ARBITRATION
OPINION AND AWARD

In The Matter of Arbitration

Between

SOUTHWEST AIRLINES CO.

And

TRANSPORT WORKERS OF AMERICA, LOCAL 555

(Gr. No. TWU-ALL-5002/16; Arbitrator Removal)

Hearings Held

December 5, 2016

Doubletree Hotel, Love Field
3300 Mockingbird Lane
Dallas, Texas 75235

Arbitrator

Steven Briggs

Appearances

For the Company:

Kevin Minchey, Esq.
Assistant General Counsel
Southwest Airlines Co.
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For the Union:

Cortney Thomas Heywood
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2608 Inwood Road, Suite 150
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BACKGROUND

The present dispute concerns whether Southwest Airlines Co. (the Company) violated its collective bargaining agreement with Transport Workers Local 555 (the Union) when it removed Arbitrator Daniel F. Jennings from the parties' Arbitration Panel on July 27, 2016. These proceedings arose from the following grievance, filed by Union Vice President Cortney Heywood on August 8, 2016:

> Statement of Grievance:
>
> The Company is in violation of the current CBA between Transport Workers Union (TWU) and Southwest Airlines (SWA) by removing Arbitrator Daniel Jennings without allowing him to hear a case prior to his removal. While Arbitrator Jennings has been assigned a case, he has not heard one and there is a chance for resolution in the case he has been assigned.
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> Remedy or Settlement Sought:
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> The Union seeks to have the Company cease and desist violating the contract by removing Arbitrators prior to allowing them to hear a case. The Union seeks the reinstatement of Daniel Jennings to the panel between the TWU 555 and Southwest Airlines. (JX-3)

When the parties' internal grievance resolution mechanisms did not result in settlement, they appointed Steven Briggs to conduct an arbitration hearing and issue a final and binding decision. The hearing was held on December 5, 2016, during which time both parties were afforded full opportunity to present documentary evidence and testimony in support of their respective positions. The hearing was transcribed.

The parties submitted Post-Hearing Briefs to the Arbitrator on January 20, 2017, whereupon the record was closed.

THE ISSUES

At the hearing the parties placed the following issues before the Arbitrator for final and binding resolution:

1. Did the Company violate the contract by removing Arbitrator Jennings from the panel on July 27, 2016?[1]

2. If so, what is the remedy.

PERTINENT AGREEMENT PROVISIONS

ARTICLE TWENTY – GRIEVANCE/SYSTEM BOARD/ARBITRATION
DISCHARGE AND DISCIPLINE

SECTION ONE – PROCEDURES

. . .

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. . . .

13. A panel of Arbitrators is hereby established for the purpose of adjusting and deciding disputes or grievances which may arise under the terms of this Agreement and which are properly submitted following a System Board of Adjustment. The following rules and procedures shall apply:

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[1] Under Article 20, §1.L.13.a of their collective bargaining agreement the parties have established a "panel" of eight arbitrators, with four selected by each party. Section1.L.13.c provides that "an Arbitrator may be removed from the panel by a unilateral decision of either of the parties to the Agreement. Should an Arbitrator be removed, the party initially appointing him/her "will name a replacement." That provision continues with this language: "The replacement Arbitrator may not be removed by either party until he has heard at least one case." (JX-2, p. 62)

a. The panel will consist of eight (8) Arbitrators, four (4) to be selected by each party (sic) Arbitrators will be set in order, and used in turn as cases are requested. If the Arbitrator scheduled to hear the case is not available within sixty (60) calendar days from the arbitration request, the next Arbitrator up on rotation will be contacted to hear the case. This procedure shall continue until an Arbitrator is available within the aforementioned time constraints.

b. Once the Union notifies the Company of the request for arbitration, within three (3) working days, the Union will request in writing, with copy to the Company, a list of available dates from the next Arbitrator in the rotation. After the Arbitrator provides the list of dates, the Union and the Company will alternately strike dates until one date remains, which will be the date of the hearing. The first strike will go to the side that did not place the Arbitrator on the panel. The process will not take more than five (5) working days after receipt of dates from the Arbitrator. If the Arbitrator scheduled to hear the case has fewer than three dates available within the specified time frames, the next Arbitrator up on rotation will be contacted to hear the case.

c. Arbitrators selected for the panel shall serve for the duration of the Agreement; however an Arbitrator may be removed from the panel by a unilateral decision of either of the parties to the Agreement. Should any member be removed, or be unable to serve for the remainder of the length of the Agreement, the party who originally selected the Arbitrator will name a replacement. The replacement Arbitrator may not be removed by either party until he has heard at least one case. Once an Arbitrator is removed from the panel he cannot be returned to the panel for the duration of this Agreement.

. . .

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.

. . .

THE PARTIES' POSITIONS

Company Position

The Company maintains that it did not violate the contract by removing Arbitrator Jennings from the panel on July 27, 2016. Its main arguments in support of that position are summarized here:

1. Under the predecessor collective bargaining agreement, either party could unilaterally remove arbitrators from the panel, but their replacements had to be "mutually acceptable". That requirement often prevented the parties from adding replacement arbitrators to the panel. Indeed, prior to ratification of the current contract there were only two arbitrators serving on the panel (CX-4, Tr. 47-48, 67).

2. During negotiations for their 2016-2021 Agreement, the Union proposed that a "replacement Arbitrator may not be removed by either party until he/she has made a ruling on at least one case." (CX-1, Tr. 52). The Company rejected that proposal and countered with this language: "the replacement Arbitrator may not be removed by either party until he/she has heard at least one case." The Union agreed to that proposal, and the parties removed the prior "mutually acceptable" requirement for appointing replacement arbitrators to the panel. Company negotiator Michelle Jordan testified in these arbitration

proceedings that the Company understood the term "heard a case" to mean that the record would be opened (Tr. 57-58, 64).

3. Shortly after the new contract became effective, each party appointed four arbitrators to the panel. No "mutually acceptable" standard for that action was required either. One of the Union's appointees was Arbitrator Daniel Jennings, who had been removed from the panel by the Company under the parties' 2008-2011 Agreement.

4. Mr. Jennings was subsequently assigned to adjudicate Grievance No. 5000/16. The matter was scheduled for a July 6, 2016 arbitration hearing (CX-6). The parties met with Arbitrator Jennings that day, a court reporter was present, and the record was opened to introduce some joint exhibits and define the issue(s) to be decided. Also in that record is a lengthy discussion among the advocates and Arbitrator Jennings about the purpose of the hearing before him that day (UX-2). After that discussion the two advocates left the room and discussed the matter between themselves. They returned shortly thereafter, went back on the record, and announced that they had agreed to adjourn the hearing. They also indicated that Arbitrator Jennings would retain jurisdiction over Grievance 5000/16, should the hearing before him be reconvened at a later date (UX-2, at 27).

5. On July 27, 2016 the Company notified Arbitrator Jennings (with a copy to the Union) that it had decided to remove him from the TWU Local 555 arbitrator panel. The letter indicated as well that though

he would not be assigned any future cases, he still had jurisdiction over Grievance No. 5000/16, and that the parties would reach out to him in the near future to discuss how to best proceed with that grievance.

6. On August 29, 2016 the Union notified Arbitrator Jennings that the Grievance No. 5000/16 hearing would be reconvened on October 6, 2016.[2] Arbitrator Jennings and the parties completed the hearing that day. The parties subsequently filed Post-Hearing Briefs, and Mr. Jennings issued a December 16, 2016 decision on the matter. The Company subsequently filed an action in federal court to have it vacated.

7. The collective bargaining agreement clearly indicates that only "replacement arbitrators" are required to hear at least one case before being removed from the panel. Arbitrator Jennings was not a replacement arbitrator; rather, he was one of the Union's four original panelist selections under the 2016-2021 Agreement. Thus, there was no contractual requirement that he hear at least one case before being removed.

8. Union witness [redacted] was present during the negotiations leading to the current language of Article 20. He testified that the intent of that language was that all arbitration panelists had to hear and rule upon at least once case before being removed (Tr. 38-39). But the Company rejected that Union proposal during negotiations, and

[2] Citing Union Exhibit 5, the Company indicated on p. 5 of its Post Hearing Brief that the Union's notification to Arbitrator Jennings was dated August 26, 2016. In fact, Union Exhibit 5 bears the date of August 29, 2016.

the proposed language was not even followed by the Union itself when it notified the Arbitrator in the present case on December 9, 2016, even before the parties had filed their Post-Hearing Briefs, that the Union had removed him from the panel.

9. Even if there were a contractual requirement for Arbitrator Jennings to hear a case before being removed from the panel, that requirement was clearly met. As noted, the parties met with him on July 6, 2016, with a court reporter present, and the record was opened. Both sides were ready to call witnesses and proffer evidence. The fact that they chose not to do so does not justify the conclusion that no hearing was held.

10. Article 20 does not define the phrase "heard at least one case", and the parties did not indicate in negotiations that it meant an arbitrator had to hear all the evidence. The dictionary definition of "heard" is "listen to" or "be made aware of." On July 6, 2016 Arbitrator Jennings listened to and was made aware of the parties' positions regarding the issues placed before him for decision.

11. The July 6, 2016 hearing was "adjourned" by the parties, and they stipulated that Arbitrator Jennings would retain jurisdiction. In fact, he subsequently heard the parties' complete evidence, the record was closed, and he rendered a decision. Furthermore, the Union has presented no evidence that it was in any way prejudiced by the Company's July 27, 2016 removal of Arbitrator Jennings from the panel.

12. The Arbitrator should dismiss the grievance in its entirety.

Union Position

The Union asserts that the Company violated the contract by removing Arbitrator Jennings from the panel on July 27, 2016. Its main arguments are summarized here:

1. Arbitrator Jennings met with the parties on July 6, 2016 to conduct an arbitration hearing. Before opening statements were even made by the parties, the hearing was delayed at the Company's request so as to wait for a decision from another arbitrator in a somewhat related case.

2. The parties' mutual intent in amending Article 20 during negotiations leading to the 2016-2021 Agreement was for all arbitrators on the panel to hear at least one case. After all, with an 8-person panel, each side gets four original appointments. Under the Company's view of this case, either side could simply remove the other's four appointments before they had heard even one case, with the other side having no recourse. Obviously, such a system could be abused by either party.

3. Arbitrator Jennings was removed prior to hearing a case. And when the Company removed him on July 27, 2016, it had no way of knowing that he was ultimately going to finish hearing the case the parties had begun to present to him on July 6, 2016. In fact, Mr.

Jennings did not complete that hearing until October 6, 2016 --- 93 days following his removal by the Company.

4. Union witness [redacted] testified under oath in these proceedings about the Article 20 negotiations. Here is exactly what he said:

> So we were running short on arbitrators to hear cases and with a backlog of cases, and that's why the language was changed. And the agreement was that either side could pull either side's choice as an arbitrator but not until they heard a case. And that would have included all arbitrators on the panel. (Tr. 41)

5. The change in language about arbitrator appointment was made because the parties became locked in a drawn out contractual dispute and were having trouble getting each other to approve the arbitrators they each had requested. To solve that problem the parties agreed that each side could appoint whomever it wished to the panel. The simple caveat was that each arbitrator must get to hear one case. Without that last point, the revised Article 20 language would accomplish nothing. Indeed, it would encourage game playing with the system.

6. The Company is playing games with the system, and the Union has a duty to police it.

7. The grievance should be sustained. As a remedy, Arbitrator Daniel Jennings should be returned to the panel to hear at least one additional case outside of Grievance No. 5000/16.

OPINION

Preliminary Comments

In the interest of complete candor with the parties, at the outset of this Opinion I am compelled to comment on a very sensitive issue. After our December 5, 2016 hearing, and prior to the parties' filing of their timely Post-Hearing Briefs on January 20, 2017, I received a letter from Union Vice-President Cortney Heywood notifying me that "the Union has notified the Company of its decision to remove you from the TWU Local 555 Arbitrator panel."

I cite that fact only to underscore my support of the Union's right to take the action it did. Article 20 permits either party, with certain limitations that will be discussed momentarily, to remove an arbitrator from the panel. The contract does not require the removing party to provide a reason. I further note that after the Union exercised its legitimate contractual removal authority here, neither party asked me to recuse myself from issuing this Opinion and Award. Indeed, they both filed timely Post Hearing Briefs about six weeks later and neither of those documents raised a question about my continuing neutrality.

Suffice it to say that my own removal from the parties' arbitration panel had absolutely no effect on my neutral perspective in this case. Arbitrators come and go from bilaterally-appointed panels all the time. It is a fact of arbitral life --- including my own. My participation in one more or one less arbitration panel makes absolutely no difference to me.

Having dispensed with the elephant in the room, I turn now to the merits of the present agreement interpretation dispute. In such cases the grieving party (usually the union) has the burden of proof. Here, then, the Union must demonstrate by a preponderance of the evidence that the Company violated the contract by removing Arbitrator Jennings from the panel on July 27, 2016.

The Agreement Language

The contractual crux of this case is found in Article 20, §1.L.13.c. It provides that "an Arbitrator may be removed from the panel by a unilateral decision of either of the parties to the Agreement. Should an Arbitrator be removed, the party initially appointing him/her "will name a replacement." That provision continues as follows: "The replacement Arbitrator may not be removed by either party until he has heard at least one case." That language clearly identifies "replacement" arbitrators as being in a different class from the one occupied by arbitrators originally appointed by the parties to fill previously vacant panel slots from which no arbitrator has been removed. Moreover, the parties encapsulated in one sentence the way in which they mutually intended to govern the removal of "replacement" arbitrators, indicating that they may not be removed until they have "heard at least one case."

If the parties also mutually intended that originally appointed arbitrators could not be removed until they have "heard at least one

case", they should have said so. Indeed, had they said "An" arbitrator may not be removed until he/she has heard at least one case, the Union's position here would have some contractual backing. But that is not what the parties said.

In explaining its position, the Union deftly noted that the revised Article 20 language was mutually intended to help the parties more quickly and lastingly populate their arbitration panel. That appears to be an accurate representation, given that the parties removed the "mutually acceptable" criterion for appointing arbitrators to the panel. They also agreed on new contract language to ensure that certain arbitrators were guaranteed the opportunity to hear "at least one case." As noted, they specifically characterized such persons as "replacement" arbitrators.

Overall, the revised language of Article 20 mirrors what appears to have been the parties' mutual bargaining table intent: (1) it accelerated and simplified appointment to the panel by removing the "mutually acceptable" requirement; and (2) it ensured that "replacement" arbitrators would last longer --- i.e., they could not be removed until they had "heard at least one case."

The Bargaining History Evidence

Both parties submitted evidence of what was said and done at the bargaining table. Thus, even though the language of Article 20 itself

lends strong support to adoption of the Company's position, I am duty-bound to consider the bargaining history evidence in the record.

In its December 5, 2012 proposal to the Company, the Union separated "replacement" arbitrators into a class by themselves. That is, it demanded that they could not be removed from the panel by either party until they had "made a ruling on at least one case." Though the Union later abandoned that position, the fact that it was obviously limited to "replacement" arbitrators lends credence to the Company's position that the current Article 20 was meant to administer the removal of originally-appointed arbitrators and that of replacement arbitrators differently.

Union Vice President Cortney Heywood also served as a witness in these proceedings. He testified about some of his research into the merits of the grievance, and claimed that he found Union negotiation notes which indicated that Company Labor Relations official Mike Ryan had said the contract language in question here "was going to pertain to all arbitrators, replacement or not." (Tr. 30) Unfortunately, Mr. Heywood did not bring those negotiation notes with him to the December 5, 2016 arbitration hearing, and said he "would have to find them." (Tr. 30) Those notes were not produced by the Union, presumably despite Mr. Heywood's good-faith efforts to find them. I cannot therefore in good conscience assign any weight to Mr. Heywood's testimony on that

important point. And, again, the fact remains that the language of Article 20 itself does not support Mr. Heywood's assertion.

[redacted] was present in the parties' contract negotiations over the arbitrator removal issue. He testified that the "intent of the negotiations ... was that every single arbitrator upon implementation was to hear at least one case and rule a decision on it before either party could remove them." (Tr. 38) While [redacted] seemed sincere in that assertion, there is no specific documentary evidence in the record to support it. [redacted] also claimed to have notes from the negotiation session in question about what Mr. Ryan allegedly said on behalf of the Company, but he said he did not have those notes "directly in front of him."[3] He also testified that the parties had agreed that every arbitrator on their panel must hear and rule upon at least one case before being removed. That last point is inaccurate, as the parties did not adopt the Union's bargaining table proposal to that effect.

Overall, the bargaining history evidence presented by the Union is insufficiently persuasive to support its position that the parties mutually intended for all arbitrators, whether replacements or not, to hear at least one case.

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[3] [redacted] testified by telephone from a location other than the arbitration hearing room.

Concluding Comments

When Arbitrator Jennings was removed from the panel by the Company on July 27, 2016 he was not a replacement arbitrator. He was one of the Union's original picks, having been originally appointed on March 17, 2016 to the panel assembled by the parties under their new February 19, 2016 through February 18, 2021 collective bargaining agreement (CX-4; JX-1). Accordingly, he was not entitled under Article 20, §1.L.13.c. of that Agreement to hear "at least one case".

Having reached the foregoing conclusion, the question of whether Arbitrator Jennings actually heard a case on July 6, 2016 is moot, as is the Article 20 significance of the hearing he ultimately conducted on October 6, 2017 in that same case. Accordingly, there is no need for me to address those issues.

I also note that Article 20, §1.L.15 prohibits arbitrators from changing or adding to the terms of the parties' collective bargaining agreement. Were I to rule for the Union here, I would be adding something to Article 20, §1.L.13.c that simply isn't there. As noted, I am contractually prohibited from doing so.

Finally, following up on what was said in the introductory comments of this Opinion, I have concluded that the Union has not met its burden of proof in this agreement interpretation dispute. The Award on the following page stems from that conclusion.

AWARD

Based on a detailed study of the record, including all of the documentary evidence, witness testimony, and argument presented by both parties, the Arbitrator has decided that the Company did not violate the contract by removing Arbitrator Jennings from the panel on July 27, 2017. The grievance is therefore denied.

Signed by me at Hanover, Illinois this 8th day of March, 2017.

Steven Briggs