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| IN THE MATTER OF ARBITRATION | ) | |
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| SOUTHWEST AIRLINES CO. | ) | |
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| and | ) | Case MDW-R-1402/11 |
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| TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 555 | ) | |
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Kevin Minchey, Esq., for the Employer
Randy Barnes, for the Union
Before Matthew M. Franckiewicz, Arbitrator

# OPINION AND AWARD

This arbitration proceeding involves a final warning letter to Grievant [redacted].

A hearing was held on December 21, 2011, at Dallas Texas. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Both parties filed briefs. The record closed with the exchange of briefs on January 31, 2012.

## Contract Provisions Involved

ARTICLE SIX
SECTION ONE
HOURS OF SERVICE

L. Local Agreements. The provisions of this Article may be changed by local agreement to provide for different work schedules in regards to Section One of this Article (Hours of Service), Article Seven (Overtime), and Article 14 (Vacations).

ARTICLE SEVEN
OVERTIME

I. Overtime Call Book. If a known overtime assignment of four (4) hours or more is available, the overtime call book for each bid location shall be utilized. In accordance with Appendix A, to be eligible for this overtime, an Employee must complete and sign the overtime call book in ink, and must initial, in ink, any subsequent deletion or changes.

All such changes must be witnessed and initialed by a supervisor. A standard overtime call book shall be used at all stations and offices. Overtime call books shall be posted for a minimum of fourteen (14) days in advance. When an Employee signs the overtime call book, it shall constitute his agreement to work on the day for which he signed, and normal attendance rules shall apply.

1. An Employee who is assigned voluntary overtime and reports ill will be paid sick pay at his regular rate of pay. A maximum of eight (8) hours sick pay will be paid for that day. All attendance rules will apply in accordance with Article 23.

2. Assignment Order. Assignments from the overtime call book shall be assigned to qualified Employees in the following descending order:

    a. By scheduling of the senior Employee of that bid location who is on his first day of rest, or who is on his second day of rest and has not worked four (4) or more hours of overtime on his first day of rest. If no such Employee is available, then;

    b. By scheduling of the next senior Employee of that bid location who is on his regular workday and is at work, or has left work. If no such Employee is available, then;

    c. By scheduling of the senior Employee of that bid location who is on his second day of rest and who has worked four (4) or more hours of overtime on his first day of rest. If no such Employee is available, then;

    d. By scheduling of the senior Employee of that bid location who has adjusted his hours because of a shift trade. If no such Employee is available, then;

    e. By scheduling of the senior Employee of that bid location who is on a shift giveaway. If no such Employee is available, then;

    f. By scheduling of the senior Employee of that bid location who is on a freeday. If no such Employee is available, then;

    g, By scheduling of the senior Employee of that bid location who is on vacation. If no such Employee is available, then;

    h. By scheduling of the senior Employee of that bid location who is on an EAD. If no such Employee is available, then;

    i. By scheduling of the senior Employee of that bid location who has completed and signed the overtime call book below the close out line.

3. Complete Utilization of Call Book. An Employee who has worked an overtime assignment of four (4) hours or more in his overtime day has fulfilled his obligation to work voluntary overtime for that day, but shall be eligible for further overtime assignments after all other Employees above the close out line in the overtime call book have been utilized.

4. Closing/Notification. The overtime call book for the following day shall be closed at 1200 hours of the preceding day or sooner when the station or office closes prior to 1200 hours. The Company shall attempt to assign known overtime assignments within two (2) hours after the overtime call book is closed.

## ARTICLE TWENTY
## GRIEVANCE / SYSTEM BOARD / ARBITRATION
## DISCHARGE and DISCIPLINE

### SECTION ONE
### PROCEDURES

A. Purpose. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

B. Representation Requirements. The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

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

G. Fact-Finding Procedures. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures.

1. No Suspension. In circumstances where no suspension is imposed:

   a. The Employee shall be advised, in writing, with a copy to the local representative of the Union, of the nature of the factfinding not later than ten (10) calendar days from the time the Company becomes aware of the incident concerning which the factfinding shall be convened.

b. The factfinding shall be held within five (5) calendar days from the date such notice is given to the Employee and the local representative of the Union; and

c. The Company shall render its decision (inclusive of any discipline), in writing to the Employee, within five (5) working days after completion of the factfinding, and a copy of the decision shall be delivered to the local representative of the Union.

L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of a disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

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. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

## ARTICLE TWENTY-THREE
## ATTENDANCE

* * *

### SECTION I
### ATTENDANCE PROGRAM

### DEFINITIONS

A. No Show. (Unreported Absence). Any Employee who is scheduled for regular work, overtime, training, trades, or holidays and does not report his absence as outlined in the "Requirements of Reporting" section of this program shall be charged with a No Show (Unreported Absence). Failure to report an absence, whether or not verified by a doctor's statement, shall be chargeable as a No-Show (Unreported Absence). The Employee shall not be allowed to work.

* * *

SECTION II
CONTROL PROCEDURES

A. Recorded Occurrences. Absences and tardiness on scheduled workdays, overtime, training, trades, or holidays shall be recorded in the following manner:

| | | |
|---|---|---|
| No-Show (Unreported Absence) | 2 | |
| Reported Personal Absence (Personal Business) | 1 | |
| Reported Illness (non Chargeable) | 0 | |
| Four (4) doctor's statements per calendar year, but no more than one (1) November 1 - January 3 | | |
| Reported Illness (Chargeable) (No doctor's statement or after utilizing allowable number of doctor's statements for Non Chargeable Reported Illness | 1 | on the first day and ½ for the third consecutive day, to a maximum of 1 ½ per single continuous illness |
| Unreported Tardy | 1 | |
| Reported Tardy | ½ | |

B. Point Accumulation. The Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:

| | |
|---|---|
| Less than 1 point | No action taken |
| 1 - 2 ½ | Letter of instruction |
| 3 - 4 ½ | Warning letter |
| 5 - 6 ½ | Final warning |
| 7 or more | Termination |

## The Facts

Grievant [redacted] a 14 year employee at Midway airport, was assessed two points and issued a final warning under the contractual attendance program as a no-show for an overtime shift on June 16, 2011. It is undisputed that [redacted] did not in fact work the shift in question, but whether he was notified of the overtime assignment is in dispute.

The agreed-to Work Rules Interpretations provide, in pertinent part:

31. What are the guidelines regarding local agreements? (Section One, Par. L)

Local agreements made under the prior contract must be reviewed and reestablished. Local agreements only apply to Article Six, Section One, Article Seven, and Article 14 (under Art. 8, Par. B). Whenever there is a change of management or local TWU representation at a location, local agreements should be reviewed. Local agreements should include an ending date, which may be changed with notice.

A Local Overtime "Will Accept" Agreement at Midway Airport, dated April 8, 2009, provides:

> This will serve as a Local Agreement between Midway Station Management and TWU Local 555 Midway Ramp Membership. The purpose of this agreement is to allow a Ramp Agent to waive the right to notification for a known overtime.
>
> If an Employee wishes to utilize this option and waive the notification of his or her assignment, he or she will do so by marking a "WA" in the CHRTR column. By doing so, it becomes the EMPLOYEE'S RESPONSIBILITY to call and verify their overtime by calling the Ramp Overtime Hotline (773-884-3157).
>
> This agreement will only apply to the initial 12:00 noon close out only. All unknown overtime assignments that may become available after the initial close out shall be awarded following contractual notification procedures.
>
> Please note that by Not Marking "WA" in the overtime call book, Management will be responsible for contacting you for your assignment of known overtime between 12:00 and 14:00.
>
> If you desire to work more than one shift of overtime and mark an "WA" in the CHRTR column, you MUST write DBL or TPL between your 1st, 2nd , and/or 3rd choices. Once you indicate that you are willing to work a double or triple of overtime, you are required to work all overtime issued. If you do not write DBL or TPL between choices and have received 4 hours overtime or more, the Company is required to ask if you want any overtime exceeding the original assignment.
>
> This local agreement shall go into effect at 00:00 on April 08, 2009. At any time, the Union or Company may cancel this agreement with a 30-Day written notice.

As set forth more fully in the agreement quoted above, when an employee signs as "WA," the employee is responsible to check a recording to see whether he has been selected for overtime. While the "WA" designation is voluntary on the employee's part, signing up in this manner can have mutual benefits for the employee and for supervision: Management is relieved of the responsibility to contact the employee individually, while the employee need not consider himself or herself tethered to the telephone.

It is undisputed that Grievant [redacted] signed the overtime call book for June 16, 2011 with a "WA," indicating that he was volunteering for overtime of June 16. Although employees do not indicate the time of their signatures, from his position on the list of names, he must have added his name shortly before the book closed at noon.

After the overtime book closes for the day, a supervisor or supervisors allocates the number of overtime opportunities available among the employees who have signed up. Typically this allocation is completed between noon and 2:00 p.m.

For those employees who sign for overtime as "WA" a supervisor makes a recording, listing all the employees selected, and the particular assignment for each. The employee telephones a designated hotline number to listen for his or her name on the recorded list. There are seven tabs, one for each day of the week, from which the employee selects the appropriate tab to hear overtime assignments for that day. The recording is kept alive for seven days, after which it is re-recorded with the message for the corresponding day of the new week. An overtime list is also posted.

Ramp Supervisor Rick Herrington prepared the list of overtime assignments for June 16, 2011. (See Employer Exhibit 6.) The three page list includes all overtime assignments, whether "WA" or not. By my count, the list includes 60 names, of which 31 are "WA." [redacted] name is included on the second page of the list as a "WA". The list designates employees by status. A status depends on scheduling, B status depends on seniority. [redacted] got most of his overtime on B status. He is listed as B status on the June 16 list.

Ramp Supervisor Hector Montanez testified that he recorded the hotline message for June 16, and that he read from the list (Employer Exhibit 6), first giving the date, and then reading all the names on the list, both WA and non-WA. He stated that after he read the list for the hotline, he called the hotline number himself on an outside line, and listened to the recording to verify that he did not miss any names.

[redacted] normal shift ended at 1:00 p.m., and by virtue of his seniority, he was selected for an overtime assignment to begin at 1:30 p.m. He punched out at 1:22 p.m. When Montanez learned the following day that [redacted] did not work the overtime shift on June 16, he thought it odd, because [redacted] had worked the morning shift that day. Montanez testified that therefore he called the hotline again to verify that he had not omitted [redacted] name, and that he asked fellow supervisor Eric Lopez to listen with him. He stated that he listened specifically for [redacted] name, and is 100 percent certain that he heard it on the hotline recording.

Ramp Administrative Supervisor Eric Lopez testified that on June 17, he listened to the hotline recording for June 16, together with Montanez, listening specifically for [redacted] name, and tha [redacted] name was on the recording.

Montanez and Lopez did not ask any Union representative to listen to the recording with them, in order to verify tha [redacted] was included. No one ever attempted to make a copy of the June 16 hotline recording.

According to Lopez, when he learned that [redacted] was not working the overtime, he found a replacement, and changed the ramp assignment schedule (Employer Exhibit 7) accordingly.

Grievan [redacted] testified that he called the hot line and listened to the entire message for June 16, but his name was not on it. He recalled that he phoned from the ready room during a lull, and that he was the only one in the room, so that surrounding noise would not have affected his ability to hear the recording. He also stated that his name was not on the daily duty roster for the overtime shift, only for his scheduled morning shift that day, when he looked at the schedule in the ready room. According to [redacted] he would

have been happy to work the overtime shift because he needs the money. He works three or four overtime shifts a week and has never been a no-show for overtime.

[redacted] was not aware he had been designated a no-show for overtime on June 16 until he was notified of the fact finding.

[redacted] stated that on a prior occasion when he had signed for overtime, his name was not on the hotline list although junior employees were. The Employer paid him for the bypass without the need for a grievance.

The Midway ramp daily work assignments for June 16, 2011 (Employer Exhibit 7) includes a printing time stamp of October 24, 2011 at 5:10 p.m. A somewhat different version of the Midway ramp daily work assignments for June 16, 2011 (Union Exhibit 2) includes a fax stamp indicating that it was sent on September 20, 2011 at 1:31 p.m. Both documents list [redacted] for the a.m. shift in Zone 4. Both parties would draw certain inferences from these documents, as detailed below.

Based on the Employer's conclusion that [redacted] was a no-show for the June 16 overtime assignment, Administrative Supervisor Rachel Cerniuk set up a fact finding meeting. Initially, Management believed that [redacted] was at the discharge stage of the attendance program, calculating that 2 points for a no-show, added to [redacted] previous 5.5 would result in a total of 7.5 points. At the fact finding, however, it appeared tha [redacted] had not been issued a final warning in connection with an earlier absence, and so his point total was adjusted down from 5.5 to 4.5, so that the 2 points at issue in this case gave him a total of 6.5.

According to Administrative Manager Colleen Bragiel, who attended the fact finding, [redacted] did not assert during the meeting that his name had not been on the hotline recording for the June 16 overtime, but instead that no one called him. Station Representative Troy Lamont represented [redacted] at the fact finding, and requested a copy of the hot line recording for June 16, but apparently by the time of the fact finding, the June 16 recording had been recorded over.

Lamont worked a double shift on June 16, including overtime from 1:30 to 10:00 p.m. No supervisor told him that day that [redacted] was a no-show for overtime, and Lamont did not learn that [redacted] had been accused of a no-show until the fact finding was scheduled. Likewise, Assistant Station Representative Juan Cordova worked overtime from 1:30 to 5:15 p.m. on June 15, but no supervisor told him that [redacted] was a no-show for overtime. Lamont did not hear [redacted] name when he called the hotline for June 16. Normally Lamont's name would be listed before [redacted] though.

Montanez stated that he recalled making only one mistake with respect to the overtime hotline. According to Lamont, however, the Employer makes frequent mistakes as to overtime, most of which are handled informally when employees are bypassed, and Montanez has often committed errors in this regard, and paid one employee who was bypassed the week before the arbitration hearing. Lamont stated that there have been at least 10 occasions when an employee was designated a no-show and assessed points, but after review and discovery that the employee's name was not on the hotline recording, the points were removed. Alternate Station Representative Juan Cordova agreed that Montanez has made numerous mistakes regarding the hotline. Grievance Specialist Brian Smith summarized a number of instances in which points were removed after it was determined that employees had not been properly notified of overtime assignments.

## Issue

The issue, as agreed to by the parties, is whether there was just cause for the final warning, and if not what should the remedy be.

## Position of Management

The Employer maintains that the Union knew the overtime recording was overwritten every seven days, and waited until that time had expired before raising the claim that Grievant [redacted] name was not on the recording.

The Company contends for a "preponderance" standard of evidence in this case, and it argues that it has satisfied that burden. It cites testimony that Montanez verified that all the names were on the recording; that Montanez and Lopez both listened to the recording after the overtime shift and heard [redacted] name on the recording; tha [redacted] name was on the daily schedule with an overtime assignment, the overtime assignment list, and the overtime call book, and that [redacted] name had never been omitted from the recording previously.

It depicts the Union's evidence as no more than the self-serving and uncorroborated testimony of [redacted] who has an interest in the outcome of the case. It contrasts the two supervisors, Montanez and Lopez, whom it says have nothing to gain or lose in this case.

The Company dismisses Union Exhibit 2, the daily schedule, in that the Union did not show that this was the last version of the schedule. It describes the schedule as a fluid document, and avers that Employer Exhibit 7 is a later version of Union Exhibit 2.

It disputes any claim of disparate treatment, contending that most of the employees identified by the Union did not sign for overtime as "WA". As to employee [redacted] it asserts that his points were removed as part of an agreement at the station level.

It asks that the grievance be denied.

## Position of the Union

The Union asserts tha [redacted] listened to the overtime recording but did not hear his name, and saw his name on the daily work assignment shift for his regular shift only. It argues that an employee's only responsibility is to phone the recording, and that he has no duty to check with a supervisor nor to consult any written list.

It contends that the Company did not conduct a full and fair investigation, noting that only one Management representative attended the fact finding, and that the only document it had there was the ramp overtime assignments list (Employer Exhibit 6). It emphasizes that Montanez and Lopez were not at the fact finding, and that the recording was never produced. It submits that the Company relied on the word of two supervisors who are trying to prevent their own discipline.

The Union maintains that the Company has not shown that Grievant [redacted] was properly notified of the overtime shift. It again points to the absence of the recording, which would be conclusive evidence of whether [redacted] name was on it. Without the recording, it regards the Grievant as being asked to prove his innocence. It also cites Union Exhibit 2, the daily work assignment sheet. As to the Company's claim that there are multiple versions as the document is modified during the course of the day, the Union avers that some two months after the event, it requested the final version, and received Union Exhibit 2, listing [redacted] regular shift but not an overtime shift. It contrasts employee [redacted], who was an overtime no-show, but who, unlike Grievant [redacted] was listed on Union Exhibit 2.

Citing several exhibits, the Union further insists that historically, when agents were not notified, attendance points were removed. It reasons that this shows that the Company has made the same mistake in the past and rectified it.

It asks that the grievance be sustained and that the two attendance points be removed from the Grievant's total.

## Analysis and Conclusions

The outcome in this case depends solely on my resolution of the disputed factual issue of whether Grievant [redacted] name was on the recorded list of employees who were to work overtime on June 16. There is no dispute that if [redacted] name was on the recording he was required to work the June 16 overtime shift without further notice. There is no dispute that he did not in fact work the overtime shift. There is no dispute that a no-show would take his point total to 6.5, the final warning stage, under the attendance program set forth in Article Twenty Three of the collective bargaining agreement.

As the Union correctly points out, the best evidence of whether or not the Grievant's name was included on the recorded list would be the recording itself. But the original has been recorded over, and is no longer capable of being reviewed.

When it appears that a party has deliberately hidden or destroyed evidence, it is usually fatal to that party's case. Such a desperate act shows both the party's own recognition that the evidence would be highly damaging to its case, and the general untrustworthiness of that party. This is not the situation here, however. The Company offered testimony, and I accept, that the original was simply re-recorded in keeping with standard practice.

Since the primary evidence of what was on the recording is no longer available, we must turn to secondary evidence. In my view, the second best evidence of the recording's contents is the testimony of witnesses who listened to the recording. The parties each pointed to various documents, such as the overtime call book, the ramp overtime assignment list, and the ramp daily work assignments list, as tending to show that [redacted] name was, or was not, on the recording. There is, of course, a logic to this: normally if [redacted] name were on one, it would probably be on the other, and conversely if his name was not on one, it would probably not be on the other. But such evidence is necessarily indirect: it does not directly show what was or was not on the recording, but only what probably was or was not on the recording.

More reliable, in my view, is what I would call the direct evidence of testimony by people who listened to the recording, and who testified as to what was or was not on it, rather than what probably was or was not on it.

There is, of course, a dispute in such direct evidence. Montanez and Lopez both stated that they heard [redacted] name on the recording, bu [redacted] testified that he did not. It is certainly possible that one or more of these witnesses was not telling the truth. [redacted] obviously has an interest in the outcome of the case. The Union suggests that Montanez does also, in not costing the Company money by subjecting it to a "bypass" grievance. As far as I can tell, though, Lopez has no stake at all in the outcome.

In any event, I saw and listened to the witnesses, and it was not my impression that any of them was lying. It is entirely possible that all these witnesses testified accurately, that Montanez and Lopez heard [redacted] name on the recording when they reviewed it after he did not work the overtime shift, but that [redacted] himself did not hear it when he phoned the hotline number. It seems to me most likely that what happened is that [redacted] name was on the recording, but he did not hear it when he phoned, either because he was distracted, or because he inadvertently entered the tab for the wrong day and listened to the wrong recording. I cannot be sure why [redacted] did not hear his name, but I am sure that Lopez, a disinterested witness, could not have heard [redacted] name on the recording unless it was in fact on the recording. To state it otherwise, it seems more likely to me that [redacted] did not hear something that was on the recording, than that Montanez and Lopez both heard something that was not on the recording.

To summarize the above, I conclude that [redacted] name was in fact among those on the recorded overtime message for June 16 overtime. Since [redacted] signed for overtime as "WA" the Company's only notice obligation was to include his name on the recording, which it did. Having done so, it was within the Company's authority to assess attendance points in the event that [redacted] failed to work the overtime shift.

The Union complains that the Company's conduct of the factfinding was inadequate. But since no loss of pay was involved, a factfinding was not required at all under Article Twenty Section One (G).

Accordingly, I conclude that the grievance must be denied.

## Award

The grievance is denied. Pursuant to Article Twenty Section One (C) of the collective bargaining agreement, the arbitrator's fee and expenses are allocated to the Union.

Issued February 15, 2012

Matthew M Franckiewicz