upon being advised of a disciplinary suspension. The hearing will be held before any suspension is served. Prior to the actual hearing the Union and employee will be given copies of any previous disciplinary action letters which are to be considered and the Union will be advised in writing of the precise charges against the employee. The Union and employee will have at least forty-eight (48) hours advance notification of the hearing should they so desire. Nothing herein shall be construed as preventing the Employer from holding an employee out of service pending such investigation.

C. Appeals of suspensions shall be made directly to Step Two of the Grievance Procedure. Appeals of discharge and appeals of employees laid off because of lack of qualifications shall be filed directly to Step Three of the Grievance Procedure. A hearing will be held within ten (10) days of perfecting such appeal. Oral and written evidence may be introduced at such hearings and witnesses may be required to testify under oath. All time limits for answers

D. All disciplinary letters (letters of warning, reprimand, or suspension) will be removed from the employee's file after a period of two (2) years (excluding periods while on layoff or Leave of Absence) from the date they were issued. Decisions relating to appeals of disciplinary action may not be used by the Employer as part of the employee's past record when assessing subsequent discipline if more than two (2) such years have elapsed from the date of the disciplinary action taken.

E. If, as a result of any hearing or appeals therefrom, it is found the suspension or discharge was not justified, the employee shall be reinstated without loss of seniority and

made whole for any loss of pay he suffered by reason of his suspension or discharge, and his personnel records shall be corrected and cleared of such charge; or, if a suspension rather than discharge results, the employee shall have that time he has been held out of service credited against his period of suspension. In determining the amount of back wages due an employee who is reinstated as a result of the procedures outlined in this Agreement, the maximum liability of the Employer shall be limited to the amount of normal wages he would have earned in the service of the Employer had he not been discharged or suspended.

F. Necessary hearings and investigations called by the Employer shall, insofar as possible, be conducted during regular business hours and all stewards, Local Committeemen and witnesses necessary for a proper hearing or investigation will be compensated at straight-time rate for all time spent attending such hearing or investigation.

ARTICLE XVIII - BARGAINING AND GRIEVANCE PROCEDURE

H. Step Four - System Board

If the grievance remains unsettled after being processed through Step 3 above, the System General Chairman may request the case be heard by the System Board in compliance with Section 204, Title II of the Railway Labor Act as amended.

1. The System Board of Adjustment shall consist of three members, the CHAIRMAN, who will be a neutral member selected in a manner agreeable to the Employer and Union, the EMPLOYER MEMBER, who will be appointed by the Employer, and the UNION MEMBER, who will be appointed by the Union. In matters relating to contract interpretation, all members of the Board will hear and decide the case by majority vote. In disciplinary cases, only the Chairman will sit on the Board and he shall decide the case.

3. The Board shall have the power to make sole, final and binding decisions on the Employer, the Union, and the employee(s) insofar as a grievance relates to the meaning and application of this Agreement. The Board shall have no power to modify, add to, or otherwise change the terms of this Agreement, establish or change wages, rules, or working conditions covered by this Agreement.

4. All appeals properly referred to the Board shall include:

a. The question or questions at issue.
b. A statement of the specific Agreement provisions which are claimed to have been violated.
c. All facts relating to the dispute which it intends to cite in support of its position.
d. The full position of the appealing party.

A copy of the Submission shall be served on the other party.

5. Except in cases involving appeals of disciplinary action, letters in the file, suspension, or discharge, in which the only written procedural step will be the Union's Submission to the Board...

ARTICLE XX - GENERAL AND MISCELLANEOUS

I. The right to hire; promote; discharge or discipline for cause, and to maintain discipline and efficiency of employees is the sole responsibility of the Employer except that employees will not be discriminated against because of Union membership or activities. In addition, it is understood and agreed that the routes to be flown; the equipment to be used; the location of plants, hangars, facilities, stations and offices; the scheduling of airplanes; the scheduling of overhaul, repair and servicing of equipment; the methods to be followed in the overhaul, repair and servicing of airplanes are the sole and exclusive function and responsibility of the Employer.

LETTER OF AGREEMENT 82-2

During the course of these negotiations both the Union and Employer discussed our current disciplinary system in an exploratory attempt to find a better way of addressing disciplinary problems.
The traditional method of responding to Employer rule violators has been to impose punishment in the form of progressive disciplinary suspensions. The effectiveness of this form of behavior modification has been questionable, particularly in dealing with those types of problems such as absenteeism.
The concept of eliminating most disciplinary suspensions and replacing such actions with progressive disciplinary letters and joint counseling by both the Employer and the Union was thought to be potentially beneficial to all parties and worthy of further exploration. Accordingly, the Employer and the Union agreed to implement a new corrective disciplinary procedure throughout the system on a trial basis. Implementation will be on a location by location basis as fast as the appropriate training can be reasonably accomplished.

The new concept includes the following principles:

1. The Union and the Employer both realize that rules of conduct are necessary for the welfare of the Employer and of all employees but believe through mutual efforts improved standards of conduct can be achieved in most cases by utilization of this program.

2. Letters of Discipline may be given in place of traditional disciplinary suspensions.

3. Such Letters of Discipline shall have the full force and effect of disciplinary suspensions and will be considered as equivalent corrective discipline in reviewing the merits of any subsequent suspension or discharge.

4. Such letters will be progressive in nature and will represent various levels of severity depending upon the offense and/or previous disciplinary record.

5. The employee's Supervisor or other designated Management Representative shall be responsible for administering this program.

6. Letters of Discipline shall be presented to the employee in the presence of his Steward, if requested, and shall contain an explanation of the infraction and the future corrective action expected.

7. This program will not limit the Employer's current rights to discharge employees for a single serious offense, to hold an employee out of service without pay, or to issue disciplinary suspensions if circumstances so warrant.

8. This program will not limit the Union's right to grieve all disciplinary action including Letters of Discipline.

9. This program may be modified by mutual agreement as experience is gained.
10. The program is on a trial basis and may be cancelled upon written notice from the System General Chairman or the Vice President of Employee Relations.

LETTER 87-2R

This will confirm the understanding reached during negotiations regarding the application of Letter 82-2 of the Mechanics' Agreement and similar provisions of the Ramp and Stores, Food Services, Communications Employees', and Dispatchers' Agreements.
In the application of the Employer's Non-Punitive Disciplinary System, the following features will be included:

4 and Level 5. Any appeals of such discipline shall be made directly to Step three of the grievance procedure using the rules and time limits which apply to that Step.

2. If an employee has received a Report of Non-Punitive Discipline at Level 4, that discipline shall be reduced to Level 3 after a period of one year (excluding periods while on layoff of Leave of Absence) without issuance of a Notice of Investigative Review Hearing which results in further disciplinary action.

POSITION OF THE EMPLOYER

The Employer’s position is that it had just cause for the termination of theEmployee and that the grievance should be denied. Arguments and contentions in support of this position may be summarized as follows.

A. The Employer had just cause to terminate Employee based on his continued failure to fulfill his responsibilities as a ramp serviceman.

1. The Employee acted with extreme negligence on February 11, 1993 in violation of Rule 30. Two eye witnesses, Person 14 and Person 13, testified credibly that the Employee twice attempted to back up a food truck in close proximity to a departing airplane without using a guideman as Employer safety regulations require.

2. Avoidance of accident on the night in question does not excuse the Employee's negligence. He should have known that backing up a truck so close to a plane required a guideman, especially after three mechanics alerted him.

3. He should have known the importance of the Employer's safety policy given his two prior disciplinary actions for safety violations (i.e. November 1990 and April 1991). And he should have known that he stood on the brink of discharge and could not risk even the most minor rule violation. Yet he failed to take responsibility for his actions in any of these cases.

4. Arbitral authority supports termination in cases such as this.

5. For these reasons, the arbitrator should conclude that the Employer properly terminated the Employee.

B. Nothing presented by the Union supports the Employee's reinstatement.

1. The Union's presentation in this hearing is highly questionable. The Union's submission dealt only with procedural issues. Yet by the end of the hearing the Union had ignored the procedural issues and focused only on the merits of the Level 5. The Union also improperly raised questions

about all prior levels of discipline, including the Level 1 that was no longer even part of the Employee's file. Moreover, none of the Union's presentation established that the termination was improper.

2. The Employee's testimony lacked credibility.

a. Neither the Employee's own statement written at the time of the February 1993 incident, nor any corroborating testimony supports his contention that a lead ramp serviceman directed him to move the food truck without a guideman.

b. The Employee's time cards directly conflict with his testimony that he did not receive a copy of the proposed Level 5 in a timely fashion and that the Employer held him out of service pending the results of the Investigative Review Hearing.

c. The Employee admitted lying about the reasons for his absences addressed in his June 1992 Level 4.

3. The procedural issue regarding prior disciplinary actions amounted only to harmless error.

a. The Employer’s position is that the Union has waived its right to raise any due process questions by failing to present evidence and argument on the due process issue.

b. Even if the due process issues raised in the Union's submission are considered, they do not warrant overturning the Employee's discharge. The contract refers to just cause, not due process. As arbitrators have noted, the question is not whether the disciplinary process is totally free from procedural error, but whether the process is "fundamentally fair."

4. The Union's apparent assertions about the propriety of disciplinary actions prior to discharge are improperly before the arbitrator. The Union raised this issue for the first time at arbitration. The Employer position is that disciplinary actions not grieved stand as a matter of record. Prior arbitration awards support the Employer's position on this point.

C. The appropriate penalty based on the entire hearing record was discharge. Nothing in the circumstances of the incident in question or in the Employee's record warrants mitigation. Therefore, the discharge should stand.

For the reasons stated above, the Employer requests the arbitrator to find that it had just cause for discharge and to deny the grievance.

POSITION OF THE UNION

The Union’s position is that the termination of the Employee was improper and unjust and the grievance should be sustained. Arguments and contentions in support of this position may be summarized as follows.

A. Procedural errors.

1. Arbitral authority supports the position that a contract provision requiring "prompt, fair and impartial investigation" prior to suspension or termination requires a full inquiry into and ascertainment of facts respecting all matters pertinent to guilt or innocence and to a determination of the appropriate penalty if guilty. In the present case, the Employer made no

attempt at such a "full inquiry." From the beginning it was apparent that the Employer's motives were not in the interest of justice.

2. Many in the field of industrial relations believe that the workplace is a microcosm of our society and many rights that employees believe to be theirs are drawn directly from societal standards and principles. This fact is reflected in the well known opinion of Arbitrator #2 in another case. Arbitrator #2 noted that every accused employee in an industrial democracy has the right to due process of law and the right to be heard before discipline is administered.

B. Merits

1. In cases of negligence, an employee's prior record may be a significant factor in the arbitrator's determination. Article XVII, Paragraph D of the labor agreement specifically bars inclusion in the record of matters resulting in prior discipline. Over the Union objection, the Employer entered into the hearing record references to the Employee's past record in order to establish a history of unsafe practices. This evidence should not be considered, but even if it is, it would not warrant the Employee's termination for the February 11, 1993 incident.

2. The Employee was subject to disparate treatment in this case. Person 18, City 2 Local Committee Chairman, testified that other employees at the City 2 station have committed negligent acts and received no disciplinary action.

3. Reference to the Employee's record and the Employer's Non-Punitive Discipline Policy booklet further supports the Union's position that the Employee was subject to disparate treatment.

a. On page 4 of the booklet, supervisors are instructed to "use this chart to determine the level appropriate for the current infraction." It also states that "Progression through the levels occurs on a single track regardless of the particular rule violation."

b. The Employee's record shows that his November 1990 discipline at Level 3 was reduced to a Level 1 through the grievance procedure. His next disciplinary action, for the February 1991 parking violation, was assessed at Level 4, but should have been assessed at Level 2 because of the requirement that the levels take place on a single track regardless of the particular rule violation.

c. The Employee's next disciplinary action, assessed at Level 4 in June 1992 should have been assessed at Level 3.

d. It follows that if any discipline was warranted for the February 1993 incident, it should have been assessed at Level 4, the next logical step following what should have been a Level 3 for the June 1992 discipline.

4. As to the February 1993 incident itself, the lead ramp serviceman assigned the Employee to drive the food truck without assigning a second person as a guideman. The reasonable inference is that the lead felt that the Employee could carry out the assignment without putting any person or property at risk. And in fact, the assignment was carried out without injury or damage to person or property.

5. The Employer denied the Employee his rights of due process and the facts do not justify his termination.

For these reasons, the Union requests the Board to rule that the Employer discharged the Employee without just and proper cause in violation of Article X Paragraph F.2, and to sustain the grievance.

ANALYSIS

The issue before me is whether the Employer had just cause for the discharge of the Employee. The just cause standard comprises three questions: whether the evidence establishes that the Employee committed the offense forming the basis for the discharge, whether the Employee was afforded due process and whether the penalty was appropriate, considering the nature and severity of the offense and any mitigating factors. I will consider each question.

1. Does the evidence establish that the Employee committed the offense forming the basis for the discharge?

The basis for the discharge was the charge that the Employee violated Rule 30 of the Employer's Rules of Conduct, which provides:

> "Any negligent or unsafe action which results in, or has the potential of resulting in, injury to the employee or others, or damage to Employer property or the property of others."

At the conclusion of the Investigative Review Hearing in this matter, the Employer's hearing officer found the following facts, which are essentially the same as those stated in Supervisor Person 16's proposed charges:

> ...Employee backed FT 245 away from the terminal without a guideperson. The Employee, using side mirrors, was watching the left wing of A/C 1373. Person 13 and Person 14 were trying to get the Employee's attention by yelling and waving. The Employee stopped approximately 3 feet from the leading edge and repositioned truck to continue backing around wingtip. Person 13, sensing the truck's path would cause impact with the wingtip, threw his flashlight at FT 245 to get the Employee to stop. FT 245 stopped with the back right-hand corner of box 4-5 inches out from wingtip. Person 13 then guided the Employee forward and back out at a safe distance from wingtip.
> In my opinion, the Employee was operating the food truck unsafely in a congested area. A guideperson should have been used. The food truck was operated in an unsafe manner even if wingtip was in view, as the proximity to the aircraft was dangerously close. A food truck box should never come within 4-5 inches of an aircraft.
> (Employer Exhibit 3)

The Employer also cites its regulations concerning ground safety and health, specifically the operator's responsibilities set forth in Section G:

> "Securing a guideman whenever vision is limited to the extent that a safe operation cannot be insured." (Employer Exhibit 10)

The Employee and the Union do not deny that the Employee backed his truck away from the terminal without a guideman, nor do they deny that the Employee stopped the food truck within inches of the wingtip of the aircraft. They do deny that the Employee committed an unsafe act in violation of Rule 30. The Union emphasizes that the Employee had the wingtip in view at all times through the side mirrors of the truck. The Union further notes that the lead ramp serviceman assigned the Employee to drive the food truck without also assigning a second person as guideman. According to the Union, this fact permits the inference that the lead felt that the Employee could carry out the assignment without putting any person or property at risk. The Union further emphasizes that, as a matter of fact, the assignment was carried out without injury to person or damage to property. As for the Employer's regulation requiring a guideman, the Union states that there is no evidence that the Employee was even aware of its existence. Further, this regulation requires a guideman when vision is limited to the extent that a safe operation cannot be insured. In this case, the Employee safely operated the food truck from its position at Gate E-3 and safely delivered it to the flight kitchen.

According to the Employer, the Employee's argument that he did not need any assistance, because he had the plane in view in his right hand mirror, is without merit. A large, 33-foot truck limits the driver's vision and perception. If a mirror were sufficient, the Employer regulation requiring a guideman would be superfluous. Further, the Employer contends that even if the Employee had avoided hitting the plane, the Employer cannot tolerate a 4" to 6" margin of error

given the size of the plane, the size of the truck and the potential for disaster should the two impact. The Employer states that the Union's argument that the Employer should not discipline an employee for a potential accident is without merit. Nothing in Rule 30 requires an actual accident to take place to justify disciplinary action. Further, Employer Exhibit 20 contains examples of the Employer's practice of reprimanding employees who are negligent, whether or not such negligence results in an accident.

The Employer also questions the Employee's credibility, noting that in the written statement made at the time, the Employee did not claim that a lead ramp serviceman had directed him to move the food truck without a guideman. Further, the Employee made no such statement at the third step hearing. Also, the Union did not call the lead ramp serviceman to corroborate the Employee's claim. Taken together, these factors compel the conclusion that the Employee's story is untrue, the Employer contends.

I agree with the Employer that the Union's failure to call the lead ramp serviceman to corroborate the Employee's version of the facts casts doubt on the Employee's story and on his credibility in general. Even if true, however, the fact that a leadman directed the Employee to move the truck by himself would not establish that the Employee acted in a safe manner. Similarly, even if the Employee was unaware of the rule about securing a guideman, this fact does not mean that he acted safely. In my opinion, backing a truck to within 4" to 6" of a loaded aircraft creates an unacceptable risk of contact. Further, the Union's argument that the Employee's action was proper because no contact in fact took place and no injury to person or damage to property occurred is without merit. Rule 30 expressly encompasses negligent or unsafe action that "results in, or has the potential of resulting in" injury or damage to person or property. The reasonableness of such a rule is self-evident, in my judgment. Clearly the Employer need not

wait until an accident or injury actually occurs to discipline an employee for negligent and unsafe conduct.

In short, I find that the evidence establishes that the facts of the incident in question are as stated in the reports of the supervisor and the hearing officer, and that those facts establish that the Employee violated Rule 30 on February 11, 1993 as charged.

2. Was the Employee afforded due process?

The Employer asserts that the Union has waived its right to raise any due process questions in this case. According to the Employer, the Union's submission in this case emphasized alleged procedural defects, but at the arbitration hearing the Union's evidence addressed only the merits of the disciplinary action. Even the Union's evidence regarding prior disciplinary action addressed only the merits of those actions, not any claim that those actions were out of date.

It is true that the Union's submission emphasized alleged procedural defects in the Employer's case, in particular the question of whether management improperly relied on outdated disciplinary actions in deciding that the appropriate disciplinary level for the Employee's February 1993 offense was discharge. At the arbitration hearing, the record reflects that the Union addressed both procedural and substantive issues. I have reviewed the parties' labor agreement and find nothing in it that expressly prohibits the Union from addressing both procedural and substantive matters in this arbitration.

The Employer further asserts that even if the due process allegations in the Union's submission are considered, they constitute only harmless error. According to the Employer, the contract refers to just cause, not to due process. The Employer cites arbitral authority for the proposition

that the question is not whether the disciplinary process is totally free from procedural error, but whether the process is "fundamentally fair."

I do not agree with the Employer that due process is something separate and apart from the concept of just cause. In my view, as noted at the outset of this analysis, due process is an element of the just cause standard. On the other hand, I am inclined to agree with those arbitrators who hold that if a procedural violation does not disadvantage the employee; such violation will not warrant overturning an otherwise appropriate discipline.

In the present case, the Employer applies its views regarding procedural errors to the question whether the Employer improperly relied on an outdated Level 1 disciplinary action. As the Employer states, this issue was raised by the Union in its submission. I will address the question of levels of disciplinary action in discussing the third element of the just cause standard, whether the penalty of discharge was appropriate in this case.

For purposes of this second element of the just cause standard, whether the Employee was afforded due process, the basic question is simply whether the Employee received notice of the charges against him and an opportunity to be heard. According to Letter of Agreement 87-2R, incorporated into the parties' collective bargaining agreement, an Investigative Review Hearing must be conducted prior to issuance of discipline at Level 4 and Level 5 of the Employer's Non-Punitive Disciplinary System. In the present case, the Employee received notice of the Investigative Review Hearing on February 25, 1993, following the February 11, 1993 incident (Union Exhibit 1, Employer Exhibit 2). The Employer's statement of charges and proposed discipline at Level 5 was attached to the Notice of the Investigative Review Hearing. The notice advised the Employee and the Union that the hearing would be held on March 4, 1993 to

consider the Employer's proposed disciplinary action. The hearing was held on March 4, 1993 as scheduled. The Employee was not present, but his Union representative appeared on his behalf. The decision of the hearing officer sustaining the proposed Level 5 was issued March 15, 1993, with the discharge effective March 16, 1993. This sequence of events indicates that the parties have incorporated a due process requirement into their disciplinary procedure as specified in the labor agreement. Further, the evidence indicates that the required procedure was followed in this case.

According to the Union, however, the Employee did not receive due process under the facts and circumstances of this case. First, the Union asserts that the Employer made no attempt at a "full inquiry" into the facts of this case. The Union and the Employee have presented no additional facts that might have been learned prior to arbitration, had the Employer conducted a more complete investigation. Supervisor Person 16 interviewed all the witnesses to the incident and obtained written statements from them, as well as from the Employee. The Union complains that two weeks passed from the date of the incident until management approached the Employee about it and asked for a written statement. According to the Union, the Employer did not seek the Employee's version of events until it already had proposed disciplinary action and scheduled the Investigative Review Hearing. While Supervisor Person 16 certainly could have questioned the Employee earlier in the process, the fact remains that one purpose of the Investigative Review Hearing itself is to allow the accused employee the opportunity present his side of the story. Unfortunately, as stated earlier, the Employee was not present at the Investigative Review Hearing, although his Union representative appeared on his behalf. According to the Union, Article XVII.F of the contract provides that necessary hearings and investigations called for by the Employer are to be held during regular business hours "insofar as possible." It further

provides that witnesses and others are to be compensated at the straight-time rate for time spent in hearing. When management scheduled the Investigative Review Hearing for March 4, 1993, it was well aware that the Employee was on his regular day off, the Union asserts. Management knew that his regular hours of employment were from 8:00 p.m. until midnight when it scheduled the hearing to commence at 7:00 a.m. The Union charges that the Employer made no effort to consider possible family obligations of the Employee when it scheduled the hearing, despite management's awareness of the premature birth of the Employee's child in November 1992 and related problems.

The difficulty with the Union argument is that the Employee did not testify that family obligations or the early hour of the scheduled hearing prevented his attending. Rather, he testified that he had intended to appear, but simply confused the dates and missed the hearing for that reason. In any event, the Employee's Union representative, Person 18, was present at the hearing. The hearing officer report indicates that Person 18 presented arguments on the Employee's behalf that are essentially the same as those the Union has presented at arbitration. Person 18 did not request that the hearing be postponed to a time when the Employee could be present. In my judgment, these facts establish that the Employer gave the Employee an opportunity to be heard, even though the Employee himself did not take advantage of that opportunity. Moreover, the Employee's interests were represented at the hearing by his Union advocate. Since neither the Employee nor his Union representative objected to the Employer's going forward with the process at or immediately following the Investigative Review Hearing, I must conclude that the Employer afforded him due process.

With regard to the severity of the penalty, the Union makes two basic arguments against the Employee's discharge in this case. First, the Union states that correct application of the levels of discipline in the Employer's discipline system would place the Employee at a lower level than Level 5, discharge. Secondly, the Union states that at its City 2 station, the Employer has not disciplined employees for the same type of offense that the Employee committed in this case. Turning first to the question of levels of discipline, the Summary of Facts presented earlier in this opinion, sets forth the Employee's disciplinary history and the basic components of the parties' Non-Punitive Disciplinary System. Briefly stated, the chronology of the Employee's discipline history is as follows:

1. November 28, 1990: Level 3 assessed for violation of Rule 30 (Negligence). On July 15, 1991 this was reduced to a Level 1 through the grievance procedure.
2. On February 19, 1991 a Level 4 was proposed for violation of Rule 30 (Negligence). On April 11, 1991 Level 4 was assessed following an Investigative Review Hearing held April 5, 1991. This level reverted to a Level 3 after one year in accordance with contract provisions.
3. On May 13, 1992 Level 4 was proposed for violation of Rule 32 (Dependability). On June 2, 1992 Level 4 was assessed following an Investigative Review Hearing on May 29, 1992.

The Union emphasizes the statement in the Employer's Non-Punitive Disciplinary System that "Progression through the levels occurs on a single track regardless of the particular rule violation." According to the Union, this language means that when an employee receives a Level 1, the next disciplinary action assessed for a subsequent offense must be assessed at Level 2, the next violation after that must be assessed at Level 3, and so on. Thus, in the Union's view, when

the November 1990 Level 3 was reduced to a Level 1, the effect was that the next disciplinary action, imposed in April 1991, should have been assessed at a Level 2 rather than the Level 4- that the Employer proposed and the hearing officer upheld. Correspondingly, the Union asserts, the June 1992 disciplinary action should have been assessed at Level 3 rather than at Level 4 as the Employer proposed and the hearing officer upheld. Therefore, the Union reasons, the March 1993 disciplinary action now before me should have been assessed at Level 4 rather than Level 5, discharge.

The reference to "progression through the levels on a single track" does not necessarily have the meaning that the Union attributes to it, in my judgment. That is, if a particular offense warrants a Level 1, it does not necessarily follow that the next offense would warrant a Level 2, and so on. The Employer's Rules of Conduct identify 20 offenses that warrant immediate discharge in and of themselves (e.g. drinking alcohol on duty; unauthorized possession of firearms). The Rules of Conduct also identify another 28 offenses which may; result in a range of penalties

> "depending on the circumstances involved and the employee's record. Discipline will commence at the level specified, except that the circumstances of the particular situation or the employee's disciplinary record may warrant a higher level." (Employer Exhibit 1)

For these 28 offenses, the range of penalties varies from a range of Level 1 to discharge, to a range of Level 4 to discharge. For example, the penalty for refusing to comply with a supervisor's direct order ranges from Level 4 to Level 5 - discharge (Rule 22), while the penalty for failing to promptly report work-related injuries ranges from Level 1 to discharge (Rule 35). Other offenses carry a penalty ranging from Level 2 to discharge, or Level 3 to discharge. Review of the Rules of Conduct demonstrates that the level of penalty for a particular offense does not depend simply on what level the employee received for the offense immediately prior. Since the "employee's record" is a factor to be considered, the level of discipline for prior

offenses merits some weight, but the "circumstances involved" in the offense constitute a factor to be considered as well.

In this context, the Union argument that the level of penalty depends on what level the employee received for an offense immediately prior to the one in question simply does not make sense. A more reasonable interpretation of the statement "progression through the levels occurs on a single track" is that different types of successive offenses may warrant increasing disciplinary levels. For example, say an employee has reached Level 4 through a series of offenses related to dependability (Rule 32), which carries a range of penalties from Level 1 to discharge. If the employee then commits the offense of failing to comply with the direct order of a supervisor, which carries a range of penalty of Level 2 to discharge, the Employer is not required to start a new "track" and assess a Level 2. In this regard, I note that the description of the Non-Punitive Disciplinary System (NPDS) in Employer Exhibit 7 states at page 2: "The NPDS follows a single 'track' of discipline. An employee will be placed at successively higher levels even if he violates different rules on each occasion." This management description of the "single track" of discipline is more reasonable than the Union's interpretation, in my opinion.

A further problem exists with the Union position with regard to levels of discipline. Except for the November 1990 Level 3, which the Union grieved and had reduced to a Level 1, the Union has not grieved any of the prior disciplinary actions assessed against the Employee. The Union asserts that the propriety of the February 10, 1991 Level 4 "was the subject of a FAX message" from the Union to Person 11, after the latter reduced the November 1990 Level 3 to a Level 1. The Union states that this matter remained unresolved at the time of the Employee's discharge. The FAX was introduced into evidence as Union Exhibit 8. It is dated May 21, 1992 and thus apparently was written after management proposed Level 4 on May 13, 1992 for the Employee's

violation of the Employer rule regarding dependability (Rule 32) and before the Investigative Review Hearing scheduled for May 29, 1992. , The FAX message states in pertinent part:

> Supervisor Person 16 thought Employee was presently at a Level III and proposed a Level IV for attendance. I am trying to clarify that Employee is now at a Level III because of the third step answer. Please get back ASAP. Person 16 is waiting for an answer.
> (Union Exhibit 8)

The record contains no evidence regarding the response, if any, from Person 11, to the Union's inquiry. The Union raised the matter at the Investigative Review Hearing on May 29, 1992. Hearing Person 19 rejected the Union argument on the grounds that the Employee's poor dependability warranted a Level 4 in any event (Employer Exhibit 5). Person 19 also noted that the reduction of the Level 3 to a Level 1 (for the November 1990 incident) did not mitigate the fact that the Employee was involved in two unsafe actions in less than three months. The Union did not grieve the hearing officer decision of June 1992, upholding the proposed Level 4 for violation of the rule regarding dependability. The FAX message quoted above is an inquiry, not a grievance.

In short, in my opinion, it is simply too late for the Union to be challenging the levels assessed for earlier offenses. The Employee's prior discipline must stand as assessed.

The Union's other argument is that the Employee has been subject to disparate treatment. The Union challenges the Employer's evidence and argument regarding how the Employer has handled analogous situations. The Union offered the testimony of its City 2 local committee chairman, Person 18, regarding other employees at the City 2 station who have committed negligent acts and received no discipline. According to the Union, one such instance involved mechanic Person 13 riding on the hood of a tug, which is prohibited by Employer regulations. In another instance, the Union asserts, Person 13 operated an aircraft's engines at full power, with

the result that a hangar door was torn from its moorings and ejected a great distance across the ramp area, potentially subjecting other persons to severe injury or loss of life. The Union notes that this incident occurred despite a prior notice by the Employer to employees to refrain from operating aircraft power plant checks in that specific area. Finally, the Union asserts that a mechanic driving a tractor struck a tow bar with such force that it pierced the terminal wall and entered an office area that had just previously been occupied by a secretary.

The Employer asserts that it has disciplined employees in the past for near misses such as the incident of February 11, 1993. Moreover, the Employee had reached Level 4 of the NPDS. He knew or should have known the importance of the Employer's safety policy given his prior safety violations in November 1990 and April 1991, the Employer asserts. Further, the Employer maintains that the Employee knew or should have known that he stood on the brink of discharge and could not risk even the most minor rule violation. Despite these factors, the Employee acted in an irresponsible and careless manner on February 11, 1993, the Employer contends.

I have reviewed the Union's evidence and argument and find that it is insufficient to establish disparate treatment. First, the City 2 cases that the Union cites contain too little information too allow a conclusion that these other employees were similarly situated to the Employee, particularly in terms of their disciplinary record. Moreover, the question is not merely how other bargaining unit employees at City 2 have been treated, but how bargaining unit employees Employer-wide have been treated. On this point, the Union has not shown that in general the Employer has failed to discipline for violations such as those of the Employee herein.

In its submission, the Union points out that Article XVII, Paragraph D of the labor agreement provides that disciplinary letters are to be removed from an employee's file after a period of two

years from the date they were issued. The Union notes that the Employer listed the November 1990 Level 1 on both its proposed Level 5 and the third step decision of the grievance procedure. The Employer admits that it made an error in listing that prior discipline, but states that the error was harmless and emphasizes that the hearing officer and the decision maker for the third step decision both testified that the Employer did not rely on that prior discipline in rendering the Level 5 in this case, nor did the Level 1 have any impact on the decision of either the hearing officer or the Employer representative at the third step. Other than noting that the Employer had improperly listed this prior discipline in the course of assessing the Level 5 against the Employee, the Union did not pursue this matter in its post-hearing brief.

The significant point, in my view, is that through application of the Employer's discipline system, to which the Union has agreed, the Employee had reached Level 4 of the disciplinary procedure prior to the February 11, 1993 incident. The Union had not grieved the prior discipline. Thus, when the Employee committed the violation in question on February 11, 1993, the Employer was justified in proposing a Level 5 and the hearing officer was justified in upholding that Level 5. Further, as the Employer points out, the record contains nothing in the nature of mitigation that would warrant reduction of an otherwise appropriate penalty. The Employee was a short-term employee, with only three years service at the time of discharge, and already had reached Level 4.

For all these reasons, I conclude that the Employer had just cause for the discharge of the Employee and the grievance must be denied. I will enter an award consistent with the foregoing findings and conclusions.

AWARD

After careful consideration of all oral and written arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Employer had just cause for the discharge of the Employee, Employee.

2. The grievance is denied. Respectfully submitted on this the 18th day of April 1994 by John H. Abernathy Arbitrator