The evidence fails to show in any respect that the Union's request to view the video recordings at issue unreasonably burdened the Company, caused any expense to the Company or that the DAL airport authorities denied access to the airport's video recordings for viewing. Further, the evidence shows the Company, as a contractural user of the airport, made no request or contact with the DAL airport authorities concerning access to the video recordings of SWA's 18 gates for the hours of 4:00 a.m. to 12 midnight, July 17, 2015.

Statement of Facts

Prior to the summer of 2015, the DAL station operated about 140 flights per day. Generally, the Company schedules 30 to 40 Ramp Service Supervisors ("RSS") divided between the two main shifts of operation. In mid-2015, the Company increased its number of flights to 180 per day. In or about the same time frame of July 2015, the Company's DAL station experienced difficulty with the DAL airport, owned by the City of Dallas, Texas, with the airport's support of the additional flight traffic. For a number of various reasons, the airport managed the arrival and departure of the Company's aircraft at different gates than were convenient for baggage handling. Ramp Agents perform the baggage handling efforts from aircraft to aircraft. The parties use the term "Sweeper" to refer to a Ramp Agent that retrieves baggage and cargo from an aircraft that has arrived at one gate and must transport the baggage/ cargo to a different gate for a departing flight or vice versa due to the airport unexpectedly making a gate change for the aircraft. Unexpected gate changes disrupt the normal flow of luggage and cargo through the normal baggage handling system. The disruption in mid-summer 2015 caused the Company to occasionally utilize Ramp Supervisors to perform the Sweeper function.

The Company's DAL station operates, as of mid-2015, 18 gates. Each gate has two surveillance cameras for recording video footage from two different perspectives. The surveillance system would presumably produce video recordings of the activities at the gate. Indisputably, the video recordings would show the movement of an employee driving a tug pulling a luggage cart(s) from and/or to a particular gate with luggage carts. The recordings are captured in color. Thus, the video footage would show the color of the work vest the employee wore at each gate. Ramp Agents wear an orange vest while performing their duties. In contrast, Ramp Service Supervisors ("RSS") wear green vests during their shifts. The City of Dallas ("City") owns and operates camera/video surveillance system of the Dallas Love Field airport and maintains the video footage for a brief period of time. The City allows, upon approval of a request, to view and receive copies of the video recordings. Mr. Westermajer testified that it could take up to a week or two for the City to release a copy of a requested surveillance video, should the City approve the request.

Mr. McCrummen, as the Vice President for TWU Local 555, serves as the grievance liaison to process grievances. He referred to an arbitration award[4] that sustained a grievance concerning supervisors performing bargaining unit work in violation of the Agreement. He testified that in a different grievance arbitration of a previous case that involved supervisors to have been found to violate Articles Two and Five the arbitrator denied granting punitive damages.[5] The arbitrator held that the appropriate remedy

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[4] Hereinafter referred to as the "Barnard Award." Arbitrator John B. Barnard issued an arbitration award on October 24, 2009, that sustained the grievance concerning supervisors performing five job duties found to consist of bargaining unit work. Subsequently, the parties entered into an Implementation Agreement on November 2, 2009, to settle nearly 200 grievances over covered work related to the Barnard Award issue. *See Southwest Airlines Company and Transport Workers Union of America, AFL-CIO, Local 555* (Neumeier, 2012) at 3.

[5] *Southwest Airlines Co. and Transport Workers Union of America, AFL-CIO, Local 555, TWU-ALL-5001/12* (Neumeier, 2012) ("The remedy being sought, payment of the minimum call out of 4.0 hours of VOT or MOT, is unrelated to the duration of the violent and would, in many cases, go beyond making the harmed employee whole for actual damages. . . . The record presented here, however, does not support a finding that the Company is engaged in willful and repeated violations that would justify the extraordinary remedy [of punitive damages].").

was to grant back pay for an overtime bypass the Ramp Agents should have worked in lieu of the supervisor.

Mr. McCrummen explained the importance for the Union to gather evidence of the alleged violation(s) to ascertain the when, who and duration of aggrieved incidents to support a proper remedy where a bargaining unit employee was bypassed to perform covered work done by a supervisor. Mr. McCrummen elaborated that videos taken of targeted areas would show when a supervisor removed his green vest and donned an orange vest before doing the covered work. He described the sort of audit trail the Union can use to identify the aggrieved instances; i.e., flight paperwork, OTIS, Station coordinator's log of all the flights, plane numbers and gates used. Mr. McCrummen further stated that having access to review video footage has aided in the investigation of grievances similar to the instant grievance and to support the remedy to resolve the aggrieved matter.

Mr. McCrummen further referred to an arbitration award concerning the Company's failure to give timely notification to a bargaining unit employee when assigning mandatory overtime.[6] He highlighted a finding articulated in the award, as follows:

> The union is entitled to records with this information [pertaining to record keeping of the "call" book maintained by the Company's Administrative Supervisor] in addition to the records the Company actually kept and produced. Frankly, keeping records with this information is in the Company's interest. The records it relied on don't explain away, for instance, the four day delay between . . . when the mandatory process started . . . and . . . when [the grievant] was personally contacted. The incompleteness of the records leaves the Company susceptible to legitimate claims that the delay was unnecessary.[7]

Mr. McCrummen testified that he interpreted the above finding to mean that the Union has the right to records to prove its case in grievances. He further interpreted the above finding to mean that once the Union shows a prima facie case the burden shifts to the Company in its best interest to provide the records. Mr. McCrummen stated that the grievance form does not require the Union to identify the individual(s) believed to have violated the Agreement but acknowledges that eases the process. He referred to Article 20, Section One.K of the Agreement that gives the Ramp Agents who are Union representatives time from work duties to investigate grievances. He adds that the Ramp Agents are not always allowed to be granted time off Company work to conduct grievance investigations because they have a job of Ramp Agent that comes first. Mr. McCrummen stated that should the local Union representative be unable to exercise the time-off provision in Article 20.One.K then he must chase down the information.

Mr. McCrummen described that most of the Company's violations of Article Two.B can be easily identified because the supervisor performs particular covered work duties at a specific gate to load bags or at a particular aircraft's belt to offload the plane's bin. He added that when the supervisor performs Ramp Agent duties that involve driving tugs and luggage carts from gate to gate the situation becomes more difficult to identify . Mr. McCrummen gave as an example where a Ramp Agent driving luggage carts from one gate to another observes a supervisor doing the same duty. The Ramp Agent cannot make on-the-spot notes of the supervisor, the location where he saw the supervisor, the time he made his observation and sometimes not remember or know the name of the supervisor. Mr. McCrummen testified that the Agreement is violated when a supervisor drives a tug pulling a cart from gate to gate to move baggage because that is a bullet point in the parties' Agreement. He clarifies that a supervisor is limited under the Agreement to driving only within the shadow of the aircraft.

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[6] *Southwest Airlines Company and TWU Local 555,* Case No. ATL-R-2729/14 (Vernon, 2015).

[7] Transcript 104:20-105:5, *Id*. at 10.

Mr. McCrummen testified that in processing grievances that claim violations of Article Two.B and the Company disputes the allegation he has asked that the parties then view the video segments that would show whether the supervisor performed covered work. He added that viewing the video has worked out real well to help resolve the grievance one way or the other. Mr. McCrummen states that in his experience of handling similar grievances to the instant case that if the supervisor or Company admits to the violation and grants pay for it the Union does not request to "pull" the video for verification. He referred to the dismissal of testimony pertaining to a covered-work grievance in Seattle involving a supervisor switching vests [presumably from green to orange] to perform Ramp Agent duties in disguise.[8] Mr. McCrummen stated that viewing the video footage for that particular incident could have confirmed whether or not a violation had occurred. Mr. McCrummen further added that the Company retains the OTIS; i.e., the station coordinator's log of the gates used by all of the flights and plane numbers, only for 90 days.

Mr. McCrummen acknowledged that a normal day of ramp operations began at 5:00 a..m. and ended at midnight. He admitted he had not sat to view the video for an entire day showing movement of baggage from gate to gate. Mr. McCrummen stated that on those occasions the Union had access to the airport's video footage he received it from the Company and he viewed it while alone. He added that the Union's request for the video could have been satisfied by viewing only those segments of the footage showing "gate swaps or aircraft changes" and this method would have reduced viewing time considerably. Mr. McCrummen proffered that Mr. Westermajer at the Dallas Station should have known when those gate-to-gate or aircraft swaps occurred as part of his job. Mr. McCrummen admitted there is no provision in the Agreement to require the Company to provide the Union with video recordings for an entire day based solely on the Union's request. He added; however, that the Union is duty bound to investigate grievances under the provisions of the Agreement and that it was reasonable for the Union to request the video related to the grievance.

[illegible] works at the DAL airport and served as the Gate 8 Assistant on July 17, 2015. He has worked at DAL for about 12 years. He testified that on July 17, 2015, during his work shift[9] he witnessed a RSS transporting luggage bags with a tug from Gate 8 and then returned to Gate 8 with bags. Agent X did not state the name of the RSS he observed doing Sweeper duties. He asserted that other Ramp Agents mentioned to him that they had seen RSSs performing Sweeper duties as well. Agent X admitted that he was "stuck" throughout his entire shift on July 17, 2015, and had no personal knowledge of events that may have occurred at the other 17 gates used by the Company's aircraft. He stated that he believed the ramp was short of Ramp Agents on July 17, 2015.

Agent X testified that he spoke to two supervisors about what he had witnessed and claimed that the supervisors knew of Sweeper duties performed by RSSs that day. He added that the supervisors admitted that they did not have the staffing of Ramp Agents needed and utilized supervisors to do the Sweeper duties instead. Agent X stated his belief that the RSSs were utilized as Sweepers for the Company to avoid having Ramp Agents perform the work on overtime.

Agent X imparted that normally Ramp operations scheduled two Ramp Agents to work as Sweepers on the day shift and one for the evening shift. He stated that on July 17, 2015, no Ramp Agent worked the Sweeper assignments inasmuch as all had been moved to cover other positions. Agent X opined that the Ramp Agents were so assigned due to either sick calls or other staffing personnel being unavailable that day.

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8 *TWU-ALL-5001/12*, *supra* Note 5, at 17.

9 On July 17, 2015, Agent X worked the day shift which ended at 1:45 p.m.

On July 18, 2015, Agent X filed the grievance at issue to Mr. Joe Bacon, an administrative supervisor at the Dallas Station responsible for coordination of gate scheduling and related information.[10] The written grievance references Articles 2, 5, 7 and 20 as involved in the aggrieved matter. Agent X wrote on the grievance form as the matter at issue, "Ramp Sups and Mngs performing covered work by moving bags and freight from gate to gate with out an agent. Requesting to see video for the whole day." The grievance requested as the remedy, "8hr OT for am and pm to the next available agent that would have been mando'd.[11]"

Agent X believed the instant grievance involved the possibility that more than one RSS had worked as a Sweeper based on the information he gathered. He explained that the Union's request to view the video for the entire work day of July 17, 2015, sought confirmation of whether any violations, other than the one he witnessed at Gate 8, had occurred. The video was not made available to the Union at any time during the processing of this grievance.

Agent Y served as one of the Union's alternate representatives at the DAL Station on July 18, 2015. He did not work on July 17, 2015. When he returned to work on July 18, 2015, more than one Ramp Agent complained to him that RSSs had performed bargaining unit work, Sweeper duties, on the whole ramp during both the am and the pm shifts. He identified the supervisors at issue as Messrs. Kia[12] and Medlock. Agent Y informed the complaining agents that the Union would look into the matter, request to see video and if there could be seen any violation a grievance would be filed. He added that if no violation appeared on the video the Union would abstain from a grievance. Agent Y did not personally file a grievance inasmuch as he learned that Agent X was pursuing the aggrieved matter. Agent Y learned of the latter action when informed by two supervisors he spoke to about the aggrieved circumstances. Agent Y was also told by the supervisors that they acknowledged the violations.

Mr. Moreno worked as a Ramp Agent on July 17, 2015, at the DAL Station on the 6:30 a.m. to 3:00 p.m. shift. He testified that while he was working at Gate 7 he witnessed a RSS performing bargaining unit work; i.e., taking bags from one gate to another, that day. Mr. Moreno specified that the RSS performed the covered work at Gate 5. He believed the supervisor was Mr. Medlock because that was Mr. Medlock's assignment for July 17, 2015, but he was certain the person at issue was a supervisor because he was wearing a green vest. Mr. Moreno reported his observation to a Union representative on July 18, 2015.

Mr. McClanahan worked as a Ramp Agent on July 17, 2015. He began his shift at 4:30 a.m. in the T-point. The T-point is the location in the ramp operations where passengers' checked luggage is moved down to the baggage carousel and the Ramp Agents disperse the luggage to be loaded to the designated flight's aircraft. Mr. McClanahan worked a double shift on July 17, 2015, where he was assigned to Gate 3 in the p.m. shift. He testified that while working at Gate 3 he witnessed a RSS in a green vest moving bags off Gate 3 and to Gate 3. He reported the situation to his Union representative.

The Company denied the grievance at subsequent steps on July 18 and 28, 2015. On August 11, 2015, the Union pursued the grievance internally with the written explanation, "Pending further investigation, and to proceed in a timely manner, this grievance is being forwarded to the next level[.]" On August 25, 2015, the Manager, Labor Relations for the Company's Ground Operation Department (located at the Company's headquarters in Dallas) responded to deny the grievance at that time "[t]o remain within time frames, . . . until collection of additional information from the Dallas Station."

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10 Documentation submitted by the Company shows that Mr. Bacon was on leave without pay [LWOP] for 0.1 hours on Friday, July 17, 2015.

11 An abbreviation the parties use to refer to "mandatoried," or non-voluntary mandatory overtime.

12Documentation submitted by the Company shows that Mr. Kia was "OFF" on Friday, July 17, 2015.

The Union moved for a System Board of Adjustment hearing on August 31, 2015. By letter dated September 3, 2015, the Union submitted a request for information to the Company for another request for the video for the instant grievance inasmuch as the local Union station representative had previously requested it but the video had never been given to him. At 6:41 p.m. on September 3, 2015, the Company sent via facsimile a letter in response to the Union's request for the video. The Company's Manager, Labor Relations for the Ground Operation Department denied the Union's request and stated in pertinent part:

> When the grievance was turned in on July 18, 2015 it lacked the location, name of Manager or Supervisor and time in which he alleged covered work violation occurred. Due to this, the Station could not determine if a violation existed. Furthermore, a request to show the Local TWU Representative video coverage for the entire station, for a 24 hour period is not reasonable.
>
> In addition, your request dated September 3, 2015 is well past the thirty (30) day time limit for the Company to obtain video from the airport of the July 17, 2015 daily activities.

The System Board hearing was conducted on September 4, 2015, to commence at 10:00 a.m. The System Board reached a deadlock at 10:45 a.m. The Union moved the grievance to arbitration thereafter.

Evidence in the record shows that Agent X has filed at least a few grievances claiming violations that supervisors have performed bargaining unit covered work. In those three cases, he filed the grievances with Mr. Bacon but also named the RSS as the person alleged to have committed the violation and the flight number. In two of those cases, Agent X requested to see the video. In three additional grievances filed by the Union around the same time frame with claims of similar violations of Articles 2, 5, 7 and 20, the grievances were directed to Mr. Bacon but also specifically named the RSS who allegedly committed the violations. In seven other grievances filed by persons other than Agent X from April 15, 2015, through September 19, 2015, the grievance or Union representative identified the RSS by name and sometime the flight number, the gate number and the approximate time of the work violation. In four of those grievances, the filing party requested to either check the video or to see the video.

Mr. Westermajer's responsibilities include scheduling all of the employees at the Dallas Station, to handle safety matters for the operations and to handle labor relations matters such as grievances and fact findings. He summarized that his responsibilities include most of operations except turning airplanes. He testified that he reviewed the instant grievance. He noted the Union's request to view the video. Mr. Westermajer interpreted the Union's request to require the full day's operation beginning at 5:00 a.m. until about 30 minutes after midnight for video footage from 18 gates with 36 camera angles of the Company's gates at the Dallas Station. He testified that he made no inquiries with Mr. Bacon on the grounds that Mr. Bacon was not a line supervisor at the time but a supervisor in the Administrative Office and did not believe Mr. Bacon could have been involved in doing any of the alleged covered work.

Mr. Westermajer stated that he was unable to investigate the allegations made in the grievance because he was never given any information other than the very general statement made on the grievance form. He added that he needed more specifics to properly investigate the Union's claims. Mr. Westermajer testified he was unable to provide all of the footage from the airport's video recordings. He described the multiple steps the Company must take to receive video recordings from the City of Dallas; i.e., the Company must first make a request from the City, the Company provides the City with a flash drive or an external drive to download a copy of the video, the City takes roughly one to two weeks to respond and often the City of Dallas provides a 15- to 30-minute clip from one camera view. Mr. Westermajer speculated that the City would not comply with a request for all of the cameras' footage for an entire day because it would be impossible. He considered the Union's request as unreasonable and novel for the Union to make. Mr.

Westermajer testified that the typical process for requests in the past has been with him and a Union representative to watch the 15 to 30 minute video recording at the Dallas Station during a very specific time frame and the gate involved in the aggrieved situation.

Mr. Westermajer described the type of information the Union's grievance representatives had given on the grievance forms in similar types of disputes to the instant grievance. He noted that the other grievance forms included such identification of the names of the supervisors allegedly performing covered work, the flight numbers of the aircraft where the aggrieved incident occurred, a specific time of day of the incident, and other information. Mr. Westermajer testified that with this specific type of information on the grievance form he could investigate the grievance by referring to the OTIS and to then look at the video.

Mr. Westermajer testified that the grievance form for this instant case lacked any of the specific information that would have aided him to investigate the situation. He stated that he did raise the matter sometime around July 21, 2015, during the daily briefing with the supervisors who were in attendance. Not all of the supervisors who worked on July 17, 2015, attended the meeting. Mr. Westermajer asked the supervisors as a group if any of them recalled any covered work being performed on July 17, 2015. He indicated that none of those supervisors recalled they had done such for the date in question. Mr. Westermajer made no other inquiries into the circumstances of the grievance, except to inform the Union that he needed additional information.

Mr. Westermajer testified that he could view the copy of the Dallas Love Field's airport surveillance video recordings via his office's computer. He explained that he did not allow the Union to have this access for a number of reasons. First, he must use an authorized password and his employee number to gain access to this restricted source. Second, he is not allowed to simply walk away and let the Union representatives view the video for the entire day. Third, it would take hours upon hours to watch all of the video footage the Union requested. Mr. Westermajer did not think this expenditure of time would have been productive. Fourth, the parties had no practice for the Union to make such an extensive request for information. He further stated it would be impossible to watch all of the video taken from all of the camera angles recorded from all of the different cameras because it would take everybody off-line all day. He added that the Union has withdrawn grievances where the Union was unable to identify a flight or a supervisor in the grievance matter. Mr. Westermajer referred to a prior grievance, BWI-R-2664/14, where the Union withdrew the matter. Documentation pertaining to the grievance shows that an unidentified supervisor walked a bag containing a dog to another gate, that the Union considered the violation of covered work to be de minimis and there was insufficient information to identify the flight, bag or time the violation occurred.

Mr. Westmajer described the practice the parties had developed when the parties sought to view the airport's surveillance video to confirm whether a violation had occurred relative to a grievance. Either Agent X or Agent Y would accompany him to the "video room" to watch the video footage for which they had set the parameters; i.e, based on the flight, date and time of the alleged incident. While watching the 30 minutes or less portion of the video, if the video showed a violation Mr. Westermajer would write down a settlement, and if no violation was shown he would deny the grievance.

Ms. Traylor handles grievances filed by the Union's district representative at the level of the Company in which she works. She reviewed the narrative in the instant grievance and found it "rather vague" and not typical for a covered work grievance. Ms. Traylor referred to a grievance filed over a similar covered work allegation at the Baltimore (BWI) airport; i.e., BWI-R-2571/14. The Union's district representative withdrew the BWI grievance for a number of reasons. The Union's withdrawal letter stated there was insufficient or lack of information to identify the flight or time of the violation and the supervisor listed on the initial grievance form was never a Company employee. Ms. Traylor referred to a grievance filed in Company's station at the Detroit airport, DTW-R-1438-15, that was withdrawn by the Union for the Union's stated reasons "because of the unique circumstances related to [the] grievance . . ." The grievance form's narrative of the aggrieved incident stated simply "ramp supervisor performed covered work" and the date of the incident. Ms. Traylor testified that she discussed with the Union's district

representative for the grievance that neither of them were able to investigate the grievance because the grievance was so vague. Ms. Traylor also referred to another covered work grievance filed in DTW; i.e., DTW-R-1437-5, that the same Union district representative withdrew for lack of sufficient information. She noted that the narrative of the grievance form merely stated that "covered work was performed by both A.M. ramp sups." Ms. Traylor also observed that the Detroit grievance made no indication of a flight or the name of the alleged supervisor. In her letter to the Union's district representative on July 15, 2015, Ms. Traylor denied the grievance "[d]ue to the vague statement of the grievance I am unable to investigate this matter."

Positions of the Parties

For the Union

The Union contends that the duty known as Sweeper has been one for which the DAL Station's bargaining unit Ramp Agents have historically performed. The Union claims that on July 17, 2015, Ramp Supervisors performed Sweeper duties at the Station in lieu of Ramp Agents, as witnessed by TWU Representative and other Ramp Agents. The Union argues that the utilization of Ramp Supervisors to perform Sweeper duties on July 17, 2015, violated Articles Two.B and Five, Section One of the Agreement.

The Union asserts that it met the burden of proof to the best of its ability. The Union refers to the testimony of its witnesses at arbitration to show that two supervisors were specifically seen performing covered work on July 17, 2015, and that two Union representatives received complaints from Ramp Agents about ramp supervisors seen performing covered work in violation of the Agreement.

The Union counters the Company's defense arguments for denying the grievance. The Union argues that the Company failed to provide to the Union access to review the video footage taken of ground operations on the day and night shift upon the Union's request to investigate whether any violation had occurred, and if so, to determine actual damages relative to the violation. The Union refers to Mr. McCrummen's testimony concerning the practice developed between for the parties to rely on the airport's videos to confirm whether a covered work violation occurred or not, including mentioned in the Neumeier Award of the importance to show that a supervisor changed his vest from green to orange so he could perform covered work without detection. The Union counters the Company's complaint about viewing the video because there was no need for the Union representatives to spend the entire day but the Company could have looked at time frames where gate changes were captured.

The Union claims that it is entitled to records in the Company's possession as part of the Company's contractual obligation to supply the Union with information under Article Twenty, paragraph K. The Union relies upon the awards of Arbitrators Neumeier and Vernon in support of its argument for cooperation from the Company to provide evidence that is within the control of the Company pertinent to investigating a grievance. The Union opines there is a difference between discovery and its duty of fair representation to investigate grievances. The Union maintains that viewing the video would have led to a resolution of the conflict.

The Union asserts that the Company failed to conduct a thorough investigation into the grievance. The Union refers to Mr. Westermajer's testimony that he was unsure about what work gave rise to the grievance but he did not ask the Union Representative to clarify. The Union also refers to the Company's witness who admitted that the Company did not staff a Sweeper position for July 17, 2015, and evaded a question about who would have worked the Sweeper position that day by answering that the issue had not been mentioned in the grievance; i.e., making gate-to-gate swaps. The Union further notes that Mr. Westermajer conducted no investigation into this latter issue. Lastly the Union faults the Company for its representative for not viewing the surveillance video on the bases that some of the supervisors who worked on July 17, 2015, claimed they did no covered work for that day and the representative had no reason to disbelieve them.

For the Company

The Company claims that the Union failed to meet its burden of proof[13] to show a violation of the Agreement on July 17, 2015, specifically, that any supervisors or managers performed covered work by moving bags and freight from gate to gate without an agent. The Company refers to Mr. Richardson's testimony in which he admitted he did not know how many supervisors performed covered work because he did not leave his A.M. shift at Gate 8 that day. The Company posits that Mr. Bacon, the supervisor listed on the grievance form, could not have performed covered work because he was assigned as the supervisor in the Administrative Office. The Company observes that Agent X did not know how much time was involved in the alleged violations nor did he have any personal knowledge of any covered work violations that may have occurred at Gates 1 through 7 and Gates 9 through 18 for the A.M. shift or for any time during the P.M. shift. The Company further observes that Agent X could not identify the supervisor he allegedly saw perform covered work at Gate 8.

The Company asserts that the other Union witnesses could not provide evidence to support a violation of the Agreement having occurred on July 17, 2015. The Company refers to Mr. Salas's testimony that acknowledged he knew from employee complaints that two supervisors had performed covered duties and mentioned the names of two individual supervisors, one of whom did not work on July 17, 2015. The Company also refers to Mr. Moreno's testimony that he could not identify the Supervisor who allegedly performed covered work at Gate 7 and that he did not see any violations occur at Gates 1 through 6 and Gate 8 through 18.

The Company argues that the Union failed to provide additional information pertinent to the grievance. The Company maintained that the grievance failed to give the names of the Supervisors or the number of Supervisors that allegedly performed the covered work. The Company insists that the Union failed to give specific times the violations allegedly occurred or the names of the bargaining unit employees impacted. The Company posits that the Union did not identify the flights or the gates where the violations allegedly happened. The Company summarizes that the Union made only a bare conclusory statement without any evidentiary support to show that any Supervisor or manager violated the covered work provisions of the Agreement on July 17, 2015.

The Company asserts that the Union has historically provided sufficient information on the grievance form for the Company to investigate the grounds for the grievances. The Company refers to the Union witnesses' testimony where the Union representatives generally provide the name of the supervisor who committed the covered work violation, the flight number, the gate and other identifying information to support the grievance. The Company contends, as Mr. Westermajer testified, this information from the Union allows him to review the schedule for the day, the gate location, and when the flight arrived or departed to allow him to review the time frame on the video to determine if a Supervisor or Manager actually performed the alleged covered work.

The Company renewed its position that the Union lacks both a contractual and a legal basis to require the Company to produce a whole day of videos for the Union to review. The Company relies on case law to support its position that an employer covered under the RLA has no statutory duty to provide documents

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[13] *Community Consol. School Dist. No. 15*, 126 LA 79 (Goldstein, 2009); *Sperry & Rice Mfg. Co.*, 122 LA 1665 (Kilroy, 2006).

or information, unlike the provisions of the NLRA.[14] The Company posits that a duty for it to provide to the Union information or documents to the Union is governed solely by the parties' contractual agreement. The Company insists that nothing in the Agreement requires the Company to give to the Union 720 hours of video recordings relative to the grievance. The Company maintains that the parties have a past practice of providing the Union with information that may be useful in determining whether a covered work violation occurred when the Union has provided the name of the Supervisor and the flight number to narrow the time frame to conduct a fair investigation. The Company argues that a decision that requires the Union to view the video recordings in their entirety and at any time and to make any and all recordings available is outside the terms of the negotiated Agreement. The Company further argues that such a decision is contrary to applicable law. The Company asserts that the Union should not be allowed for the first time at arbitration to extend the grievance to any other bargaining unit employees than Agent X. The Company contends that the Union failed to show by a preponderance of the evidence that agents were impacted by any alleged covered work violations.

The Company asserts that the Union did not need the video recordings to confirm any alleged violations inasmuch as the Union had the ability to conduct its own independent investigation into the grievance. The Company refers to Mr. McCrummen's assertion that even where violations have occurred at airports that do not have surveillance video systems witness testimony has helped to support those grievances over covered work violations. The Company excerpts a portion of Mr. McCrummen's testimony that the Union relies on the credibility of the witnesses who provide information relative to the grievances. The Company asserts that the Union had every opportunity to interview agents and to collect witnesses' statements in their independent investigation. The Company maintains that the Agreement contains no specific provision for the Company to produce videos or to engage in discovery prior to the System Board or arbitration.

The Company argues that because the Union has failed to show any employee was harmed on July 17, 2015, there is no basis to award any recovery for damages.[15]

Analysis and Decision

This grievance poses the issue of whether Ramp Supervisors violated Article Two.B when at least one of the supervisors working on July 17, 2015, performed work known under Article Five.One as functions historically performed by Ramp Agents. As a grievance claiming a non-disciplinary contract violation, the Union bears the burden of proof to show sufficient persuasive and reliable evidence that a violation occurred. Both parties appear to have strategized their respective positions upon their version of which party bears the burden of proof in this particular case.

The Union appears to acknowledge that it bears the burden of proof to demonstrate the contract violation; however, the Union asserts a shifting burden methodology. The Union stands on the proposition that the Company denied the Union the necessary information; i.e., the airport's surveillance video recordings, to conduct its grievance investigation. The Union essentially adopts the mechanism used in other forums,

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[14] *Pac. Fruit Exp. v. Union Pac.*, 826 F.2d 920, 923 (9th Cir. 1987); *Air Line Pilots Ass'n v. Trans World Airlines, Inc.,* 729 F.Supp. 888, 889-90 (D.D.C. 1989); *Bhd. of Maint. of Way Employees Div./IBT v. Norfolk S. Ry. Company.*, 10 C 7425, 2012 WL 4461690, at *1, *10 (N.D. Ill. Sept. 25, 2012), aff'd 745 F. 3d 808 (7th Cir. 2014). *See also Henry v. Delta Air Lines*, 759 F2d 870, 873 (11th Cir. 1985), Teamsters v. Pan Am World Airways, 716 F.Supp. 726 135 (E.D.N.Y. 1989), 135 LRRM 2075; *USAir, Inc. v. NMB, 711 F.Supp. 285, 297 (*E.D. Va. 1989).

[15] *Atlanta Wire Works, Inc.*, 66 LA 365 (Roberts, 1976); *General Cable Corp*., 52 LA 229 (Feller, 1968); *Safeway Stores*, 93 LA 457 (Cohen, 1989); *Acf Industries, Inc.*, 62 LA 364 (Williams, 1974). *See also* ELKOURI & ELKOURI, HOW ARBITRATION WORKS , 6th ed. (2003) pp. 1216, fn. 167.

such as the analysis of Title VII employment discrimination lawsuits, to shift the burden of proof to the Company once the Union has shown enough evidence of a plausible violation. The Company stands firm on the proposition that the Union solely bears the burden of proof to show a violation of the Agreement, period. The Company stands equally firm on its position that the Company has no obligation to the Union to provide the Union with information to support the Union's grievance, much less 720 hours of sit-time for multiple Company employees on the clock to view the entire video footage. Despite the parties' posturing, the primary issue remains unresolved. Unfortunately, the evidentiary record suffers from the shallowness from both parties' insufficient uses of their respective resources. Nevertheless, both parties made some modest attempts.

Messrs. Agent X and Agent Y engaged in tackling the covered work claims. Agent X's eye-witness account of a supervisor moving bags from and to Gate 8 was credible. His credibility was only modestly undermined by his inability to name one of the many supervisors who could have been the person who committed the violation. Agent X did not explain why he did not identify the time of the supervisor's violations or the flight numbers, if he had actually known them. He also had discussions with supervisors he did not identify. He made no request for information other than to view the video for the entire day. On balance, however, there was no evidence in the record that the Union had ever asked for any information other than to view the video; i.e., to take employees off line for interviews and to take their statements, to take supervisors off line for interviews and to take their statements, to review or receive copies of the OTIS records, or to review or receive copies of the roster of scheduled employees, including supervisors. Given the tenor of the Company's response to the Union's request for information in the instant case, it seems highly likely that the Company would react similarly to giving access to these different sources of information, despite the Company's implication the Union could have gathered its investigation facts through methods other than viewing the July 17, 2015, video.

The Company's position that it had limited ability to discern the gravamen of the grievance and was thereby hampered to investigate the grievance without more specificity obfuscates both the historical context of this type of grievance and the conditions under which it surfaced on July 17, 2015. From a review of the arbitral cases submitted in the record, the parties have had contentious disagreements concerning supervisors performing bargaining unit work to supplant those employees. After a change to the language in the Agreement, an arbitration award and a negotiated implementation agreement for grievances held in abeyance, the Company began a program to both educate supervisors about their parameters from performing covered work and to occasionally discipline supervisors for violations. Nevertheless, violations continued with claims that supervisors performed covered work or claims of such that could not be validated by resources to records. The alleged violations generally amounted to a single isolated incident involving one supervisor on one day at one location of an airport with regard to one gate, flight and/or aircraft.

The Union at the DAL Station also made the above general grievance assertions pertaining to covered work. The instant grievance appears to be one of first impression; i.e., that more than one supervisor performed covered work throughout the A.M. and P.M. shifts on July 17, 2015, and traveling gate to gate moving baggage. Upon receipt of the instant grievance, the Company's representatives of and for the DAL Station knew or should have known the nature of the grievance given this long history and the filing of similar grievances in the 2015 period. Moreover, both Company witnesses were familiar with both of these types of grievances. I must find their testimony disingenuous that they were unable to proceed with investigating or attempting to investigate the matter, other than to deny the grievance because it was too vague.

Moreover, I must find Mr. Westermajer's superficial attempts to garner additional information about the grievance as insufficient. There is no indication, other than his bare assertion, that he requested from the Union additional information. There is no indication in the record from the Company to deny the Union's request to view the video until the Union revived its request the day before the System Board hearing. Mr. Westermajer's query to a group of supervisors en masse on an unknown date and who did not encompass the all of the supervisors who worked on July 17, 2015, seems hardly worth the effort. Noting

that supervisors have been disciplined for violating Article Two of the Agreement places their collective denials to Mr. Westermajer as motivation to simply not recall. Nor did Mr. Westermajer make any reviews of the scheduling rosters of employees maintained in the office he worked to ascertain if any Ramp Agents or Ramp Supervisors had been assigned as Sweepers for July 17, 2015.

Additionally, the Company's defenses that to make the video accessible to the Union would be unreasonably burdensome, outside the scope of the parties' past practice and unproductive lack logical support. The video footage could have been downloaded and feasibly reviewed before the Systems Board had the Company made a timely request to the City. Article Twenty allows for extensions of time that could have been exercised if the City took the amount of time proffered by the Company to produce the video. The Union's suggestion, which was an obvious one, that the video be fast-forwarded until it showed a person in a green vest moving bags from gate to gate, may have decreased the viewing time. The resulting amount of actual viewing time could have been feasibly far less than the amount of time the Union Representative(s) may need to conduct individual interviews with Ramp Agents and involved supervisors to take their statements and to review the Company's records pertinent to the grievance. The parties have yet to establish a past practice relative to the scope of this particular grievance; i.e., that the supervisors allegedly performed covered duties for an entire day's operation. Lastly, the Company's unproductive argument ignores its duty to expend effort to resolve a grievance.

Circling back to the burden of proof conundrum, is there a duty for the Company to provide access to the airport's surveillance video to the Union when processing a grievance, or in other words, is there a right for the Union to receive access from the Company to the video in the pursuit of a grievance matter? In the circumstances of this particular grievance, yes, there is.

The Company correctly notes that neither the RLA nor the Agreement directly obligates the Company to produce information to the Union integral to the negotiatiated grievance procedure. Nevertheless, the RLA and Article Twenty of the Agreement establish the mechanisms for the voluntary bilateral resolution of workplace disputes. The efficacy and effectiveness of the Union's and the Company's attempts for mutual settlement of grievances would be severely compromised should the Union bring to the table nothing more substantive than a bare allegation and a posture of a right to a remedy simpley because the Company did not act as surrogate investigator of the aggrieved situation. A similar negative impact would result where the Union brings a plausibly reasonable claim but the Company withheld access to the pertinent evidence which the Company solely possessed. Mutual resolution of workplace disputes brought within Article Twenty requires an appropriate balance to address the aggrieved matter but not result in an unreasonable burden on the Company to cooperate with the Union access to relevant, pertinent information. In other words, the RLA places a duty on both parties to "exert every reasonable effort" in the conduct of their bilateral relationship.[16]

The parties should not misconstrue this Award to set a bright line test for a duty for the Company to provide information upon the Union's request in a grievance matter. Nor does this Award adopt as a labor policy a shifting burden analysis. I conclude after a review of what little evidence was presented by both parties that the Union demonstrated more likely than not at least two supervisors, one on each shift, performed covered work by moving bags from gate to gate on July 17, 2015. The Company's defense that it was at a loss to investigate the grievance's claim cannot be sustained. Under the circumstances and factual background here, the Company had more than sufficient information to deduce the nature of the grievance, the overarching time of day on July 17, 2015 of the alleged violations, to do more than treat the

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[16] *Chicago & N.W. Ry. Co., v. United Transportation Union*, 402 U.S. 570 (91 S.Ct. 1731, 29 L.Ed.2d 187) (1971) (citing *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*,"(t)he heart of the Railway Labor Act is the duty, imposed by § 2 First upon management and labor, 'to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes * * * in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."); § 2 First, RLA, as amended, 45 U.S.C. 152.

grievance in a perfunctory manner. More important, the Company had at its disposal documentation to review the matter, as discussed above, that the Union did not have. Further, the Company made absolutely no attempt to obtain the airport's surveillance video, the information both requested by the Union and pertinent to the grievance. Instead, the Company unilaterally speculated the airport would not release the video without any consultation with the airport.

The Company's claim that to allow the Union to view the video as unproductive lacks a reasonable basis. Had the Union been specifically informed of the Company's disapproval, which apparently it was not until the eve of the System Board hearing, the Union could have requested other options to gather facts, as discussed above. Exercise of those options may indeed have been more onerous than an Administrative Supervisor and a Union Representative jointly viewing the video by fast-forwarding the footage until an individual in a green vest may have been seen moving bags from gate to gate.

AWARD

The grievance is sustained.

The Company is hereby ORDERED to disburse eight (8) hours of pay at the overtime rate to the Ramp Agent next in line for an overtime assignment as of the end of the A.M. shift on July 17, 2015.

The Company is hereby ORDERED to disburse eight (8) hours of pay at the overtime rate to the Ramp Agent next in line for an overtime assignment as of the end of the P.M. shift on July 17, 2015.

Date: June 1, 2016

/s/ Kathy L. Eisenmenger
Labor Arbitrator