Nevins #6

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

PRELIMINARY STATEMENT

David C. Nevins, Arbitrator: This proceeding involves a dispute between District Lodge 141 of the International Association of Machinists and Aerospace Workers Union (the "Union") and United Airlines (the "Employer"). A hearing was held in this matter on April 7, 1993, before the parties' System Board of Adjustment, with the undersigned sitting as the sole member and as chairman. The parties were given a full opportunity to participate, present evidence, and put forth their respective arguments.

The question submitted to the System Board in this proceeding is stated as follows:

ISSUE

Was the discharge of the Employee just and proper, and, if not, what shall be the remedy?

BACKGROUND

The Employee was hired by the Employer in 1978, and in 1984 he became a ramp serviceman. Depending on a ramp serviceman's work selection for any given day, his position was responsible for loading and unloading of goods in and from the Employer's aircraft in connection with its cargo service, building and breaking down pallets of goods, storing and fetching goods

in and from the air freight warehouse facility, operating equipment within the air freight facility, and loading and unloading goods in and from customer vehicles. In a letter denominated as 69-6R, as found in the parties' collective bargaining agreement (the "Agreement"), a letter intended to draw "a clearer line ... between work of Ramp Servicemen and the work of Air Freight Agents," the parties acknowledged the following:

> either Ramp Servicemen or Air Freight Agents may be assigned to load and unload trucks and customers' vehicles at the freight dock, ... except that only Ramp Servicemen shall load and unload trucks and customer vehicles using motorized ground handling equipment or pneumatic or hydraulic pallet movers.

What triggered the Employee's discharge occurred on July 13, 1992. However, during the two years preceding that occurrence, the Employee had experienced other disciplinary problems.[1] In early September of 1990, he was given a "Level 1" discipline (the equivalent of a letter of reprimand) for violating Rule 30 of the Employer's Rules of Conduct, which prohibits "[a]ny 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." On that occasion, the Employee's forklift, which he was driving while loading a customer's truck, fell and got stuck between the loading dock and the truck because the truck rolled forward while the Employee was entering it; apparently, the Employee had failed to ensure, as was his responsibility, that the truck's wheels were properly blocked.

[1] Article 17, Section D, of the Agreement indicates that "[alit disciplinary letters (letters of warning, reprimand, or suspension) will be removed from the employee's file after a period of two (2) years . . . from the date they were issued." When the Employer proposed discharging the Employee because of the July 13 incident, it took note of and relied upon the discipline he experienced within his last two years, and thus this discipline is set forth above.

Later in September of 1990 the Employee was given a "Level 2" discipline (which is considered the equivalent of a 1-day suspension) for violating Rule 41 of the Employer's Rules of Conduct, which prohibits "[e]ngaging 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." Although the Employer was apparently unable to fix precise blame for the underlying incident, the Employee was faulted for having participated in a yelling encounter, in which he used profanity, with a truck driver from one of the Employer's customers.

In February of 1992, effective on the tenth, the Employee was discharged for violating Rule 22 of the Employer's Rules of Conduct, which prohibits "[r]efusing to comply with a direct order of a Supervisor or other person in authority." The incident involved insubordination toward his supervisor, Person 1. According to a written statement concerning the incident, the Employee would not comply with Supervisor Person 1's direction to him to perform certain security duties during a time when the air freight building's lights were turned off, and then he refused to leave the area until Person 1 called to the scene a police officer. In an agreement dated March 10, 1992, however, the parties (including the Employee) restored the Employee to employment as of March 13, treating his 30-day loss of work as a suspension. In addition, that settlement agreement specified that the Employee would "be placed at Level 4 ...[of the Employer's disciplinary program] effective January 10, 1992" (the equivalent of a 20-day suspension), and further stated:

> He [the Employee] acknowledges receipt of the Rules of Conduct of Union represented Employees and recognizes that violation of any of these rules will result in termination.

This, then, brings us to July 13, 1992. Earlier than ordinary for her and specially assigned to do so on overtime pay, Person 2, a truck driver for one of the Employer's regular freight customers,

Company 1, arrived at the Employer's air freight facility before 7 a.m. to pick up some goods. She was given this special assignment so she could return to her Employer with the goods, so they could then be loaded on another of her Employer's trucks to be delivered out of the area. Person 2 gave the Employee her freight bill and he fetched her goods. He brought them on a pallet, by forklift, to the rear of her truck and left them there on the dock. The goods consisted of three bundles of metal material, weighing each about 162 pounds and measuring in length 13.5 feet. (Person 2's truck was 12 feet long, and she says she intended to allow the goods to stick out some 1.5 feet, tie them down, and close the truck's rear door on them. Her claim that this would have been a perfectly legitimate way to transport the goods is uncontested.) After dropping the goods off on the dock, the Employee apparently performed some other brief duty, and it was then that he and Person 2 had a conversation about him helping her to load her truck with the metal goods.

According to Person 2, she asked the Employee if he would or was going to load the goods on her truck. She says he responded, in essence, that if she was going to hold a man's job she could load the goods like a man. She recalled (at the arbitration hearing) asking him what he had said and that he then repeated the same thing to her. She says he also said that he did not load trucks. Her written complaint to the Employer, dated July 14, indicates however that after the Employee made his initial remark to her, Person 2 pointed out to him that another truck driver at the dock had just had his goods loaded, to which the Employee responded, "'If you wanted a man's job go ahead and load it like a man' and then he said 'I don't load trucks'." The Employee then left the area. It was at this point that Person 2 measured the length of the goods she was there to pick up, called her Employer and informed it about what had happened, and then returned to her Employer without the goods she had gone to pick up. (She says that her Employer's policy was

to have her retreat from any confrontation and allow management to take up the problem.) The goods were picked up later that morning by the driver who was to deliver them to the customer out of the area, and according to Person 2 the problem with the Employee caused a delay for both her and this other truck driver.[2] Person 2 submitted a written complaint letter to the Employer, as noted, dated July 14.

At the arbitration hearing the Employee sought to put the July 13 incident in a different light. He says he dropped the goods on the dock and told Person 2 they were too long for her truck, after which he went to perform another brief duty. He says when he returned and she asked him to load the goods on her truck, he told her they were too long for her truck, that he did not load trucks. The Employee, however, acknowledges saying to Person 2 that if she had a man's job she should do a man's work; a written statement submitted by him in connection with the July 13 incident indicates he made this statement to Person 2 after he had told her he did not load trucks and that he never had since he worked there. According to Supervisor Person 1, the Employee admitted during the fact-finding investigation that he twice said to Person 2 something to the effect that if she had a man's job she should do a man's work and that he told her he did not load trucks for people.

As a result of receiving Person 2's written complaint, the Employee was held out of service on July 17 and he was charged with violating Rule 41 of the Employer's Rules of Conduct, the same rule he was also charged with violating back in mid-September of 1990, when he was given a Level 2 discipline. It was proposed this time, however, that the Employee be discharged for his

[2] A hearsay statement written by the other truck driver indicates he returned with a tractor-trailer rig and that another employee loaded the metal goods for him with a forklift.

conduct on July 13, a "Level 5" discipline. The discharge recommendation was upheld after the investigative review hearing, as well as being sustained at the third step grievance hearing.

ANALYSIS AND CONCLUSIONS

I. Introduction: The Basic Contentions.

The Employer contends that it justifiably discharged the Employee, referring to his past active discipline and claiming that his conduct showed he was either unwilling or unable to perform his service-oriented functions; he refused to perform the duties which were part of his job, and that he refused to do so in a hostile, belligerent manner which seriously detracted from the Employer's ability to provide a high and acceptable level of service to its customers.

The Union rejects the Employee's discharge, viewing it as unjust and improper. The Union raises a number of contentions in behalf of the Employee: that no written procedures or training existed in regard to a ramp serviceman's loading and unloading of customer vehicles or with how to treat customers; that what the Employee did on July 13 was not so serious as to result in discharge for a 14-year employee; that because Person 2's load was too long for her truck and because the Employee was never given training to cover such a circumstance, he did not act unreasonably in refusing to load her truck; that settlement of the Employee's February 1992 discharge did not constitute a "last chance" situation for him that would allow for further discharge if he committed another, simple rule infraction; that the Employee was treated differently than other employees; and that the Employee has provided some 18 letters of commendation from Employer customers, which show that he performed his job ably and skillfully.

II. Discussion.

A. Preliminary Remarks.

It makes sense to address some of the matters raised by the Union which have not been previously alluded to regarding the events leading up to the Employee's discharge, before addressing the possible disciplinary significance of those events. First and of considerable potential importance is the Union's assertion that the Employee was treated differently than other employees. One part of this assertion relates to two letters of complaint introduced by the Union, one being written by Company 2 and the other being written by an employee of the postal service, both being Employer customers. The Union points out that despite these two complaint letters, no discipline resulted to the other employees involved in those two complaints. Unfortunately, it is quite difficult to rely exclusively on the hearsay complaint letters to establish the truth of their alleged incidents; for all we know, extenuating circumstances may have existed which mitigated the behavior of the other employees involved in those complaint letters. Indeed, the complaint letters do not specifically identify the employees involved (except that Company 2's letter says it took its complaint regarding night employees to a daytime supervisor, Person 3). Without any evidence concerning their identity it is difficult to say that either the Employer or the Union knew who the employees were (so as to establish a basis for comparing the lack of their discipline to the Employee and its significance). In short, the complaint letters, on their own (and that is all we have been given), tell us too little to establish worthwhile conclusions regarding a disparate treatment claim.

Another part of the claim regarding disparate treatment relates to a couple of employees who had been given "last chance" letters but who were not then discharged when next violating an Employer rule. This very limited factual view is all that is put forward, however, and this

Arbitrator has no way of understanding its significance in connection with the Employee's discharge. We have no way of comparing the importance of those employees' "next" rule violation with the ones they previously were faulted for; nor can we tell whether any repetitive conduct was involved for either employee. Indeed, that neither of those employees was subsequently discharged for his "next" rule violation might have been part of an agreement that these situations not be used as precedent. We know that when it comes to discipline each matter often contains such specific factual characteristics as to be treated quite differently than other instances of discipline. Once again, our evidence contains far too little concerning these two employees for this Arbitrator to make any significant findings regarding their treatment as compared to the Employee's.

The final part alluded to in connection with the Union's disparate treatment complaint relates to the fact that Person 2's complaint was by way of a written letter, as contrasted to a simple, verbal complaint. The Employer, or at least Supervisor Person 1, apparently does not initiate a formal disciplinary investigation when a customer's verbal complaint is levied against an employee (though Person 1 does speak to the employee about it), while one is initiated when a written complaint is received, as in the Employee's case. This distinction between complaints, however, seems a reasonable one: it curtails the number of disciplinary investigations that are initiated, it cuts down the number of complaints that might result in serious discipline for employees, and it seems reasonable to think that those who write down their complaints are either more bothered by what happened to them or are likely to take the matter more seriously and wish to pursue it than do those who simply call in to complain. At least in Supervisor Person 1's case, he apparently discusses even the verbal complaints from customers with the employee involved; he then seeks to counsel the employee about the importance of providing good customer service and

avoiding such customer complaints, as he recalls doing several times previous to July 13 with the Employee (who on these previous occasions denied the basis of the customers' verbal complaints).

Another matter raised by the Union concerns the lack of training or written procedures regarding the loading and unloading of customer vehicles and regarding customer service. The significance of this matter is difficult to gauge. Of course, it always looks better when an employee force is thoroughly trained to perform its work in a professional manner and has clear procedures outlined to operate by. The Employer apparently has not provided these characteristics to ramp servicemen, although it does provide them with on-the-job training and with leadmen to instruct them in their work.

But, it is very difficult to believe the Employee was unaware that he should not act toward customers as he is accused of acting in connection with Person 2, even without formal training or formal procedures. Clearly our evidence shows that the loading and unloading of customer vehicles is an integral part of a ramp serviceman's job when he is working the loading dock. Indeed, as earlier noted, this function is specifically referenced in the Agreement. Furthermore, a number of the Employee's complimentary letters, the testimony of Employer management, the testimony of Person 2, and the earlier admissions of a ramp serviceman leadman all go to show that ramp servicemen regularly load and unload customer vehicles as part of their jobs. Moreover, it is not contradicted that when a problem arises on the dock and a ramp serviceman does not know how to handle it, he is has instructions to seek help from an air freight agent, his own leadman, or from a supervisor. Also, the courteous, helpful treatment to be given customers is not necessarily something which must be reduced to written instructions or addressed in formal training, as common sense would indicate to virtually everyone that such treatment

should be extended. In fact, the Employee's numerous complimentary letters, which he solicited from customers when his job looked jeopardized, amply demonstrate that he too understood he should extend such helpful and courteous treatment to Employer customers. In sum, the absence of formal training procedures and written instructions regarding certain aspects of the ramp serviceman job does not seem fatal to the Employer's discipline of the Employee, in the context in which that discipline arose.

B. Conclusions Regarding the Employee's Discharge.

The Employer has promulgated a perfectly rational rule which prohibits employees from "[e]ngaging 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"--namely, Rule 41. Now, it seems quite clear that this rule may well cover a host of employee conduct, ranging from the most trivial to the most serious; likewise, it is clear that since it may well cover unthinking, spontaneous acts of misbehavior the application of the rule should not in some draconian way foster the swift or summary discharge of employees. The Employer's rule, itself, seems to recognize the wide scope of conduct it seemingly regulates, as the discipline for its infraction is stated to vary from a Level 1 discipline (a letter of reprimand) all the way to discharge. The two abiding questions presented in this proceeding are whether the Employee violated Rule 41 and, if he did, did that violation adequately warrant his discharge.

Although the Union disputes the point somewhat, there is no question but that the Employee did violate Rule 41 by his behavior on July 13. It was not necessary in order to violate that Rule for his conduct to have actually impacted the Employer's business relationship with Person 2's

Employer; the rule reasonably and expressly prohibited conduct by him that "has the potential to adversely affect" the Employer's relationship with Person 2's Employer, a regular customer.

Two features of the Employee's conduct stand out as having violated Rule 41. For one thing, he clearly refused to load Person 2's truck with the goods she had come there to pick up. By refusing to load the goods with his forklift, the Employee effectively made it impossible for Person 2 to leave with her goods, as they clearly weighed more than she (or most people) would have been capable of lifting without mechanical assistance. Yet, the only ones allowed to operate that mechanical assistance were the ramp servicemen like the Employee. For another thing, in refusing to load her goods the Employee twice made derogatory remarks to Person 2 that since she held a man's job she should work like a man. In effect, the Employee prevented Person 2 from performing her paid work for her employer, which was to pick up goods that had been shipped with the Employer, and he did so in a hostile and negative manner concerning her being a female working in a truck driver's job, both of which together had the potential of interfering in her Employer's relationship with one of its customers, costing her Employer unnecessary expense for her unsuccessful pickup effort, and interfering in her Company’s willingness and interest in doing business with the Employer in the future. Clearly, the Employee's conduct was no way to treat a customer's employee, and it created a serious potential of lost business from that customer.

The refusal to load Person 2's truck, coupled with the Employee's comments to her in connection with that refusal, cannot be described as innocuous, or joking, or inconsequential conduct. The Employee's misbehavior was serious, particularly in this day and age when women not only need to work as much as men but work in the same jobs as men do.

Clearly, there is no evidence of mitigation related to the Employee's conduct on July 13. Our evidence does not portray Person 2 as having in any way provoked the Employee. She appears to have been a total innocent. Nor is the Employee's effort to lay claim to a safety concern credible. Person 2 denies the Employee ever mentioned that he thought her goods were too long for her truck, even though the Employee suggests he mentioned this concern to her once or twice. Far more telling than this conflict in their recollections, however, is the fact that in connection with his refusal to load her truck the Employee, without question, told Person 2 that since she had a man's job she should work like a man and that he did not load customer trucks. The first comment, of course, was a hostile one, the second comment, of course, was not true; and together these comments reflect nothing about any safety concern over the length of Person 2's goods and whether they would properly fit on her truck.

Given what was said during the encounter on July 13, it is impossible to believe that the Employee's refusal to load Person 2's truck had anything to do with a safety concern over the length of the load. In fact, if he was concerned about the safety aspects of her load, in response to her request for him to load the material he should have taken the matter to the freight agent or his leadman, as he had instructions to do when problems arose. Going to his leadman and describing the incident with Person 2 to that leadman, after the fact, is not at all the same thing as going to a leadman while a problem is currently underway to seek help or advice in its resolution. If we discount the Employee's safety explanation as to why he refused to load Person 2's goods, as we must in view of the preponderance of evidence, we are essentially left with no rational explanation at all for such obstinate behavior by the Employee.

Nonetheless, if it stood alone the Employee's misconduct on July 13 would seem unreasonable to this Arbitrator as the singular basis for discharging a 14-year employee. While an arbitrator is not

generally free to substitute his judgment for an employer's regarding an employee's discipline just because the arbitrator disagrees with the level of discipline in a given case, it is also true that when the level of discipline seems to an arbitrator unreasonably severe, as outside the reasonable norms of employee relations, the arbitrator has an obligation to disapprove of that discipline. After all, it is widely understood that the level of employee discipline must bear rational and reasonable relationship to the underlying causes and surrounding circumstances, but when that relationship exists an arbitrator should not interfere with it merely because he disagrees personally with the degree of discipline.

If it stood by itself, the Employee's misbehavior on July 13 has some features which would make a discharge based on it seem unreasonable, in view of his 14-year career. His conduct, after all, appears to have been spontaneous, without premeditation or thought; it involved verbal misconduct which is generally correctable and, while unfortunate, was the type of misbehavior which occurs in the work place from time to time. His comments to Person 2 were not so contemptible (and certainly not threatening) so as to likely cause her psychological harm or fear. But, the Employee's misbehavior of July 13 does not stand alone as the basis for the Employer's discharge decision. It was the fourth violation of the Employer's rules within a two year period, the contractually designated period which is subject to scrutiny. And it constituted the second violation of the same rule, Rule 41, within that period. More importantly, however, his misbehavior came about some four months after the Employee had been reinstated to work from a prior discharge for insubordination and had been placed by the parties' settlement letter regarding that discharge on a "last chance" employment basis.

While it is true the Union disagrees that the Employee was then in a "last chance" condition, no other view of his reinstatement seems warranted from a fair reading of the parties' settlement

letter. As earlier noted, that settlement indicated the Employee was being placed at a Level 4 discipline effective in January of 1992 (the level just preceding discharge), that he was being given a set of the Employer's Rules of Conduct, and "that violation of any of these rules will result in termination." The plain and unambiguous meaning of these provisions indicates that any meaningful infraction of another Employer rule would necessarily, not just possibly, lead to the Employee's discharge. This is what the parties agreed to in March of 1992 when reinstating the Employee to work, and it is not up to this Arbitrator to change or eliminate the meaning of that agreement.[3] For this Arbitrator to ignore that the parties had agreed the Employee faced immediate discharge for another rule violation, and to ignore that barely four months later he had engaged in another, unprovoked and serious rule violation, would essentially encourage disregard for the kind of voluntary resolutions of employee misconduct and discipline, as reflected in the parties' March 1992 settlement agreement, thus frustrating bargaining parties in arriving at such resolutions. That settlement agreement in March of 1992, given the nature of the Employee's misbehavior of July 13, has essentially mandated the ultimate conclusion in this proceeding.

The conclusion, based on all the foregoing considerations, is that the Employee's discharge was just and proper. The Employer's decision to discharge the Employee, based on his conduct of July 13 and in view of his prior discipline and his then-existing "last chance" employment condition, cannot be viewed by this Arbitrator as unreasonable or so outside the realm of

[3] It may well be true, as argued by the Union, that if the Employee's next rule violation following reinstatement were meaningless, or simply technical, or wholly inconsequential, or completely minor, his "last chance" condition should not allow for discharge. But, in view of the considerations noted above, it is impossible to view his conduct on July 13 in any of these ways.

reasonable opinion as to warrant reversal, notwithstanding the unfortunate end it causes to a 14-year career. Nor do any of the arbitration awards offered for study suggest a contrary conclusion, for these awards essentially dealt with misconduct which was simply verbal in nature, misconduct unknowingly directed at clients of an employer, or misconduct not engaged in while in a "last chance" condition. These awards, in short, involve characteristics quite different than those involved in the Employee's situation.

AWARD

The grievance is denied. The Employer's discharge of the Employee was just and proper.