In the Matter of the Arbitration between

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Southwest Airlines Company

and

Transport Workers Union Local 555

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Arbitrability of Grievance No. MCO-O-1705/18

Hearing held October 26, 2018
Before Richard I. Bloch, Esq.

Appearances:
For the Union: Charles Cerf
For the Company Edward F. Berbarie

OPINION

Facts

Prior to execution of the current (2016) Collective Bargaining Agreement (hereinafter "CBA") Operations Agents ("Ops Agents") who were in the status of On-the-Job-Injury ("OJI") leave were given the option to return to work to a light duty assignment or to remain off duty, yet still receiving full salary coverage.

Under the 2016 CBA, however, employees no longer retained the option to decline a light duty assignment - an employee able to perform work was obliged to accept the assignment.[1] Ops Agents returning from OJI Leave to light duty were placed in the Coordinator position, which involved, among other Coordinator duties, routine announcements, performing data entry and generally coordinating flight arrivals.[2] Significant to this case, when an Ops Agent was assigned to perform Coordinator duties, he or she would *replace* another Ops Agent who had been performing the Coordinator role.[3] The replaced Agent would be reassigned to working a flight.

With the anticipated influx of employees who would now be working the light duty assignments, the Company created a so-called "Work Matrix," a document that identified the overall "Operational Task Requirements" of the assignment. The Matrix was transmitted to the Union for review[4] prior to its being implemented in July of 2016.

The Union filed the instant grievance on June 30, 2018, contending that:

> SSO forces injured Ops Agents on return to work transitional duty to replace coordinators to [avoid] covering them with overtime. This violates the RTW Matrix agreed upon between the Company and the Union which states injured party will 'assist' not 'replace' coordinators and is not an approved duty on the RTW Matrix list.[5]

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[1] Article 13, Section Two (E) of the current labor agreement provides:
Termination of Salary Continuation. Payments by the Company under this Section may be terminated…if the Employee is found fit to perform work, including available work as provided for in § 2.I. below.

Section Two (I) states:
OJI Return to Work Program…the Company may offer temporarily amended duties under Southwest Airlines OJI Return to Work (RTW) program…to Employees who cannot yet perform all of their required job duties but have been released to return to work with restrictions.

[2] See Tr., 28, 29.

[3] See Tr., at 30, 32.

[4] Tr. at 46.

[5] Joint Ex. 2, at 12.

By this grievance, the Union claims that, by way of the Matrix, the Company agreed to discontinue the longstanding practice of replacing the working Ops Agent, adopting, instead, a process wherein the returning Ops Agent would now be assigned to "assist" in the Coordinator duties. The parties differ on the merits of the case – whether the Company was obligated, post-Matrix, to add the returning light duty worker without replacing the incumbent employee. However, the parties also disagree on whether the grievance is timely: They agree the current dispute before the arbitrator is strictly limited to the question of whether the grievance was filed in a timely manner.

Management Position

The Company maintains the dispute at issue was, according to the existing labor agreement, to be filed within 10 days from the time the Union was made aware of the facts giving rise to the grievance. The practice of replacing the Ops Agent on duty in the Coordinator role with a light duty worker was well-established prior to the advent of the new labor agreement and the construction of the Matrix. Nothing changed, says the Company, but even assuming the language of the Matrix should be understood as terminating the longstanding practice, the grievant in this case, [redacted], returned to work, replacing a Coordinator, on June 5, 2018. The grievance, however, was not filed until June 30, well beyond the 10-day limit. Under the circumstances, the Company argues, the labor agreement requires that the matter be dismissed as untimely.

Union Position

The Union acknowledges that Article 20 of the labor agreement clearly establishes the various 10-day time limitations applicable to the filing of grievances. However, it notes, the contract also waives those limitations in the event either party, due to circumstances beyond its control, is reasonably unaware of, or prevented from becoming aware of, the facts or circumstances that would give rise to a protest. Such was the case in this instance, the Union says. It requests, therefore, that the grievance be considered timely.

Relevant Contract Provisions

Article Thirteen, Section Two

Occupational Injury Pay

... E. Termination of Salary Continuation. Payments by the Company under this Section may be terminated if the Employee is found fit to perform work, including available work as provided for in Section 2.1. below.

... I. OJI Return to Work Program. So" long as the Employee is not prescribed a drug by his treating physician that would impair his ability to safely perform classification duties, the Company may offer temporarily amended duties under Southwest Airlines OJI Return to Work (RTW) program for a period not to exceed eight (8) calendar weeks to Employees who carmot yet perform all of their required job duties but have been released to return to work with restrictions...

Article Twenty
Grievance/System Board/Arbitration

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 flames set forth are violated by the Union the grievance shall be considered withdrawn. Determination of the 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 giving rise to the either a factfinding or grievance, the time frame for pursuing such factfinding and/or grievance shall be extended as appropriate.

L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement ("Contractual 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.

1. Step 1/Department/Assistant Manager ("Manager"). If an Employee is unable to resolve his grievance through his supervisor, within (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.

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3. Step 3/Labor Relations or designee. If the decision of the Station/Provisioning Manager is unsatisfactory, the District Representative /designee of the Union may appeal the grievance to Labor Relations or designee, provided that such appeal is presented, in writing, within ten (10) working days after receipt of the Station Manager's decision

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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...

Analysis

The Collective Bargaining Agreement provides that grievances arising "over the interpretation of, or application of this Agreement,"[6] must be filed within ten calendar days "of the occurrence of the circumstances in question."[7] Failure of the Union to abide by a time limit shall require that the grievance be considered withdrawn.[8] It is also true, as the Union notes, that in situations where a party could not reasonably have become aware of facts or circumstances giving rise to a grievance, time frames are to be extended as appropriate.[9] On this point, the Union says grievant [redacted] returned from an OJI on June 5, 2018 and could not have been aware, until June 30, that his acting alone as a Coordinator, rather than assisting another individual in that position, amounted to a contract violation. For the reasons that follow, the conclusion must be that the grievance was not timely filed and, therefore, that it must be considered to have been withdrawn.

[6] Article Twenty, Section One (L), *supra*, at p. 5.
[7] *Id* at Section One (L)(1).
[8] Article Twenty, Section E.
[9] Article Twenty, Section One, F.

The Company notes that, while the grievant returned to work on June 5, he failed to grieve until June 30[10], well beyond the 10-day limit. For its part, the Union claims [redacted] was improperly denied the opportunity to review the Matrix at the time he began his Coordinator duties.[11] Had he been allowed to do so, it is argued, he would have known to protest the offending assignment. The record is relatively uninformative as to whether, and to what extent, the grievant was fully informed of the job content during a June 4 phone call that was dedicated to discussing the expectations of the grievant as he returned to work. The grievant testifies that, at the time of his return, he recalls discussing his return to work with the Company.[12] He does not recall, however, any discussions directed to his being assigned to *replace* an existing Coordinator.[13] Southwest contends he was fully briefed.[14] However, with due regard for the differing views of the return to work conversation, the critical point, one concludes, is the Union's contention that, had such conversation occurred; had, in fact, [redacted] been fully informed of the duties recited in the Matrix, he would have recognized the contract violation inherent in assigning him to "replace," rather than "assist," a Coordinator.[15] Says TWU:

> "[The] discussion [of temporary amended duties and tasks that a worker may perform][16] would have made him aware of the RTW program, thereby starting

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[10] Representative [redacted] testifies he had been speaking with a Union District Rep on June 29th, who advised him of the Union's view that the Company could not replace the Coordinator, and that he shared this information with [redacted] the next day. (Tr., at 109 *et seq.)*

[11] See Union brief, at 9.

[12] Tr. at 174 *et seq*.

[13] [redacted] testifies, credibly, that he was simply focusing on getting back to work.

[14] The Matrix document that reflects the full "Operations Task Requirements" was evidently signed by [redacted] on July 10, although an accompanying signature by a management representative includes the written observation of "Accepted via phone call – 6-4-18."

[15] See Statement of Grievance *supra*, at p.2.

[16] See Tr. at 215.

> the timeframes for filing a grievance. This failure by SWA caused [redacted] not to be made aware of the violation until June 30 and immediately filed a grievance on the same day."[17]

The TWU's argument is fully consistent with its contention that the 2016 publication of the Matrix, and its use of the word "assist," resulted in a binding prohibition against the Company's continuing to replace coordinators with RTW employees. But the Union's claim that, due to circumstances beyond its control, it could not have been previously aware of the contested action is not supported by the record in this case. It may be that [redacted] was unaware of the possible violation until he spoke with a Union official on June 29th. The same may not be said for the Union, however. As is clear from the record, the Union was specifically aware of what it claims here to have been a very meaningful change to procedures when, in 2016, the Company created the Work Matrix, shared it with the Union[18] and worked with the Union in general on all elements of the new language.

There is no evidence in the record as to the extent to which the bargaining parties may have discussed the specific meaning of "assist" at the time of the 2016 contract revisions. In 2016, the chief focus, it would appear, was on the employee's obligation to accept a proffered RTW assignment of this nature. It is likely, according to the evidence, that the parties devoted most of their attention, at the time, to that new "mandatory" reporting requirement, a change that was both the subject of conversation between the

[17] Union brief, at 8-9.
[18] See Tr., at 40 *et seq*.

parties and publication by the Union to its membership.[19] Nevertheless, the conclusion is unavoidable that the 2016 execution of a new contract was the time and the event during which the Union reached *its* assessment that the Company could no longer replace Coordinators: Any other conclusion is inconsistent with the claim of a negotiated change to the labor agreement.

Moreover, to the extent the change ("assist" rather than "replace") invalidated the previous Return to Work practice of replacing Coordinators, as the Union here contests, violations, if they are to be considered such, were occurring regularly and continuously from before and after execution of the 2016 agreement and the Matrix creation. The unrebutted testimony reflects that, in the years following the advent of the Matrix and prior to the current dispute, more than fifty RTW workers were assigned to replace Coordinators, all without objection by the Union.[20]

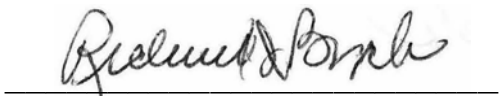
For these reasons, the finding, based on the testimony and evidence presented, is that the Union knew, or could have known, of the events giving rise to the grievance in this case well before the date the matter was formally contested. If, as the Union claims, the 2006 publication of the Matrix served to modify the decades-long practice, the breach of that claimed new understanding was, or should have been, apparent on numerous occasions following execution such an agreement. Even assuming, without deciding, that [redacted] himself had not been fully briefed at the

[19] See Company Ex. 9, a document published and circulated by the Union's Education Committee. That notice announces, in bold print, "Article 13 Changes" and highlights as "the most notable" change the Article 13 Section Two, reflecting the parties' agreement that offers under the RTW program to return to work were mandatory and that the Union local and the Company had agreed upon the listing of specific duties "deemed appropriate to the employee's classification" – the Work Matrix.
[20] See Tr., at 132 *et seq*.

time of his assignment, the Union, which, with management, bears equal responsibility for monitoring administration of the CBA, cannot be found to have been somehow unaware of the impact of what it claims to be the 2016 changes and of the numerous instances following execution of the agreement and distribution of the Matrix when the Company engaged in what is now claimed to have been offending activity. For these reasons, the finding is that the grievance at issue must be considered untimely.

AWARD

The grievance in this matter is untimely.



Richard I. Bloch, Esq.

January 12, 2019