AMERICAN ARBITRATION ASSOCIATION

In the Matter of Arbitration Between	:	
SOUTHWEST AIRLINES COMPANY "Company"	:	AAA 71 300 00305 96
and	:	(Gr. HOU-R-0226/96)
SOUTHWEST AIRLINES RAMP OPERATIONS PROVISIONING ASSOCIATION "Association"	:	[redacted]
Before: James F. Scearce, Arbitrator	:	

This case involves a dispute over the rate of pay received by the grievant, [redacted], at the time of his employment. The hearing was held on January 23, 1997 at the Company's corporate facilities in Dallas, Texas. Both parties wee afforded a full opportunity to present, examine and cross-examine witnesses and to submit exhibits. The proceedings were recorded by notes of the arbitrator. The Association closed argument at the hearing; the Company closed by brief, which was received January 29, 1997.

APPEARANCES

For the Association -

Presenting -

Mark Goodwin	President

Witnesses -

Grady Glover	District Representative
[redacted]	Grievant

For the Company -

Presenting -

Ruth Landau, Esq.	Labor Counsel

Witnesses -

Lisa Sides	Secretary-Benefits & Compensation Office*
Mark Schmidt	Manager-Ramp Operations (HOU)*
Ruth Chancellor	Director-Employee Resources-Ground Operations

BACKGROUND

The grievant commenced his career with the Company in May of 1990 as a Ramp Service Agent. The record indicates that he was interviewed initially at the Company's operations at Houston (Texas) Hobby Airport and subsequently came to the Company's corporate headquarters located adjacent to Love Field in Dallas, Texas for processing; his work location was then and remains the Hobby location.

It is undisputed that in the Spring of 1990 the Company and Association were in the process of re-negotiating the

*Position held at time of events germane to this dispute.

terms of their collective bargaining agreement (Agreement). One of the terms of the Agreement being re-negotiated was the starting rate of pay for newly hired "Ramp/ Provisioning" employees. By date of May 16, 1990 negotiations for the new Agreement were complete and the document was signed by both parties. Of relevance here was Article Twenty-Eight (Wage Rules) K. which read: "Employees hired on or after May 17, 1990 will be paid during their first year of service at entry rate levels as follows:

> "Ramp/Provisioning...
> 1st 6 months $6.50...
> 2nd 6 months $7.00" (Jt Ex 3)

The record indicates that prior to May 17, 1990 new hires in the grievant's job classification were paid $7.61 per hour as a start rate. There is no apparent dispute that the grievant was interviewed prior to, and was processed for hire, on May 11, 1990. The record shows that he was at the corporate facility on May 11, 1990 and had an identification (ID) badge issued to him showing "5/11/90" as both the "issue date" and "hire date." (Un ex 1) It is also undisputed that the grievant's first day of work was May 18, 1990.

The next event of record relevant to this dispute was a formal grievance dated July 20, 1996 wherein the grievant contended that he was being paid at the "incorrect pay/scale step" and that this had occurred "due to qestion-

able tactics." (Jt Ex 1) The remedy sought was that he be paid at the "correct pay step" and that he be able to recover "all back pay" as provided for under the Agreement. (IBID) In its response, the Company rejected the claim of improper pay and the demand for back pay; it also took issue with the time delay in advancing this claim. Following review without resolution at all Steps of the grievance-handling procedure, an effort by the four-person System Board of Adjustment to resolve this grievance was unsuccessful; whereupon, the dispute was scheduled for hearing before the undersigned for final review and disposition.

POSITION OF THE ASSOCIATION

In May of 1990, while being interviewed by management at HOU, the grievant was specifically informed that he would be paid $7.61 per hour as a starting rate. The grievant was giving up a job paying $8.50 per hour to start his career with the Company. He went to Company headquarters in Dallas for final processing and, with the concurrence of the Company, returned to work off a week's notice with his employer. After commencing work with the Company, the grievant was then told that his start rate would be $6.50 per hour. When he confronted his supervisor with this situation, he was told to "take it or leave it." He was also made to believe that he could not file a grievance during his probationary period as an employee. Afterward, when

he looked at his personnel record on file at HOU, he could not substantiate the $7.61 per hour commitment, even though he was certain that it had been made. Access to the grievance procedure to challenge the Company's improper action was denied the grievant due to a lack of proof, even though his ID made it clear that his hire date preceded May 17, 1990.

Because he wanted to make a career with the Company and given the fact that he had already left his previous employment, the grievant remained with the Company, but continued to try to get the rate of pay promised him. It was not until the current District Representative was in office that the grievant learned that a separate personnel file on him kept at corporate headquarters might contain confirmation of his claim. He went to Dallas and was able to review such file. In doing so, he found the original application form he had completed and had dated May 11, 1990; in the Section of the form filled in by a Personnel Office official, the rate of $7.61 per hour had been inserted; the personnel official signing it had dated the form May 16, 1990. When the grievant compared it with the same form that was in his HOU file, it was apparent that the latter form had been prepared by someone else who had also forged his name on it; that form bore the date of June 4, 1990 and had been executed by the same Company official. These findings substantiated the grievant's claim

that he had been promised a starting rate of $7.61 and demonstrated that he had been denied such right unfairly and improperly. He raised this matter as soon as he had proof of the validity of his claim; this met the procedural requirements of Article Twenty, Section One F. of the Agreement.

The result of this incident has been the denial of proper compensation to the grievant over an extended period of time, as well as the benefits of being in the proper step in the growth process. The grievant is entitled to be placed in such proper step and to recover all back pay in the amount of $11,219.63 as has been requested.

POSITION OF THE COMPANY

This case on the merits is not a proper matter for consideration at arbitration. Article Twenty, Section One, Item C is explicit in requiring employees to comply with jointly negotiated and agreed-upon time frames during which grievances had to be initiated and/or appealed. Item I, Step 1 of this Article/Section specifies that a formal grievance had to be raised "within five (5) working days of the occurrence of the circumstance in question"; instead of doing so, the grievant waits six and one-half years to allege a violation occurred. Besides being a clear violation of the Agreement, such an extended passage of time makes it virtually impossible for the Company to reconstruct

the events that took place; many of the management officials who were at HOU are no longer there, if with the Company at all. It should be noted that neither the grievant nor the Association has ever asserted that the Company in any way attempted to deny the grievant access to his personnel file kept at corporate headquarters; furthermore, the grievant conceded that he was aware that such a file existed, that he could have traveled from Houston to Dallas free of charge, and that he could have reviewed such file at any time. Over the preceding six-plus years the grievant has executed numerous documents affirming his hire date, payroll date and seniority date to be May 18, 1990; at no time did he ever lodge a formal protest in this regard. Moreover, his claim that he was told by his immediate supervisor in May of 1990 (M. Schmidt) that he could take his Ramp Service Agent job with a beginning rate of $6.50 per hour or leave it was directly refuted by Schmidt in the hearing.

The arbitrator should give no credence to the grievant's claim that he "understood" that he could not file a grievance while in the status of a probationary employee. He could not identify any member of management who alleged such a circumstance and, in fact, did not even try to do so; additionally, he cannot point to any provision of the Agreement that denies such right to probationary employees. Neither should any credence be given to the claim that

he did not want to "stir things up" at the outset of his employment. Such self-serving claim should not be accepted as any excuse for his belated claim. The fact is that the claim was grossly untimely and should be dismissed without any further consideration.

Even if the merits were considered, the claim is without substance. The grievant's assertion that he was an employee as of May 11, 1990 is in error. The record clearly indicates that on May 11, 1990 the grievant signed an "Employment Process Acknowledgment" that made it clear that his employment was contingent upon his successfully passing certain tests and verifications. While his ID badge bore the date of May 11, 1990 it was not issued to him until his first day of work -- May 18, 1990. It is also clear that an employee is not hired until he/she goes on the payroll and starts work. The grievant's hire/start/seniority date is May 18, 1990 -- a fact he has repeatedly acknowledged. The fact that a document with an incorrect start rate may have been retained in the grievant's official record does not establish a basis for a claim that he is now entitled to a higher rate/step and back pay. Such incorrect document was not input into Company records which is required to make it official. The Company also established, through credible and unrefuted testimony, that no one involved in the hiring of the grievant had the authority to offer a rate of pay to him above that

set out in the Agreement. In point of fact, the grievant could not even identify the Company official who allegedly made him an offer of $7.61 as a start rate. The record clearly indicates that the grievant was treated no differently from other employment candidates who: were interviewed prior to May 18, 1990; had ID badges made prior to that date in anticipation of passing the necessary requirements; and, were placed on the payroll on May 18, 1990. The grievant's assertions that someone else completed a bogus employment application after-the-fact is as non-credible as his claim that he did not sign the second form is incredible. The logical explanation is that the first one got mislaid and the grievant was asked to provide a second one.

In any case, even if the merits of the case were proper for consideration, they are without substance and should be denied.

CITED/RELEVANT PROVISIONS OF THE AGREEMENT AND RELATED DOCUMENTS

AGREEMENT (1990-1994)

ARTICLE EIGHT - SENIORITY

. . . .

C. Company seniority shall begin from the date placed on the payroll as an employee...

. . . .

G. Probation. All new employees will serve a probation period of one hundred eighty (180) calendar days, with a minimum of ninety (90) days worked. During this period, a new employee has an opportunity to demonstrate his qualifications and ability to adapt to Company policies and procedures. The probation period

affords the Company an opportunity to evaluate the employees qualifications and ability to perform tasks assigned. Probationary employees shall bid for shifts under the provisions of Article Six, Section One, Paragraph E, and exercise the use of shift trades and giveaways under the provisions of Article Six, Section One, Paragraph 1 after the completion of thirty (30) days employment.

ARTICLE TWENTY - GRIEVANCE/SYSTEM BOARD/ARBITRATION

. . . .

F. No employee who has completed his probationary period will be disciplined to the extent of loss of pay or discharge without first having the benefit of a hearing with the right to have an Association representative present....

G. In the event of a grievance arising over the interpretation of or application of this Agreement or in the event of disciplinary action or discharge, the following steps will apply However, if the action is discharge, proceed to Sub-Paragraph Six (6).

1. Within five (5) working days of the occurrence of the alleged contract violation or disciplinary action, the employee will discuss his grievance with his supervisor or department manager in an attempt to arrive at a possible resolution....

2. If the grievance cannot be resolved through this discussion, the employee, after receipt of the supervisor's or department manager's verbal decision, may reduce his grievance to writing within five (5) working days. The grievance will be signed by the employee and his elected representative and presented to the supervisor or department manager.

ARTICLE TWENTY-EIGHT - WAGE RULES

. . . .

J. Nothing in this Agreement shall prevent the Company from paying to an individual employee hereunder a higher rate of compensation than the rate established in this Agreement.

K. Employees hired on or after May 17, 1990 will be paid during their first year of service at entry rate levels as follows:

Ramp/Provisioning
1st 6 months $6.50
2nd 6 months $7.00

L. Upon completion of the first year of service with the Company, an employee will advance to Step One of the progressive pay scale. Thereafter, on the anniversary of such employee's date of hire, the employee will advance to the next step and so on until he reaches the top of the pay scale.

(Jt Ex 3)

AGREEMENT (1995-1999)

ARTICLE TWENTY - GRIEVANCE/SYSTEM BOARD/ARBITRATION

Section One - Procedures

. . . .

C. Cost of Arbitration. It is understood and agreed that the cost of arbitration shall be borne by the losing party.

. . . .

F. Extension of Time Frames. It is understood and agreed that, at any step of the fact finding or grievance procedure, the time limits set forth may be extended by mutual agreement between the Company and the Association, using whatever means appropriate. 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 fact finding or a grievance, the time frame for pursuing such fact finding and/or grievance, shall be extended as appropriate.

(Jt Ex 2)

EMPLOYMENT PROCESS ACKNOWLEDGMENT

I hereby acknowledge that, while I have partially completed employment processing, my employment with Southwest Airlines is contingent upon the following areas:

1) Evaluation of the Personnel/Departmental interviews

2) Successful completion of the physical exams and drug screens administered by a Southwest appointed clinic

3) Verification of application information through a background check of past employment, personal references, and education

4) Verification of my driving record

Should any of the above areas fail to meet the standards set forth by Southwest Airlines, my employment will be terminated.

(Signed by the grievant on May 11, 190)
(Co Ex 6)

THE ISSUES

1. Is consideration of the merits issue/evidence/arguments barred due to procedural infirmities as claimed by the Company?

2. If the answer to Issue 1 is in the negative, did the Association meet the necessary burden of proof to substantiate its claim that an oral contract existed establishing the grievant's start rate at $7.61 per hour; if not, what is the appropriate remedy?

DISCUSSION AND FINDINGS

The Company has raised the time lapse between the grievant's being hired and the filing of the grievance -- over six years -- as a procedural basis to dismiss the grievance without any consideration of the merits issue. It asserts that the grievant had the obligation to fully explore his claim that he had been offered a higher rate and did not do so since he did not try to determine what

was in his corporate personnel file as well as the one maintained in his work location. This presumes that the grievant could have been expected to know of -- or at least could have discovered early that such file existed. A better argument could be made that he might have learned of such circumstance as his career with the Company extended; it is not a fair assumption that he would have been aware of its existence at the time of his employment or that he would have known he could have demanded the right to see it at that time. It would also be speculative as to whether the grievant would have known that he could file a grievance as a new employee. The grievant makes no claim that any member of management led him to the conclusion that he could not do so; more likely, he would have been persuaded by a fellow employee, if anyone. The grievant indicates that he tried to pursue this matter later on, but was advised by one or more unnamed Association officials that the execution of a grievance would be futile without some concrete proof that the offer was made at the higher rate. Such advice was eminently reasonable, since he and the Association would have to bear the burden of proof that a valid and binding oral contract was made setting his starting rate at $7.61 per hour.

The grievant and Association have another burden to bear, even in light of the belated discovery of the personnel document referencing $7.61 per hour: the 1990-94

Agreement had no jointly-negotiated provision to extend time limits where salient facts or circumstances were not available. It is noteworthy that the succeeding Agreement did contain such provision. Presumably, if the right to raise a grievable issue at a future time had been implicit in the 1990 Agreement, where information relevant to it had not been available "due to circumstances beyond the reasonable control of such party," there would have been no need to negotiate such language as exists in the 1995-99 Agreement. (Jt Ex 2 - Article Twenty, Section One F.)

There is no reason to doubt the validity of the grievant's account of events concerning how/when the personnel document bearing the reference to $7.61 came to light; indeed, there is not even any basis to question the grievant's claim that the $7.61 per hour was discussed during his pre-employment interview or that he has persisted over the years in claiming such discussion was held. The problem is that it was not timely raised, given the terms and conditions of the controlling (1990-1994) Agreement, even if it is conceded that the grievant made his best effort to bring it to light as soon as possible.

While this case can be dismissed on procedural grounds, it is instructive to point out that the grievant would not prevail on the merits, even if it was deemed to be properly before this arbitrator. The parties negoti-

ated the provision establishing what the rate of pay was to be for employees on the payroll after May 17, 1990. I feel certain that the March 18, 1990 start date was not an arbitrary one picked by the Company; it obviously had economic ramifications to it. This is made even more manifest by the Company's introduction of documents showing May 18, 1990 as the start date for a number of other employees who were being processed at that time. While the Company might be faulted for adding confusion in putting May 11, 1990 on the grievant's ID as both the "issue date" and "hire date," the fact is that the Agreement reflects the joint decision between the parties as to when an employee becomes an employee -- the date he/she commences work. It is apparent that the Company took advantage of the fact that the grievant was in Dallas and went ahead and prepared his ID in advance of his commencement as an employee; presumably, it did the same for other employees who were being hired for other locations at that time. This does not alter the fact that they would not become employees until May 18, 1990. It is also reasonable to conclude that someone in management discussed a $7.61 per hour start rate with the grievant and a document was completed to that effect. The question arises as to whether the representation made by such individual, who went unnamed and unidentified, could have prevailed anyway, given the events underway in negotiations at that time relative

to the wage rate for the Ramp Agent's job and the start date for employees going into that position. The Company contends that the decision as to the outcome of such negotiations was not made until shortly before approval of the new Agreement. The grievant concedes that he was made aware of the impending change in wage rates by his brother as he was processing in as an employee. One can only speculate as to whether he would have been allowed to actually start work prior to May 18, 1990; and, it must be remembered that he formally acknowledged on that he was not yet an employee on May 11, 1990 during the processing procedure.

The Association raised a question about who prepared the second employment application (dated June 4, 1990) and the validity of the grievant's signature. It may well be that someone also prepared the employee portion of the document, but I am satisfied that the grievant signed it. It is not clear why the Company felt compelled to retain the early application with the $7.61 rate of pay notation. Obviously, it became the basis for the matter now before this tribunal.

In sum, while I will dismiss this matter on the basis of the lack of contractual language extant at the time recognizing the right of the grievant to do so as he did; I have also taken pains to explain why it would not have prevailed had it been decided on the merits.

AWARD

Grievance is dismissed on the basis that the 1990 Agreement did not recognize an employee's right to raise a claim and particularly given the passage of time that occurred; moreover, the grievant was not affirmable on the merits, if it had been properly before the arbitrator.

James F. Scearce
Arbitrator

Date: February 8, 1997