

VOLUNTARY LABOR ARBITRATION TRIBUNAL
Before George T. Roumell, Jr., Arbitrator

*In the Matter of the
Arbitration Between:*

SOUTHWEST AIRLINES CO.

Jerry McCrummen Pay Shortage
DAL-R-0002/17

-and-

TRANSPORT WORKERS UNION
LOCAL 555

ARBITRATOR'S OPINION AND AWARD

APPEARANCES:

FOR SOUTHWEST AIRLINES CO.:

FOR TRANSPORT WORKERS UNION
LOCAL 555:

Christopher L. Maberry, Senior Attorney
John Brophy, Manager Labor Relations
Alexa Kern, Specialist Labor Relations
Natalie Roffino, Paralegal

Kevin Carney, ABQ Prov.
[REDACTED] DAL Ramp
Jerry McCrummen, Grievant

The Grievance

On December 28, 2016, Jerry McCrummen, a Dallas Ramp Agent, filed the following grievance on his behalf, maintaining that the date of incident was December 20, 2016:

Employee Statement of Grievance: SWA is in violation of the CBA in their application of Article 13, Section 2, Paragraph B" Salary Continuation". I am not being paid the 1 hour of premium pay for the hour scheduled from 0400-0500, the amount I would have been paid for working my regular shift.

Remedy or Settlement Sought: To be paid .5 additional hours per day during my salary continuation period, and make whole in every way.

The grievance was denied at all steps of the grievance procedure. A System Board of

Adjustment was held on February 24, 2017. The Board deadlocked. As a result, the grievance was processed to arbitration.

Mr. McCrummen testified that he was claiming a pay shortage of one half hour each day for November 28, 29 and 30, 2016 based on the proposition that on each of those days he was entitled to be paid time and one-half for one hour, but only received straight time pay for the hour on those dates. (Tr. 53, 64, 68-69).¹

Background

Jerry McCrummen has been employed by Southwest Airlines for 32 years. He is currently a Dallas Ramp Agent. Mr. McCrummen has held numerous other positions with Southwest, including being a provisioning agent and an operations agent.

During his career, Mr. McCrummen has held multiple positions with the Union “all the way from alternate station rep to vice president”. Mr. McCrummen was Vice President of Local 555 from 2005 to May 2016. (Tr. 42).

Article Six, Section One, “Hours of Service”, of the parties’ February 19, 2016 - February 18, 2021 Collective Bargaining Agreement in One.G provides:

- G. **1:00 A.M.-5:00 A.M. Shift.** If a shift is established with a starting hour at or after 1:00 A.M. but before 5:00 A.M., the Employee shall be paid time and one-half of his regular rate of pay for the portion of such shift which falls between such hours.

In the latter part of 2016, as a Dallas Ramp Agent, Mr. McCrummen was scheduled particularly in September and November 2016 to commence work at 4 a.m., thereby qualifying him for one hour of start time premium at time and one-half for work performed between 4 a.m. and 5 a.m. pursuant to Article Six, Section One.G. (Tr. 50, 52). In the period between

¹ “Tr.” is a reference to the transcript of the arbitration hearing.

September 16, ending September 30, 2016, the pay for which would be on the October 5, 2016 pay check, Mr. McCrummen was off work for five days for an on-the-job injury (OJI). (Tr. 50-51). For these five OJI days for which he had been scheduled to begin work at 4 a.m., he was paid eight hours a day or 40 hours at straight time and not premium start time. (Tr. 50-52).

At Southwest for Local 555 represented employees, wages are paid biweekly on the 5th and 20th of the month. (Tr. 64; Article 28.A). Mr. McCrummen received direct deposit and does not receive a manual pay stub printout. Instead, he can examine his pay stub by utilizing the communication system of the Company known as SWALife and represented he did so on December 5, 2016. (Tr. 62).

Mr. McCrummen was on OJI leave on November 28, 2016 and continued on OJI leave until January 4, 2017. (Tr. 59). His scheduled start time on November 28, 29 and 30, 2016 was to be 4 a.m. (Tr. 60).

Mr. McCrummen testified that the December 5, 2016 pay check covered November 28-30, 2016. For those three days, the pay check was for eight hours pay at straight time and did not provide time and one-half for the one hour between 4 a.m. and 5 a.m. According to Mr. McCrummen, based on his interpretation of the contract, his pay check was shorted one and one-half hours, namely, a half hour each of the three days for the one hour between 4 a.m. and 5 a.m. Mr. McCrummen testified that on December 5, 2016 when he realized that in his view his pay was being shorted by an hour and one-half, his first phone call was to "John", apparently referring to John Brophy, Manager, Labor Relations. Mr. McCrummen also testified "I told Adam Westermajer at the station and -- because I knew that they were going to have to go to John as a regional I called John and told him". Mr. McCrummen also stated that he talked to Mandy

Vitela at the latest by December 8th. (Tr. 71).

Reviewing Mr. McCrummen's testimony, the discussion with Mandy Vitela seemed to be centered around an alleged confusion over whether he worked the Wednesday before Thanksgiving Day rather than being on OJI that day. (Tr. 71, 73).

Mr. McCrummen testified that he believed that as to the shortage "they don't have to pay me until the next pay check. So I waited until the next pay check." (Tr. 72). Mr. McCrummen went on to testify that when the one and one-half hours he was claiming did not appear in his December 20, 2016 check, he filed the instant grievance on December 28, 2016.

Relevant Contract Provisions

In addition to Article Six, Section One.G, the following contract provisions are relevant to the dispute between the parties:

ARTICLE THIRTEEN SICK AND OCCUPATIONAL INJURY PAY

* * *

SECTION ONE OCCUPATIONAL INJURY PAY

* * *

B. **Salary Continuation.** The Company will make up no less than the difference between the amount paid by Worker's Compensation and the amount the Employee would have earned (after tax withholding) if he had worked a regular shift. Payments under this article will commence upon a determination by the Company, its insurer, or an appropriate governmental body or court, through a final non-appealable order, that the claim for occupational injury is compensable under the applicable Worker's Compensation law, or alternative program adopted in lieu of Worker's Compensation. Until the claim has been deemed compensable under the applicable Worker's Compensation law and a definite rate has been established, the Employee will be paid his normal base pay on each regular pay day. Unless, and to the extent, limited by applicable law, the Company may include the indemnity benefit payment due to the Employee pursuant to applicable law in the payment of salary continuation. To the extent, if any, that such inclusion results

in excess withholding from such salary continuation, the Company will remit such excess to the Employee after such excess is determined.

* * *

ARTICLE TWENTY
GRIEVANCE/SYSTEM BOARD/ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE
PROCEDURES

* * *

E. **Time Frames.** For the purpose of this Article, a working day shall be defined as Monday through Friday, excluding all Company recognized holidays. It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent. Furthermore, if the time frames set forth are violated by the Union the grievance shall be considered withdrawn. Determination of time frame violation issues shall take precedence over consideration of any other issue, and, if upheld, no further determination shall be appropriate.

F. **Extension of Time Frames.** It is understood and agreed that, at any step of the factfinding or grievance procedure, the time limits set forth may be extended by mutual agreement between the Company and the Union, in writing. Further, in the event either party, due to circumstances beyond the reasonable control of such party, does not become aware of, or is prevented from disclosing, facts or circumstances which would give rise to either a factfinding or a grievance, the time frame for pursuing such factfinding and/or grievance shall be extended as appropriate. If an Employee makes himself unavailable (other than on his regularly scheduled days off) to work his full shift on his last scheduled workday within the time frames under the fact finding procedures and paragraph H of this article, the Company may issue the notice/letter to the Employee upon his first full day returned to work.

* * *

L. **Interpretation/Application of Agreement.** In the event of a grievance arising over the interpretation of, or application of, this Agreement ("Contractual Grievances"), or in the event of a grievance involving disciplinary action other than discharge ("Disciplinary Grievances"), the following steps shall apply. However, in the event of a grievance involving discharge or a Union grievance concerning a change in Work Rules ("Discharge/Work Rule Grievances"), it shall

proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company. If a termination is grieved, insurance benefits will continue until all grievance procedures have been exhausted and a final decision has been rendered. Employees are required to continue to pay the premiums when they are due; failure to do so will result in termination of insurance benefits.

1. Step 1/Department/Assistant Manager ("Manager"). If an Employee is unable to resolve his grievance through his supervisor, within ten (10) calendar days of the occurrence of the circumstances in question, the grievance shall be summarized in writing and presented to the manager or his designee. At any meeting to discuss same, the Employee may be accompanied by his local representative. The manager or his designee shall issue a written decision upholding or denying the grievance within five (5) working days.

* * *

15. **Arbitration/Function and Jurisdiction.** The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

ARTICLE TWENTY EIGHT WAGE RULES

* * *

- C. Where there is a shortage equal to one-half (1/2) a day's pay or more in the pay of an Employee, the Employee shall be reimbursed from the General Office for such shortage within three (3) working days.

Issue Presented

The parties stipulated to the following issue:

Was the grievance filed within the time frames required under Article 20, Paragraph E, of the Southwest Airlines Co. and Transport Workers Union Local 555 Collective Bargaining Agreement?

The Position of the Parties

By virtue of the issue as stipulated by the parties, the hearing has been bifurcated in that at this point in time this Arbitrator is limited to determine the procedural question as to whether the grievance was filed timely consistent with the language of the contract as set forth in Article Twenty, Section One.L(1), namely, the "ten (10) calendar days of the occurrence of the circumstances in question". Southwest argues that the grievance filed on December 28, 2016 challenging a pay shortage for November 28-30, 2016 was untimely for two reasons as set forth in its Advocate's brief at page 2:

First, the alleged breach of the CBA first occurred decades ago when Southwest began its practice of not paying starting time premiums to employees on OJI leave. If the Union believed this widespread and consistently-applied practice violated the CBA, the time to challenge it has long passed.

Second, the "occurrence of the circumstances in question" was the alleged pay shortage on November 28-30. Given his repeated use of OJI leave, including for a period just a few months prior when he similarly had a starting time before 5 a.m. *yet was not paid a starting time premium*, the Grievant should have known it was Southwest's practice not to provide premium pay to employees on OJI leave. Therefore, the grievance should have been filed at the latest by December 15 -10 days after he received his paycheck for the three days in question.
(Emphasis in original.)

The Union's position is stated at pages 1-2 of its post-hearing brief as follows:

It is the Union's position that the grievant, Jerry McCrummen, filed a timely grievance regarding a payroll shortage in an employee's

paycheck of less than a half a day's pay, which is excluded from the contractual requirement in Article 28, Paragraph C, or Page 80. {Joint Exhibit 1} The CBA is silent on how a shortage not equaling a ½ day's pay is to be handled. The Union has met its burden of proof of by the unrefuted and unchallenged testimony of former Vice President Jerry McCrummen, due to a past practice that each party understands and applies, that payroll shortages of this nature are not required to be paid within three days but are generally paid on the next scheduled paycheck on the 5th or 20th. {TR, Page 65, lines 7-9}

1. The Company has chosen an indefensible position by concentrating on the merits of the case by the introduction of 3 grievances showing where the "premium" pay has not been paid and not grieved. It is questionable whether these exhibits may prove meaningful for the merits portion of the grievance in this bifurcated arbitration. However, these exhibits are irrelevant in the decision before the Arbitrator, since this portion of the proceedings is to determine whether the grievance was filed in a timely manner and involves no other considerations.
2. Mr. McCrummen notified local management (Adam Westermajer and Mandy Vitela) and the Labor Relations Department (John Brophy) of his payroll shortage shortly after reviewing the direct deposit of his paycheck after the December 5, 2016 pay day. (Pay days are the fifth and twentieth of each month.) Since the amount being sought was less than half a day's pay there was no contractual requirement for the Company to compensate Jerry within three working days.
3. When the disputed amount was not deposited in his account on the regular payroll on 12/20/16, it is the Union's position that he had the contractually provided 10 calendar days in which to file a grievance. {Joint Exhibit #1, Article 20(L), Page 59}
4. A grievance was filed by Mr. McCrummen on 12/28/16 seeking the shortage of funds due to SWA violating the clear and unambiguous language of Article 13, Salary Continuation.

Discussion

As a general proposition, arbitrators facing contractual language specifying time lines in

the grievance procedure and provisions denying authority to add to, subtract from or modify the agreement as in the Southwest/Local 555 Agreement have dismissed a grievance found to be untimely under the grievance procedure. *See, e.g., Abex Corp.*, 53 LA 79, 82 (Stouffer, 1969); *Baggett Transportation*, 79 LA 52 (Eigenbrod, 1978).

The Company's Advocate submitted the August 20, 2016 decision of Arbitrator Elizabeth Neumeier decided between Southwest and Local 555 in *Gr. ALL-5001/15* where at page 7 Arbitrator Neumeier in her opinion cited several cases where arbitrators involving Southwest and its various unions have dismissed grievances based upon the failure to follow contractually provided time limits which is consistent with general arbitral thinking where applicable.

There is, however, the recognition that where there are reasonable doubts as to whether the contractual time limits are applicable in a given situation arbitrators applying the adage that the law abhors forfeiture interpret the agreement so as to avoid forfeitures. *See, e.g., Seaboard Allied Building Corp.*, 82-1 ARB ¶8308 (Madden).

Applying these principles, observe the position of the parties. John Brophy, Manager, Labor Relations, testified that the language in the parties' 2016-2021 contract in Article Thirteen, Section Two.B, "Salary Continuation", has been the same language that appeared in previous contracts between the parties. (Tr. 19, 25). Mr. Brophy identified Company Ex. 2 which was the contract between the parties for the period June 14, 2001 to June 30, 2006, as well as Company Ex. 3, the Collective Bargaining Agreement between Southwest and Local 555 for the period July 1, 2008 through June 30, 2011 in support of the fact that the language has not changed. The only change in the language in the 2016-2021 contract is the adding of the phrase "(after tax withholding)". Mr. Brophy testified that the Company has never paid a starting time premium

for employees out on OJI leave based upon research that he did. (Tr. 24-25). Mr. Brophy identified as specific examples three individuals, namely, Juan Cordova, for a period between June 16, 2016 through June 30, 2016, Tyler Cluff, for a period between May 6, 2011 through June 20, 2011, and Michael Roach, for the period April 16, 2010 through April 30, 2010, all of whom during said periods were on OJI who did not receive starting time premiums while on OJI, though they did when working. (Tr. 24-31).

The testimony suggested that each of these individuals were at one time or another elected Union representatives, implying that they were familiar with the contract and filed no grievance challenging the failure to be paid starting time premiums while on OJI leave.

The Union challenged whether these individuals were Union representatives at the time they went on OJI leave.

It is based upon the Brophy testimony as just noted that the Southwest Advocate argues that the breach of the CBA alleged here “first occurred decades ago when Southwest began its practice of not paying starting time premiums to employees on OJI leave”. For this reason, Southwest argues that a grievance filed on December 28, 2016 is beyond 10 days of the occurrence.

In support of this position, this Arbitrator was presented the decision of Arbitrator Neumeier between Southwest and Local 555 in *ALL-5001/15* (August 20, 2016), where she did dismiss a grievance as being untimely apparently based on the theory suggested here by Southwest. Arbitrator Neumeier was dealing with a specific set of facts based upon third party contracting and attrition of work that had been the subject of bargaining between the parties resulting in certain contract provisions. She concluded that the Union had not alleged that there

was any evidence suggesting a violation of the negotiated contract language which had been established through bargaining. In other words, there was a specific set of circumstances tied to the bargaining history of the parties addressing the subject matter that caused Arbitrator Neumeier to conclude that the grievance should have been filed at an earlier date, absent an allegation that there was evidence that the negotiated language was violated.

In the view of this Arbitrator, the evidence concerning the position of the Company as to the interpretation of “the amount the Employee would have earned after tax withholding if he had worked a regular shift” and the reference to “the normal base pay on each regular pay day” in Article Thirteen, Section Two.B involves a dispute as to language interpretation. This evidence goes to the merits.

This is not a situation as before Arbitrator Neumeier where the language addresses attrition and the Union did not claim there was attrition. This is a situation where Mr. McCrummen is claiming a certain interpretation of Article Thirteen, Section Two.B with Southwest maintaining a different interpretation based upon past practice. In other words, the evidence produced by Mr. Brophy goes to the merits. For this reason, this Arbitrator concludes that this case is to be resolved on the question of whether a grievance filed on December 28, 2016 was within 10 days of the “occurrence of the circumstances in question”.

Addressing the question of currently when the “ten (10) calendar days of the occurrence” ran, Southwest suggested that Mr. McCrummen had been on OJI numerous times previously and did not receive starting time premium when on OJI. The implication was that Mr. McCrummen had accepted Southwest’s interpretation of Article One, Section Two.B. Mr. McCrummen acknowledged that he had taken OJI leave eight or nine times prior to September 2016 but

maintained that in each case he never was involved with premium start time, stating that he had no reason to believe that when applicable he would not be entitled to premium start time when on OJI. (Tr. 45. There was a situation in September 2016 during the period between September 16 through September 30, 2016 where he was on OJI and did not receive a difference in pay that included premium start time. (Tr. 46-47). Mr. McCrummen acknowledged that his salary continuation differential for his September OJI on the October 5, 2016 pay check did not include any start time premium payment though at the time he began employment at 4 a.m. (Tr. 51-52).

Mr. McCrummen was asked concerning the difference in his reaction to the October 5 and to the December 5, 2016 checks which in either case did not contain the premium start time in providing salary continuation and answered:

Q. You first noticed that you were short on your paycheck on December 5th?

A. December 5th, yes.

Q. Okay. Is there anything different about your December 5th paycheck? Did it have any extra information that helped you realize that you were allegedly being shorted for this premium pay that was not on the October 5th paycheck? I mean, I'm just talking about the paycheck, nothing external to the paycheck. Anything different on the December 5th one that allowed you to suddenly realize you're not being paid this premium pay that's not on this October 5th paycheck?

A. I just paid closer attention to it, I guess.

Q. Okay.

A. Nothing triggered it.
(Tr. 55).

Mr. McCrummen acknowledged that when he gained knowledge of the December 5, 2016 check he noticed that he was paid OJI for 40 hours at his regular rate. (Tr. 61). After so testifying, Mr. McCrummen was asked:

Q. And this is the paycheck where you first noticed that you were not being paid the – what I call the starting time premium while you were on OJI?

A. That's correct.

Q. Okay.

A. 28th, 29th and 30th.
(Tr. 61).

On re-direct examination, Mr. McCrummen confirmed that on the December 5, 2016 pay check he was paid 40 hours of OJI leave. After doing so, he was asked:

Q. And that represents five days at eight hours per day?

A. That's correct.

Q. Okay. Your scheduled start time during this month was 4:00, correct?

A. That's correct.

Q. So five days at 4:00 a.m. start time you should have been paid according to you five hours of premium pay, right?

A. This is the error that shows the calculation of my salary continuation. I did not turn in my ID and go out OJI until Friday. So –
(Tr. 66-67).

Mr. McCrummen testified that he discussed with Mandy Vitela the question of when he went out on OJI, maintaining he did not go on OJI until the Friday after Thanksgiving. Mr. McCrummen maintains he was told by her “just leave it. It's better that way”. (Tr. 67).

Mr. McCrummen was asked “if this is accurate, the Southwest Exhibit 7 that shows you were out for OJI on the 23rd, 25th, 28th, 29th and 30th, you would agree that you would have been shorted, according to your theory, five hours of premium pay, correct?” (Tr. 68). He answered, “That's correct.” (Tr. 68). Then Mr. McCrummen stated that he was actually shorted a half hour

each day because he had been paid eight hours. According to Mr. McCrummen, he should have been paid time and one-half for one hour each day representing an extra half hour each of the days involved. (Tr. 68). Mr. McCrummen then stated, "For those five days I'm saying they owe me another half hour for each of those days five times a half hour is 2.5, which is less than four." (Tr. 69).

This Arbitrator set forth the above discussion of the record to note that in the end Mr. McCrummen stated:

A. I'm patient because it's only 1.5. It's only 1.5. I don't know where they get –

THE ARBITRATOR: 1.5 or 2.5?

THE WITNESS: No, that's wrong. My time card is wrong.

After testifying that he did not know the time card was wrong until told by Mandy Vitela on December 8, 2016, Mr. McCrummen stated, "I thought we got it straightened out", referring to the days he actually worked. (Tr. 73). Then Mr. McCrummen testified that he did not know what happened on straightening out his time card, "but the only days I'm asking for is the 28th, 29th and 30th because those are the days I know beyond a shadow of a doubt – she took my badges on that Friday and I'm scheduled to work on Monday, Tuesday and Wednesday." (Tr. 73).

The testimony establishes two points. There was some confusion as to when Mr. McCrummen went on OJI in the last week of November 2016. This confusion stemmed from the fact that Mr. McCrummen was injured on duty on or about September 21 or 22, 2016 and subsequently returned to work on transitional duty. (Tr. 45-49). The confusion came about as to when the transitional duty ended.

The second point is that though Mr. McCrummen maintained there was an error on his

time card as to when he went out on OJI, he is limiting his recovery for premium start time to November 28, 29 and 30, 2016 – days he believes that he was out on OJI. Mr. McCrummen also clarified that he is asking for an additional half hour each of these three days as he already was paid eight hours for said days maintaining he should have been paid eight and one-half hours, the time and one-half rate for the daily one hour at issue.

Mr. McCrummen noted that Article Twenty Eight, Section C, provides, to repeat, “when there is a shortage equal to one-half ($\frac{1}{2}$) days pay or more in the pay of an employee, the employee shall be reimbursed from the General Office for such shortages within three working days”. Mr. McCrummen testified that as less than a half day’s pay was involved “the contract is silent” as to when Southwest addresses pay shortages of less than a half day pay. Mr. McCrummen argued that shortages in such cases are addressed in the next regular pay check, noting:

- A. That’s the criteria that we handle in pay shortages. In my tenure as Vice President, I handled pay shortages with the Company, and when it says, when there’s a shortage equal to one half a day’s pay or more in the pay of an employee, the employee shall be reimbursed from the General Office for such shortage within three working days.
- Q. In your experience, if it’s less than half a day’s pay, when is the pay normally paid?
- A. The next pay check.
- Q. So were you expect -- if it’s not on the 5th paycheck if you made somebody aware of the shortage?
- A. Yes, I did.
- Q. So when were you expecting to be paid for that shortage?
- A. 12/20.
(Tr. 64-65).

Mr. McCrummen made the same point later when he testified:

- Q. Okay. Where does it say in the contract that anything less than a half day's pay shortage is going to show on the next regular pay check?
- A. Because the contract is silent on that, that's what the Company does.
- Q. Okay.
- A. And it's been that way for years and years and if they don't pay it on the next check we go after punitive damages then.
- Q. Okay.
- A. For three hours – for every day past that check, we have hundreds of those but that will come in on the merits.
- Q. So if I heard you right, in some cases the Union knows what the Company's practice is even though it's not in the contract; is that what you just said?
- A. On payroll shortages when somebody writes a grievance we know how payroll shortages are handled.
- Q. Okay.
- A. I don't have access to their pay checks and that's the first thing I do when they call me on a pay shortage. Send me your checks so I can see what you did ...
(Tr. 69-70).

Thus, Mr. McCrummen argues that the grievance was filed timely on December 28, 2016 for he waited until the pay check of December 20, 2016 to determine whether the start time premium pay shortage would be made up. When it was not, he filed his grievance within eight days of December 20, 2016. This is the Union's theory that the grievance is timely. Mr. McCrummen explained that the "occurrence" began with the pay check of December 20, 2016.

According to Mr. McCrummen, on December 5, 2016 he called John Brophy "as a regional" and also talked to Adam Westermajer at the station. (Tr. 71).

Mr. McCrummen did not speak with Mandy Vitela until December 8, 2016. (Tr. 71). He testified that his conversation with Mandy Vitela involved the question of whether he went out on OJI prior to November 28, 2016. Mandy Vitela told him his time card was wrong. (Tr. 73).

Mr. McCrummen testified:

When I talked to her, she told me that they're showing you as OJI. I said, Mandy, I worked and so I don't know what happened on that. But the only days I'm asking for is the 28th, 29th and 30th because those are days I know beyond a shadow of a doubt -- you took my badge on Friday and I'm scheduled to work on Monday, Tuesday and Wednesday. (Tr. 73).

Mr. McCrummen was asked and answered:

Q. Okay. So why didn't you file a grievance within 10 days of --

A. I still hadn't gotten an answer from anybody telling me that they weren't, and they don't have to pay me until the next pay check. So I waited until the next pay check. When it wasn't on there, that starts my clock. Now if they had come to me and told me you're not going -- we're not going to pay you and management never did that we were talking about OJI.

Q. Okay.

A. -- is all we were talking about and because I had already talked to Adam and John about the other, I didn't bring Mandy into the loop on that.

Q. All right.

A. She might have heard it just in casual conversation. I went to Adam first and called John and told him what happened. So Chris whenever that took place if she -- anyone that told me -- and keep in mind this is a Christmas time. Labor Relations take off a lot. A lot of people are on vacation so nobody got back with me and told me: we're not going to pay you, or my clock would have started right then. I did not know -- since she didn't have to pay me. I'm patient because it's only 1.5. It's only 1.5. (Tr. 72).

There is no dispute that Mr. McCrummen and Mandy Vitela had a discussion on December 8, 2016 concerning the question of when he went on OJI the last week of November

2016; that prior to the Vitela discussion on December 8, 2016 Mr. McCrummen on December 5, 2016 "told" Adam Westermajer at the station and "called" John Brophy about the premium start time issue. (Tr. 71). Whether Mr. McCrummen raised the premium start time issue with Mandy Vitela is not clear because, as quoted above, Mr. McCrummen testified "we were talking about and because I had already talked to Adam and John about the other, I didn't bring Mandy into the loop on that". (Tr. 72). Whether the Vitela/McCrummen conversation also involved the premium start time issue is an open question on this record.

In any event, Mr. McCrummen testified "I still hadn't got an answer from anyone telling me that they weren't, and they don't have to pay me until the next pay check". (Tr. 72).

At pages 10-11 of Southwest's brief, the following statement is made:

The CBA clearly says that if "an employee is unable to resolve his grievance through a supervisor, within ten (10) calendar days of the occurrence of the circumstances in question the grievance shall be summarized in writing." (CBA Article Twenty, Section One, Paragraph L.1). The CBA does not say that an employee can wait more than ten days to see if the company is going to change its mind. Nor does the CBA say that the employee can file a grievance within ten days of being unable to resolve the grievance/which is essentially what Mr. McCrummen and the Union argue for here. Rather than the contractual rule is requiring that a grievance be filed within ten days of the occurrence in question. They are arguing for a rule that would allow the grievances to be filed within ten days of whenever a grievance happens to conclude that Southwest is not going to change its mind.

This statement is well taken where applicable. The problem for Southwest is that since the Company is alleging a procedural violation, Southwest has the burden of proof to establish when the "occurrence" took place. Based upon Article Twenty Eight, Section C, if the shortage is more than a half day's pay Southwest has three working days to reimburse the shortage. If this was the situation here, the time would begin running from December 8, 2016, meaning that 10 calendar days would expire on either December 18 or 19, 2016.

But the shortage here involved one and one-half hours. Mr. McCrummen, referring to his experience as Vice President of Local 555, testified to the effect that in shortages of less than one half day's pay, once supervision is notified of the shortage and there is no objection to paying same, the shortage will be reimbursed in the next pay check. (Tr. 64-65; 69-70). Mr. McCrummen testified that he notified Adam Westermajer and John Brophy about the "shortage".

On this theme, referring to Westermajer and Brophy, Mr. McCrummen testified "still hadn't got an answer from anybody telling me that they weren't and they don't have to pay me until the next pay check. So I waited 'til the next pay check. When it wasn't on there, that starts my clock. Now, if they had come to me and told me, you're not going – we are not going to pay you and management never did that we were talking OJI ... is all we were talking about ...". (Tr. 72).

There was no rebuttal to this line of testimony. There was no testimony from management that Mr. McCrummen's explanation as to the handling of shortages of less than one half day's pay or that he was told by Brophy, Westermajer, or for that matter Mandy Vitela that Southwest was not going to pay the alleged shortage.

Based upon the above explanation, this is not a case of "waiting more than 10 days to see if the Company is going to change its mind". The Company, based upon the record, had made no statement concerning the alleged one and one-half hour shortage. Nor can it be said that Mr. McCrummen was filing his grievance "within 10 days of being unable to resolve the grievance". Rather, it seemed that Mr. McCrummen, absent testimony to the contrary from management, was conducting himself based upon his experience with less than one half day's pay shortages.

What Mr. McCrummen argued in his testimony is that, based upon his experience, in the

absence of a statement from management that the alleged shortage would not be addressed, his experience has been that a shortage of less than one half day's pay would be addressed in the next pay check; that here the next pay check was December 20, 2016. Noting that the shortage was not reimbursed on that check, Mr. McCrummen filed his grievance within eight days of December 20, 2016.

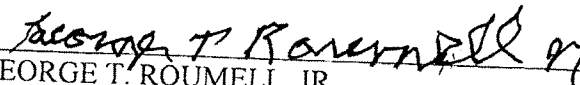
There is no testimony on this record rebutting Mr. McCrummen's explanation as to the procedure followed involving less than one half day's pay or testimony indicating that Mr. McCrummen was put on notice after notifying management of the shortage that his shortages of less than a half day's pay would not be reimbursed in his December 20, 2016 check. When the December 20, 2016 check was issued, the alleged shortage did not appear, causing Mr. McCrummen to file a grievance within eight days of the occurrence, which on these facts occurred on December 20, 2016.

It may be that the merits could well involve a different result. But this Arbitrator, by the parties' stipulation, is limited to the jurisdictional issue. It is based upon the above analysis that this Arbitrator concludes that the grievance is timely as the occurrence took place on December 20, 2016 when management was notified on the same day of the December 5, 2016 check of the alleged one and one-half hour pay shortage and there is no evidence that management indicated that the alleged shortage would not be reimbursed in the forthcoming pay check.

A W A R D

1. The grievance is timely.
2. Pursuant to Article Twenty, Section One.C, as the grievance has been held timely, the costs of the Arbitrator's fees and expenses shall be borne by Southwest Airlines Co.

July 25, 2017


GEORGE T. ROUMELL, JR.
Arbitrator