Larocco #1

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

OPINION OF THE BOARD

INTRODUCTION

Effective January 20, 1999, the Employer terminated the Employee, a Utility worker, for allegedly violating Employer Rule 23 on October 25, 1998. Thereafter, the Union properly appealed the Employee's termination to this System Board of Adjustment (Board) for a decision on its merits. [Union Exhibit 1]

At the June 13, 2000 arbitration hearing, the Employer and the Union stipulated that the undersigned Neutral Member would act as the sole member of this Board. At the conclusion of the hearing, the parties gave closing oral arguments and the matter was deemed submitted.

The Board finds that the issue herein is whether the Employer had just cause to discharge the Employee and if not, what is the appropriate remedy?

Rule 23 of the Employer's October 1996 edition of its Rules of Conduct for Union represented Employees (Rules) provides:

> While on Employer property, on Employer business, or in other work-related circumstances:
>
> a) fighting or provoking a fight
> b) threatening
> c) coercing
> d) intimidating
> e) assaulting other individuals. Level 4 to discharge [Joint Exhibit 2; Emphasis in text.]

The introductory paragraph to the group of rules that includes Rule 23 reads:

> 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. [Joint Exhibit 2; Emphasis in text.)

II. BACKGROUND AND SUMMARY OF THE FACTS

The Employee, a Utility Employee in the Cabin Service Department, at Airport 1, holds a July 14, 1997 seniority date. Prior to her termination, the Employee had a clean disciplinary record. On October 25, 1998, the Employee worked the afternoon shift and was a member of a crew that cleans the interior of aircrafts. The Employee and Utility Employee Person 1 were specifically assigned to clean seats[1]. During the shift, the Employee and Person 1 had two confrontations: the first occurred in an aircraft cabin and the second occurred inside the rear shell of a cabin service truck. The two protagonists gave vastly different renditions of the two altercations. Throughout the two altercations, the Employee and Person 1 spoke to each other in Spanish. Person 1 testified that she complained to the Employee that the Employee was not doing her share of the aircraft seat cleaning work. Person 1 related that she told the Employee she wanted the Employee to finish her assignment.[2] Person 1 declared that the Employee then called Person 1 a "bitch," a "dirty person," and a "fucking Spanish person." Person 1 claimed that each time the Employee leveled an insult at her, Person 1 responded by saying, "that's not me - it's you" or,

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[1] There is some confusion in this record as well as the record of unemployment insurance hearing concerning Person 1's surname. To the best of the Board's knowledge, she was known as Person 1 on October 2S, 1998 and so, we will refer to her as Person 1.

[2] Person 1 explained that up until about six months before this incident, she bad a friendly relationship with Employee. In her October 25, 1998 written statement, Person 1 wrote that during the last six months, Employee had occasionally called her insulting and profane names. Person 1 was vague about why her relationship with Employee had soured. (Employer Exhibit 21)

"it's not me - that's you." Person 1 denied trading insults with the Employee. Person 1 stressed that she merely returned the insults back to the Employee. Person 1 declared that she took particular offense to the Employee calling her "dirty" because that adjective is considered a grievous personal insult in her Columbian culture.

Person 1 related that a short while later, when she and the Employee were inside the utility service truck, the Employee resumed calling Person 1 the same insulting names and Person 1 issued the same "it's not me - that's you" retort. Person 1 asserted that the Employee became so angry that her face was "very white" in color and her eyes were "big." Person 1 asserted that the Employee next tried to jump toward Person 1 with both her hands in a fist but, two other employees grabbed the Employee. According to Person 1, the Employee then yelled, "I'm going to break your face!" and "I will wait for you in the parking lot!"[3] Person 1 heard Person 2, one of the employees holding the Employee, tell the Employee, "Don't do that- you're going to lose your job."

Person 1 testified that she was scared about what might happen later in the parking lot. Therefore, Person 1 immediately reported the incident to her supervisor.

The Employee testified that while she and Person 1 were cleaning the seats in the aircraft cabin, Person 1 told the Employee that she [the Employee] was not a good worker. The Employee related that she did not respond to Person 1's remark. In her written statement dated October 26, 1998, the Employee attested that when she went to dump garbage in the service truck, Person 1 called her a "piece of shit." The Employee acknowledged that she and Person 1 then exchanged "strong language." The Employee declared that Person 2 placed a hand on the Employee's shoulder and said, "leave it alone - walk away from it." According to the Employee, Person 2

[3] In her October 25th, 1998 statement Person 1 wrote that the Employee shouted that she, "…will fix me in the parking lot." (Employer Exhibit 2)

was trying to comfort her, not restrain her. The Employee specifically denied telling Person 1 that she would break her face or get Person 1 in the parking lot. Indeed, the Employee denied threatening Person 1 in any way.

At a September 29, 1999 unemployment insurance hearing concerning the Employee's application for unemployment benefits, the Employee testified that she never raised her hands or swung an arm towards Person 1. While the Employee denied making any threat about getting Person 1 in the parking lot, the Employee claimed that she said, ". . . I said to her what ever you have to say after work, but we are in property of company and we not going to continue this." [Union Exhibit 2]

Several co-workers observed both or one of the altercations between the Employee and Person 1. Person 3 testified that, while in the aircraft cabin, she heard Person 1 tell the Employee that the Employee was not doing a good job.[4] In her written statement dated October 25, 1998, Person 3 wrote that the Employee passed by Person 1 and said, "She was going to break her ass." [Employer Exhibit 3]

Person 3 related that a short while later in the truck, the Employee called Person 1 "a fucking bitch" and Person 1 responded, "You are too - you're a bitch too." Person 3 further declared that when Person 1 told the Employee that she was going to a supervisor, the Employee went towards Person 1 and had to be held back. According to Person 3, Person 2 held the Employee's shoulder while another employee stepped in front of her. Person 3 recounted that even though the two employees were holding her, the Employee tried to hit Person 1 with her hands. In her written statement, Person 3 attested that the Employee went after Person 1 "in a violent manner." [Employer Exhibit 3]

[4] Person 3 speaks and understands Spanish

Person 3 next stated that the Employee yelled to Person 1, "I'm going to settle with you in the parking lot!"

At the Employer's request, Person 3 appeared as a witness at the September 29, 1999 unemployment insurance hearing. During the hearing, Person 3 acknowledged that Person 1 is a friend of hers. [Union Exhibit 2]

Person 4 testified that in the service truck, the Employee called Person 1 names and Person 1 responded, "The same to you."[5] According to Person 4, the Employee called Person 1 "dirty" and then hollered something to the effect, that she [Employee] would "see her in the parking lot!" Person 4 related that she observed that the Employee had her fists aimed at Person 1 and took a swing at Person 1, but the Employee did not hit Person 1 because two employees pulled Employee backwards. Person 4 recalled that Person 1 may have started crying.[6]

Cabin Service Worker Person 2 testified that she heard the Employee and Person 1 in a heated argument, but she did not understand what they were saying because Person 2 does not speak Spanish. She deduced from the Employee's and Person 1's gesticulations that they were very angry with each other. Person 2 related that the Employee did not try to strike Person 1. Person 2 claimed that she threw her arms around the Employee and twisted the Employee's back to tell the Employee, to her face, not to argue because "they want you out of here." In her October 25, 1998 statement, Person 2 wrote that she hugged the Employee and tried to calm her down. [Union Exhibit 6]

[5] Person 4 understands Spanish.
[6] In her October 25, 1998 statement Person 4 wrote a rendition consistent with her testimony. (Employer Exhibit)

In her statement dated the same day, another Utility Employee, Person 5, attested that Person 2 held Employee on the shoulder and "tried to pacify her." (Union Exhibit 7]

Person 5 testified that she told the Employee to stop arguing with Person 1 and then, stood in front of the Employee and Person 2 in an effort to quell the argument. Person 5 stressed that she was simply trying to calm the Employee down. Person 5 was certain that she did not see the Employee attempt to strike Person 1. Person 5 acknowledged that since she does not speak Spanish, she does not know if the Employee threatened Person 1.

On Board Supervisor Person 6 related that Person 1, weeping, came to her office doorway and asked to speak with Ramp Supervisor Person 7. Person 1 told Person 6 that she just had an altercation with the Employee. Person 6 relayed Person 1's request to Person 7.

Person 7 spoke to Person 1. He observed that she was pale, nervous, upset and crying. After hearing Person 1 recount the incident, Person 7 immediately commenced an investigation. Person 7 procured written statements from several witnesses including Person 3, Person 4, Person 2 and Person 5. With Person 6 also present, Person 7 conducted a 30 to 45 minute interview with the Employee. During the interview, the Employee denied both threatening Person 1 and attempting to physically attack Person 1, Person 7 related that the Employee was indignant because she claimed she was being accused of something that did not happen. Person 7 took notes during the interview, but he neglected to request the Employee to furnish a written statement.

At the advice of her Union Representative, the Employee presented a written statement to Person 7 the following day. Person 7 testified that he took the statement into consideration however,

since the statement did not contain any new facts, he went ahead and proposed that the Employer assess the Employee a Level 5 (discharge). Person 7 verbally counseled Person 1.

Person 7 testified that on that same day, October 26, 1998, he detected the odor of alcohol on the Employee's breath and thus, ordered her to undergo an alcohol test; the Employee cooperated. The test results were negative. [Union Exhibit 4]

Person 8, Manager of Ramp Services at AIRPORT 1, conducted the investigative review hearing on November 5, 1998. He explained that the long delay between issuing the final disciplinary decision (January 20, 1999) and the hearing was because the Employee's file, among others, was lost. Although there may have been temporary interruptions in her compensation, Person 8 emphasized that the Employer fully paid the Employee for the extended period of time that the Employer withheld her from service pending the final decision.

Union Committee Chairman Person 9 asserted that the Employer engaged in unprecedented and unfair activities with regard to terminating the Employee. Person 9 characterized the Employer's investigation as one-sided since Person 7 did not take a written statement from the Employee, which Person 9 charged was contrary to a November 15, 1983 memorandum from an Employer manager.[7] Person 9 testified that he heard from a shop steward that Person 7 actually prepared the discharge notice before the Employee tendered her written statement. Person 9 also stated that it was unprecedented and extremely unfair for an Employer official to solicit bargaining unit employees to testify on behalf of the Employer at an unemployment insurance hearing.

[7] The November 15, 1983 letter states that a supervisor should talk to the charged employee before taking disciplinary action because the employee's version of events must be considered in making any disciplinary decision. (Union Exhibit 11)

III. THE POSITIONS OF THE PARTIES

A. The Employer's Position

On October 25, 1998, the Employee engaged in aggressive, intimidating, threatening and violent behavior. She erupted with multiple verbal outbursts. She attempted to physically attack Person 1 and would have succeeded but for being restrained by other employees.

The Employee was not provoked. Person 1 merely remarked to the Employee that the Employee was not doing her work. Person 1 did not call the Employee insulting, profane or obscene names. Rather, the Employee started the torrent of foul language. The Employee was loud and mad. She personally insulted Person 1 by calling her "dirty."

The Employee failed to calm down. She resumed the argument in the truck. She swung or attempted to swing her fist at Person 1. Only the intervention of other employees prevented the Employee from assaulting Person 1. Since she could not hit Person 1 in the truck, the Employee threatened to get Person 1 in the parking lot after work.

Most witnesses corroborated Person 1's version of the incident. Person 3 and Person 4, the only persons who understood the threats since they are fluent in Spanish, related that the Employee started hurtling insults at Person 1. They also heard the Employee threaten Person 1. It is incredible that the Person 2 and Person 5 were merely comforting or hugging the Employee. Moreover, they would not be aware of the Employee's parking lot threat, because they did not understand Spanish.

Person 1's behavior and demeanor was consistent with one who has been the victim of a threat and an assault. She immediately reported the incident to her supervisor. She was scared and nervous. She was weeping. The Employee did not offer any excuse for her conduct except for the unbelievable assertion that nothing happened. Her outrageous behavior shattered the workplace

decorum and warranted the maximum penalty. The Employee had only 15 months of service and thus, there are not mitigating circumstances.

The Employer afforded the Employee due process. Two supervisors interviewed the Employee on the evening of the incident and the next day, they took her written response into consideration. The Employee's written statement did not add anything to her story. Moreover, the Employee had another opportunity to tell her side of the incident at the investigative review hearing. Even though the Employer did not ask the Employee to submit a written statement, the 1983 memorandum does not require such a statement. The memorandum merely suggests that the Employer managers should hear the employee's version before taking formal disciplinary action.

In conclusion, employees should not work in an environment where they are the targets of threats and where they must constantly fear for their own safety. The Employee issued two verbal threats of bodily harm and she attempted to hit Person 1. The Employer had no choice but to discharge Employee.

B. The Union's Position

The Union emphasizes that the Employee is accused of violating Rule 23, not Rule 5. Rule 5, which forbids an employee from fighting with a supervisor, is far more serious misconduct. The Union contends that, in the past, the Employer has never terminated an employee for a Rule 23 violation.

The Employer and, in particular Person 7, was biased against the Employee and prejudged the case. Person 7's animosity toward the Employee was shown by his pattern of conduct from the investigation through the unemployment insurance hearing. He prepared the Level 5 disciplinary

notice before receiving and reading the Employee's written statement. Indeed, Person 7 did not even ask the Employee for a written statement which shows that Person 7 had no interest in hearing her side of the story. Regardless of whether she submitted a statement or not, Person 7 was determined to discharge her. Person 7 also manifested his bias against the Employee by ordering her to undertake an alcohol test the following day without providing a good and reasonable justification for requiring the test.

While a verbal altercation may have occurred, witnesses gave conflicting accounts of the events in the truck. The Employer ignored the statements and testimonies of Person 2 and Person 5. Instead, it credited the versions given by Person 4 and Person 3 who are pals with Person 1. This again shows that the Employer conducted a one-sided investigation.

The decision following the investigative review hearing was late (about 76 days late). This is hardly prompt and operated to the Employee's disadvantage.

Finally, the Employer's solicitation of Union members to testify against another Union member at an unemployment insurance hearing was unprecedented and outrageous. However, it is again noteworthy that Person 7 arranged for Person 3 to come to appear at the hearing but he did not ask the Person 2 and Person 5 to attend.

Finally, even if the Employee is guilty of a Rule 23 violation, the penalty of discharge was too harsh. The Employee had an unblemished disciplinary record. Therefore, at most, the Employer should have assessed the Employee a Level 4.

IV. DISCUSSION

The evidence is overwhelming that the Employee precipitated a verbal altercation and then the Employee persisted in pursuing Person 1 by not only threatening physical violence against Person 1 but also committing an assault against her.

The Employee started the argument. Person 1 complained to the Employee about her work but Person 1 did not say anything demeaning, insulting or profane to the Employee. If the Employee was upset with Person 1's complaint, she could have reported the matter to the supervisor or simply told Person 1 to mind her own business. Instead, the Employee leveled a verbal barrage of insults at Person 1 which included the Employee calling Person 1 "dirty," a personally offensive insult in Person 1's culture. While the Employee instigated the verbal hostilities, Person 1 is not without blame. Once the Employee leveled the insults at her, Person 1 should have immediately sought out a supervisor. Person 1 may have fueled the Employee's anger by returning the insults (when she said the same names back to the Employee). Nevertheless, Person 1's retorts did not justify the Employee's persistence in resuming the altercation when the two workers were ensconced in the rear of the service truck. Had the argument ended in the aircraft cabin, this Board would not have a discharge case before it.

Without any provocation from Person 1, while the two workers were in the cabin service truck, the Employee escalated the verbal altercation into an assault. Even if the Employee's testimony is credible, that is, that Person 1 called the Employee a profane name in the truck; words did not justify the Employee threatening Person 1 with physical harm and her lunging at Person 1 in an attempt to hit her. While the Employee denies threatening or trying to hit Person 1, these denials are not supported by the objective evidence in the record.

The witness's descriptions of the Employee's physical movements in the truck are consistent with a person who is trying to attack another person. Person 1, and Person 3 and Person 4 all stated that the Employee raised her arms with clenched fists in an effort to hit Person 1. While Person 2 and Person 5 stated that the Employee did not try to hit Person 1, their renditions are inconsistent with their own actions. If they were unconcerned that the Employee might make physical contact with Person 1, they would not have had to intervene. Stated differently, if the Person 2 and Person 5 were certain that the argument was going to remain entirely verbal, they would not have had to hold the Employee's shoulder or stand in front of the Employee. Also, the Person 2 and Person 5's contention that they were comforting the Employee is implausible when placed within the context of Employee's physical movements and her emotional level. She was very angry. The Employee was not exhibiting the kind of behavior that would be receptive to comforting. Therefore, Person 3 and Person 4's observations are more credible than the Person 2 and Person 5's renditions.[8]

Person 5 and Person 2 admitted that they do not know what the Employee said to Person 1 in the truck. Two witnesses who understood Spanish, Person 3 and Person 4 related that the Employee said something to the effect that she would take care of Person 1 in the parking lot. It is this threat that ultimately justifies the Employer's decision to discharge Employee. The parking lot threat evinced that the Employee intended to resurrect her efforts to physically harm Person 1 at a later time. The Employee was not going to calm down. She was not going to manage her anger or forget about her hostility toward Person 1. The threat demonstrates that the Employee

[8] The Board also notes that Employee's version that nothing happened is patently implausible. Even Person 2 and Person 5 implicitly related that the Employee was engaging in conduct that could result in her firing because Person 2 and Person 5 warned the Employee to stop.

harbored a grudge against Person 1 and wanted to retaliate against Person 1 when she was vulnerable.

After hearing the threats from the Employee, Person 1 was obviously concerned, apprehensive and upset. The Employer persuasively argues that the fact that Person 1 immediately reported the matter to the supervisor is consistent with a person who has been the victim of an attempted battery.

The Employer has a duty to provide workers with a safe workplace. When an employee threatens and intimidates a fellow worker to the point that the fellow worker does not feel safe, the Employer must take severe disciplinary action. Therefore, even though Employee had no prior discipline on her record, the Employer could not tolerate her threats.[9] In addition, Employee has not demonstrated that she is a candidate for rehabilitation. She still clings to the faulty and flimsy notion that she did not do any wrong. She continues to claim that nothing happened and that she is being wrongfully accused even though her claims are contrary to all the witnesses, including Person 2 and Person 5's. Whether or not the Union is correct that this case represents the first time that the Employer discharged an employee for violation of Rule 23 is irrelevant, because not only has the Employee failed to evince any susceptibility to rehabilitation but also, the Employer could simply not assume the risk that the Employee might retaliate against Person 1 if she were returned to service.

Next, the Union argues that the local manager was biased against the Employee and thus, the Employee did not receive a fair and impartial investigation. Certainly, seeking out workers to testify for the Employer at the unemployment insurance hearing is an indication that Person 7

[9] Employee had also been employed by the Employer for just 15 months and thus, she had not accumulated sufficient service to justify a second chance.

held some degree of bias against the Employee.[10] However, right after the incident, Person 7 conducted a fair investigation. Person 7 did not automatically endorse Person 1's complaint. He and Person 6 interviewed the Employee for 45 minutes after Person 7 heard Person 1's version. Person 7 fully understood the Employee's story. The Employee's written statement was simply a repeat of the story that she had given Person 7 the previous day. The 1983 memorandum, on which the Union relies, does not absolutely compel the Employer to seek a written statement from a charged employee. Certainly, requesting a written statement is preferable, but it is not required so long as the employee is given an opportunity to be heard before a manager makes any disciplinary decision. To reiterate, Person 7 conducted an extensive interview with the Employee. She had ample opportunity to communicate her story to the Employer during the Employer's investigation. Indeed, she availed herself of this opportunity.

Person 7 may very well have jumped to conclusions by ordering the Employee to undergo an alcohol test but, there is inadequate evidence that he was intentionally harassing the Employee or that the absence of probable cause to test the Employee somehow changes the outcome of the investigation into the incident that occurred on the preceding day. The Employee committed gross misconduct the previous day. No subsequent action can change what she did.

In sum, the Employee created her own predicament. She had a chance to stop the argument at several points before she became so angry that she escalated the confrontation into an attempted battery plus, threatening Person 1 with bodily harm. The introductory language to the group of rules which includes Rule 23 warns employees that discharge could be imposed depending on the "circumstances." This Board concludes that the threat to attack Person 1 in the parking lot is

[10] Person 7's request that Person 3 appear at the hearing may or may not be poor labor relations. This Board will leave it to the Employer and the Union to determine if, in the future, such requests are appropriate.

a serious circumstance justifying the Employer's decision to assess the Employee with a Level S rather than a Level 4.

AWARD AND ORDER

Grievance denied. Dated: August 31, 2000