Damon Jr. #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

I. INTRODUCTION

This arbitration arose pursuant to the Collective Bargaining Agreement noted below between the Employer and the Union.

The proceedings resulted from the discharge of the Employee by the Employer as the result of an incident which occurred on November 24, 1992. An arbitration hearing was held on January 18, 1994.

II. APPLICABLE DOCUMENTARY PROVISIONS

1) Collective Bargaining Agreement
   Effective November 1, 1990 - October 31, 1993.

2) Rules of Conduct (Rev. March 1989)
   Category II Paragraph 4:
   "4. Sleeping or giving the appearance of sleeping during working hours."

III. SUMMARY OF RELEVANT FACTS

1) Statement of Incident in Question.

At the time of the incident, November 24, 1992, the Employee had been employed by the Employer as a Terminal Agent at the City 1 Airport for approximately five years. His duties

consisted of loading and unloading the aircraft, and performing other tasks in connection with the Terminal Agent position necessary for the Employer's operation of the airport.

On November 24, 1992, the Employee reported to work at the airport before 5:00 A.M. Thereafter he participated in several loading procedures. At about 6:07 A.M., the Employee left Gate 48 where he had been working, and walked to Gate 51, where Aircraft No. 725 was parked. The Employee entered the plane's forward cargo compartment and was in a "lay down position" when he was discovered by Person 1, Customer Service Manager.

Person 1 tapped on the floor panel with no response. He then pounded his fist on the flooring, to which the Employee responded. The incident resulted in the disciplinary action which is the subject of this arbitration.

2) Prior Disciplinary Actions.

Employer's Exhibit 1, which was received in evidence, sets forth in part the following:

a) February 19, 1992. A Letter of Warning was issued to Employee after he was found sleeping inside an aircraft compartment.

b) April 1, 1992. Investigative Hearing Decision. This involved an incident on March 22, 1992 when the Employee was observed in the employee break room "lying down" and "giving the appearance" of sleeping. For this incident, the Employee was suspended for a period of 45.5 hours and given a warning that a future incident of this nature within a twelve month period would result in further disciplinary action including immediate termination.

IV. ISSUES

1) Was Employee discharged for just cause?

2) If not, what is the appropriate remedy?

V. EMPLOYER'S POSITION

1) Un-contradicted evidence shows that the Employee, if not sleeping, gave "... the appearance of sleeping during working hours ..."

2) However, the evidence shows that the Employee was actually sleeping.

3) The Employer is justified in its termination of the Employee's employment, in view of his prior record of similar incidents.

4) The Employee was aware that if he violated Rules of Conduct Category II Paragraph 4, he would risk discharge.

5) The Employer followed the standards of progressive discipline with respect to the Employee, and is therefore justified in its decision.

VI. UNION'S POSITION

1) The Employee did not absent himself from his work. Having completed loading procedures with respect to two aircraft, he was awaiting the next flight and in no way was he withholding his services.

2) The Employee was not sleeping.

3) Joint Exhibit 2, involving a similar incident, cannot be considered in connection with any sanction imposed by Employer.

4) The Employee was not reported missing on November 24, 1992.

5) The Employer did not prove that the Employee was not in his assigned work area.

VII. DECISION

Whether the Employer had just cause to discharge the Employee depends in large part on whether the Employee was in violation of Rule 04 of the Rules of Conduct quoted in Section II above. Thus, was the Employee "sleeping or giving the appearance of sleeping during working hours"?

Person 1 testified that the cargo compartment door on Aircraft 725 was partially open. He raised the door in order to look inside and turned on the light. He saw a body lying inside. He tapped on the floor with his knuckles; receiving no response, he pounded his fist on the floor and then noticed that the person was the Employee. He reported to the Senior Agent, Person 2 that the Employee should be taken out of service until there was a hearing on this matter. The Employee did not deny that he was present in the aircraft on the day in question. He admitted in his testimony that he opened the door part way and went inside the compartment, did not turn on the light and was in a "lay down position". He remembered being found by Person 1 and heard Person 1 say to him "sleeping again". On cross-examination by Person 3, the Employee admitted that the cargo door was closed, that he opened it and "crawled in". When asked by Person 3 why he laid down, his answer was to "stretch out".

According to this Arbitrator's notes, the following repartee took place at the end of Employee's cross-examination:

> Person 3: "What possessed you to be in an aircraft in a dark place in prone position?"
>
> Employee: "The plane was due to go out; I was stretching. I recognize that I gave the appearance of sleeping. Body language says it all."

Thus, there is no question that even if the Employee was not sleeping at this time, then by his own admission he gave the appearance of sleeping.

There remain to be discussed other issues that were raised in the arbitration, and also whether there circumstances exist which would justify a lesser sanction by Employer.

Considerable testimony was elicited both by the Employer and by the Union regarding the time schedule of various aircraft which were to leave the airport on the morning of November 24, 1992, and regarding where Employee was working that morning. While this testimony gave useful background, the Arbitrator feels it was not the kind of evidence which would justify a lesser sanction or cast doubt upon the main issue in this case. There was also testimony elicited from both parties regarding procedural matters which took place prior to this arbitration and after the incident in question. This testimony did reveal that the Employee was given ample opportunity to tell the Employer his position in this matter if he chose to do so. Further, it appeared that a Union representative was present during the discussions with management.

With respect to the Union's argument that the Employee did not absent himself from work on the morning of November 24, 1992, the Rules of Conduct cited above state clearly that anyone giving the appearance of sleeping during working hours is breaking this rule. No evidence was introduced which would permit an employee to sleep during the period he/she was on the job, even though at a particular moment he/she was not physically engaged in carrying out the duties of a Terminal Agent.

Union also argues that the Employee was not reported missing on November 24, 1992 and that the Employer did not prove that the Employee was not in his working area. The Arbitrator does not give weight to these arguments, and finds them irrelevant to the issues in this matter, there being no requirements in the Rules of Conduct that such standards be met.

Finally, the Employee's record of prior sanctions is relevant. The Employee received a Letter of Warning from Employer on January 29, 1991, regarding sleeping or giving the appearance of sleeping in the locker room area. The Employee received another Letter of Warning resulting in a week's suspension on February 19, 1992 for "sleeping inside the forward cargo compartment of Aircraft 728". Again, on April 1, 1992 the Employee was the subject of an Investigation Hearing Decision regarding a March 22, 1992 incident when he was observed "lying down in the employee break room and giving the appearance of sleeping". As a result of the latter incident, the Employee was given a "last chance letter" wherein he was warned that if there was any further violation of Rules of Conduct, Category II, Paragraph 4 within a twelve month period, there would be further disciplinary action which could include termination. This letter of warning was approved in writing both by the Union representative and the Employee himself.

The Employer argues that all three prior incidents must be considered in deciding upon the sanction in this matter. The Arbitrator disagrees; and agrees with the Union that the incident of January 29, 1991, should not be considered because that incident occurred over a year before the one in question. (Accordingly, the Arbitrator did not consider this incident). However, in a situation where there had been two prior warnings within the year involving similar behavior, as was the case here, the Arbitrator will not interfere with management's decision. Three incidents of violating the same rule within a twelve month period suffice to justify the penalty of discharge, particularly since the second incident resulted in a "last chance letter".

In conclusion, the following quote from Elkouri and Elkouri, How Arbitration Works, page 679 (4th Ed. 1985) is relevant:

> "In many cases arbitrators have reduced penalties in consideration, in part, of the employee's long good past record. On the other hand, an arbitrator's refusal to interfere with a penalty may be based in part upon the employee's poor past record. In one case Arbitrator Morris J. Kaplan held that although neither the incident at the time of

> discharge nor any other single incident cited by the employer was sufficient to warrant discharge, the general pattern of the employee's unsatisfactory conduct and performance, as established by a series of incidents over an extended period, was preponderant evidence justifying discharge. In similar "last straw" situations other arbitrators have also reached similar results." [Footnotes omitted.]

VIII. AWARD

The Arbitrator finds that the evidence supports the decision of the Employer to terminate the employment of the Employee. The Arbitrator confirms and upholds the action of the Employer in this regard.