

In the Matter of Arbitration
between
Southwest Airlines Company
Dallas, Texas
and
Transport Workers Union of America
Air Transport, Local 555

Grievance ALL 1000/09
Supervisors performing
covered work
before
John B. Barnard
Arbitrator

For the Company

Mr. Eric Carr, Esq.
Senior Counsel

For the Union

Mr. Charles Cerf
Union President

Mr. Gary Drummond
International Representative

Hearing, 9:00 a.m. July 10, 2009
Wyndham Hotel
Dallas, Texas

The Issue

The Company proposes,

Did Southwest violate the parties collective agreement by allowing Supervisors to assist in performing covered work (specifically, working at the bottom of a belt loader, working in a bin, wing walking, pushing back, and marshalling at aircraft) without standing directly next to covered Employees?

The Union proposes,

Did the Company violate the CBA when Supervisors performed the following covered work by themselves,

1. Working at the bottom of the belt loader
2. Working in the bin
3. Marshalling in aircraft
4. Wing walking
5. Pushing back aircraft

If so, what should the remedy be?

Authority

Collective Bargaining Agreement
June 14, 2001 to June 30, 2006

Article Two
Scope of Agreement

B. ...Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty...

Collective Bargaining Agreement
July 1, 2008 thru June 30, 2011

Article Two

Scope of Agreement

B. ...Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty, with the understanding that intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce...

Background

Union President Charles Cerf filed a grievance on April 29, 2009 which is the subject of this arbitration. Such states,

Statement of Grievance

Supervisors performing covered work in violation of, but not limited to, Article Two and Article Four. (examples, but not limited to, driving without covered employee, working in the bins alone, and at the end of the belt loader, etc.)

Remedy or Settlement Sought

Cease the above mentioned violation. Pay overtime bypass to next available agent (s) in call book or, if none available, the next junior agent(s) in call book or, if none available, the next junior agent(s) that would have been required to work when in violation of the CBA.

Such matter is now properly before the arbitrator.

Union Position

As reviewed

Company Position

As reviewed

Discussion and Conclusions

At times, during the bargaining history between a company and a union, there are occasions when language is agreed to during negotiations that differs from the recently expired contract, and such modified or changed language then becomes part of the new agreement. Typically in those instances, both parties fully understand and have no further questions and/or concerns with the new language.

That said, however, in some instances, the newly agreed to language becomes a focal point of subsequent disagreement between the parties, which then more times than not presents itself before the arbitration process, thus charging the arbitrator to, in effect, deciding the meaning and intent of the parties having agreed to the changed, or modified language.

For the most part, those few instances are readily understandable. Both parties become intent on creating a change to the present language during negotiations, or for that matter, staying status quo, and during the myriad of lengthy discussions that seem to be getting nowhere, a word or sentence is proposed which then leads to an agreement to place such into the new agreement, as both parties feel a sense

of accomplishment in that one party might believe the status quo is not changed, whereas the other party walks away believing that the change satisfies their understanding that the new language accomplishes their position in negotiations.

In this case specific, the issue here has become more complex in that it appears that both parties left negotiations believing and understating what the changed language meant when such was agreed to, yet there was little or no discussions between the parties as to any examples that fully explained the change. For instance, Gary Drummond (I will not burden this decision by listing the titles of the individuals mentioned, nor their role in the recently concluded negotiations, as both the parties understand the roles).

testified,

...there was no discussion on the word assist...

Mike Ryan on direct,

Q. Supervisors can only assist if standing next to an agent. That discussed?

A. No, we don't do business that way.

Q. Need a supervisor stand next to an agent to assist?

A. No, we'd never agree to that.

Q. How many agents are to be put into the bin, that discussed?

A. Not discussed.

Q. Ever know supervisors to wing walk as agent pushes a vice verse?

A. That's been the practice.

Q. Any discussions at negotiations concerning a supervisor at the end of the belt alone?

A. No.

Ryan on cross,

Q. Did you say that you've seen enough examples, and you don't want to hear more?

A. I don't recall.

Ryan further,

...my intent (in negotiations) was to allow supervisors to work hand in hand with agents...

Jeff Cox on direct,

Q. If two agents in bin, and a supervisor at end of belt, any discussion at negotiations?

A. No.

Q. That's a replacement?

A. No, same as always done.

Cox on cross,

Q. If a supervisor is in the bin by himself, who is he assisting?

A. The entire group covering the turn.

Cox on redirect,

Q. The Company proposed assist language. What context?

A. It was a Union proposal first. Charles Cerf said supervisors have historically assisted, not replacing agents....

The only discussion of any import between the parties seemed to be the Bradley (Hartford) example, when the supervisors, basically took over agent duties in an unusual situation. That example appears to have no impact with this case, however.

As can be seen, the language concerning the question of supervisors performing covered work was modified, yet there was no discussion on examples as to how the modified language would be applied.

The 2001 to 2006 agreement, Article Two, scope of Agreement states in part,

B. Covered Employees

...Supervisors are not covered by this Agreement but may continue to perform covered work while on duty...

the current agreement in Article Two, Scope of Agreement, states in part,

B. Covered Employees

...Supervisors are not covered by this Agreement but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce...

The parties' notes reflect that the agreed to language took place on February 26, 2008, with a short series of proposals across the table. For instance, at 10:45 a.m.,

the Union proposed (all regarding Article Two, Scope of Agreement) stated,

...Supervisors are not covered by this Agreement and may not perform covered work....

At 12:00 p.m., the Company countered,

...Supervisor are not covered by this Agreement, but may continue to perform covered work while on duty, with the understanding that the intent is for a Supervisor to assist, direct, train, evaluate agent performance and ensure efficient operations, not to replace (in the case of an emergency) any covered employee...

At about 3:30 p.m., the Union countered the Company's proposal of 12:00 p.m.,

...Supervisors are not covered by this Agreement but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and ensure efficient operations by managing and directing the workforce. A supervisor may not replace any covered employee or cover a scheduled line...

The Company then responded to the Union's proposal on the next day, February 27, 2008 at 10:00 a.m. with,

...Supervisors are not covered by this Agreement but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce. A supervisor may not replace any covered employee or cover a scheduled line...

Such counter from the Company was then ta'd by both parties on February 27, 2008 at approximately 11:25 a.m. That language is now in effect for the present

agreement. The prior contract allowed to supervisor to perform covered work with virtually no restrictions. By adding the term assist, such changes the role of the supervisor from before.

Union ex. 20 reflects the handwritten notes of John Kaczmarek, a member of the Union's negotiating committee. Some random notes,

2/26

Cerf

Historically, supervisors were to help out periodically but now, due to inadequate staffing, supervisors are working our lines all day long. The Company is allowing supervisors to fully perform our duties. The original intent was to assist or help out.

Drummond

The system has been bastardized, with whole crews of supervisors working flights by themselves. The number of supervisors has increased. No supervisor should be doing our work for a majority of their shift.

Ryan

Agree that supervisors are taking away our job duties. It is currently in practice. Knows of current grievances over this.

Acknowledged prior examples. Wants to continue present business model Intent is not to use supervisors to cover scheduled lines. Says we can hold Company accountable to supervisors not holding covered lines. Supervisors are imp (important)? Are not to cover lines but to support the operations.

Cerf

Supervisors are not to cover a scheduled line and will allow them to work during an emergency.

Drummond

Intent is that supervisors may ensure efficient operations by directing and managing the workforce, but they're taking away our work or replacing us. We're using your true intent of a supervisor's job description.

Must be limitations or what and when a supervisor can do our work or else they can take over our duties. We're concerned about being outnumbered.

On the last page of the notes, according to Kaczmarek, "our discussions" in caucus, (in relevant part) on 2/26/2008,

Supervisors may not,

- perform covered work solo
- perform covered work a majority of their shift
- cover agent lines
- perform covered work if it renders him unable to perform his supervisor duties

Supervisors may,

- direct the workforce
- train
- work when all hands on deck

Company ex. 3 are the notes of Jeff Cox took on the 26th,

Cerf

Historically supervisors have assisted and helped out. What is happening now, supervisors are working the whole line all day long. Examples—Hartford

Drummond

This has been bastardized. The supervisors are doing the work. It is the best to just tell them this is our work.

Ryan

Company's counter to Union proposal. We acknowledge the example Cerf gave and that we have addressed these issues. No system boards, etc on this topic. We explained our history.

Cerf (after break)

Difficult time working with what would allow supervisors to continue to do work. Deleted emergency

Drummond

Change the language from ours. Change the words to clarify the intent.

There then was some discussion on the term emergency.

Drummond

Too many supervisors. Doing work sometime and not other times.

Ryan

If I didn't add a supervisor on absences of agents then no issue per Cerf.

Drummond

What is to stop the Company from just hiring supervisors and not agents.

In post hearing brief, the Union highlighted some arguments,

...Director of Ground Ops, Employee Relations Jeff Cox testified there was no intent on the Company's part during those negotiations to change the supervisors' historic role of "being part of our operation, work with our Agents, lead by example, anything to turn an aircraft..." It is inconceivable that a reasonable person would look at the significant changes in Article 2.B. and conclude that the status quo of the previous contract had been maintained...

(p 10)

...Oral testimony and written evidence has shown that, in accordance with the language of Article 2.B., the only time a supervisor is permitted to perform covered work, other than when he is directly assisting (alongside of, not replacing) an Employee, is when that supervisor has a documented shift trade with an agent...

(p 12)

...The Company's response throughout the hearing from their only two witnesses was basically that of denial. Jeff Cox testified that there was no intent to change 2.B. The testimony of Mike Ryan was confusing. In one breath, he said it was a violation if a supervisor performed covered work of an assigned line such as running bags, servicing the lavs or working at T point. In the next breath, he said it was not a violation if a supervisor was performing covered work in one of the five scenarios under contention because he was assisting in the entire operation. That is just not logical.

(pp 15, 16)

In conclusion, the Union states in part,

...Oral testimony and written evidence has shown the Company did violate the Collective Bargaining Agreement when supervisors performed the following covered work by themselves,

- 1) working at the bottom of the beltloader
- 2) working in the bin
- 3) marshalling in aircraft
- 4) wing walking
- 5) pushing back aircraft

We ask that you not allow the Company to renege on what was fairly negotiated.
(pp 15, 16)

In turn, the Company mentions in post hearing brief,

...There is no question that the grievances at issue involve work that the Supervisors have consistently performed throughout Southwest's 30 year history. This is obviously a substantial past practice that must be considered when evaluating the merits of the Union's case...if Southwest had agreed to significantly change this long standing practice, there would be something in writing to commemorate that agreement.

(pp 6, 7)

...Assuming that this Arbitrator finds the language to be ambiguous, the Union must demonstrate through a preponderance of the evidence that when it and Southwest sat at the negotiating table, they mutually intended that Supervisors must stand next to Agents while performing covered work...

(p 9)

...There was no dispute at the arbitration that the topic regarding Supervisors and covered work revolved exclusively around one example in which a group of Supervisors worked flights without any Agent present...

(p 9)

In conclusion, the Company asserts,

...without asking for anything in return, the Company agreed to put language in the Contract that clarified Supervisors' duties and made clear that Supervisors should not replace Agents. The Union agreed to this language and raised no further issues concerning Supervisors performing covered work...Southwest respectfully requests that the grievances be denied in their entirety...

(p 11)

With post hearing brief, Company counsel submitted a March, 1998 decision by arbitrator Hughes (AAA 71 300 00147 97), grievant Peter Klein. While such can be considered instructive, it is not on point here in that the language contained in Article 2.B. at that time did not coincide with the language under consideration here. Article 2.B. has been modified, as the parties have agreed upon a revision of

2.B.

Company counsel, in a number of times in post hearing brief, refers to an example of a supervisor standing next to an agent while covered work is performed. For example,

...the Union must prove that Southwest agreed during contract negotiations that Supervisors can only assist Employees in performing covered work if they stand directly next to them...

(p 1)

and,

...at no time during the training did the Company mention that Supervisors can only perform work if they are standing next to an Agent...

(p 4)

There are several other references in post hearing brief to that example.

There is little or no testimony or evidence presented which could have led to the example as described in the Company's post hearing brief, i.e., supervisors standing next to agents. As such, there cannot be any consideration here in that regard.

If one were to attempt to reconstruct the thought process and intention of the parties during negotiations, one conclusion that can be drawn is that the Union (Cerf) made mention on February 26th across the table,

...The original intent (2.B) was to assist or help out...

when he discussed the role of the supervisor. It is abundantly clear that the original intent of the Union was to completely eliminate supervisors from doing

covered work. Such position obviously was somewhat modified later.

Within a short time later, the Company then centered the Union's position and offered the following change to 2.B. in part,

...the intent is for a Supervisor to assist, direct, train, evaluate agent performance and ensure efficient operations, not to replace (in the case of emergency) any covered employee...

With a few minor changes later, that language was adopted by the parties. It is reasonable to believe that the word assist was proposed by the Company in response to Cerf's comments earlier that day that the original intent was to assist or help out.

Unfortunately, the trail ended there. It appears the parties at that time felt that they both had a firm understanding of the agreed upon change. The Union believed there was relief given to the problem of supervisors performing covered work, whereas it appears that the Company felt nothing had really changed. This discussion will not attempt to second guess the process here, but rather to render a decision on the issue based upon a fair reading of the testimony and evidence as presented. That said however, by not discussing various examples of how the word assist is to be viewed for the term of the contract, an opportunity was missed by the parties to clarify such with examples. None were forthcoming.

Although the company believed in good faith that the status quo was preserved, there must be a realization on their part that 2.B. was changed, with modification

made to the then current language. With that, the Company and the Union must realize that there was a contractual change, and the word assist clearly alters the then current 2.B., thus creating a different meaning to that section. Nothing can be considered status quo as such when the language is changed by the parties.

With that as a complete background as I can reconstruct, the word assist must be considered when viewing the duties as mentioned in the parties' issues. My decision here will attempt to consider the testimony and the evidence, and the intent of the parties, as presented.

It could be argued that a supervisor, when performing any of the five issues here, is assisting covered employees, thus in effect that supervisor is virtually continuing to assist, thus B is not violated. That argument must be rejected, however, as pointed out, such is not logical, and such argument simply doesn't mesh with the intended language. Under the previous contract, the supervisor had free reign to do covered work. Section 2.B., changes that with the current contract, as such was modified.

With that as the background, the issues then are,

Union

Did the Company violate the CBA when supervisors performed the following work by themselves,

1. Working at the bottom of the belt loader

2. Working in the bin
3. Marshalling in aircraft
4. Wing walking
5. Push back of aircraft

In turn, the Company proposes,

Company

Did Southwest violate the parties' collective bargaining agreement by allowing Supervisors to assist in performing covered work (specifically working at the bottom of a belt loader, working in a bin, wing walking, pushing back and marshalling an aircraft) without standing directly next to covered Employees?

One more comment seems in order. In post hearing brief, the Company made mention a number of times in regard to their argument of past practice,

...It is evident from the record that neither party expressed an understanding during negotiations that 30 years of past practice would change and Supervisors now could only perform covered work when standing next to Agents. Even if this arbitrator ultimately interprets the contract language to contain this requirement, the Company should not be penalized for committing "violations" of a condition that it could not have been aware of...

(p 11)

I am aware of the concepts of an established past practice. While past practice serves as a backdrop to this case, it must be realized that the parties agreed during negotiations that the apparent long standing language contained in Article 2 (B) was modified to include the word assist, which must also be a factor in the

decisions reached here.

As mentioned before, to decide that supervisors could now only perform covered work when standing next to agents, (i.e., 10 feet as mentioned in the Company's argument) seems to me to be an unrealistic approach to the situation and would only serve to create more problems for the parties.

The following represents the most reasonable solution to the issue here, based upon the totality of the testimony and evidence presented, along with an understanding as to the duties in question.

Working at the bottom
of the belt loader

Such duties typically involve, on an outbound flight, to place the baggage, etc, on to the belt for employees to put into the bins. On an inbound, the duties are to take the baggage, etc off the belt and placing it into nearby carts.

It would seem that typically the tug driver could or would assist in the loading and unloading of baggage to be placed on or off the belt. If a supervisor is working at the bottom of the belt, and the tug driver works with the agent as to the placement on or off the belt, the supervisor is assisting. If the supervisor works alone loading or unloading the belt without the assistance of an agent for a good portion of the turn, such would be in a violation of the agreement.

Working in the bin

The duties consist of the agent positioning himself in the plane's bin(s) and then either loading the baggage onto the belt or, taking the baggage off the belt.

A supervisor is not considered assisting if he works alone on a turn. Conversely, if an agent is also working the majority of the turn along with the supervisor, the supervisor should be considered assisting.

Marshalling in aircraft

The duties here consist of the Agent using wands and hand signals to direct the aircraft into the gate, ensuring that the aircraft is correctly parked at the gate.

Of all the five duties under consideration, this function seems the easiest to call. There is little or no assistance required to marshal, thus a supervisor marshalling a plane into the gate should not be considered as assisting, thus a violation of the agreement if the supervisor performs this function.

Wing walking

When an aircraft is in push back off the gate outbound, the ramp agent is responsible, using wands and hand signal, to remain in communication with the push back tug operator and guide the plane safety.

Of the various functions at issue here, it seems that the duties of the wing walker are most in line with the description of assisting in this context. The wing walker is there to assist the tug operator pushing the aircraft out. The wing walker is in communication with the tug operator by means of hand signals and wands, thus assisting the operator in the safe and efficient push back. Thus, the wing

walker duties are those of assisting, and not a violation of 2.B.

25.

Aircraft push back

With the plane ready for departure (push back), the agent is responsible to operate the push back tug. (hooked up to the plane by a tow bar) and safely push the plane off the gate into a position where, once the tow bar is unhooked, the plane can then taxi under its own power.

This function in some respects can be compared with the wing walker in that the tug operator is in communication with the wing walker. The push back tug operator is to be considered a distinct function in itself however, not lending itself to assistance, as the tug operator is obviously responsible for the operation of the tug in pushing the aircraft. A supervisor operating the tug then should be considered in violation of 2.B.

That said, there is no magic wand that can be waived which solves all of the questions and concerns revolving around those five functions. As can be seen, in regard to the discussion of the supervisor's role in working the beltloader and the bin(s), such functions are quite fluid, and by necessity, there is some interchange with both supervisors and agents working in and out of the bins and working the belt, so the question of assisting at times can be blurred somewhat, thus my comments of the supervisor working alone for a good portion of a turn. Also

compounding the situation is the size and scope of the station itself, with the possible different manning requirements for a particular station.

I would hope that the parties can now discuss these five functions in an effort to come to some conclusions that they both can agree upon. The alternative of course is to wait until contract expiration to discuss the issues, or, going forward, the decisions reached here are obviously my award based upon the testimony and evidence of record.

In sum, by the parties agreeing to change the wording in Article 2 (B), foremost of which the addition of the term assist, that changed the meaning of 2.B.as it was constructed. Such term in effect modified the intent of 2.B by spelling out the supervisor's role in the performance of covered work, whereas in prior agreements, there was no restriction on a supervisor performing covered work. The term assist was proposed and accepted by the Union on February 26, 2008. As mentioned, unfortunately the trail ended then. When different wording is inserted into a section of the agreement, it is the responsibility of the party proposing the change to fully explain the change and its possible ramifications, and the responsibility of the other party to also understand the meaning of the wording change. It seems obvious that both parties felt a sense of relief with the Company's proposal to add the term assist, with both parties believing their positions had been validated. Hindsight being what it is, had the parties fully

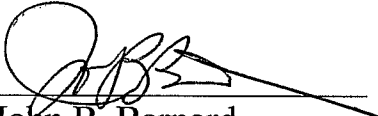
discussed examples as to how the term assist would be implemented, arguably any issues could have been resolved during negotiations. It must be recognized that the supervisors, in prior agreements, had much latitude in performing covered work. The fact that the term assist was proposed and agreed upon by the parties does now change the supervisor's role in that performing of covered work.

Decision

The decisions regarding the five job duties are contained in the discussion section.

I will retain jurisdiction over this matter if the parties so elect.

October 24, 2009
Dallas, Texas


John B. Barnard
Arbitrator