

## **Horowitz #4**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

This arbitration arises pursuant to the 1994-2000 Ramp and Stores Agreement ("Agreement") between the Employer and the Union. The parties concur the grievance in question has been processed pursuant to the provisions of Article XVIII of the Agreement and the matters at issue are properly in arbitration before the System Board of Adjustment with Fredric R. Horowitz, as sole neutral member.

## **MATTERS AT ISSUE**

Grievance No. A20232-AIRPORT 1CG presents the following issues to be decided in arbitration:

1. Was the discharge of Ramp Serviceman Employee for just cause?
2. If not, what shall be the remedy?

## **FINDINGS OF FACT**

### **Background**

The Employee, Ramp Servicemen, was hired by the Employer on November 9, 1992 to a part-time position in City 1. Employee was subsequently laid off, but he was rehired to a full time position in City 1 on October 19, 1994. About 1,800 persons were employed by the Employer at AIRPORT 1. There is no evidence of any prior discipline against the Employee.

During the period of the Employee's employment, the Employer conducted in-service training to all employees on preventing sexual harassment in the workplace. The training was reinforced at briefings and in written policies and memoranda distributed to all employees. The Employer's Equal Employment Policy included the following statement:

Further, the Employer shall provide work environments in which all employees are free from harassment or any other improper conduct which is directed at them because of their race, color, national origin, religion, sex, age, disability, veteran status, or sexual orientation.

A letter to all Customer Service Division Employees dated July 25, 1994 concerning sexual harassment included the following:

At its root, the issue of sexual harassment is simply about respect. Each of us has a right as an owner/business partner to expect to be treated with respect by the people with who we spend our work day. Sexual harassment in any form is an act of disrespect. Negative, disrespectful actions such as sexually oriented language, touching, innuendoes, and offensive graffiti or drawings in the work area or in aircraft baggage compartments, are aggressive actions which can only harm our mutual interest in building the kind of partnership that will be so essential to our success as an employee owned airline. These actions are also illegal, and may subject the perpetrator of such acts not only to the loss of their job, but also to civil and criminal prosecution.

Employer Regulations, Series 15-1 reads:

In keeping with our corporate values and our commitment to equal employment opportunity, it is Employer policy to forbid harassment and discrimination based on race, color, sex, age, religion, national origin, disability, veteran status, or sexual orientation. The Employer believes that each employee should be treated with respect and dignity, in accordance with our corporate values. Harassment and discrimination -- whether verbal, physical, or visual -- violate both Employer policy and the law. Our commitment to our employees is one of "zero tolerance" for harassment and discrimination based upon any of the nine characteristics listed above.

Also during the period of the Employee's employment, graffiti in restrooms, aircraft, and other work areas was a serious problem. Beginning in September 1993, management embarked on a pit graffiti cleaning program. Briefings and memos were issued to remind employees that

defacing any Employer property is prohibited, that such action is deemed a Code of Conduct violation, there will be a "zero tolerance" for such conduct, and violators are subject to discipline including discharge. Despite these warnings, however, the efforts by management to eliminate graffiti by employees from the terminal, the aircraft, or equipment were not completely successful.

### **Incident in Question**

Late in the evening of September 24, 1995, Lead Ramp Serviceman Person 1 notified Supervisor Person 2 there was threatening, hateful, and racially motivated graffiti directed at him on the inside of a stall door in the large employee restroom under the passenger terminal at AIRPORT

1. Person 1 is an African American male who was described in these proceedings to be homosexual. The graffiti read as follows:

Person 1 is A Faggot  
HE NEEDS to Be Killed

Above this graffiti someone had written: "Kill all the faggots." Just below those three lines someone added: "He is a human being." Person 1 gave station management a photograph of the graffiti, demanded a thorough investigation, and claimed he was unable to work due to stress and fear for his safety.

The Employer engaged the services of a handwriting expert to examine the photograph of the graffiti. About 10 employees, including the Employee, were required to submit samples of their handwriting. The forensic expert positively identified the Employee from those exemplars as the author of the three lines of graffiti. The Employee was excluded, however, as the author of the

lines, "Kill all the faggots" and "He is a human being," appearing in the stall above and below the three lines of graffiti in question.

A fact finding investigation was convened by Acting Ramp Manager Person 3 on November 3, 1995. The Employee was present with his Union representative, but he was given no forewarning of the subject of this meeting. Person 3 asked the Employee if he knew who had written the graffiti about Person 1. The Employee repeatedly denied any knowledge of the graffiti. Person 3 then informed the Employee of the findings of the handwriting expert. After a private caucus with his Union representative, the Employee admitted to Person 3 he had written the three lines in question. At the request of Person 3, the Employee wrote a short statement confirming he had written the graffiti. The Employee explained in that statement he had trouble with Person 1 in the past, that Person 1 had falsely accused him over the radio of being on drugs, and that he did not realize the seriousness of his action with all the other graffiti present in the restroom and other areas of the terminal.

The Employer suspended the Employee on November 3, 1995 pending further investigation. A Review Hearing was conducted on December 11, 1995. The Employee was charged with violations of Rules of Conduct No. 11, 23, and 41 as well as violation of the Employer's Zero Tolerance Policy prohibiting discrimination and harassment. On January 26, 1996, the Employer sustained the allegations of misconduct and discharged the Employee effective November 3, 1995. After the parties were unable to resolve the matter through the steps of the contractual grievance procedure, the dispute was duly submitted for resolution herein by the System Board of Adjustment.

## **EXCERPTS FROM THE RULES OF CONDUCT (REVISED 4/86)**

Violation of one or more of the following Rules will result in discharge unless mitigating factors are considered applicable:

11. Deliberate: a) destruction b) serious damage or defacement of Employer property or the property for which the Employer bears responsibility.

Violations of one or more of the following Rules will result in disciplinary action, up to and including discharge, 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.

23. While on Employer property, on Employer business, or in other work-related circumstances: a) fighting; b) threatening; c) coercing; d) intimidating; e) assaulting other individuals. Level 4 to discharge.

41. Engaging in any conduct detrimental to the Employer or which has the potential to adversely affect the Employer's relationship with customers, suppliers, employees, or the public. Level 1 to discharge.

## **POSITIONS OF THE PARTIES**

The Employer states there was just cause to discharge the Employee for a serious violation of Employer Rules of Conduct and their zero tolerance policy against harassment and discrimination. The Employer claims management has made an extended and vigorous effort over the years to educate employees, including the Employee, of the need to maintain a hostile free work environment where employees treat each other with respect and refrain from improper actions and conduct on the basis of race, gender, or sexual orientation. It is said the graffiti written by the Employee was extremely offensive and directly threatened another employee with death. The Employer asserts the claims of the Union regarding the prevalence of graffiti, disparate treatment, Airport 1 enforcement of rules, and excessive punishment are unavailing in this case, because of the seriousness of the misconduct committed by a short term employee. For these reasons, the Employer urges the discharge be sustained.

In turn, the Union acknowledges the Employee wrote the offending graffiti but contends the punishment far exceeds the crime. The Union asserts the Employee candidly explained how this "dumb mistake" was a result of continued frustration brought on by a series of conflicts caused by Person 1. The Union maintains the Employee had not been forewarned that he could be terminated for this conduct. The Union also argues the Employer's training program in this area was inadequate, that graffiti is a widespread problem at the Employer, and that rules against graffiti are not enforced. It is said the Employee is a victim of disparate treatment, that he did not violate the Rules of Conduct charged, and that he is unfairly being asked to pay the price for Person 1's civil law suit against the Employer. Finally, the Union claims the Employee deserves to be given the chance to apologize for his actions and return to the career of his choice. Accordingly, the Union seeks reinstatement with full back pay and benefits for the Employee.

## **OPINION**

The Employee acknowledges he wrote the offensive graffiti inside a stall in the men's employee restroom at the Employer terminal in City 1. The graffiti targeted Lead Ramp Serviceman Person 1, an African American homosexual, as a "faggot" who "needs to be killed." The Employer maintains the termination of the Employee was justified in light of the severity of the misconduct, while the Union claims that discharge was excessive for a variety of reasons. A review of the entire record of evidence and argument at arbitration indicates there was just cause for the termination in controversy. The grievance must therefore be denied.

The Union questions the application of Rules of Conduct No. 11, 23, and 41 in this case and asserts that discharge for the actions of the Employee is unprecedented. The Union cites other cases where inflammatory conduct or graffiti has not resulted in termination under the Rules of

Conduct. But those cases do not have the combination of factors in aggravation presented here. Person 1 was understandably upset and badly shaken when he reported the graffiti to supervision on September 24, 1995. Violence in the workplace, racial prejudice, and bitter animus towards homosexuals unfortunately remain serious and widespread social problems. The men's restroom under the terminal in City 1 serves hundreds of employees daily. By penning this graffiti on a restroom stall, the Employee not only subjected this African American employee to scorn, humiliation and derision by calling him a "faggot," but the Employee placed him in a position to be fearful of receiving physical harm or retribution from anonymous and malevolent coworkers on account of his race and lifestyle. All employees have a right to be treated with dignity and respect and to feel secure from violence or sinister threats of harm in the workplace. It follows that conduct which subjects employees to fear and intimidation in the workplace should not be tolerated.

Contrary to the claim of the Union, the evidence reflects the Employee had been well aware that graffiti, harassment, and threats of violence at the company were not to be condoned. During his one year of full time employment, the Employer conducted diversity training attended by the Employee and issued policies and memoranda reinforcing the need to treat coworkers with respect despite differences in race, gender, sexual orientation, or other characteristics. In addition, management issued memoranda and held briefings on the need to eliminate graffiti on Employer premises, aircraft, and equipment. The training, memos, and briefings on these topics made it clear that violations would result in discipline which could include termination. The evidence does not demonstrate that termination is too severe for the Employee's misconduct. This record reflects discharges have been imposed by the Employer and other airlines for

malicious graffiti or sexually offensive remarks. In this instance, the Employee subjected Person 1 to revulsion from his coworkers by calling him a "faggot." The Employee then compounded the misconduct by exhorting a death threat which would fill Person 1 with a sense of fear and apprehension. For purposes of this proceeding, it may be assumed that Person 1 engaged in a series of actions toward the Employee, including "hitting on" his friends, expressing anger or disapproval of his work, and spreading false rumors about him being under the influence of drugs. It may also be accepted that Person 1 treated many other employees at the Employer in a similar fashion. These actions by Person 1, however, do not warrant vindictive discrimination and sinister threats of death or harm to be posted on toilet stalls. If the Employee had been mistreated by Person 1, there is no showing he made any effort to use accepted avenues of complaint or protest which do not involve anonymous threats and malevolent conduct.

Nor does the evidence establish the Employee is a victim of selective or disparate enforcement by management of rules against graffiti in the workplace. The Employer's efforts over the past few years to control or eliminate graffiti are shown to have been less than successful. It is also seen that graffiti abounds in various areas of the terminal in City 1. But typically, the author of graffiti is not known and impossible to identify. In this instance, the culprit was able to be determined and disciplinary action was initiated. There is no evidence any other employee caught by the Employer for writing graffiti was not disciplined for the offense.

It is recognized the Employee expressed remorse and regret for his actions in this proceeding.

The Employee claims herein his actions were not premeditated, rather he unthinkingly wrote the offending graffiti to express un-vented frustration towards Person 1 upon seeing "kill all the faggots" on the bathroom stall. But this mitigation does not outweigh the severity of his actions. The Employee, with less than one year of full time service, viciously subjected another employee



to fear, stress, ridicule, and revulsion. When confronted by management, he repeatedly denied any knowledge of the graffiti until presented with the findings of the handwriting expert. In addition, the Employee knew such conduct was wrong and in conflict with campaigns at a company directed at promoting respect for a diverse group of employees and discouraging graffiti and defacement of Employer property.

In conclusion, the evidence establishes there is just cause to terminate the Employee for writing the subject graffiti in a stall of the men's employee restroom. The Employee is a short term employee whose graffiti not only involved malicious discrimination based on race and sexual orientation, but included a sinister threat of harm and violence. Although the target of the graffiti may have behaved in an annoying or irritating manner towards the Employee and other employees, such facts, if true, do not excuse or justify the actions of the Employee. Every employee is entitled to be secure from fear of violence, retaliation, or insidious discrimination in the workplace. On balance, the severity of the misconduct by the Employee outweighs the mitigation presented. It follows the grievance must be denied.

## **AWARD**

1. The discharge of Ramp Serviceman Employee was for just cause.
2. The grievance is denied.