**Witt #1**

IN THE MATTER OF ARBITRATION BETWEEN:

Employer

AND

Union

## INTRODUCTION

The Employer is an air carrier. The Union represents maintenance workers who service the Employer's airplanes at several locations throughout the system. The Employer and the Union are parties to their first collective bargaining agreement effective June 1, 1991. This agreement was in effect at all times relevant to these proceedings.

## BACKGROUND

The Employee is a maintenance mechanic employed by the Employer since May 5, 1990 who learned his trade in the military as a helicopter mechanic and who served in Desert Storm for four or five months after he was hired by the Employer. He protests that his suspension and subsequent discharge were not for just cause. The Employee was discharged by letter dated May 7, 1993 for events alleged by the Employer to have occurred on March 30, 1993. The letter from Person 1, Vice President of Maintenance, informed the Employee of his termination for conduct described in an earlier memorandum to the Employee from Base Maintenance Manager Person 2. The Person 2 letter, dated March 31, 1993, notified the Employee of his suspension. It reads in full as follows:

> On March 30, 1993 about 8:30 p.m., you were advised by phone that you were suspended indefinitely. The suspension is because of a situation which arose earlier in the day

> during a verbal counseling session with your supervisor, Person 3, concerning your continuing failure to accomplish your work in a timely fashion. Person 3 brought the matter to my attention.
>
> Because of your negative response, Person 3 warned if you did not show prompt and continuing improvement, he would write up any future reoccurring problem areas.
>
> You then threatened if he issued written warnings to you, you would provide documentation to the FAA and/or other agencies alleging that you and/or your fellow mechanics had "pencil whipped" maintenance items.
>
> You are directed to promptly provide a written statement about your meeting with Person 3 to Person 4 in the Personnel Department. He is handling the investigation.

The Employee denies that he threatened management and charges that the Employer wants to get rid of him because he is a very thorough mechanic who refuses to pencil whip maintenance items and because he is a vigorous and outspoken supporter of the Union.

The Employee worked the night shift which begins at 10:30 p.m. and ends around 7:30 a.m. Approximately 50 maintenance employees in City 1 inspect and maintain exclusively Dash-8 aircraft, a deHavilland airplane. The City 1 base also performs maintenance for other airlines on a contract basis.

At the time of the events in question, three lead mechanics were assigned to the evening shift, Person 5, Person 6, and Person 7. The Maintenance Supervisor was Person 3.

At the start of the shift on the evening of March 30, 1993, the Employee was assigned to do a landing gear lubrication. He picked up the paperwork pertaining to the assignment and proceeded to do the work. Several Employer witnesses testified that such a job normally would take about one to one and a half hours, two hours at the most, unless problems were encountered. Between 5:15 and 5:30 a.m., Supervisor Person 3 inquired of leads Person 5 and Person 6 why aircraft #915, to which the Employee had been assigned, had not yet been moved out of the hangar for transport to the terminal. Person 3 was informed that the Employee had taken six hours to

accomplish the gear lube. All of the leads testified that they had not been approached by the Employee with any problems in connection with the gear lube and none had inquired of him during the course of the night why the work was taking so long. Each was vaguely aware that the Employee had been working on the same task for the entire shift.

The evidence indicates that several other mechanics were assigned to assist the Employee in completing the repairs. The airplane was delivered to the terminal and caused no delays.

At about 6:20 a.m., Person 3 sent Person 5 to tell the Employee that the supervisor wanted to talk to him. Person 3 testified that he told the Employee he wanted to speak to him "about his performance slipping again." He said the Employee answered that he did not know he had a performance problem and asked to see his file. He was told the files are kept in the administrative office. Person 3 said he asked the Employee why it took so long to perform the landing gear lube and the Employee replied that he had several problems: he had to purge out all the old grease, which takes a little time; he had problems with some zert fittings not taking grease, and he had to clean out the gear well. He said he had used 40 rags in the process.

The supervisor asked why he had to clean out the gear well and the Employee said it was on the work card. Upon examining the work card, the supervisor saw that the new revision had added a block to cleaning the gearwell. He acknowledged that the additional work could take some additional time, perhaps an extra half hour. But, he testified, he still could not understand how it took the Employee so long.

The Employee told Person 3 that when he was doing the job, the shop was out of Mirachem, a solvent used to clean parts. Person 3 said he asked Person 5 if that were true. Person 5 told him that they no longer use Mirachem and had not for some time since they switched to Synasol. There was plenty of Synasol, Person 5 said.

When Person 3 persisted that he could not understand how it could have taken the Employee so long to do the work, he said, the Employee said that "he wasn't going to pencil-whip the work card like other mechanics do." Person 3 testified that he responded there was no pencil-whipping taking place in City 1 by any mechanic on any work card that he was aware of. He added that at that point, the Employee said he had documentation of mechanics pencil-whipping. The supervisor persisted, he said, and told the Employee his performance had to improve or Person 3 would "write him up." The Employee repeated that he would not pencil whip and Person 3 repeated that the Employee had to improve his performance. Person 3 testified that, at that point, the Employee said, "If you write me up, I'll take my documentation of mechanics pencil-whipping to the FAA and other agencies." Person 3 testified that he was shocked by the comment and simply repeated his earlier warning. The meeting ended on that note.

No written discipline was issued for the productivity problem. Person 3 and Person 5 discussed the incident after the Employee left and both concluded that it was the Employee's intention to take documentation to the FAA if he received discipline. Person 3 reported the incident to his supervisor, Base Maintenance Manager Person 2, shortly thereafter when the manager arrived at work. Person 3 had no role, other than as a witness, in the subsequent decision to discipline the Employee.

Person 2 reported the incident to Vice President Person 1 who made the decision to suspend and, ultimately, to discharge the Employee. Both Person 2 and Person 1 testified that the Employer could not tolerate an employee stripping managers of the right to discipline as the Employee attempted to do here.

The Employee was informed by telephone before the start of his next shift that he was suspended and should discuss the matter with an Employer personnel officer. He received written

notification about the suspension dated March 31, 1993 from Person 2 in the presence of Union chief steward Person 8 on April 1, 1993.

On April 6, 1993, Person 8 presented three grievances to Person 2 pertaining to the suspension. The first, No. 1772, protested that the Employee had been given no reason for his suspension when orally notified of it on March 30 by his immediate supervisor. The Union claimed violation of Article 16 - I.

The second grievance, No. 1773, seeks back pay for the entire period of the suspension. The record indicates the Employee was paid in error for a portion of the suspension period.

The third grievance, No. 1774, reads as follows:

> I, the Employee, while seeking to gain advice on a grievance matter with Chief Steward Person 8, believe that I have been discriminated against because of Union Membership and lawful Union Activity. The end result being suspension without just or any known cause to this date of 3-30-93.

The Employee was sent a letter by Vice President Person 1 dated May 7, 1993 which advised him of his discharge. No other grievances pertaining to the discharge were filed. The Chief Steward testified that the Union did not believe another grievance had to be filed because "it would be assumed that these grievances would run together, and if we ever got to this situation, that that would be understood."

The Union requested a Third Step meeting on its grievances. It was held on June 23, 1993. Eight grievances, including the three filed on the Employee's behalf, were discussed in detail. No Employer witnesses testified and neither Person 3 nor Person 5 were present. The Union advised the Employee not to testify and subject himself to cross-examination inasmuch as the Employer had offered no witnesses. Vice President Person 1 testified that it was his understanding, gleaned from his participation in contract negotiations that the purpose of the Third Step was to afford the

Union a last chance to change the Employer's mind prior to issuing a decision on a grievance; the Employer had no obligation, he believed, to hold a full-fledged hearing.

The Employee's testimony differs in essential detail from that of the Employer's witnesses with respect to the nature of the conversation that led to the Employee's discharge. He said that at 5:15 or so, he was summoned to Person 3's office by Person 5. A Shop Steward there at the time was asked by Person 3 to stay while Person 3 counseled the Employee. However, the Steward left to complete other work saying he would return soon.

The Employee testified that Person 3 told him he had a continuing failure to perform routine tasks in a timely manner. When asked for specifics, Person 3 mentioned that it took the Employee too long to do a gear lube, the Employee said. The Employee denies that he spent six hours on the work. He explained that the aircraft was not in the hangar until 11:00 p.m. and at 5:00 a.m. he had already been to lunch, finished the job, and noticed Person 3 walking around the hangar.

The Employee said that he explained to Person 3 what he had to do to clean the wheel wells and said that it took two hours just to do that part of the work with rags. At that point, the Employee said, Person 3 asked Person 5 why they were cleaning gear wells. Person 5 answered that he did not know for there is no requirement to clean the wheel wells. The Employee said he told them the work card requires it and he showed a copy to the two men. He quoted Person 5 as saying, "Oh, bull s..., we don't have time for that crap."

The Employee said he became alarmed because the Lead Mechanic "has a history of telling people to sign things off." He said he told the two others, "I'm not going to pencil-whip it." He recalled that Person 3 responded that there is no pencil-whipping going on here.

The men argued about pencil-whipping and the availability of equipment with the Employee alleging that all he had to work with were pump bottles of alcohol and rags while other bases have steam cleaning machines.

The Employee testified that Person 3 "got nervous" and agreed that perhaps the Employee had "a valid excuse" this time. But Person 3 added, the Employee said, "If it ever happens again, I'm going to put something in writing".

The Employee said he told Person 3 to do what he had to do but that he, the Employee, would not let himself or anyone be coerced into pencil-whipping maintenance. As he was leaving, he told the supervisor that he intended to write a memorandum of the conversation.

The Employee denied that he ever said he was going to turn the Employer in to the FAA. He said he never used the words FAA but rather, "proper authorities". When asked by his representative at the hearing if he ever threatened, intimidated or coerced Person 3, or if Person 3 wrote him up, he said "No".

The Employee and other Union witnesses testified about several incidents concerning the processing of grievances which they regard as indicative of the Employer's anti-union bias. For example, a memorandum posted on the bulletin board forbade the discussion of Union business on Employer time. In addition, they said that grievances brought to Person 3 were always answered the same way: Person 3 would tell the Union that he had to run the matter by Person 2.

The Employee said that after his meeting with Person 3, he made a record of the conversation. About two hours later, he spoke to Person 8 about the incident while Person 8 was on duty in the battery shop. Person 3 came in, the Employee said, and told the two to stop discussing Union business on Employer time. After arguing briefly, Person 8 said he would take up the matter later.

At about 8:00 a.m., Employee said, he approached Person 2 as he came to work, intending to discuss "what happened earlier" because the Employee wanted Person 2 to understand that the Employee "was not going to be pressured into not pursuing the grievances" which he had previously filed relating to overtime and job assignments. He said Person 2 refused to talk to him and told him he had to leave the premises immediately.

There is little dispute on the following events including issuance of the suspension letter, the Employer's requests for statements from all participants in the incident and the discussions which took place between the parties.

Person 3 and Person 5 each prepared a statement the morning the incident occurred which expressly recounts the Employee's threat to report the Employer to the FAA for pencil-whipping. Person 3's statement says that the threat was in response to the supervisor's warning that if the Employee did not improve his performance, he would be written up.

The Employee's statement, prepared after he was suspended, contains no reference to the alleged threatening words at all. In it, the Employee records that after Person 3 said the Employee's performance had to improve or he would be disciplined, the Employee responded:

> You do what you want. But don't think I'm going to sit idly by while you try to threaten and intimidate me and other mechanics into playing your game for you. Oh, and I will be writing a memorandum for myself about this conversation.

**CONTENTIONS**

As its threshold position, the Employer argues that no grievance was filed that addressed the Employee's termination from employment on May 7, 1993. Therefore, the dispute concerning the Employee's discharge is non-arbitrable because the System Board of Adjustment has jurisdiction over only those grievances which have been properly submitted according to the terms of the collective bargaining agreement.

In the instant case, says the Employer, the three grievances which were filed on April 6, 1993, each of which specifically addresses the March 30, 1993 suspension, pre-date by more than a month the Employer's decision to discharge the Employee. They could not possibly pertain to the discharge, therefore, the Employer argues.

The Employer contends that, in light of the clear requirements of the contract pertaining to submission of grievances within 20 days of the event, the fact that the Union did not file a grievance pertaining to the termination renders the dispute "final" and, thus, not within the jurisdiction of the System Board. Thus, this System Board's jurisdiction does not encompass the issue of termination and is limited to matters relating to the Employee's suspension, the Employer avers.

On the merits, the Employer asserts that the issue is whether the Employee committed the act for which he was suspended and ultimately terminated, not whether termination is the appropriate discipline for such serious conduct.

The Employer argues that credibility must be resolved in favor of supervisor Person 3 and lead mechanic Person 5, people with nothing to gain, whose versions of the threat have been complete and consistent from the date of the occurrence. In contrast, the Employer claims, the Employee's versions are motivated by self-interest and have been inconsistent up to and including his testimony before the System Board. Moreover, he has demonstrated a willingness to lie by adding details to explain earlier inconsistencies.

The Employer contends that the serious nature of the Employee's threat and insubordination justifies termination. It characterizes the Employee's actions as "an act of blackmail against the Employer" intended to insulate the Employee from discipline. But it was also a violation of the reporting procedures, the Employer says, by which a mechanic is to notify the Employer of any

discrepancies in maintenance procedures and, thereafter, if no remedial action is taken, to make a report to the FAA.

Finally, the Employer argues that there is no merit to either the Employee's excuses for taking so long on the gear lube or to the Union's assertion that the Employee's discipline was in retaliation for his submission of grievances in the past. Urging that the Arbitrator not modify the severity of the discipline, the Employer asks that the Employee's discharge be upheld and the grievances be denied.

The Union does not address the arbitrability issue in its Brief but argued at the hearing its position that the suspension grievances covered the later termination because both the suspension and termination depend on the same set of facts. In its view, the suspension grievance ripened into a grievance protesting termination when the Employer gave notice of termination and was, in fact, considered by the Employer as a protest against the discharge.

The Union contends on the merits that credibility should be resolved in favor of the Employee and other Union witnesses. Person 3's testimony should be discredited, it says, because he said he had not intended to discipline the Employee when he called him into the office on March 30, 1993, only counsel him, but later acknowledged that an unsatisfactory performance letter was placed in the Employee's file without his knowledge.

More importantly, the Union urges, the Employee had no reason to make the alleged threat if there was to be no discipline. The Union regards Person 3's failure to send the Employee home immediately and his need to confer with Lead Mechanic Person 5 concerning what they had both heard as proof that neither man felt threatened at the time.

What really happened, the Union argues, is that the Employer seized upon its version of the incident as a means of getting rid of the Employee. It motivations to remove the Employee from

the workforce were (1) retaliation against a vocal employee who was willing to file grievances over matters such as overtime and job duties which the Employer did not want to discuss; (2) elimination of a mechanic who "demanded that the Employer go by the book, no short cuts, no pencil-whipping"; (3) retention of absolute control for Person 2 by eliminating "his problem", the Employee, because from the beginning, the Maintenance Manager in City 1 did not want the Union on the property.

The Union requests that the Employee be restored to his employment and that he is made whole, including full back pay.

**FINDINGS**

Controlling language from the collective bargaining agreement reads:

> Article 2 - Management Rights
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> A. Subject to the provisions of this Agreement, the Employer retains discretion and authority to manage its operations and direct its workforce. Such rights include, but are not limited to, the right . . . to maintain good order and efficiency; to discipline and discharge employees for just cause;…to determine uniform qualifications for continued employment…
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> * * *
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> Article 16 - Grievance and Arbitration Procedure
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> C. Grievance Procedure A grievance is defined as a dispute between the parties arising under the express terms of this Agreement. The following procedure shall be used by the Employer and any employee who has competed his new-hire probationary period:
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> 1. Any employee(s) having a grievance or complaint in connection with the application of the terms of this Agreement may, with the Steward or other authorized Union Representative, present the grievance orally to his immediate supervisor or his designee in an effort to resolve the matter.
>
> 2. If the employee and the Steward are not satisfied with the oral decision of the immediate supervisor or his designee, he may, within twenty (20) days after the incident giving rise to the grievance, present his signed grievance in writing to his immediate supervisor or his designee on a form supplied by the Union; the designated supervisor will initial and date acknowledgement of receipt of the grievance. The grievance will state the remedy desired and the date of the alleged

violation. The immediate supervisor or his designee will render his written decision within seven (7) calendar days after final discussion with the Steward and/or Employee.

3. If the decision in Step 2 is not satisfactory to the Union, the General Chairman or his designee may appeal the decision to the Vice President-Maintenance of the Employer or his designee within fifteen (15) days after receipt of the written decision rendered in Step 2 above. This appeal will be by submission of the written grievance. The Vice President-Maintenance or his designee will render his decision in writing within fifteen (15) days after final discussion with the General Chairman or his designee.

4. If the decision of the Vice President-Maintenance or his designee is not satisfactory to the Union, the grievance and decision thereon may be referred to arbitration within thirty (30) days after the receipt of the written decision of the Vice President-Maintenance or his designee.

* * *

G. The Arbitrator shall proceed to hear and resolve the dispute without delay. In arriving at a decision, the Arbitrator shall not have the power to delete from, add to, or in any way modify the provisions of this Agreement.

I. An employee who has completed his probationary period who is disciplined to the extent of loss of pay or discharge will be entitled, upon request, to a fair and impartial hearing which will be held within a reasonable period, and after the employee has received a forty-eight (48) hour notice in writing prior to the hearing. Further, the employee shall be advised in writing, with copies to the Union, of the precise charge/charges being preferred against him. A steward will be in attendance at all disciplinary hearings.

The procedural issue here is whether there is a grievance before the System Board of Adjustment which protests Employee's termination. If not, only the preliminary suspension and the grievances related to it may properly be considered.

Disputes concerning arbitrability of an issue may be submitted either to a court or, by agreement of the parties, to an arbitrator for resolution. In each case, the only guidance is the collective bargaining agreement which sets forth the matters the parties have agreed to submit to arbitration and the procedure they intend to follow. In the instant case, the parties have agreed to a broad

arbitration clause, one which defines a grievance as "a dispute between the parties arising under the express terms of this Agreement."

But they have also expressly agreed to a series of procedural steps which include time and formatting requirements applicable to both sides. These provisions have the same force and effect as other provisions of the Agreement pertaining to rates of pay, hours of work and other conditions of employment. They are enforceable to the same extent as any other provision unless the parties expressly or implicitly agree otherwise.

The parties here have expressly agreed in Article 16, Paragraph G, that the Arbitrator "shall not have the power to delete from, add to, or in any way modify the provisions of this Agreement." This provision can only be interpreted to bar the Arbitrator from considering the equities of a given grievance when determining whether a matter is arbitrable. Only the facts of record, viewed within the context of the Agreement, may be considered.

There is really no dispute that there was no grievance filed to protest the Employee's termination after notice of it was given by the Employer to Employee on May 7, 1993. The previously filed grievances all addressed issues related to Employee's suspension imposed on March 31, 1993. While the parties have certainly had informal discussions and even a Third Step meeting, it is clear from the record evidence, including Person 1's response to the Union dated July 13, 1993, that the Third Step was regarded by the Employer as related solely to the suspension grievances. It cannot be found, therefore, that the Employer waived any of the requirements of Article 16, Paragraph C-2 of the Agreement with respect to filing grievances in writing and appealing them within certain time limits through the various steps of the grievance procedure. Nor does the record suggest or the Union argues that the Union was somehow deliberately misled into thinking that the absence of a written grievance did not matter.

While the Arbitrator notes that this was the parties' first agreement and their respective representatives may have been somewhat inexperienced, neither of these essentially equitable considerations permit her to alter the express and unequivocal language of the contract which requires the filing of a written grievance. In the absence of a grievance, the merits of the termination will not be considered.

With respect to Grievance No. 1772 protesting the Employer's failure to give the Employee notice of the reason for his suspension, the record indicates that the Employee was given a suspension letter dated March 31, 1993 by Person 2 on April 1, 1993 in the presence of a Union Steward. That letter details the reasons for the suspension, specifically, that the Employee had threatened that if his supervisor issued written warnings to him, the Employee would provide documentation to the FAA and/or other agencies alleging pencil-whipping. This letter of suspension is adequate to fulfill the requirement of Article 16, Paragraph I that "the employee shall be advised in writing, with copies to the Union, of the precise charge/charges being preferred against him." Therefore, Grievance No. 1772 must be denied.

Grievance No. 1773 claims pay for the period of the suspension. It is undisputed that the Employee was paid for the period from March 31 through April 25, 1993. The balance of the period during which he was suspended was from that date until the date of his discharge on May 7, 1993. Because the Employee has not been reinstated to his employment and remains separated from the Employer, there is no basis for awarding him back pay for the period of his suspension for which he was not compensated. Grievance No. 1773 must be denied.

Grievance No. 1774 alleges that the Employer discriminated against the Employee because of Union membership and lawful Union activity. It specifically claims that he was suspended without just cause as a manifestation of that discrimination.

The record suggests that the relationship between the Employer and the Employee was not a good one. The Employee was quick to file grievances over matters in which he had a personal interest such as assignment to the floor machine, pay for using personal time to pick up his identification card and equalization of overtime. The Employee was not a Union representative. He served in no official capacity. But he consulted often with the Chief Steward about contractual matters. Notably, some of the matters he raised had been successfully resolved in his favor.

The Employee had been counseled before about his work performance. The counseling was not about the quality of his work but about the pace at which he worked. The record shows that his productivity had been mentioned to him on several occasions by leads and supervisors and that on each occasion he argued or made excuses. But he had incurred no other time-off discipline. There is nothing in the record to suggest that the Employee was treated differently than others in the maintenance group. All were subjected to the same time constraints and regulations. All worked under the same group of leads. Most important, however, is that the Employee was suspended for specific reasons which are adequately proved on the record. His insubordinate and threatening remarks to management, found here to have occurred, warranted that he be suspended pending investigation. There is, therefore, no basis for sustaining the grievance that alleges discrimination because of Union activity. Grievance No. 1774 is denied.

**AWARD**

Grievance No. 1772 is denied.

Grievance No. 1773 is denied.

Grievance No. 1774 is denied.