BEFORE

WILLIAM H. LEMONS

SYSTEM BOARD OF ADJUSTMENT

In the Matter of Arbitration between	)	
	)	
Southwest Airlines Company	)	
Dallas, Texas	)	Case No. DTW-R-0568/14
	)	
And	)	
	)	
Transport Workers Union of America,	)	Time Frames [redacted]
AFL – CIO Local 555,	)	
Representing Ramp, Operations,	)	
Provisioning and Freight Agent Employees	)	

OPINION AND AWARD OF THE ARBITRATOR

August 14, 2014

ARBITRATION AWARD

By the terms of the Collective Bargaining Agreement ("CBA") (Jt. Ex. 1) between Southwest Airlines, Co. (hereinafter referred to as the "Company") and the Transport Workers Union of America, AFL-CIO Local 555 (hereinafter referred to as the "Union"), William H. Lemons of San Antonio, Texas was selected by the parties to serve as Impartial Arbitrator, as per the parties' April 28, 2014 letter to him. A hearing was held in the Board Room at the Wyndham Dallas Love Field on June 20, 2014. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments. The Union introduced nine exhibits into evidence, and the Company introduced five exhibits into evidence. Additionally, the parties introduced three joint exhibits, including the CBA, the grievance package (Jt. Ex. 2), and later by stipulation, an exhibit denominated "Stipulated Facts ("Jt. Ex. 3). The exhibits were received into evidence without the need for formal authentication or foundation, unless a particular document was the subject of a specific objection. The evidentiary portion of this matter was declared closed on June 20, 2014. Post-hearing briefs were received and cross-served.[1]

APPEARANCES:

FOR THE COMPANY:	Colin LeCroy, Esq. **OGLETREE DEAKINS**
FOR THE UNION:	Jerry McCrummen, Vice President TWU Local 555

[1] This Arbitrator received the Company's Post-Hearing Brief at 11:20 a.m. CT on August 8, 2014. He received the Union's Post-Hearing Brief at 8:51 a.m. CT on August 11, 2014. I suppose it is the height of irony that a Post-Hearing Brief in a "time frames" case would be late. Suffice it to say, my decision is in no way based upon the fact that one brief was late. As I could not have read either Post-Hearing Brief earlier than now, it makes no difference. I also would point out that I was prepared to announce my decision at the conclusion of the hearing on June 20, 2014, but one party requested to submit Post-Hearing Briefs so I did not do that.

ISSUE: Did the Company violate time frames required by the contract ("CBA"), and if so, what is the appropriate remedy?

TIME FRAME ISSUES: The parties stipulated that there were no arbitrability or procedural issues, other than the time frame argument before me, and that the issue is properly before me and within my jurisdiction to render a decision. (Jt. Ex. 3) Reference is made to the grievance package (Jt. Ex. 2) for applicable dates, the same being incorporated herein by reference as though fully set forth *verbatim*.

PROVISIONS OF THE LABOR AGREEMENT: (Jt. Ex. 1)

Article 20 – Grievance / System Board / Arbitration

Section One – Procedures

L. **Interpretation/Application of Agreement.** In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, 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.

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.

2. **Step 2/Station/Provisioning Manager ("Manager")**. If the decision of the Department/Assistant manager is unsatisfactory, the Employee or his representative may appeal the grievance to the Manager, or in the event of his absence his designee, within five (5) working days. Copies of the Manager's decision shall be forwarded to the Employee and the Union office.

STATEMENT OF THE FACTS

The Grievant is the elected representative for the Union in Detroit ("DTW"), having begun his career with Southwest Airlines in 2000 in Phoenix ("PHX"). After three years in PHX, he transferred to DTW and has been there ever since. The Grievant was apparently involved in a deicing truck incident in January of this year, resulting in his receiving a ten day suspension.[2] Also apparently as a result of this incident, the Company began contracting out certain deicing duties. The Grievant filed a grievance on February 15, 2014 over the contracting out issue.[3]

The contracting out grievance was submitted directly to Station Manager Chris Collins, who then had five (5) working days to respond based upon the contract language I cite above. Because of the ten day suspension, the Grievant (who at this station is also the TWU representative) was not at work until the last day for response. On that day, the Grievant asked for and received permission to leave early to go on vacation with his family. Tr. p. 77 l. 4 to p. 77 l. 16. Noting the Grievant's absence, Station Manager Collins, after conferring with Mike Holcomb in Labor Relations, placed the Company's response to the grievance under the door of the Union office at this station, and faxed a copy to the TWU headquarters in Dallas, Texas.

THE UNION'S CONTENTIONS

The Union takes the position that although the CBA language quoted above does not specify what the meaning of *Union office* is, and particularly whether it means just the TWU Dallas headquarters, long-standing past practice of the parties is that it means the Union office at the local station. This, it says, is shown by the explanatory language on page 1 of the grievance

[2] Apparently, Arbitrator Hill issued a decision that the Grievant's disciplinary letter be removed from his file, and reduced the suspension to two days.

[3] I am not authorized to delve into the merits of the underlying grievance in this case – contracting out – and only if I find compliance with the time frames would the merits of that grievance be reached.

form (U. Ex. 1), and the Company knew, or should have known, that the station representative, not the Manager, will be responsible for forwarding the grievance, by fax, to the Dallas TWU headquarters. It contends that Arbitrator Neumeier, in her decision in BNA-R-1978/13, mandates that the Company *shall* render its decision in five working days. And that here, Mike Holcomb recommended that Chris Collins not otherwise contact a TWU official about this out of spite towards the Union's District III Representative, Randy Barnes. TWU concludes that by fostering the past practice of the Manager having to personally hand the grievance response to the local Union representative and the Grievant provides them an opportunity to talk and gain an understanding of their mutual interests and reasoning.

THE COMPANY'S CONTENTIONS

The underlying grievance involves the Union challenging the use of contract deicers in DTW.[4] Although the grievance is to be *presented* to the Manager, Chris Collins testified that he received it on February 17, 2014, two days after it should have been submitted, because someone had *presented* it by slipping it under his door. He testified that he completed his investigation just before noon on February 21, 2014 (the last day for response), and intended to present it personally to the Grievant at the time clock when it was anticipated that the Grievant would be punching out.[5] After Chris Collins found out that the Grievant had LWOP'd and left early, he conferred with Mike Holcomb, who recommended that Collins both fax copies to the TWU office in Dallas and leave a copy under the door of the Union's office in DTW. That he did.

[4] Indeed, the remedy sought in the grievance, in addition to "make-whole" steps, is that the Company "[d]iscontinue contracting deicing immediately." More about that later.

[5] Testimony is that the alternative Union representative, [redacted] was not at work that day.

DISCUSSION OF THE EVIDENCE

Witness Holcomb testified that, in fact, the large majority of grievance responses are hand-delivered by Managers to the local Union representative, but that approximately ten percent of the time, grievance responses are issued by other means. A summary of Witness Holcomb's testimony about other means of issuing grievance responses is set forth on page 7 of the Company's Post-Hearing Brief. Common sense is that at larger stations, hand-delivery is feasible most time because there are numerous TWU representatives at the location, and normally a number are at work any given time. Yet, in smaller stations, including DTW, because the TWU representative may not be at work at times, the Company and the Union have worked out a method that often does not mean hand-to-hand transfer. Tr. p. 152-157, inclusive. Even Union witness Barnes could not say that the Company *always* hand-delivered its grievance responses. Tr. 52-53. Similarly, Union witnesses Mark Waters and Juan Cordova buttressed this testimony by describing a varied and inconsistent practice system-wide.

OPINION OF THE ARBITRATOR

Based upon all the facts and evidence before me, and after my review of the applicable provisions of the CBA, after an extensive analysis of applicable arbitration decisions found in Elkouri & Elkouri, *How Arbitration Works* (7th Ed.), and upon my extensive reading of the decisions on this property cited by both sides,[6] it is my conclusion that the Union has failed to sustain its burden of proof under these facts and circumstances and show that the Company violated the CBA and or past practice when Station Manager Chris Collins *issued* the Company's response to the grievance in the way that he did. The evidence establishes that the Manager

[6] In addition to Arbitrator Neumeier's decision referenced above, I have studied carefully *Southwest Airlines* (*In re* [redacted], BNA-R-2458/14 (Hill 2014); *Southwest Airlines Co.* (*In re* [redacted], BDL-R-1222/09 (Massey 2010); *Southwest Airlines Co.* (*In re $100 Phoenix Ramp Bonus*) (McKee 2002); and *Southwest Airlines Co.* (*In re Flight Attendant Compensation*), 106 LA 655, 658 (Allen 1996).

issued a written decision . . . . within five (5) working days. Thus, I conclude that there were no time frame violations, and that we must now schedule a hearing on the merits of the underlying grievance.

Frank and Edna Elkouri teach us, and it is black letter law, that where the terms of the CBA are plain and clear, and not ambiguous, the Arbitrator must apply the language as he reads it, without using interpretive tools like past practice or bargaining history.[7] Even were there ambiguity or uncertainty in the applicable language, the kind of past practice that defines the terms of a collective bargaining agreement requires that the parties' conduct 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. The elements of a past practice are "clarity, consistency, longevity, repetition, and acceptability."[8]

In support of my decision, I make the following specific findings:

a) I surmise that someone either at the local or higher level of TWU was playing a game of "gotcha" in hopes of winning on a technicality. I generally do not allow that, particularly when the potential stakes are great. Trying to win this way also reflects on the strength of the player's hand when it comes to the merits. Here, the remedy was basically for the Company to forever cease and desist contracting out deicing at DTW. If it has equipment failure, I suppose then it has to shut down operations? Suppose that the Grievant had slipped the grievance under the wrong door, and blown his time frames? I suppose this would mean that the Company then could always contract out deicing whenever it wants to? This Arbitrator is not going to play "gotcha" games with substantive rights. Here, Randy Barnes did get the response, did put a number on it and did go to the next step in time. I resolve doubts about timeliness in favor of having a full hearing on the merits of the underlying issue. No harm, no foul;

b) Although some may question the wisdom of some of my Awards, this Arbitrator is not going to read something into past practice or stretch the CBA in order to achieve an absurd result.[9] As mentioned above, going off on a technicality would have profound consequences on

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[7] Elkouri & Elkouri, *How Arbitration Works* 434 (Alan Miles Ruben et al., 6th ed. 2003).
[8] Elkouri & Elkouri, *id* at 608.
[9] Apparently, other Arbitrators agree. *Southwest Airlines Co.* (*In re* [redacted] BDL-R-1222/09 at 16 (Massey 2010); *Johnstown Wire Tech.*, 111 LA 216, 221 (1998); Elkouri & Elkouri, *id* at 470-71.

operations in DTW. It would also mean that the Company would have to rush its investigation of a grievance in instances where it knew ahead of time that both the Grievant and [redacted] were to be gone. And when as here, the Grievant LWOP's early, and his alternate is not there, if TWU Dallas closes early or loses power to the fax machine, does the Company automatically lose? These are absurd results, and I am not going there;

c) The isolated example of resolving a grievance at the DTW station does not establish past practice, or for that matter, establish any precedent or violation of the CBA. *The parties are free to resolve these matters as they have done in the past.* However, just because some have been resolved in a certain manner *does not mean that a past practice has been established.*[10] Rarely, if ever, is the non-filing of a grievance, or a settlement by local management on a non-precedent and non-referable basis, dispositive of the outcome in another grievance. The Union may not pursue a grievance for a number reasons completely unrelated to the merits, including availability of witnesses, the credibility of the grievant and whether he or she wants a remedy, and even the state of the treasury.[11] Similarly, the Company may elect not to contest a grievance for much the same reasons, or merely because the remedy does not justify the cost of battle.[12]

AWARD

After careful consideration of all the oral and written arguments and the evidence, and for the preceding reasons, the Arbitrator finds that the Union failed to sustain its burden of proof under these facts and circumstances and show that the Company violated the CBA and or past practice when Station Manager Chris Collins *issued* the Company's response to the grievance in the way that he did. The evidence establishes that the Manager issued a written decision . . . . within five (5) working days, and thus the Union's grievance over time frame segment of this case is denied. Any unresolved differences regarding interpretation or application of this Award will be settled by the undersigned upon written request of the parties. The cost of the arbitration shall be borne by the Union.

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[10] *Southwest Airlines Co. (In re* [redacted], BDL-R-1222/09 at 16 (Massey 2010).
[11] *Southwest Airlines Co. (In re* [redacted], PHX-R-1850/13 (Hill, 2014).
[12] And so, settling the [redacted] companion case, DTW-R-0569/14, by conceding two hours of double overtime to Employee [redacted] is more cost-effective than taking it to System Board and/or a $5,000.00 arbitration hearing. Is there a lesson here that might apply to routine overtime bypass grievances?

This Award should not be construed as any indication that I not inclined to enforce time frame requirements. I will. They are in the CBA for a number of very good reasons. I am just finding on these facts that the Station Manager did all he reasonably could be expected to do in meeting the response deadline. Thus, I find that he substantially complied with the terms of Article 20 of the CBA.

It is further my directive that the parties shall confer in a good faith attempt to resolve the underlying grievance concerning contracting out deicing at DTW in the manner grieved, and failing same to contact my office to secure potential arbitration dates for conducting a hearing on the merits.

Signed this 14th day of August, 2014, at San Antonio, Texas.

William H. Lemons

WILLIAM H. LEMONS, Arbitrator