BEFORE

WILLIAM H. LEMONS

IMPARTIAL ARBITRATOR

In the Matter of Arbitration between	)	Case No. TWU-ALL-5001/13
	)	
Southwest Airlines Company Dallas, Texas	))	
	)	
And	)	Group Grievance
	)	
Transport Workers Union of America, AFL – CIO Local 555, Representing Ramp, Operations, Provisioning and Freight Agent Employees	))))	Basic Principles of Conduct #41

OPINION AND AWARD OF THE ARBITRATOR

January 17, 2014

ARBITRATION AWARD

By the terms of the Collective Bargaining Agreement (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' August 26, 2013 letter. A hearing was held at the Wyndham Dallas Love Field on October 3, 2013. The parties were afforded full opportunity for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments. The Union tendered some six exhibits into evidence, as well as some photographs describing the work situation implicated by this dispute. The Company introduced four exhibits. Together, the parties introduced two joint exhibits, consisting of the Collective Bargaining Agreement ("CBA") and the grievance package (Jt. Ex. 2). They also introduced their written Stipulations, which I gratefully accepted. This matter was declared closed on November 8, 2013, the date that Post-Hearing Briefs were received. In addition to the Official Record in this matter, consisting of some 175 pages, I have been provided and have carefully considered two earlier arbitration decisions that I refer to hereinafter.

APPEARANCES:

FOR THE COMPANY: Kerrie V. Forbes
Senior Attorney

FOR THE UNION: Jerry McCrummen
Vice President, TWU Local 555

IMPARTIAL ARBITRATOR: William H. Lemons
4040 Broadway, Suite 616
San Antonio, Texas 78209

ISSUE: Did the Company violate the parties' Collective Bargaining Agreement ("CBA") by issuing Basic Principles [of Conduct] #41? If so, what is the proper remedy?

TIME FRAME ISSUES: There were no timeliness/time frame issues, so I will simply refer to the grievance package (Jt. Ex. 2) for applicable dates, the same being incorporated herein by reference as though fully set forth *verbatim*. The parties had agreed to skip the System Board, and further stipulated that this grievance was properly before me for final and binding decision. The parties also stipulated that all Company documents presented as exhibits without objection from the other party shall be considered as entered into evidence. All Stipulations were received and accepted.

PROVISIONS OF THE LABOR AGREEMENT:

Preamble

This Agreement is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between Southwest Airlines Co. (hereinafter referred to as the "Company" and/or "Southwest") and the Transport Workers Union of America, AFL-CIO Local 555 (hereinafter referred to as the "Union"), representing the class and craft of Employees recognized by the Company as Ramp, Operations, Provisioning, and Freight Agents.

Article 2 – Scope of Agreement

C. **Reasonable Work Rules**. Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued by proper authority of the Company which are not in conflict with the terms and conditions of this Agreement and which have been made available to covered Employees and the Union Office prior to becoming effective.

D. **Management Rights**. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

Article 17 – Safety and Health

F. **Company Provided Equipment**. The Company shall furnish, without cost to the Employees, all safety equipment such as, rain gear, ear protectors, gloves, knee

pads, high visibility garments and headsets. The Employees shall use or wear such devices in performing their work.

Article 20 – Grievance/System Board/Arbitration

Discharge and Discipline - Section One - Procedures

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

L. **Interpretation/Application of Agreement**.

14. 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. . . .

(Jt. Ex. 1)

OTHER PERTINENT INFORMATION

GROUND OPERATIONS EMPLOYEE HANDBOOK
Ground Operations – Basic Principles

3.2 Basic Principles of Conduct

Each Employee is expected to be familiar with and adhere to all Company policies and procedures. Any violation of the following will be grounds for disciplinary action. Discipline may range from a reprimand to discharge, depending on the particular violation and the circumstances. The following list is meant to be representative only, and in no way is it intended to be a complete list of all violations of our Basic Principles of Conduct. . . .

12. Abuse or destruction of Company property. Converting to your own use, including sale or purchase of any Company property from the premises without proper approval of the Company.

13. Act of theft or dishonesty, including knowingly presenting the Company falsified documents.

. . .

16. Failure to immediately report to your Supervisor an accident or incident involving personal injury or damage to equipment, facilities, aircraft, and/or other property in the workplace shall warrant termination.

. . .

41. Failure to care for and maintain Company-issued equipment or failure to return/exchange Company-issued equipment upon request.

(Co. Ex. 1)

STATEMENT OF FACTS

On July 25, 2013, two Memoranda were issued to the Union under the letterhead of Chris Wahlenmaier, Vice President – Ground Operations, and Mike Hafner, Vice President – Cabin Services.[1] One memo involved a revision to Basic Principles of Conduct (hereafter, "BPC") #16, pertaining to "Failure to Report Injury or Damage." (Co. Ex. 2). The other, which is the subject of this arbitration, involved the implementation of an entirely new BPC #41. There had been some preliminary discussions between Bill Venckus and Jerry McCrummen before the Memoranda were actually sent, but it is obvious that the subject matter had not been entirely vetted, and these discussions, while healthy, may have raised more questions and suspicion than they alleviated. Without conceding that it had to bargain with the Union (or for that matter, even discuss these two topics), it seems it was the Company's intent to at least allow that opportunity, and perhaps even have the matter decided in arbitration if necessary, before fully implementing the new BPC.[2]

[1] Unfortunately, neither of these individuals testified at the hearing in this case.

[2] This Arbitrator paused his hearing in this matter to allow the parties to discuss BPC #41 further, at the Arbitrator's insistence. In so doing, he did not imply that there was a duty to bargain about this subject, or that the Company was free to unilaterally implement a work rule. The Arbitrator insisted on the discussions in an effort to see if the parties could come to an amicable agreement (without conceding that they did or did not have to do so), because after some five hundred hours of advanced mediation training, this Arbitrator realizes that the parties to a dispute will generally come up with a more workable and satisfactory solution than some impartial neutral who does not have a dog in this fight.

On August 8, 2013, Jerry McCrummen sent a letter to Bill Venckus addressing the revised BPC #16. That communication reflected the Union's concerns, and advised that the revised verbiage, when applied to a discharge penalty, could well be a violation of the CBA. However, the implementation of BPC #16 was not then grieved, the intent being that each application of the revised rule will have to be judged on a case by case basis to determine if a grievance was then warranted. (Co. Ex. 3). BPC #41 did not fare so well. It became the subject of a grievance dated August 1, 2013. (Jt. Ex. 2).

POSITION OF THE UNION

The Union recognizes that it has the burden of proof to show this Arbitrator that the CBA was violated in the manner alleged. The Union's position on this grievance may be summarized as follows:

a. There has been similar language in Article 17 of the CBA at least since 1976. In the negotiations leading up to the 1995-1999 CBA (the "Blue Contract"), the Company accepted without quibbling the Union's proposal concerning sub-paragraph F, and that language remains intact today;

b. The Company attempted to justify its unilateral implementation of BPC #41 by unsubstantiated economic data and innuendo about costs, theft and abuse pertaining to Personal Protective Equipment ("PPE"), a major target of the new BPC. That by placing the threat of disciplinary action into the equation, the Company is, in effect, putting a "cost" on the employee and that is prohibited by Article 17;

c. By implementing BPC #41, the Company is making a clear, unambiguous and negotiated part of the CBA more restrictive. That constitutes a change in work rules during "Section 6" negotiations, and thus is a violation of the Railway Labor Act;

d. This unilateral change is working conditions is prohibited by the decision in *Southwest Airlines/TWU Local 555, Group Grievance 5000, Plane-Side Scanning*, 2012 (Neumeier).

POSITION OF THE COMPANY:

Not so, says the Company. Its position in this matter may be summarized as follows:

a. Article 2 of the CBA grants to the Company the express and bargained-for right to issue reasonable work rules so long as those rules are not in conflict with the terms and conditions of the CBA. BPC #41 is reasonable and not in conflict with the CBA;

b. The Company has a long history of unilaterally issuing work rules similar to BPC #41 (e.g. BPC #12, #13 and #16, set forth above), and those have not been challenged or otherwise found to be violations of the CBA;

c. Here, BPC #16 was promulgated on the same day, and the Union has not grieved it. Because of its subject matter, and the manner in which it was promulgated, this should be binding on the issues pertaining to BPC #41;

d. The Company's unilateral issuance of BPC #41 does not implicate the Railway Labor Act, and certainly did not violate any legal obligation "to maintain the 'status quo' under the Railway Labor Act;"

e. The Union has jumped the gun. As with the other BPC, failure to comply with BPC #41 may result in discipline, depending upon the circumstances. While the employee might be disciplined for failing to take care of Company-issued equipment, the employee "would not be charged for the cost of such equipment." Company's Post-Hearing Brief, page 1). And if the Company were to ever apply BPC #41 in an unreasonable or unfair manner, then the Union would have a right to file a grievance on that basis.

OPINION OF THE ARBITRATOR

Both parties did a fine job in presenting their respective views on this dispute. I am always impressed by the zeal and enthusiasm that Mr. McCummen and Mr. Cerf pour into their efforts on behalf of their membership. I am likewise impressed with the seriousness with which Ms. Forbes and Mr. Venckus take these matters. It is a pleasure to hear a case where capable representatives present a good case using credible witnesses – witnesses who tell the truth. It says a lot about the culture of the Company and the Employees, and speaks highly of the professional relationship between the Company and TWU Local 555. Unfortunately, there must be a winner and so too a loser, as it is not my job to split the baby.

First, let me dispel any notion that the unilateral promulgation of BPC #41 violated the Railway Labor Act. As Witness Harris explained, Section 152 of the Act, in the sub-section that

explains the "status quo" obligation under Section 156, says that changes in rates of pay, rules or working conditions may only be accomplished in two ways. One, where the CBA provides the authority to implement and change a work rule. Second, if that option is not applicable, the change may only be accomplished by collective bargaining. "A union cannot freeze the status quo by demanding negotiations over something that the carrier is entitled to do unilaterally either because the collective bargaining agreement authorizes the carrier to do it or because it is within the carrier's 'management prerogatives.'" *Chicago & North Western Transportation Co. v. Railway Labor Executives Ass'n.,* 908 F.2d 144, 151 (7th Cir. 1990). In this instance, I find that the CBA authorizes the Company to unilaterally issue reasonable work rules under its Management Rights authority, so long as they are not in conflict with the terms and conditions of the CBA. That is the *status quo.*[3]

Next, let me talk about what impact Arbitrator Neumeier's decision in the Plane-Side Scanning Grievance has on my decision in the situation before me. I have carefully studied her decision. I respect her opinion, and although I do not have the benefit of her official record before me and have not heard the testimony, I most likely would have reached the same or a very similar result. That grievance arose when the Company decided to require, for the first time, that Ramp Agents use a device (PSCS system) to scan each bag as it was being loaded onto the aircraft. After studying the April 30 and May 1, 2008 bargaining session notes, it became apparent to Arbitrator Neumeier that the parties had, in fact, engaged in collective bargaining on precisely that topic. Between May 8 and May 15, 2008, for example, it was apparent that Mike Ryan was trying to

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[3] It is likely, although I need not decide the issue, that even had the provisions of BPC #41 been found to be in conflict with the terms and conditions of the CBA, such would have generated a grievable dispute, and not a violation of the Railway Labor Act. Remember that a violation of 45 U.S.C. Section 152, Seventh, carries serious criminal penalties. But here, for reasons explained later, I find that BPC #41 *on its face* does not conflict with the terms and conditions of the CBA.

interject "ramp-future scanning at gate" into the bargaining process. The Company apparently achieved scanning at T-point, and could have Agents resticker at T-point, but there was no agreement on plane-side scanning then or in a later attempt to have such legitimized by side letter of agreement. Arbitrator Neumeier specifically found that "[a]fter describing an upcoming test [of the new system] Ryan states '[a]t the conclusion of the test, if successful, the Company *will meet and agree* with TWU 555 on a side letter of agreement that will capture this work as work belonging to the Southwest Airlines Ramp personnel *in accordance to the current agreement.'"* This on the heels of a salutation from Mike Ryan that begins: "Thanks for the opportunity to meet and discuss the *bargaining concept* of scanning bags gate side." Arbitrator Neumeier concludes:

> *The record in this case establishes that during the 2008 negotiations the Company sought broad changes in Article Five of the CBA that were rejected by the Union. The changes ultimately agreed to did not encompass the Company's use of plane-side scanning because there were too many unanswered questions and the parties agreed to continue negotiations on thas aspect of the Ramp Suite. Implementation of plane-side scanning would alter the working conditions of Ramp Agents as set forth in Article Five, Section One of the CBA. Therefore, unilateral implementation of plane-side scanning is a violation of the CBA. The grievance will be sustained.*

In the case before me, we don't have that bargaining history. In our case, the Union's evidence establishes that nothing like BPC #41 was ever discussed in negotiations. (TR. P. 100, ll. 1-18). Ever. Jerry McCrummen's notes from the bargaining sessions verify that. That is also his testimony. (TR. P. 29, ll. 3-10). So while the parties may have combined two provisions into one, and perhaps added some PPE descriptions or equipment to what is now subsection F, there is no discussion of anything remotely resembling BPC #41, much less having to turn in equipment, maintain or otherwise account for it. And so Witness Cerf distinguishes the Neumeier decision:

Q. (Ms. Forbes) The plane-side scanning was specifically a topic of negotiations, correct?

A. (Mr. Cerf) Which time?

Q. And that was part of the decision from the arbitrator was that it was something that had been discussed in negotiations, correct?

A. That's correct.

Q. Okay. And with regard to Work Rule [BPC] 41, you've already testified there's been no discussion of that in negotiations, correct?

A. I didn't change my testimony.

(TR. P. 122, l. 17 to P. 123, l. 2)

Next, let me carefully note that just because the Union did not grieve the revisions to BPC #16 does not mean that BPC #41 is somehow magically made legitimate, or that the Union is now estopped to complain about BPC #41 promulgated the same day. Nothing could be further from the truth. The language, bargaining history and sensitivity to the Union's position and concerns is different as to each BPC. There could be any number of reasons why the Union notes its objections and concerns for one work rule, and takes the other one on by grievance. I want to again admonish both parties that to try to make something out of an amicable resolution, non-precedential grievance settlement or apparent surrender of a position, and then attempt to convince an Arbitrator that such is controlling or binding, can be very dangerous. It should be obvious that if amicable resolutions, non-precedential grievance settlements or apparent softening of positions begin to have a toll, they are going to begin to disappear. Everything will be a battle. And so I view the position that the Union took on BPC #16 as being neither here nor there, as pertains to the case before me. Let's not penalize Mr. McCrummen for being reasonable. And let's not cast aspersions on management if it agrees to back off a termination because someone made a mistake.

In response to a question from this Arbitrator, Witness Cerf agreed that BPC #12, BPC #13 and BPC #16 in their own ways covered the substance of BPC #41. They did the same thing. (TR. P. 123, ll. 21-25). Well, if the Company can unilaterally promulgate those BPC's, that admittedly

cover even the PPE that is the subject of Article 17, then why is BPC #41 then in conflict with the terms and conditions of Article 17? Other examples abound:

- In Article 18.F. of the CBA, it is clear that the parties negotiated that qualified employees were to be given airline trip passes. Yet BPC #17 and BPC #29 both regulate how those passes may be sued, with the penalty for an infraction being termination. Is this a violation?
- In Article 17.E. of the CBA, bargaining led to the obligation that safety issues and malfunctioning and/or inoperative tools or equipment be reported. Yet, BPC #16 provides for a penalty of termination if that is not done. Violation?
- Similarly, Article 18.B. provides that employees shall have the right of reasonable tobacco use during hours of duty. Yet, as per BPC #5, smoking is permitted on breaks only. Again, is this in conflict with a negotiated term or condition?

These and other comparisons lead me to conclude, based upon the entire record before me, that BPC #41 does not conflict with any term or condition contained in the CBA, and particularly not with anything found in Article 17.

I also find on this record that BPC #41 is, *on its face,* a reasonable work rule.[4] Witness McCrummen conceded that it "is a reasonable request, to take care of equipment you've got." (TR. 49, ll. 3-5). The reason the Company implemented (or plans to implement) BPC #41 is in an effort to reduce costs. I find that to be a "reasonable Company rule" as envisioned by Article 2.C. of the CBA. We should note for the record two very important facts established in this arbitration. First, the message is "guys, take care of your equipment, and there *may be* consequences if you don't." The consequences would be on a case-by-case basis, but "I don't think the Company would ever be permitted to require the employee to incur the cost of repairing or replacing equipment." (Witness Harris, TR. P. 171, ll. 9-16). And Mr. McCrummen has had much the same

[4] Mind you that nobody appointed me to be Sheriff over what may be dumb, ineffective or poorly conceived. My jurisdiction is pretty limited. There may be other ways to accomplish the intended result. It may be that the carrot is more effective than the stick. An example of this, for instance, is that good attendance is rewarded under the Earned Award Program by granting personal days off. Perhaps if a station or shift or other work subdivision used significantly less Company-issued equipment, there could be some incentive. But those issues are not before me.

discussion with Bill Venckus, and has been told "they're not going to be charged. . ." (TR. P. 49, ll. 12-14). These facts form much of the underpinning for my decision.

I said that BPC #41 appears to be a reasonable work rule *on its face.* It remains to be seen, and will have to be judged on a case by case basis, whether the rule is reasonable *as applied.* As Witness Venckus explained:

Q. (Ms. Forbes) So, there was some testimony by the union of concern that if I lose my gloves and I don't have them to swap, I won't be able to get a new pair. Is that how you envision this work rule working so that if I lose my gloves I'm stuck, I can't get a new pair?

A. (Mr. Venckus) No, not at all. The exchange would be just an accounting of how many times you're doing that exchange, but we'll always give you a set of new gloves. I mean, by contract we have to provide the safety equipment.

Q. And will you charge for those new gloves?

A. No.

Q. Even if I've lost five pairs in a week, you're still not going to charge?

A. No.

Q. Okay. How will you decide what's the appropriate level of discipline to issue if someone is failing to take proper care of the equipment that's issued to them?

A. ***There's so many hypotheticals it's hard to just say one way to handle it. I think it's – the way I envision it is it's going to depend on the circumstances and the employee and what has happened or what is – we're going to have to investigate to figure out what has happened and the circumstances involved.***

(TR. P. 137, l. 23 to P. 138, l. 24)

So let's say that sometime down the road, Employee [redacted] is charged with a violation of BPC #41, and the penalty is termination. Let's look at the factors that are normally applied in such a case. *Southwest Airlines/TWU Local 555, PBI-R-0419/11, Termination –* [redacted] 2011

(Fragnoli). Did Employee [redacted] commit the forbidden act? What was the forbidden act? His gloves blew off or someone took them. Violation? Did Employee [redacted] have adequate notice of BPC #41 and what it covers? I understand what means "failure to return," but what does "failure to maintain" mean? Even Witness Venckus admits that as of now, the Company is not clear on what it covers. Did the training explain to the affected employees precisely what BPC #41 encompasses? Was the decision to terminate Employee [redacted] arbitrary or capricious? Why would one terminate a 19 year employee for not being able to return a used pair of gloves in order to get another pair? Was Employee [redacted] treated in a discriminatory or disparate manner? Here is where I anticipate we will have some issues. Recall Witness McCrummen's testimony to the effect that he trusted Bill Venckus' roll-out and explanation of this BPC in Dallas, but that it might not be explained, administered or applied the same in remote locations. This Arbitrator is not going to uphold a work rule that is not applied uniformly. And last, did mitigating circumstances exist to warrant modifying the discipline? Or put another way, did the punishment fit the crime? Look at Witness [redacted] testimony. (TR. P. 62, ll. 18 to P. 66, l. 18). Might it be the case that raingear or a pair of old gloves might fall victim to efforts to work flights efficiently and on time? Because of running from gate to gate and the demands of the job? It would be hard to uphold Employee [redacted] discharge under these facts. We will just have to wait future developments to see if BPC #41 is a reasonable work rule *as applied.*[5]

The whole nuts and bolts of this case is whether the Company violated the CBA by implementing something that it and the Union already negotiated in Article 17, adding to it. I find that not to be the case in this situation, for all the reasons discussed above.

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[5] And it is for that reason that I cannot speculate on possible ramifications of this BPC, as apparently Arbitrator Barnard was charged to do in *Southwest Airlines/TWU Local 555, ALL 1000/09, Group Grievance – Supervisors Performing Covered Work,* 2009 (Barnard).

AWARD

I find that the Company did not violate the parties' Collective Bargaining Agreement ("CBA") by issuing Basic Principles [of Conduct] #41. After careful consideration of all the oral and written arguments and evidence, and for the preceding reasons, the Arbitrator finds that the grievance should be and 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.

Signed this 17th day of January, 2014, at San Antonio, Texas.

WILLIAM H. LEMONS, Arbitrator