Helburn #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

RELEVANT CONTRACT PROVISION (JX-1)[1]

ARTICLE 14.GRIEVANCE PROCEDURE

(C) No employee who has been in the service of the Employer for more than ninety (90) work days will be disciplined to the extent of loss of pay or discharge without being advised in writing of the charge(s) preferred against him leading to such action. Such notice shall be presented to the employee not later than five (5) days from the time of the incident upon which such charge(s) is based, with a copy to the Local Committee and General Chairman.

BACKGROUND

This case concerns the taxiing of an Employer jet by the Employee, a Lead A&P Mechanic on the 11 p.m. – 7 a.m. shift at Airport 1 in City 1. The Employee, with over 11 years of employment with the Employer, was counted on to run the night shift and was regarded as a good mechanic.

On occasion during the night shift, in conjunction with repairs, a plane's engines must be run up to full power. At Airport 1, for noise abatement purposes, this is done at the Ground Run-Up Enclosure (GRE), a three-sided structure some distance from the main concourse. Taxiing from the concourse to the GRE is done on active taxiways and across active runways. Mechanics may taxi the planes in accordance with provisions of the Employer's Maintenance Policies &

[1] JX, CX, and UX refer respectively to Joint Exhibits, Company Exhibits, and Union Exhibits. TR- followed by a page number indicates a reference to the transcript.

Procedures (MPP). The MPP has been developed in consultation with the FAA. The Employer may be held accountable for failure to comply with the procedures. Of particular relevance is Section 400-32, 1.A. (1) which states that:

> "No ground personnel, other than a certified A&P mechanic meeting the physical qualifications, will be permitted to run-up or taxi an airplane. He may perform this function only after he has demonstrated his ability in the presence of an examiner designated by the Employer and has been approved" (CX-1).

Section 400-32, 1.E. (1) states that:

> "An individual that is engine run-up and aircraft taxi qualified must be rechecked every twenty four (24) months on each fleet that they are qualified on" (CX- I).

The Employee had been qualified on a 737, and had examined other mechanics to determine their qualifications, but his qualification had expired in June 1999[2].

Section 400-40, 2.D.23 requires that:

> "When taxi of an aircraft is authorized, two (2) MECHANICS are required in the cockpit, of which at least one (1) must be qualified for run-up and taxi. The qualified mechanic will be responsible for the operation of the aircraft and will occupy the left seat. A taxi examiner in the process of certifying a qualified candidate may choose to conduct his/her training from the right seat" (CX-l).

At times exceptions to the MPP have been made. An experienced, formerly qualified A&P Mechanic may be allowed to taxi a plane with an expired qualification. And, when there is a shortage of mechanics, a utility person may be allowed to sit in the right seat when a plane is taxied. Person 1, the Duty Manager on the night of the incident in question, now retired, and Person 2, Aircraft Maintenance Supervisor, Line Maintenance, testified that exceptions could be approved only by the Duty Manager and only in writing. Person 3, formerly an A&P Mechanic

[2] Hereafter all dates are in 1999 unless otherwise noted.

at Airport 1, now a Lead Mechanic in City 2, testified that he has gotten verbal authorizations from the Duty Manager to perform tasks as an exception to the MPP. The Employee testified that "a couple of times" he has been authorized verbally by the Duty Manager to do a run-up without current qualification, with approval by Person 2 the next morning.

There is no dispute that the Employee taxied a 737 from the Employer gate on the concourse to the GRE and back. The Run-Up Request Form shows that this happened early in the morning on September 3, the shift having started on September 2. There is no dispute that the Employee was accompanied in the cockpit by a friend who drove a cab and who was not a Employer employee or trained in the relevant procedures.[3] Person 1, Duty Manager that night, testified that there are no records showing that the Employee called for an exception. The Employee testified that a call to the Duty Manager for an exception is required if the mechanic is not currently qualified to taxi a plane. He called for and received an exception because his qualification had expired. He did not ask for an exception so that his friend could accompany him. Employee stated that he took his friend, who he was trying to interest in employment with the Employer, because it was a busy night and no mechanics were available. He said that with local approval he had taxied planes with utility personnel and even ramp agents before this time.

Person 4, Regional Manager, Corporate Security, remembered that on the morning of September 8 he get an anonymous phone call with information that Employee had taken an unknown male who was not an employee on a plane for a joyride.

The caller said that the Employee was allowed to taxi the aircraft and that there were rules requiring two mechanics on the plane. The caller, who had said nothing to local management, also provided the names of two witnesses. Person 4 received a second, similar call later that day,

[3] The testimony about the mechanical problem that led to the run up is omitted, because it is not relevant to the resolution of the issue.

with the caller identifying the unknown male as an Anglo with a ponytail and stating that the violation was serious. On September 9, Person 4 left a voice mail message for Person 2 and relayed the information he had previously received from the anonymous callers. Person 4 asked Person 2 to obtain written documentation of the taxi and named Person 5 and Person 6 as witnesses. On September 11, Person 2 was approached by Person 6, who asked the supervisor if he knew about the "airplane incident" (TR-47).

Person 4 came to City 1 on September 14 and he and Person 2 interviewed and obtained written statements about the incident from several individuals. Person 6 placed the stranger on the plane with the Employee and Person 5 had seen the Employee with the stranger. According to Person 2, they spoke with the Employee at about 11:40 p.m. There was no steward on duty, so, consistent with past practice, the senior man on duty, Person 7 served as Employee's Union representative, although the Employee testified that he asked for a steward. At the time of the interview, the Employer did not have the City 1 Airport System records to establish the exact date of the taxi and Employer records did not explicitly indicate that a plane had been taxied. Person 4 remembered that he probably identified August 31 or September 1 as the date on which the incident occurred. Person 2 stated that the Employee was asked what happened on the night of August 31-September 1. The Employee said that he had called for authorization to taxi the plane, but the Employee did not remember if he had a stranger with him that night.

The Employee testified that he was asked about August 31 and replied that he had no idea what had happened that night. He then was told by Person 2 that the incident in question involved the taxiing of the plane. The Employee said that he could see the Employer's Form PE-1, noting his termination, on Person 2's desk, so he had little to say. His written statement was that "I don't recall the specifics of the evening/morning of Sept. 1st '99" (CX-5).

Person 2 testified that he and Person 4 were concerned about the Employee's credibility and that Person 2 was concerned about safety and Employer liability in view of what was thought to have been reckless behavior by Employee. The PE-1 indicating discharge was one of several that had been prepared before the meeting with the Employee, apparently to cover a number of eventualities because the Employer was worried about acting within the five-day limit of Article 14 (C) of the Agreement. The PE-1 specifying termination was handed to the Employee early in the morning on September 15. The Unsatisfactory Performance Report noted that on August 31 The Employee had taxied a 737 accompanied "only by an unauthorized, non-employee individual whom you had escorted onto the premises" (CX-6). The Report went on to state that the Employee was not authorized to taxi the plane, and he did not have the required complement of two mechanics. The Employee was said to have violated Rules 8, 11 and 17 of the Posted Rules of Conduct. These rules relate to willful negligence, following security regulations and working safely and in accordance with posted regulations.

The discharge was grieved on September 17. When the grievance was not resolved, the matter was advanced to the System Board of Adjustment (hereafter "Board"). The undersigned was selected as neutral chair. The grievance was heard at Airport 1 in City 1, on August 29, 2000. The parties stipulated that the grievance was properly before the Board. Witnesses were sequestered, affirmed before testifying and made available for cross examination. Documentary and testimonial evidence was received. A verbatim transcript was made of the proceedings, with a copy entered into the record. The Employee was present throughout the hearing and testified in his own behalf. Timely briefs were filed by both parties, with the record closed on October 20, 2000, the date the second of the two briefs was received.

ISSUE

The stipulated issue is:

Was the Employee discharged for just cause and if not, what is the appropriate remedy?

EMPLOYER POSITION

For reasons summarized below, the Employer insists that the discharge was for just cause and thus the grievance should be denied.

1. The Employee committed serious violations of the Employer procedures and Rules of Conduct, and has not told the truth about the incident. He did not have authorization to taxi the plane at all, let alone with an untrained person on board. This unsafe act was the last in a pattern of ignoring MPP taxi procedures.

2. The discipline was timely. The September 9[4] anonymous tip did not constitute knowledge of an incident. The five-day period began on September 11 when Person 6 told Person 2 of an irregular taxi. The discharge notice was promulgated before the September 16 deadline. Anonymous, potentially inaccurate information should not be considered as the trigger for the five-day time limit.

3. The Employee had adequate Union representation. The Weingarten ruling does not apply to the Railway Labor Act. Consistent with past practice, the Employee was represented by the senior employee on duty, who was an effective representative and who could have phoned the absent steward, if that was felt to have been necessary. The negotiated agreement does not specify the nature of Union representation to be provided.

4. Confusion over the date of the incident is immaterial, particularly since the Employee has admitted that a taxi took place.

[4] The Employer brief actually refers to August 9, 1999, but in context the reference has to be September 9th.

UNION POSITION

For reasons summarized below the Union asserts that the discharge was not for just cause and thus the grievance should be sustained and the Employee reinstated and made whole.

1. The Employer was aware of the incident on September 9, but "took no action until September 14" (Brief, p. 4).[5] The Employee was not notified in writing of the charges within five days of the incident; thus the Employer violated Article 14(C) of the negotiated agreement. In the past the Employer has suspended employees pending investigation, but no waiver was requested in Employee's case.

2. At the investigative hearing, the Employee's request to call the local committee chairman was refused. The Employer offered the senior man on duty, rather than a Union steward, as representation. While the Weingarten[6] rule is an outgrowth of a Supreme Court ruling arising under the National Labor Relations Act, violation of the rule nevertheless deprived the Employee of due process.

DISCUSSION

Although on September 14 the Employee did not admit to the charges against him, there is now an acknowledgement that he taxied a 737 to the GRE accompanied by an unqualified friend not employed by the Employer. Evidence further establishes that the Employee did not ask for the exception that was necessary, because his qualification had expired. Person 1, as Duty Manager the night of September 2, would have granted the exception and generated the necessary documents had the Employee made such a request. Person 1, when Acting Manager at Airport 1, had had no problems with the Employee and thus had no reason to testify untruthfully against

[5] This is a misstatement, because action was taken early on the morning of September 15.
[6] NLRB v. J. Weingarten, inc., 95 S.Ct. 959, 88 LRRM 2689 (1975).

him. On the other hand, the Employee could cast the incident in a better light by convincing the Board that he had received the exception so that he could taxi the plane. And, the Employee testified that he had taxied planes previously without obtaining exceptions. For these reasons, Person 1's testimony is viewed as credible. The Employee both taxied the plane with an expired qualification to do so and without the necessary exception and took his friend with him.

The fact that the Employer got the date of the incident wrong during the September 14 interview and on the PE-1 is not important. There has been no allegation at any point by the Union that the use of August 31 rather than September 2 confused the Employee or the Union so that the ability to defend against the charges was diminished.

The representation afforded the Employee does not give cause to set aside the discharge. The Weingarten rule applies to parties covered under the National Labor Relations Act, not the Railway Labor Act that governs the relationship between these parties. But assuming, for the sake of argument, that Weingarten rights were applicable, the law

> "does not require an employer to postpone an interview because the specific union representative the employee requests is absent, so long as another union representative is available at the time set for the interview" (JX-1).[7]

Employee was provided representation, including the opportunity to meet with Person 7 before the interview. Presumably, the Employee and Person 7 could have called Person 8, the Local Committee Chairman and sole steward, if they had wished to do so.

The weakness in the Employer's case is found in the violation of the five-day rule. Article 14 (C) is clear that discipline involving loss of a job or pay may not occur unless accompanied by written notice. The Employee received such notice. The Agreement also states that "Such notice shall be presented to the employee not later than five (5) days from the time of the incident upon

[7] The Developing Labor Law, Vol. 1, 2d ed.) Charles J. Morris, editor-in-chief, BNA, 1983, p. 154.

which such charge(s) is based. . ." (JX-1). The award of the Board in case No. SBA 54-90 and the reference in that award to the December 21, 1988 award of Neutral Referee Eva Robbins show that the five-day clock begins to toll not when the incident takes place, but when the Employer first receives reasonable knowledge that a possible violation of the Agreement and/or rules and regulations has occurred. The Employer's insistence that reasonable knowledge was first received on September 11 is unpersuasive.

On September 8, Person 4 received two anonymous calls. The first identified the Employee by name, was specific about the nature of the incident and noted in general the rule that was violated. Furthermore, the caller provided the names of two witnesses. A second anonymous call that morning provided less information but certainly tended to confirm the first call. When Person 4 conveyed this information to Person 2 on September 9, local management was then put on notice as to what happened, who was involved and who might provide details. The information, while anonymous, put the Employer in a far better position than that of simply looking for a "needle in a haystack."

On September 11, Person 2:

> " . .was approached by a mechanic, Person 6, that said, "Are you here about the airplane incident?" And only because Howard [Person 4] had mentioned to me previously about it and I knew we had talked about him coming in Monday the following week, I was able to say, "Well, yes, I did hear something about it" (TR47).

Person 6 provided only the vaguest of information—far less than the anonymous calls had provided three days earlier. Furthermore, Person 4 had called the day after the anonymous phone calls and had asked Person 2 to obtain written confirmation of the taxi. In other words, the Employer investigation was triggered by the anonymous calls on September 8 and Person 4's September 9 message to Person 2, not by Person 6's comment to Person 2 on September 11. That

comment in no way altered the course of events. When the Employee was handed the PE-1 early on the morning of September 15, more than 120 hours or five days had passed since local Management had knowledge of the incident.

The Employer has a right to be concerned about being forced to act on anonymous tips, but it cannot place all such tips in the same category. This Opinion and Award should not be read as requiring the Employer to act on all anonymous tips. A single, anonymous tip with vague information should not toll the five-day clock. Even several anonymous tips adding only to sketchy information requiring extensive investigation should not toll the clock. But in this instance, Person 4 received not one, but two calls, with the second providing some confirmation for the first. The Employer had the name of a possible errant employee and the names of two possible witnesses. The calls provided the Employer sufficient information to allow a narrowly focused investigation. The five-day limit leaves little, if any, margin for error, but the Employer has agreed to the limit and must respect contractual provisions.

The question thus becomes, what is the impact of a violation of the five-day rule? Can there be no discipline at all if the rule is violated, or must the violation be weighed against the Employee's infraction to determine justifiable discipline? It would be useful to have the wisdom of prior awards where other Boards have had to answer this question, but it is possible, given the absence of such awards from the record, that the matter has not arisen before.

The answer seems best derived from a review of the likely intent of the language. The five-day limit seems designed to ensure that the affected employee and the Union are provided details of the charge(s) before memories dim, possible witnesses are no longer available and details become muddied. Failure to adhere to the five-day limit is a contract violation that cannot be overlooked, if only to provide incentive for future compliance. But a violation, such as that in the

instant case, that does not diminish the Employee's opportunity to defend himself, does not justify the same remedy as a violation that diminishes due process rights.

It is appropriate also to consider the nature of the infraction. The Employee used particularly poor judgment by taxiing the 737 without obtaining the necessary exception and by taking his friend in the right seat. In so doing the Employee violated parts of the MPP and the Posted Rules of Conduct. He also created a potentially hazardous condition because he taxied on active taxiways and across active runways and within the GRE with an untrained and inexperienced individual in the right seat of the plane's cockpit. Furthermore, had something unexpected happened, it is possible that the Employee's friend would have been a hindrance rather than a help and the Employer might have been liable for any harm that came to him.

But for the violation of Article 14 (C), the discharge would stand, even considering the Employee's seniority and past record. When the seriousness of the contract violation is weighed against the seriousness of Employee's infraction, no more than a return to work without back pay is appropriate.

AWARD

The Employee was not discharged for just cause. The discharge shall be replaced by a disciplinary suspension. The Employee is to be reinstated to his former position with seniority, but without back pay and allowances.