SOUTHWEST AIRLINES/TRANSPORT WORKERS UNION
LOCAL 555 SYSTEM BOARD OF ADJUSTMENT

In the Matter of the Arbitration

between

TRANSPORT WORKERS UNION OF AMERICA, LOCAL 555
and

SOUTHWEST AIRLINES CO.

OPINION

and

AWARD

Re: OT Bypass – Agent A
HOU-R-2217/16

Before: Randall M. Kelly
Arbitrator

Appearances:

For the Union:

Tyler Cluff	District IV Representative
John Spencer	District V Representative
Agent A	Grievant
Jerry McCrummen	Grievance Specialist
Brian Smith	Grievance Specialist

For the Company:

Samantha Martinez, Esq.	Attorney
Vance R. Foster	Manager, Labor Relations
Jason Young	Manager, Labor Relations –GPO/Provo

Procedure:

A hearing in the above matter was held on February 3, 2017 at the Doubletree-Love Field, Dallas, Texas, before the undersigned who was selected to serve as Arbitrator pursuant to the provisions of the Collective Bargaining Agreement between the parties and the Railway Labor Act. At the hearing, both parties were given full opportunity to present their evidence, testimony and argument. A transcript of the proceedings was prepared. The parties filed post-hearing briefs on March 24, 2017 and the record was declared closed upon receipt.

Issue:

The parties could not agree upon a stipulation of the issue before me. The Union proposed: What is the proper remedy for an overtime bypass? The Company proposed: Did the Company abide by the collective bargaining agreement and applicable precedent under the res judicata principle, and, if not, what shall the remedy be?

Background Facts and Circumstances of the Dispute:

The parties stipulated that on October 13, 2016, the Grievant, Agent A, was bypassed for overtime. A more junior employee worked in his place. Had he worked hours for which he was bypassed, he would have been paid for four hours overtime at time and one-half and two hours overtime at double time.

The parties' collective bargaining agreement contains a provision for the assignment of overtime to the senior Employee of the bid location who has completed and signed the overtime call book below the call out line (Article Seven, I.2.i). Despite best intentions and efforts, mistakes happen (frequently, according to Labor Relations Manager Vance Foster) and senior employees who have signed the call book are bypassed for overtime in favor of a junior employee. There is nothing in the contract to address this issue.

According to the Union, the parties have "always" (for thirty years) remedied proven overtime bypass violations by compensating the bypassed senior employee with overtime pay, including double time when he or she would have been paid double time had he or she worked the overtime.

In a 2016 arbitration case, Arbitrator Marvin Hill found that a Ramp Agent had been improperly removed from his temporary assignment and might be entitled to a remedy for lost overtime (Case No. DCA-R-2393/15, July 14, 2016 (U. Exh. 6)). Hill returned the matter of appropriate remedy to the parties and retained jurisdiction. The parties were unable to agree on the appropriate remedy and returned the matter to Hill. After a conference call and letter briefs, Hill awarded the Company's offer of 32 hours at time and one-half as compensation. He noted that, "I agree with the Company regarding its position with respect to the Grievant's double pay argument." (Case No. DCA-R-2393/15, August 15, 2016 (U. Exh. 7)).

Based on the Hill award, the Company took the position that double time pay was not an appropriate remedy for an overtime bypass and would only agree to time and one-half pay for such violation. When the Grievant filed this grievance, the Company would only agree to pay time and one-half; the Union insisted that part of the remedy had to be double time.

The Union processed the grievance through the contractual grievance procedure to arbitration (Jt. Exh. 2). The matter not being resolved, it is properly before me for final and binding arbitration pursuant to the terms of the collective bargaining agreement and the Railway Labor Act.

OPINION

As the parties recognize, this matter presents a conflict between the tenets of past practice and *res judicata*. Thus, the Union presented evidence that, for many years, the parties had settled overtime bypass grievances by paying the affected employee for the bypassed hours at time-and-a-half and at double time for what would have been penalty overtime hours for the affected employee. On the other hand, the Company presented an arbitration award issued by Arbitrator Marvin Hill that it asserts held that the remedy for an overtime bypass was payment at time-and-a-half and not at double time.

Article Seven of the parties' collective bargaining agreement provides for the payment of overtime at the rate of time and one-half for the first four hours worked either before or after a shift and the first eight hours worked on a one of the two scheduled days off. Double-time is paid for working in excess of the first eight hours on one of the two scheduled days off, on the second scheduled day off, in excess of 12 hours and for all time worked due to mandatory overtime assignments.

Article Seven also provides for the use of an overtime call book at each bid location (Section I). Employees sign the book for each day during a fourteen day period. Then, if a known overtime of four hours or more is available, the overtime call book "shall" be used. Section I.2. contains a "pecking order" for the assignment of overtime to employees in a bid location. The final subsection (i.) provides that the senior Employee of the bid location who has completed and signed the overtime call book below the call out line shall be assigned the overtime. The parties recognize that despite the best intentions and efforts of management, mistakes happen (frequently, according to Labor Relations Manager Vance Foster) and senior employees who have signed the call book are bypassed for overtime in favor of a junior employee. There is nothing in the contract to address of remedy for this overtime bypass.

The parties stipulated that on October 13, 2016, the Grievant, Agent A, was bypassed for overtime. A more junior employee worked in his place. They also stipulated that, had he worked the hours of overtime for which he was bypassed, he would have been paid for four hours overtime at time and one-half and two hours overtime at double time. The Union grieved the overtime bypass and asked for four hours overtime at time and one-half and two hours overtime at double time. As noted, the Company agreed that the Grievant was entitled to a remedy, but only at time and one-half for all hours. The Union insisted on double time for the two hours.

Union Grievance Specialist Jerry McCrummen testified that he has handled thousands of overtime bypass grievances in his 21 years as Union representative at the

Company and in every case, the Company agreed to a make whole remedy that included pay for the bypassed overtime at time and one-half and double time when the bypassed overtime would have been penalty overtime for the bypassed grievant. McCrummen offered three grievances with settlements showing payment of double time as a remedy for an overtime bypass from 2001 (U. Exh. 1), 2009 (U. Exh. 2), and 2016 (U. Exh. 3). McCrummen provided a 48 page list of over 600 overtime bypass cases handled by the Union from 1989 to 2017 where double time was part of the resolution (U. Exh. 4). According to the Union, this shows that the parties have "always" (for thirty years) remedied proven overtime bypass violations by compensating the bypassed senior employee with overtime pay, including double time when he or she would have been paid double time had he or she worked the overtime.

The Company pointed out that under Article Twenty of the collective bargaining agreement all of these grievance settlements in Union Exhibit 4 were non-precedential.

Union Grievance Specialist Brian Smith offered evidence that in a discharge case in 2014, the Company agreed that included double time pay as part of a make whole remedy for a discharge (U. Exh. 5).

Company Labor Relations Manager Vance Foster testified that he has handled thousands of grievances alleging overtime bypass. He cited the Company's Pro Law database of grievances resolved after not being resolved at the Station level. There are over 3,000. He testified that not all of the resolutions awarded the bypassed employee compensation; that some of them were resolved by allowing the employee to work substituted overtime. He cited a case where the Union requested double time for an overtime bypass but withdrew the grievance (Co. Exh. 1).

Foster also testified that he denied the requested remedy of double time in this grievance based on the Hill award.

In Case DCA-R-2393/15 (In re: Agent B, 2016), Arbitrator Marvin F. Hill, Jr. summarized the case before him as follows:

> In a nutshell, this case involves the question whether the Company violated the parties' collective bargaining agreement when it returned the Grievant, a 17-year employee with Southwest Airlines, from a temporary Boston assignment, retaining a junior employee agent in his place, because of the Grievant's alleged union activity.

Hill concluded that the Company could remove the grievant from the assignment based on the "needs of the location" but not for union-type activity. The Company evidence "falls short and does not compel a conclusion that there was a valid and rational-based reason for sending Agent B home early." Hill sustained the grievance

and directed that the grievant was "entitled to a non-speculative make-whole relief" and remanded the matter of an appropriate remedy to the parties (U. Exh. 6).

When the parties attempted to resolve the issue of appropriate remedy, the parties disagreed on the number of days that the grievant had been denied overtime and whether any of the remedy should be at double time. The Company offered 32 hours of overtime at time and one-half (8 hours for each day he was signed into the Boston OT call book) for a total of 48 hours at straight time; the Union insisted on 2 days of eight hours at time and one-half, 1 day of 8 hours at double time and 1 day of 5.7 hours at double time (a total of 51.4 hours at straight time). The Company asserted that the grievant was not entitled to any double time compensation.

The parties returned to Arbitrator Hill, held a conference call and submitted briefs.

Brian Smith handled the Agent B matter for the Union. He testified that he argued in the conference call that Agent B was entitled to double time hours beyond 8 for working on his first scheduled day off and 8 hours for working on his second scheduled day off. He testified that Arbitrator Hill commented that there was no way to know that Agent B would have worked either of these days; that it was "speculative." Hill also commented that the Company offer was "reasonable." Smith testified that he did not argue any past practice in the conference call; he did not argue past practice in the brief (U. Exh. 8).

Arbitrator Hill issued an award on August 15, 2016 ruling on the question of appropriate make-whole remedy (U. Exh. 7).

> After receiving the Opinion and Award the parties attempted to reach an agreement to the outstanding remedy dispute. On 8/2/2016, Management sent an offer to the Union of 32 hours of standard overtime compensation, to he paid to the Grievant, in an effort to resolve the matter. This offer compensates the grievant for eight (8) hours of standard overtime for each of the days in which he signed the BOS OT Call Book, and 8 hours of overtime was actually issued to a junior Agent. This offer was based upon facts that were unchallenged at both the arbitration hearing, and a subsequent conference call with the undersigned.
>
> The Carrier asserts that Agent B signed up for overtime at the Boston Station, MA, for 10/2, 10/3, 10/4, and 10/5/2015. He did not sign up for overtime for 10/6, 10/7, and 10/8/2015. [UX 1] For all of the aforementioned dates, overtime call sheets were made available to all BOS Ramp Agents for at least 14 days in advance. This 14 day availability time frame is mandated by the parties'

collective bargaining agreement. [JX 1 P.21-22] For reasons of his own, Agent B elected not to sign up for overtime for three of the days which remained on his temporary assignment. Therefore, he is not owed any compensation/relief for 10/6, 10/7, and 10/8/2015, in the Employer's view.

Finally, Management asserts the Grievant is not owed any double time compensation whatsoever. The Contract provides for double time compensation, concerning voluntary overtime, in a variety of ways. [JX 1 p. 20] All of the ways in which an Agent receives double time compensation, concerning voluntary overtime, involve hours actually worked. None of the hours in question are hours that the Grievant actually worked. Therefore, Southwest Airlines submits that double time compensation is unjustified for this remedy dispute.

For all of the reasons mentioned above, the Company views its offer of 32 hours of standard overtime compensation as a fair resolution of the remand order.

The Union asserts that if the Grievant was paid only for the days he was in the overtime call book in Boston, the Company's remedy of 32 hours of time and one-half is still short. Thirty-Two hours of time and one-half is equal to 48 straight time hours. The Grievant should have been awarded the following: 10/2/15-8 hours at time and one-half; 10/3/15 – 5.7 hours of double time; 10/5/15 - 8 hours at time and one-half; 10/5/15 — 8 hours at double time [UX 2]. This total broken down into straight time is equal to 51.4 hours of straight time. In the Union's view, the Company's total is 3.4 hours short of time that the Grievant would have been awarded, taking only into account the days he was actually in the overtime book in Boston.

II. DECISION AND ANALYSIS

In a 2005 publication by the National Academy of Arbitrators (NAA), *The Common Law of the Workplace: The Views of Arbitrators* (BNA Books, 2005)(2d edition), I authored the Remedies Chapter *(Remedies in Arbitration).* In relevant part I wrote:

§ 10-2. Remedial Authority When the Contract Is Silent

An arbitral appointment carries with it the inherent power to specify an appropriate remedy. Unless there is clearly restrictive language withdrawing the subject matter or a particular remedy from the jurisdiction of the arbitrator, the arbitrator generally possesses the power to make an award and fashion a remedy even though the agreement is silent on the issue of remedial authority.

Comment: Arbitrators, supported by the courts, uniformly hold that the

parties are not engaged in an academic exercise in seeking a ruling as to whether a contract has been violated, and that "jurisdiction means the power to grant relief." Phillips Chemical Co.. 17 LA 721, 722 (Clyde Emery 1951)(“the power merely to decide that the Agreement has been violated, without power to redress the injury, would be futility in the extreme"); Gilmore Envelope Corp., FMCS Case No. 98-1029-00758 (Marshall Ross, 1998)(pointing out that arbitrators have universally held that even though a contract is silent as to the remedy, the arbitrator has the authority to fashion a remedy, including a monetary award in order overtime make whole the party damaged by the violation). See also Feller, "Remedies in Arbitration: Old Problems Revisited," in *Arbitration Issues for the 1980s, Proc. 34th Ann. Meeting, Nat. Acad. Arbs.* 109, 116 (J. Stem & B. Dennis eds. 1982)(arbitrators award remedies found "implicit in the agreement"). The remedy, like the rest of the decision, must “draw its essence” from the collective agreement. No hard and fast rules exist, however, to determine when a specific remedy draws its essence from a “silent” contract.

* * *

§ 10-6. Remedies in General

When a finding is made that the employer did not have cause for imposing discipline or discharge, the arbitrator is left with the task of formulating a remedy. Even when cause existed for assessing some discipline, a remedy may still be forthcoming because the penalty was too severe for the offense or because mitigating circumstances existed.

Comment: How the remedy should be formulated is a difficult question to answer definitively. A review of both published and unpublished awards indicates that arbitrators have demonstrated no uniformity in formulating remedies in the disciplinary area.

There is no serious debate over the principle that when the collective bargaining agreement does not impose a clear limitation on the arbitrator’s authority to modify a penalty in a discipline case, an arbitrator indeed has the authority to modify penalties. Most arbitrators exercise the right to modify a penalty when that penalty is shown to be arbitrary, capricious, or otherwise unreasonable under the evidence record.

* * *

Id. at 368-369.

§ 10-12. Back Pay

The purpose of a back-pay award is to indemnify the employee by making him or her whole for loss of earnings incurred by reason of the employer's contract violation. This loss of earnings is generally measured by the wages and benefits that would have been earned during the period they were denied. The amount owed is usually reduced by the income that the employee received from substitute employment, or by the amount that would have been received with reasonable efforts to find interim employment.

Comment: Although the power to award back pay is generally regarded as automatic, the parties may by contract limit the amount of back pay that may be awarded by an arbitrator. When an arbitrator finds that discharge was improper, a range of remedies is to grant reinstatement with full, partial, or no back pay.

Id. at 372-373.

On its face, the remedy offered by Southwest Airlines - 32 hours at time and one-half - is a fair resolution of the parties' remedy dispute and consistent with the above arbitral principles regarding make-whole relief. I agree with the Company regarding its position with respect to the Grievant's double pay argument. Also, as noted by Management, Agent B elected not to sign up for overtime for three of the days which remained on his temporary assignment. Therefore, he is not owed any compensation/relief for 10/6, 10/7, and 10/8/2015.

For the above reasons, the following award is issued:

III. AWARD

The Company's offer of 32 hours at time and one-half as compensation to the Grievant is awarded (U. Exh. 7).

Position of the Company

The Company starts with the proposition that the grievance should be dismissed under the *res judicata* doctrine. "This arbitrator should not decide this question [whether a double time remedy is appropriate for an overtime bypass], because less that one year ago Arbitrator Hill considered and decided this issue for the Parties in the *Agent B* grievance, a decision which should be respected under the *res judicata* doctrine."

1. Res judicata standard

In *Southwest Airlines* v. *TWU Local 555 ,* No. PHX-R-2112/14 (2015) (attached), Arbitrator Marvin Hill wrote extensively on the res judicata doctrine in arbitration. After summarizing the law that has developed under this doctrine in arbitration, he set forth the following legal standard to determine if an arbitrator should defer to a prior arbitrator's decision: "If the issue is the same, the contractual language is the same, the same arguments are being made, and the arbitrator cannot find any significant factor that would warrant ignoring the first award, then relitigation of the issue should not be allowed." *Id.* at 19-20, emphasis added. The reason for this, Hill continued, is to preserve the integrity of the grievance process: "The need for finality and consistency, as well as the need to maintain the integrity of the grievance and arbitration mechanisms, mandate this result, even though the second arbitrator might have ruled differently." *Id.* Another arbitrator reached the same conclusion for these Parties last year. In *Southwest Airlines v. TWU Local 555 ,* No. MCO-R-0606/16 (2016) (attached), Arbitrator Conway followed a prior decision with the same facts, noting that he was "bound to give substantial deference" to identical precedent under "all generally recognized conventions and principles." *Id.* at 12-13.

Other arbitrators are in agreement. For example, in *American Airlines v. Transport Workers Union, Local 591,* 2015 AAAD 35, 11 (2015) (Sergent, Arb.), the arbitrator held:

> In short, where there has been a prior decision regarding a dispute between the same parties, at the same operation, on the same fact pattern, and involving the same contractual provisions and issues, then that decision is to be taken as final and binding unless one of the recognized situations exist for not applying the principle. Recognized situations in which res judicata should not be applied include those where the arbitrator exceeds his jurisdiction or authority : or w here conditions have materially changed in such a way as to render a prior decision inappropriate to present circumstances: and or where a previous award appears on reexamination to be clearly erroneous.

See also American Airlines v. *Transport Workers Union, Local 567,* 2015 AAAD 37, 12-14 (2015) (Sergent, Arb.) (finding in favor of the company where there was no significant difference between the previously-decided case and the instant case because the "the applicable language as well as the overtime guidelines of the CBA which govern this dispute remain unchanged."); *American Airlines, Inc., DFW and TWU, Airport Transport Division,* 105 AAR 159, 9 (2005) (Barnard, Arb.) ("In effect, Res Judicata holds that a prior arbitration award is to be given preclusive effect if it is between the same parties, it invokes the same fact situation(s), pertains to the same contractual provisions, is supported by the same evidence and concerns the interpretation of the specific agreement."); *Pan*

American Refining Corp., 9 LA 731 (1948) (McCoy, Arb.) ("[W]here, as here, the prior decision involves the interpretation of the identical contract provision, between the same company and union, every principle of common sense, policy, and labor relations demands that it stand until the parties annul it by a newly worded contract provision.").[1]

2. The two grievances are the same.

In the record are Arbitrator Hill's two companion decisions from last year, *Southwest Airlines & TWULocal 555,* No. DCA-R-2393/15 (2016) (Hill, Arb.): the first decision on the merits (Temporary Assignment Grievance ("Merits Decision")) and the second regarding remedy (Remedy on Remand ("Remedy Decision")). (U-Exs. 6, 7). Under the res judicata doctrine, this Arbitrator should defer to the holdings set forth in Arbitrator Hill's Remedy decision.

a. The issues and underlying facts are substantially similar.

In Arbitrator Hill's case, the grievant Agent B was a DCA ramp employee who was temporarily assigned to Boston. (Ex. U-6 at 1-2). The Company removed him from the Boston assignment before it was completed, alleging that he created morale problems at the station, (Id. at 2). Arbitrator Hill found the Company's evidence insufficient regarding Agent B's poor conduct, and the Union prevailed in the Merits Decision. *(Id.* at 15-17). At the conclusion of the Merits Decision, Arbitrator Hill found that Agent B was entitled to "non-speculative make-whole relief." (*Id.* at 17). He was unable to craft this make-whole relief, however, because the Union failed to present specific evidence of the amount of overtime Agent B missed from the Boston station, including whether he would have been eligible and worked those days. *(Id.* & FN 6). He thus remanded the remedy issue to the Parties. *Id.*

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[1] *See also* Elkouri & Elkouri, *How Arbitration Works,* 11-7, 11-8 (7th Ed. 2012) ("Prior labor arbitration awards that interpreted the existing terms of a contract between the same parties are not binding in exactly the same sense that authoritative legal decisions are, yet they may have a force that can be fairly characterized as authoritative."); *id.* at 11-10 ("Were the parties free to repeatedly submit the same issue to arbitral resolution, 'shopping' for a different result, the "common rule' of the work place would be destroyed. Contract terms are expected to be applied uniformly to all similarly situated employees."); Owen Fairweather, *Fairweather's Practice* Aweire *Labor Arbitration,* ch. 17 (4th Ed. 1999) ("The underlying rationale of recognizing prior awards as res judicata in subsequent cases is based on the desirability of continuity and consistency of contract interpretation and the need for finality."); *id.* At 525 ("In spite of an arbitrator's freedom from the restraints of stare decisis, when a prior arbitrator has renedered an award in a dispute between the same employer and the same union, the precedential effect of the prior award is no longer an issue of stare decisis, but rather res judicata.").

* * *

This decision is entitled to res judicata deference. First, the issues in the *Agent B* Remedy Decision and the instant case are identical, in that they both address how the Company should compensate a grievant when (1) he suffers an overtime bypass, and (2) the missed work would have resulted in payment of double-time pay. This is what the Union requested in the Agent B grievance: "for the agent to ***receive all overtime missed and [that he] 'was eligible for and to be paid at the applicable rate.'"*** (Ex. U-6 at 2, quoting the Agent B grievance language). And this is precisely what the Union is requesting here, that Agent A be paid (1) all overtime missed and that he was eligible for, and (2) at the applicable double-time rate, just as if he had worked the shift and not been bypassed. (9-10). In other words, according to Foster, the "[Ujnion treated [the ***Agent B*** case] as an overtime bypass" — which is precisely the issue here. (107).

Second, the same Contractual language underlays the Company's and Union's arguments in this case and *Agent B*. There is no agreement, in the CBA or otherwise, that establishes a remedy for an overtime bypass. (88-89). Both in *Agent B* and here, the Parties have relied instead on Article 7 of the CBA. and its scheme for payment of double-time pay. Union representative Smith testified that re explained the Article 7 Contractual pay scheme to Arbitrator Hill in the *Agent B* remedy hearing: "...you get to [the grievant's] days off, which if you're working overtime, your first day off. you'd be paid time and a half if you worked only eight hours. And your second day off, you'd be paid double time for any hours worked if you worked overtime on his first day off") (61; *see also* Union Unmarked Supp. Ex). The Company argued that the Contract was silent as to a remedy, and under Article 7, the only way an employee is eligible for double-time pay is to actually work extra hours. (Ex. J-1, Art. 7.C.). This is also what they argued here. (27, 87-88).

Finally, there is no dispute that this grievance involves the same parties and work group, and the same operations.

In sum, the foundation for the application of the res judicata doctrine is met: the same Parties are present; the factual predicate for the remedy is the same; the Parties are addressing the same issue; they are making substantially the same arguments; and their arguments require examination of the same Contractual language.

Notable, the Union did <u>not</u> argue that this Arbitrator should ignore the res judicata doctrine. Instead, it claimed that the *Agent B* decision is distinguishable from this case. However, it's arguments in support were not credible. The Union argued first that the issue addressed in the Merits Decision was different from the issue here. This may be the case as to the merits—however, the issue addressed in the Remedy Decision is identical,

as argued above. The background facts, i.e., whether the agent was bypassed while at the station (Agent A), or whether the agent was passed because his removal was based on inadequate evidence (Agent B), are immaterial and do not change the remedy analysis in either case.

The Union second argues that Footnote 1 of the Remedy Decision holds that there were too many "variable factors" to make a sound decision, rendering the Remedy Decision "speculative." (62-63; Ex. U-7 at 2). This was a complete misreading of this footnote. All that Arbitrator Hill did in this footnote is lay the factual foundation for the Remedy Decision by citing to his earlier language from the Merits Decision. The remainder of the Remedy Decision sets forth the non-speculative basis for relief, which Arbitrator Hill found to be "consistent with the above [- recited] arbitral principles regarding make-whole relief." (Ex. U-7 at 5).

b. There is no sound reason to reject Arbitrator Hill's award.

There is no basis for rejection of Arbitrator Hill's prior award. Repudiation of a prior decision only should occur "where the arbitrator exceeds his jurisdiction or authority; or where conditions have materially changed in such a way as to render a prior decision inappropriate to present circumstances; and/or where a previous award appeats on reexamination to be clearly erroneous." *American Airlines v. Transport Workers Union, Local 591,* at 11; *see also Agent C* at 20 (award should be followed unless there is a "significant factor that would warrant ignoring" it). None of those circumstances are present here. Arbitrator Hill based the Remedy Decision on established precedent regarding remedies, and thus he did not exceed his jurisdiction, nor did he state a basis for the award that was clearly erroneous. (Ex. U-7 at 3-5). There was no testimony regarding a change since May of last year regarding the treatment of overtime bypass remedies, other than implementation of a consistent approach to payment for overtime bypasses once Arbitrator Hill issued his decision. No reason exists to overturn the award.

Discussion

As set forth above, the Company takes the position that *res judicata* precludes me from even considering the merits of the issue in this matter. Technically, *res judicata* does not apply in labor arbitration. It is, however, well recognized in labor arbitration that a prior award between the same parties and dealing with the same issue should generally be followed. In this regard, the Company cites cases between the two parties, including one issued by Arbitrator Hill.

I recognize and endorse the application of *res judicata* in labor arbitration for the same reasons set forth in the authorities cited by the Company. I have applied it in appropriate circumstances.

However, every arbitrator who has considered the application of *res judicata* has also recognized that there are exceptions, even when it is the same issue, contract and parties involved.

Elkouri & Elkouri (cited by the Company in its brief) addresses the question of when an arbitrator might decide not to follow a prior award, as follows:

> A number of arbitrators have identified the circumstances under which, and the reasons why, a prior award need not be followed. One arbitrator observed that while "it is only fair and reasonable to expect an arbitrator's decision to apply to subsequent cases of the same nature," and that "the refusal to apply the arbitrator's decision to similar cases leaves unsolved and unsettled the general problem covered by the decision," nevertheless, the refusal to apply an award to cases of the same nature is justified where it is shown that any one of the following conditions obtains: (1) the previous decision clearly was an instance of bad judgment, (2) the decision was made without the benefit of some important facts or considerations, or (3) new conditions have arisen questioning the reasonableness of the continued application of the decision [footnotes omitted].
>
> Other arbitrators have agreed that an arbitrator is justified in refusing to follow an award considered to be clearly erroneous, or one whose continued application is rendered questionable by changed conditions. In the opinion of one arbitrator, a party is not ordinarily justified in seeking an award contrary to a prior decision by submitting (in a different case but with the same issue) additional evidence to a subsequent arbitrator, but in several cases the presentation of additional evidence or clarification of previously presented evidence has produced a contrary award by a subsequent arbitrator (pp. 586-587).

Indeed, in *Southwest Airlines* v. *TWU Local 555 (Agent C Grievance),* No. PHX-R-2112/14 (2015), cited by the Company in support of applying *res judicata,* Arbitrator Hill set forth the following legal standard to determine if an arbitrator should defer to a prior arbitrator's decision and implicitly added exceptions, as follows: "If the <u>issue</u> is the same, the <u>contractual language</u> is the same, the same <u>arguments</u> are being made, and the arbitrator cannot find any significant factor that would warrant ignoring the first award, then relitigation of the issue should not be allowed." *Id.* at 19-20, emphasis added. Stating this in another way, Hill states that a prior award need not be

followed if one of the parties raises persuasive new arguments and, I would add, evidence to support those new arguments.

Contrary to the Company assertions to the contrary, Arbitrator Hill was not presented with the same arguments and additional facts and considerations that were presented here.

Thus, in the Hill case, the Company argued that the grievant was not entitled to double time because the double time payment is only for hours actually worked. As summarized by Hill:

> Finally, Management asserts the Grievant is not owed any double time compensation whatsoever. The Contract provides for double time compensation, concerning voluntary overtime, in a variety of ways. [JX 1 p. 20] All of the ways in which an Agent receives double time compensation, concerning voluntary overtime, involve hours actually worked. None of the hours in question are hours that the Grievant actually worked. Therefore, Southwest Airlines submits that double time compensation is unjustified for this remedy dispute.

The flaw in that conclusion is that payment of time and one-half for overtime is also only for hours actually worked under Article Seven.

> B. Time and One-half. Employees shall be paid an hourly rate of time and one-half for:
>
> 1. First 4 Hours. The first four (4) hours worked either prior to or after an Employee's regular shift.
> 2. First 8 hours. The first eight (8) hours worked in one of the two regularly scheduled days off.

To be consistent, the Company should have taken the position that the grievant was not entitled to time and one-half for his overtime bypass because he did not work any of the hours. It never argued that and Hill did not address this inconsistency. In essence, the Company agreed that the appropriate remedy for an overtime bypass was overtime payment for hours not actually worked, but only at time and one-half, not at double time. That position lacks contractual justification.

In addition, Arbitrator Hill was not presented with the evidence of past practice that the parties had consistently applied an overtime bypass remedy of time and one-half and double time, where appropriate.

Arbitrator Hill recognizes that past practice is a significant factor in determining the proper remedy for an overtime bypass in his book, Hill, Jr., Marvin and Sinicropi, Anthony V., *Remedies in Arbitration,* (BNA Books, 1981) 122-129. The authors summarize arbitral thinking on remedies for overtime bypass, as follows:

> A review of published decisions indicates that arbitrators have been on both sides of the issue with respect to awarding monetary compensation to employees who have been improperly denied overtime assignments. Arbitrator Howard Block has aptly noted that the various opinions in this area, however, diverse, do contain consistent elements:
>
> > Decisions as to the proper remedy generally turn on analysis of, among other things, the particular provisions of the contract, past practice of the parties, the nature of the breach, and the availability of the makeup work.
>
> Absent contractual language specifying the exact remedy to be applied, the predominate view expressed by arbitrators is to award back pay at overtime rates where overtime assignments are to be allocated according to seniority [the situation under this contract].

Here, the Union presented substantial evidence of a longstanding practice to resolve overtime bypass grievances by paying time and one-half and double time where appropriate.

The Company disputes that the Union has established a past practice. In its brief, it argues:

> *The past practice argument would not have saved the Union.*
>
> The Union presented a new argument in this arbitration that it failed to argue to Arbitrator Hill, namely, that the Parties' past practice mandates a ruling in its favor. Such an argument would not have won the day, because the Union's evidence fell short of the burden to prove a past practice. "For a past practice to be binding on both parties, it must be (1) unequivocal; (2) clearly enunciated and acted upon; and (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties." *Crown Cork and Seal USA, Inc. & IAM,* 130 Lab. Arb. Rep. 1015, at p. 11 (2012) (Gaba, Arb.). The "degree of mutuality is an important factor." *Id.*
>
> The Union presented insufficient evidence to show an unequivocal, clearly articulated, mutually-accepted practice between the Parties. Union representative Spencer testified vaguely that "overtime has always been paid out at what the agent would have earned" during his tenure with the Company. (23). However, he also conceded that some employees accept a time and one-half remedy instead. (24). Similarly, Union representative McCrummen testified that he had seen "thousands of grievances, and that the Company paid "the applicable rate of

overtime to the person who should have gotten the overtime" including double time. (27). But the Union also conceded during his examination that in Houston, Grievant Agent A's station, there were settlements in which double time was not paid, and generally, double-time was not paid "every single time" the Union claimed it was due. (38). Other than these very general statements, the Union presented no descriptions of any *Company* statements or agreements which evidence a "clearly enunciated" and "readily ascertainable" practice to which it consistently adhered.

To the contrary, the Company showed that the bypass remedy practices were far from consistent. Under the Parties' CBA, the stations are able to resolve grievances at a local level without concern that they are setting binding precedent for the Company. (49-51; 92; Ex. J-1, Art. 20.L.). Labor Relations has the same latitude to make such settlements without binding effect. *(Id.)*. Not surprisingly, considering this latitude, not every overtime bypass grievance is resolved as the Union claims. (91-92). Labor Relations Manager Foster testified that he personally had seen instances in which a station awarded the bypassed employee an additional overtime assignment, instead of pay. (92). The Company also presented a 2009 grievance in which the Union acceded to its refusal to pay double-time to a bypassed employee who would have received it had he worked. (Ex. C-1; 93-94).

Moreover, the Union's key exhibit, a summary list of almost-30 years of overtime bypass grievances involving double-time pay, demonstrates not an unwavering practice of double-time awards, but the *absence* of a consistent practice. (Ex. U-4). First, it represents a small fraction (roughly 600) of the "thousands" of overtime bypass grievances McCrummen claims that he reviewed. (27; *see also* 44 (overtime bypass was second only to attendance in the volume of grievances); 90-91 (Foster counted 3000 overtime bypass grievances since 2007 in the Company system, which does not include lower-level station settlements)). The first grievance listed in the document is from 1989, and the last is from 2017 - meaning that the Union presented less than 20 grievances per year among the hundreds filed annually to support what it alleges to be a consistent practice. This begs the question, what do the remaining thousands of overtime grievances show? Second, this exhibit lists a substantial number of grievances in which, the Union conceded, an affected employee did not obtain full double-time relief. Union representative McCrummen first testified that at every time the grievance information contained the word "award," then it was a grievance in which the full double-time payment was given. (46). On cross examination, he then admitted that if the word "award" was not contained in the individual grievance entry, it was possible that the grievant was paid less than he or she requested. (47-48). In the exhibit, 129 individual entries fail to contain the word "award" and instead note that the grievance was "paid" and/or "paid" and "settled." (Ex. U-4). Thus in roughly 22% of the grievances the Union presented to support a consistent past practice, the grievant likely was paid less than the full amount he or she would have been paid had the bypass not occurred. This document thus shows that this was not an unequivocal, clearly-enunciated extracontractual practice. It also explains why the Union insisted that Arbitrator Hill settle the issue once and for

all in *Agent B*.

Despite the Company's well presented arguments, I find that the Union established a past practice here.

Based largely on the writings of Richard Mittenthal, the definition of past practice has been stated as follows:

> A "past practice" is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.

Mitthenthal cautioned that a practice is directly linked to the situation giving rise to the conduct. Here, the practice shown by the Union was that double time can be the appropriate remedy for an overtime bypass when it is clear that the affected employee would have been available to work the additional overtime (non-speculative) and the affected employee insisted on the double time.

This highlights the problem of relying on grievance settlements to establish a past practice. Grievance settlements are by their very nature matters of negotiation between the parties. Obviously, there have been situations where an affected employee just wants to get paid quickly and accepts the time and one-half and the Union has no control over that. However, the evidence presented by the Union shows that when the affected employee would have been entitled to double time and the Grievant and the Union insist on the double time as remedy, the Company has agreed to pay the double time.

In this regard, overtime bypass was not the focus of Professor Hill's award. He had found a contractual violation for improperly removing the grievant from a station and was seeking a make whole remedy for that; not directly for an overtime bypass. By the questions he asked, he was suspicious of granting any remedy for an employee who was not in the station when the overtime was worked and who did not sign up for all the overtime available; he was concerned such a make whole remedy would be "speculative". Thus, he ended up choosing the Company's remedy offer over the Union's remedy demand and felt the Company offer was "more reasonable"; he did not find that no double time was the only appropriate contractual remedy, just that time and one-half was a reasonable remedy that minimized the speculative nature of the remedy.

Thus, I find that I am not bound by the Hill award. I find that the Union established a past practice of paying double time as a remedy for an overtime bypass when the affected employee was available to work the overtime and would have been entitled to double time pay and the Grievant and the Union insisted on the double time remedy. I find that double time pay can be the appropriate remedy for an overtime bypass when the affected employee was available to work the overtime and would have been entitled to double time pay and the Grievant and the Union do not agree to a lesser monetary remedy.

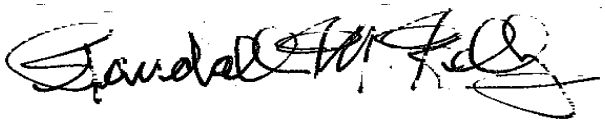
AWARD

I, the undersigned, to whom was submitted a certain issue between the parties hereto, having duly heard the proofs and allegations and after due consideration, do hereby award as follows:

1. That for reasons set forth herein, I find that double time pay can be the appropriate remedy for an overtime bypass when the affected employee was available to work the overtime and would have been entitled to double time pay and the Grievant and the Union do not agree to accept a lesser remedy; and

2. The grievance is sustained.

Signed this 21st day of July, 2017



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Randall M. Kelly
Arbitrator

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, Randall M. Kelly, do hereby affirm upon my oath as Arbitrator, that I am the individual described in and who executed this instrument, which is my Award.

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Randall M. Kelly