Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration	§	
Between	§	**Grievant:** [redacted]
Transport Workers Union of America, AFL-CIO Local 555	§	
And	§	**Case No.: BUF-R-1214/11**
Southwest Airlines Co.	§	

Before: Kathy Fragnoli, J.D.

Appearances:

For the Company:	**Christina Bennett, Senior Attorney**
For the Union:	**Kevin Carney, District VI Representative**

Place of Hearing	**Dallas, TX**
Date of Hearing:	**November 3, 2011**
Close of Record	**December 9, 2011**
Date of Award:	**December 30, 2011**
Type of Grievance:	**Transfer Bypass/Article 11 Preferential Consideration**

Award Summary

The Company did not violate the CBA when it declined to award [redacted] an Operations Agent position in June 2011. The grievance is denied.

Kathy Fragnoli, J.D.
Arbitrator

Issue

The issue to be decided in this case is whether management violated the Collective Bargaining Agreement when it declined to award [redacted] an Operations Agent position in June 2011 and, if so, what the appropriate remedy is.

Background

The Contract

In July 2008, the parties implemented a new Agreement ("CBA" or "contract"), covering the time period of July 1, 2008 through June 30, 2011. Prior to July 1, 2008, the parties operated under an agreement that was implemented on June 14, 2001 (the "2001 contract").

Article 11 of the CBA covers "Filling of Vacancies." Pursuant to Article 11, Section G, Other Vacancies:

> When there are no bids within the classification for a lateral transfer to fill a vacancy, the position will be filled in accordance with the Company policy by qualified applicants. When qualified applicants include Employees from within the scope of this Agreement, those Employees will be interviewed and will be given preferential consideration over applicants from outside the scope of this Agreement. Any selection which includes applicants from outside the scope of the Agreement is subject to review through the grievance process (emphasis added).

This language was a departure from the wording of the same provision in the 2001 contract, which stated:

> When there are no bids within the classification for a lateral transfer to fill a vacancy, the position will be filled in accordance with the Company policy by qualified applicants. When qualified applicants include Employees from within the scope of this Agreement, those Employees will be interviewed and will be given preferential consideration. The ultimate selection, however, will be made by the Company, and that decision is not subject to further review through the grievance process (emphasis added).

Neither the contract nor the 2001 contract defined the terms "qualified" or "preferential consideration."

Bargaining History

The negotiations over the changes to the language of Article 11, Section G, took place on February 7, 2008. The parties exchanged proposals via email. The Company's first proposal was to leave the language of that section as it had been in the 2001 contract. The Union's counter-proposal read:

> When there are no bids within the classification for a lateral transfer to fill a vacancy, the position will be filled in accordance with the Company policy by qualified applicants. When qualified applicants include Employees from within the scope of this Agreement, those Employees will **fill those positions, by seniority.** (Underlining added)

The Company rejected this language, and again proposed retaining the language of the 2001 contract. The Union then proposed keeping the first two sentences from the 2001 contract intact, and striking the last sentence about the ultimate selection and the decision not being subject to review.

The Company objected to that proposal out of concern that choosing between two bargaining unit employees would give rise to a grievance. The parties then agreed to the final language of the 2008 CBA, as set forth above.

Facts

The Grievant, [redacted] has worked for the Company as a Ramp Agent at the Buffalo Station (BUF) since 2001. Prior to working for Southwest, [redacted] worked as a ramp/operations/customer service/ticket agent for Shuttle America, a regional carrier for over a year. He also worked as a flight attendant for People Express/Continental.

In June 2011, the Company posted two Operations Agent positions at BUF. No employees eligible for lateral transfer bid on either of those positions, so the Company opened the application process to other employees and to outside applicants. The Grievant was the only Company employee who applied for the Operations Agent position at the time.

In order to be eligible to interview for the Operations Agent job, [redacted] was required to have fewer than three attendance occurrences on his record, and to have a satisfactory performance

record. Management recognized that [redacted] met these criteria and was entitled to be interviewed. The Company also interviewed several outside applicants for the two openings.

The interview process involved meeting with the BUF Station Manager Ariel Swenson, Station Administrator Ann Sebastian and a company recruiter. After interviewing all of the applicants, management decided to hire one of the outside applicants to fill one of the open positions. It did not fill the second opening but rather re-posted it. [redacted] was told he did not get the job because management felt he wasn't the "right fit" for the position.

Position of the Union

The Union argues that the Company failed to give the Grievant "preferential consideration" for the Operations Agent position, as required under Article 11 of the CBA. Preferential consideration, it argues, requires that a covered employee be awarded a position over an outside applicant so long as the covered employee meets the qualifications set forth in the job posting.

The Union maintains that, by agreeing to the change of language in Article 11, Section G, the Company "negotiated away its right to make the ultimate selection" between covered employees and outside applicants. It disputes the Company's "all things being equal" interpretation of "preferential consideration" arguing that even if that is the standard the Company used in the past, the new language of Article 11, Section G, has changed the definition of "preferential consideration."

The Union asserts that the evidence demonstrated that [redacted] was "more than qualified" for the BUF Operations Agent position. The evidence showed that [redacted] had previous experience as an operations agent at another airline and that that as a Southwest Ramp Agent he worked closely with Operations Agents, even performing some of the same duties that Operations Agents perform. Moreover, the Union contends, the Grievant would have been given extensive training for the Operations Agent position, if he had been awarded the job.

Thus, [redacted] was entitled to preferential consideration for the opening over the outside applicant who was ultimately hired. The Company, the Union contends, has not proved that the

outside applicant was more deserving of the job than the Grievant such that he could be hired despite the Company's obligation to give the Grievant preferential treatment.

The Union suggests that the Company did not want to move [redacted] to the Operations Agent position because he had enough seniority that he would have bumped most of the existing Operations Agents.

As a remedy, the Union requests that the Grievant be awarded the Operations Agent position.

Position of the Company

The Company argues that despite the requirement that it give preferential consideration to covered employees, management retains the right to determine whether an applicant is qualified or is the "best fit" for a position. It contends that preferential consideration is not a guarantee that a covered employee will get the job if he is qualified to interview for it. Instead, it maintains that preferential treatment is only triggered when a covered employee is equally qualified as an outside candidate for the same position—the "all things being equal" standard.

This standard, the Company asserts, is the way it has always applied the "preferential consideration" requirement in Article 11. Its concession to change the language of Section G to permit review of hiring decisions covered by that provision through the grievance process, it argues, was not an agreement to change the way it interprets and applies "preferential consideration." To interpret the contract as the Union urges—that a covered employee who is qualified to interview should automatically be awarded the position—would be "an entirely new evaluative process" that was not negotiated, according to management.

The Company believes that its interpretation of "preferential treatment" as being separate from the ability of a covered employee to interview for a position is supported by the plain meaning of the contract. To the extent that the parties disagree as to the meaning of "preferential consideration," management asserts that that term can be clarified by looking to ordinary usage. For this it points to the Code of Federal Regulations' statement regarding preferences in relation to affirmative action, which states:

> Placement goals may not be used to supersede merit selection principles. Affirmative action programs prescribed by the regulations do not require a contractor to hire a person who lacks qualifications to perform the job successfully or hire a less qualified person in preference to a more qualified one.

Even if the lack of a definition of "preferential treatment" in the CBA creates an ambiguity, the Company urges that it is the Union that has the burden of proof to show that its proffered interpretation should prevail and that the Union has not met this burden. Instead, the Company asserts that it has proved that the term should be interpreted in accordance with the parties' past practice—which Union witnesses testified was to "thoroughly assess" the qualifications of candidates and apply preferential consideration only upon the "all things being equal" standard.

The Company maintains that the parties' bargaining history also demonstrates that the Union never requested or negotiated that the Company relinquish its long-standing interview practice or application of the preferential treatment standard.

With respect to [redacted], management witnesses testified that they did not believe he had sufficient customer service skills to move into the Operations Agent position. Operations Agents have significantly more customer interaction than Ramp Agents. Even as a Ramp Agent, the Company argues, [redacted] supervisors testified that he gravitates towards tasks he can perform by himself, which are not team- or leadership-oriented.

The witnesses who interviewed the Grievant for the Operations Agent position gave specific examples of responses he gave to questions during the interview that they felt demonstrated a lack of understanding of the position and how to handle particular customer situations. They also testified that he submitted a resume that had not been updated in 10 years and that they did not believe he had made as much of an effort to research the Operations Agent position as he could have.

On the other hand, the witnesses described the outside candidate who was ultimately hired as someone who had extensive customer service and operations experience at another airline, who had worked as a supervisor and could be trained as a supervisor at Southwest, and who seemed to have gone out of his way to research the company and the Operations Agent position. According to the witnesses, this applicant gave specific, appropriate answers to the same hypothetical

questions on which the witnesses said [redacted] stumbled. The Grievant's qualifications were not equal to the qualifications of this applicant, so the need to give preferential consideration never arose, according to management.

Moreover, the Company argues, the Company only filled one of the two openings at the time it interviewed the Grievant and the outside applicants in June 2011. [redacted] did not lose the position to an outside candidate at all—if the Company had felt he was qualified he would have been awarded the second position. Thus, the Company urges that this is not a case of lack of preferential consideration at all but one where the Grievant was simply unqualified for the job.

Discussion

Is the contract ambiguous?

Article 11, Section G, of the CBA provides:

> When there are no bids within the classification for a lateral transfer to fill a vacancy, the position will be filled in accordance with the Company policy by qualified applicants. When qualified applicants include Employees from within the scope of this Agreement, those Employees will be interviewed and will be given preferential consideration over applicants from outside the scope of this Agreement. Any selection which includes applicants from outside the scope of the Agreement is subject to review through the grievance process.

Two concepts are essential to the application of this provision. First, the provision references "qualified applicants." The parties dispute the definition of "qualified applicants." The Union urges that the language refers to whether or not an employee is qualified to interview for a position—which the testimony established means that the employee has fewer than three attendance occurrences and a good performance history. The Company insists that it is for management to determine whether an applicant is qualified for the position being applied for, based on a thorough assessment of numerous variables.

The provision then states that qualified applicants will be given "preferential consideration." The Union argues that the language means that a covered employee will automatically be awarded a position if he or she is qualified. As explained above, the Company insists that "preferential treatment" is only accorded in situations of "all things being equal."

Neither "qualified applicant" nor "preferential treatment" is defined in the CBA. The meaning of those terms is not obvious and it cannot be derived from Article 11, Section 3, or elsewhere in the contract. Therefore, the terms are ambiguous and I must attempt to ascertain the intention of the parties in order to resolve this grievance.

What was the parties' intention?

When attempting to give meaning to ambiguous terms, it is appropriate to consider common usage, past practice of the parties and, if necessary, evidence regarding the bargaining history and intentions of the parties.

The Company has argued that common usage and past practice support its proposed interpretation of the term "preferential consideration." While it is impossible to fully assess the parties' past practice with respect to preferential consideration—because that concept was never subject to review before the latest contract—the Company put on evidence about its past practice, and the Union did not rebut that evidence. In other words, the Union could present no evidence to suggest that the Company's past practice in applying "preferential consideration" was to award a vacant position to an employee-applicant, even where an outside applicant was more qualified.

The evidence of bargaining history over Section G does not support the Union's proffered interpretation either. The language proposed by the Union that comes closest to the interpretation it urges is the correct one in this proceeding was contained in its first counter-proposal:

> When qualified applicants include Employees from within the scope of this Agreement, those Employees will fill those positions, by seniority.

The Company rejected that proposed language. That rejection demonstrates that the Company did not intend for employee-applicants to be automatically awarded transfers over outside applicants.

Therefore, the Company's argument regarding the proper interpretation of "preferential consideration" is supported by some evidence, while the Union's is not. However, it is not

necessary for me to resolve the precise meaning of the term "preferential consideration" in this case because the concept of whether an employee is "qualified" is determinative.

The Union proposes that the term "qualified applicant" should mean an employee who is qualified to interview for a lateral position—meaning, an employee who has a clean attendance and performance record. The Company is well known for applying much greater scrutiny to its hiring decisions and its quest for the right "personality fit" than the Union's proposed interpretation would allow. Without overwhelming evidence that the Company intended to concede its right to determine whether a job applicant is "qualified" with much more stringent criteria than attendance and current job performance, the Union's argument cannot stand.

Therefore, I find that the interpretation of the CBA that best represents the parties' intentions is that when covered Employees apply for lateral positions, the Company will interview them (provided they qualify for an interview) and will determine, through the interview process, whether they are qualified for the position. This determination includes an assessment of all relevant skills, personality and other factors the Company ordinarily considers in making hiring decisions. As in other matters where an employer retains significant discretion to make personnel decisions, the appropriate standard of review regarding the determination of "qualified" is whether the Company acted *reasonably* in making that determination.

Only after a determination that the employee-applicant is "qualified" does the issue of "preferential consideration" come into play. I am not entirely convinced by the Company's evidence that "preferential consideration" must necessarily be applied on the "all things being equal" standard, rather than a stronger preference towards the covered employee. However, I don't need to resolve that question in this case because here the Company determined that [redacted] was not qualified for the Operations Agent. As discussed below, that determination was reasonable according to the record evidence.

Did the Company violate the Agreement when it failed to award the Grievant the Operations Agent Position he applied for in June 2011?

At the hearing, Company witnesses identified the specific reasons why they decided the Grievant was not qualified for the Operations Agent position at BUF after interviewing him. Specifically:

- He did not provide an updated resume;
- He did not give an appropriate response to the hypothetical question about dealing with a "passenger of size";
- He did not know the correct boarding order, vis-à-vis families with children and passengers in wheelchairs;
- Concern tha [redacted] was not prepared for a job that requires frequent interaction with demanding and agitated customers, based on observations that he tended to seek independent work and avoid conflict; and
- Belief that the Grievant had not thoroughly prepared for the interview.

At the hearing, [redacted] appeared personable and professional. It is entirely possible that he did not prepare as thoroughly for his interview as he might have because the ambiguous language of the CBA gave him a false sense of security that as the only employee-applicant, he was essentially a shoe-in for the job. The Union's argument that the Company was concerned about allowing [redacted] to transfer into a position where he would outrank most of his fellow Operations Agents in terms of seniority is also well-taken.

That being said, however, the reasons that the Company provided to support its decision are not arbitrary or otherwise unreasonable. The witnesses denied that [redacted] seniority played any role in its decision and the Union did not rebut that testimony.

I find that the Company had the contractual right to determine whether the Grievant was qualified for the Operations Agent position and that its determination that he was not qualified was not unreasonable on these facts.

Award

The Company did not violate the CBA when it declined to award [redacted] an Operations Agent position in June 2011. The grievance is denied.