ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

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SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Group Grievance - Covered Work
TWU-ALL-5001/12

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Employer: Kerrie V. Forbes, Senior Attorney, Southwest Airlines Co.
The Union: Jerry McCrummen, Vice President, TWU Local 555

Statement of the Award: The grievance is denied.

BACKGROUND

This case arises out of a continuing dispute between the parties concerning proper application of new language in the collective bargaining agreement effective July 1, 2008 through June 30, 2011, governing when supervisors may and may not perform work covered by the CBA. The collective bargaining agreement in effect June 14, 2001 through June 30, 2006, contained the following:

> ARTICLE TWO
> SCOPE OF AGREEMENT
>
> * * *
>
> B. Covered Employees. This Agreement extends to and covers all Employees in the classifications described in Article 5 who normally and regularly spend a majority of their work time in the performance of duties described in Article 5. Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty. A supervisor's schedule may not be altered to prevent payment of overtime to a covered Employee, and a supervisor may not accept an overtime assignment if covered Employees are available for voluntary overtime assignments.

Pursuant to the above, supervisors regularly worked with the agents under their supervision. During negotiations for the agreement effective July 1, 2008, the parties agreed to change that provision to read as follows:

> ARTICLE TWO
> SCOPE OF AGREEMENT
>
> * * *
>
> B. Covered Employees. This Agreement extends to and covers all Employees in the classifications described in Article 5 who normally and regularly spend a majority of their work time in the performance of duties described in Article 5. Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce. A supervisor may not replace any covered Employee or cover a scheduled line. A supervisor's schedule may not be altered to prevent payment of overtime to a covered Employee, and a supervisor may not accept an overtime assignment if covered

> Employees are available for voluntary overtime assignments. When, at management's discretion and approval, an agent may give away their shift to a supervisor, the following will apply:
>
> > 1. The agent should, when time permits, make the shift trade available to other covered Employees prior to offering it to a supervisor.
> >
> > 2. Supervisors that enter into a shift trade will be required to form the work of that covered Employee for the entire shift.
> >
> > 3. When a supervisor is working for an agent that will be the first Employee to be involuntarily extended if the need arises on that shift.

On April 29, 2009, the Union filed a grievance protesting supervisors performing covered work in violation of the new language. The parties were unable to resolve that grievance and proceeded to arbitration. On October 24, 2009, Arbitrator John B. Barnard issued a decision sustaining the grievance as to five job duties. (Barnard decision.) Pursuant to Article Twenty, Section One, Paragraph L, subparagraph 4, "the decision of the System Board of Adjustment shall be final and binding on both the Company and the Union."

While that case was pending, the Union filed nearly 200 grievances over covered work. The parties met on October 28, 2009, to discuss implementation of the Barnard decision and on October 30, 2009, to resolve the then-pending, related grievances covering ground operations and provisioning agents. On November 2, 2009, those cases were settled. The settlement letter from the then-Director Employee Resources, Ground Operations (former ER-Director), currently Station Director-Midwest region, to the Local Union President includes the following:

> As per the Arbitrators direction the Company and the Union have worked out and agreed to settle each of the following grievances with 2.0 hours of overtime. The Union will provide the name and EE # of the Employee that is to be paid for each grievance listed below, along with a notation of overtime or double time. This is a one time exception and applies only to the grievances listed below and those that are still in process regarding this same issue. The Company will notify Leadership and the Union will notify their members on Tuesday, November 3rd as to the specifics of the ruling. After that we will handle any covered work grievance as we have in the past. [UX 1.] (Implementation Agreement.)

The Local Union President, who negotiated that settlement on behalf of the Union, testified that the "[a]fter that" sentence did not preclude the Union from bringing the instant

group grievance. Further, he said that the Union never agreed that the remedy for such violations would be limited forever. The former ER-Director, who negotiated the settlement on behalf of the Company, testified that the Local Union President was concerned that settling all the then-pending grievances for two hours would limit the remedy to two hours in the future. Therefore, he added the "[a]fter that" language.

In addition, in April 2010 the parties agreed to work rules interpretations covering a variety of topics and running some 40 pages. Among those interpretations are the following:

ARTICLE TWO
SCOPE

> In a decision dated October 24, 2009, the Arbitrator ruled that the Company and the Union must realize that there was a contractual change, and the word "assist" clearly alters the current contract thus creating a different meaning to that section. Nothing can be considered status quo when the language is changed by the parties. Under the previous contract, the supervisor had free reign to do covered work. See below for clarification regarding the arbitrator's ruling on these five areas:
>
> 1. Can a Supervisor perform the following covered work by themselves:
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> – Working at the bottom of the belt loader
> – Working in the bin
> – Wing walking
> – Marshalling in aircraft
> – Pushing back aircraft
>
> – Working at the bottom of the belt loader: if the supervisor works alone loading or unloading the belt without the assistance of an agent for a good portion of that work, such would be in violation of the agreement. This is referring to the loading or unloading and means that a supervisor should be assisting an agent working at the bottom of the belt loader by working with them and not performing this work alone except for a short portion of the loading or unloading if needed.
>
> – Working in the bin: A supervisor is not considered assisting if he works alone in the bin. If an agent is also working the majority of the bin work along with the supervisor, the supervisor should be considered assisting.

This means that a supervisor should be assisting an agent in the bin by working with them and not performing this work alone except for a short portion of the bin work if needed.

– Wing Walking: Wing walking duties are those of assisting, and not a violation of 2.B. Supervisors may perform wing walking work.

– Marshaling in aircraft: A supervisor marshaling would be in violation of 2.B. and may not perform Marshaling work.

– Aircraft push back: A supervisor operating the push back tug would be in violation of 2. B. and may not perform push back work.

ARTICLE TWO
SCOPE
(CARGO)

A Supervisor may do covered work at the Cargo counter when assisting another Freight agent and working the counter with them. The Supervisor should not be working alone at the counter without a Freight agent. (Note: The exception to this would be a facility in which there is only one Freight Agent and a Supervisor scheduled. In this case the Supervisor may work the counter while the Freight Agent is in the warehouse or vice versa but may not replace the Freight agent.)

A Supervisor may do covered work in the Cargo warehouse when assisting another Freight agent and working in the warehouse with them. The Supervisor should not be working alone in the warehouse without a Freight agent. (Note: The exception to this would be a facility in which there is only one Freight Agent and a Supervisor scheduled. In this case the Supervisor may work the warehouse while the Freight Agent is on the counter or vice versa but may not replace the Freight agent.)

If there is more than one Supervisor scheduled at the same time because of the size or volume of a facility then only one should be assisting with covered work in the facility (Counter and Warehouse), as noted above at any given time.

A Supervisor may not relieve Freight Agents for breaks and lunches except in a facility in which there is only one Freight

> Agent and a Supervisor scheduled. [JX 4, pages 3-4.]

Witnesses for both parties testified that these work rules interpretations went beyond Arbitrator Barnard's decision. That decision only dealt with five job duties of ramp personnel. However, because the same "assisting" language appears in other sections of the CBA applicable to other categories of employees, the parties agreed to interpretations covering them as well. The TWU Work Rules Interpretations were signed by the Senior Director, Employee Resources-Ground Operations, the Director, Employee Resources-Provisioning, and the President of TWU Local 555. They were sent to all station and provisioning managers, and all TWU station and provisioning representatives on April 12, 2010. Witnesses agreed that this represented a change in the "culture" at Southwest Airlines.

In the instant grievance, filed on March 16, 2012, the Union alleges that supervisors continue to perform covered work in violation of, but not limited to, Article Two and Article Five.[1] The Union further alleges that the Company "continues to willingly, knowingly, and blatantly disregard the final and binding Arbitrator's decision in TWU-All-1000/09." The Union grieved this issue "on behalf of all members of TWU Local 555, inclusive of the grievances listed below, along with any future grievances involving supervisors performing covered work, until a decision is reached in arbitration." The grievance then listed many individual grievances. As remedy here the Union is seeking:

> that the arbitration decision awarded in 2009 be consistently applied. Due to the egregiousness and volume of violations, the Union is seeking that the bypass be paid at the applicable rate (VOT or MOT), and that the minimum amount of overtime 4.0 hours or actual hours (whichever is greater) be assessed for each violation.

In the Company's March 28, 2012-denial of the grievance the Director-Human Resources stated:

> The situation surrounding the individuals listed in this grievance include various circumstances, some of which are not in violation of the 2009 [arbitrator's] decision and some of which do not encompass covered work. With regard to the remedy requested, although the 2009 arbitration decision did not outline monetary remedy, the parties agreed that, in the event of a violation, the remedy would be the least amount of overtime to the most eligible Agent. Your requested remedy is beyond that agreement. Finally, neither the contract nor the 2009 arbitration decision completely

[1]The parties stipulated that the grievance as originally filed contained a typographical error referring to Article Four.

> prohibit Supervisors from performing covered work as such, this grievance is respectfully denied. [JX 2, page 2.]

The Union Vice President agreed, on cross examination, that the practice had been that if there was a covered work violation the Company would pay the minimum amount of overtime necessary to extend the next person who would have been available, appropriate in the order of assignment, to cover the work that was performed. He added that in the Implementation Agreement the Company also made a commitment to stop covered work violations.

On cross examination, the Local Union President agreed that if the Company paid 3/4 hour it was in a situation when an employee's shift could have been extended to cover that 3/4-hour violation. Further, if it was necessary to call someone in, the Company has been paying four hours callout.

Article Seven, Overtime, governs extending shifts as follows:

> Section G Continuous With Overtime. If a known overtime assignment of less than four (4) hours is available, it shall be filled by continuous with overtime (shift extension) as follows:
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> 1. Posting. A column in the call book (Appendix A) shall be available for an Employee to indicate that he is volunteering to work continuous with overtime. The Employee will indicate either, "B" for before scheduled shift, "A" for after scheduled shift or "X" for both.
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> 2. Agreement. When an Employee signs this sheet, it constitutes his agreement to work the overtime.
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> 3. Seniority. Assignment shall be made to the most senior qualified Employee(s) on the sign up sheet.
>
> 4. Reverse Order. If no one signed up for overtime continuous with the beginning or ending of his shift, assignments shall be made in reverse order of seniority. If there is an Employee with less seniority who gets off later but can cover a portion of the overtime needed, the more senior Employee shall be released when the more junior Employee becomes available. This "stair stepping" of mandatory overtime shall only be done one time per assignment.

The parties were unable to resolve the grievance and proceeded to a hearing before the undersigned arbitrator on May 17, 2012. The parties stipulated that the grievance was properly in arbitration, to joint exhibits, and to sequester witnesses with the exception of party representatives who would remain in the hearing room and only be available to testify on rebuttal. All witnesses were sworn. Testimony was recorded by a court reporter. Post hearing briefs were filed.

The Union Vice President testified that at the October 30, 2009- meeting to resolve the prior grievances the former ER-Director told the Union to "bear with me, it's going – it will take me six months to change the culture." In response, the Union made no commitment to refrain from filing additional grievances while the Company undertook to change the culture. The Union Vice President acknowledged, on cross examination, that Barnard's award was a big change for the Company and said it would be even bigger if it was adhered to.

The Union Vice President offered into evidence the grievances filed alleging covered work violations in 2009 after the Barnard decision, in 2010, in 2011, and in 2012, all of which were awarded or settled on a non-precedent basis, withdrawn by the Union or are still pending. (Union Exhibits 3-6.) Pursuant to Article Twenty, Section One, Paragraph L, decisions made pursuant to Steps 1 through 3 of the grievance procedure "shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company." He said that some of the withdrawn grievances involved de minimis work and the Union was looking to the spirit and intent of the contract language and Barnard decision. Some of the grievances covered provisioning. The numbers contained in those Union exhibits can be summarized as follows:

	2009	2010	2011	2012	TOTAL
Total # Filed	57	358	345	116	876
# Awarded	7	112	128	11	258
# Settled	41	190	167	17	415
# Withdrawn	9	56	44	7	116
Pending	0	0	6	81	87
DT hours paid	56.7	386.75	396.1	16.3	855.85
OT hours paid	45.45	357.3	391.35	42.7	836.8

The Company does not concede that all of the grievances contained in these Union Exhibits involved covered work or reflect violations of the Barnard decision.

The Union Vice President testified that, commencing in June 2010, the Union changed the wording of the grievances to include the statement in the instant grievance about violating

the Barnard decision, and changed the remedy requested to 8.0 hours at the overtime bypass rate, plus cease and desist from violating the award. This new language first appeared in Case No. SEA-R-0747/10 because the Union found Seattle to be the worst offender. The Company has paid two or four hours for a 15-minute violation and, in Seattle, paid eight hours for a 30-minute violation. Another Seattle grievance, SEA-R-1126/10, was settled for 4 hours at the DT rate.

The International Union Vice President and Air Transportation Division Director (Air Transport Director) testified that the discussions in Section 6 negotiations played a part in his recommendation to change the wording of the covered work grievances, to increase the remedy requested and to request a cease and desist order. If the Company follows Arbitrator Barnard's decision, it would pay nothing. The Union had proposed language that the supervisors could perform *no* covered work but the Company rejected it. He said that, although the Company described efforts to comply, the failure to abide by an arbitration decision has an impact on the Union and the Company could comply if they wanted to.

The Local Union President testified that grievances are not filed on every covered work violation. He said that in some stations the agents have thrown in the towel because it has not come to a stop and in other stations the agents don't care or have worked short and are glad to have the supervisor working. Also, the bypasses are so small, most of them are 45 minutes, and if they can be connected to someone else's shift there is not much of a penalty and it goes to the person who should have gotten the bypass, not to the employee who filed the grievance. He said that the Company does not adhere to Arbitrator Barnard's decision and they could do so.

The Union Vice President testified that the collective bargaining agreement and past practice provide for "punitive damages" to be paid in several instances, such as when an employee is not permitted to take a meal period. The meal period language reads as follows:

ARTICLE SIX

SECTION ONE
HOURS OF SERVICE

B. Meal Period. A thirty (30) minute meal period, shall be scheduled during the third, fourth, or fifth hour. Should an Employee not be scheduled a meal period during the third, fourth, or fifth hour, he/she will be paid time and one half their hourly rate of pay for the thirty (30) meal period and will receive an uninterrupted meal period. Should an Employee not be permitted a meal period at all, he/she will then be paid .5 hours overtime and two (2) hours straight time pay in addition to their regular pay. Eight (8) hours, inclusive of a thirty (30) minutes meal period, shall constitute a day's work for those Employees whose regular shift begins between the hours of 6:00 P.M. and 4:00 A.M.

He said that this language was added to stop the practice of employees working through their rest period and simply being paid .5 overtime. The revised language reflected the practice of the remedy in numerous grievances filed over lunch breaks between 2003 and 2009. (Union Exhibit. 7.)

The Union Vice President testified that, although there is no language in the collective bargaining agreement, the parties have agreed to "punitive damages" in overtime bypass cases, improper mandatory cases and payroll shortage cases. For example, where agent A should have gotten the overtime and it went to agent B, agent A would be paid for the overtime at A's rate, overtime or double time, without working the hours. The 30+ year past practice of paying for overtime bypass in this manner has been recognized in arbitrations. Similarly, when an agent is improperly mandatoried to work a shift that should have gone to someone else, the Company pays the penalty of the same amount of time in comp time, time off, or, in some cities, an additional regular rate of pay for the hours involved to compensate the employee who was mandatoried to work improperly.

Payroll shortages are covered in Article Twenty Eight - Wage Rules providing for employees to be paid twice per month on a set schedule. Paragraph C now provides:

> Where there is a shortage equal to one-half (½) a day's pay or more in the pay of an Employee, the employee shall be reimbursed from the General Office for such shortage within three (3) working days.

Under the prior agreement the Company had been required to reimburse the shortage within two working days but the Company requested and the Union agreed to an extra day to correct pay shortages. The Union Vice President testified that pay shortage problems continued and the language does not state what would happen if they are not timely corrected. A series of payroll shortage grievances from 2005 through 2012 show employees being compensated in amounts ranging from six hours to 42 hours pay at straight time. (Union Exhibit 9.)

Union Representatives from the Nashville, Dallas and Seattle bases testified about their experiences processing overtime bypass and covered work grievances. In Nashville a covered work grievance was filed over a contractor moving oversized bags resulting in a $13,908.10 settlement being paid to 30 ramp agents. (Union Exhibit 10.) The Union does not shop for grievances and the Dallas base is "split" about filing them. All three locations had covered work grievances settled by the payment of more time than the supervisor spent doing covered work. In Seattle a grievance was settled at the station level for eight hours after a supervisor downloaded a front bin by herself. (Union Exhibit 13.) The Seattle representative described management's attitude as "very nonchalant" and not caring. A recent grievance, still pending, was filed over a supervisor switching his green vest with an agent so the supervisor could wear the agent's orange vest to tow a plane off the gate while in disguise.

The former ER-Director testified about efforts the Company has made to change the direction. He said they did extensive conference calls, training sessions, station visits, memoranda, and bulletins at the director level, with station managers, mid-managers and supervisors. They educated each station manager, one on one to make sure they understood what was and was not improper under the CBA. He introduced, as examples, a November 3, 2009-Memorandum to all Ramp, Operations, and Cargo Supervisors talking about "Leadership Expectations" regarding the Covered Work Ruling, a May 11, 2010-Station Leaders Bulletin on the topic, a November 3, 2010-Station Leaders Bulletin regarding disciplinary issues instructing Station Leaders that Employee Resources must be involved in grievances over covered work, among other issues, and a January 1, 2012 Station Leaders Bulletin directing that all grievances settled or denied at the station level involving covered work, among others, be sent to Employee Resources, reiterating instructions given on November 3, 2010. (Company Exhibits 2, 3 and 4.)

The former ER-Director testified that the number of covered work violations has shown a significant decrease and is actually quite small, given that Southwest operates in 72 cities, 18 to 21 hours each day, to service 3,400 flights using 1,068 ramp supervisors and 120 provisioning supervisors. In the region where he is now Station Manager the grievances have almost totally been eliminated. He disagreed that a four-hour minimum penalty for each violation is appropriate because for years the parties have followed an agreement on the proper penalty, that was reconfirmed when the pending cases were settled after the Barnard decision was received. That agreement is generous in that 90% or more of the cases involve employees who got a remedy but did not lose pay because the Company would not have needed to call someone in or extend someone. Also, supervisors can work within certain parameters so it is confusing to agents and supervisors. Although management and some employees were not happy with the Barnard decision, the Company has been doing a remarkable job in training people on it.

The Director of Employee Relations testified that he has pushed the Employee Resource representatives to have very stern conversations with supervisors about not performing covered work. He has met personally with regional directors and spoken at station manager meetings. Since early 2010 covered work has always come up at those meetings. When Employee Resources becomes aware of a grievance they gather all the documentation and get statements from both sides to ascertain whether there was a violation. If so, the Company always pays the minimum, ranging from a low of .7 to 4 hours. There have been cases where more than 4 hours has been paid, based upon the schedule. He said that he takes a very conservative approach to covered work and advises that if there is a question at all, the supervisor should not do it. On cross examination he said that he does not talk directly with supervisors and does not know if the talks he has with managers gets filtered down.

To demonstrate that the Company had disciplined supervisors for failing to carry out the instructions regarding compliance with the Barnard decision, the Director of Employee Relations introduced 34 letters issued to management personnel about leadership expectations, covered work, and safety violations. He described them as being representative of some of the discipline but was not familiar with the individual cases. The letters indicate varying levels of discipline, commencing on May 2, 2009, including "Note to File," "Note to File-Discipline," "Letter of

Instruction," "Leader Discussion Log," "Written Warning," and one "Final Letter of Warning" dated May 1, 2012. (Company Exhibit 5.) On cross examination, the Director of Employee Relations said that one Houston Supervisor was terminated for job performance issues, including covered work violations and one Seattle Manager ended up resigning over not leading and directing, including not curbing his supervisors doing covered work.

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends that Arbitrator Barnard's decision and the subsequent implementation agreements are being violated by the Company because supervisors continue to perform covered work in an egregious and blatant disregard of a final and binding arbitration decision. Given that not all violations are grieved, the sheer number of grievances portrays the Company's obvious disdain and disregard for that decision.

The Local Union President and the Air Transport Division Director testified that the parties carved out other duties, with the spirit and intent of the Barnard decision as guidance, and established the parameters for all the work groups. The Company, however, fails to take meaningful steps to curtail the violations.

The Company attempted to show that they have disciplined supervisors by introducing letters of discipline issued to supervisors. The letters are heavily redacted, leaving no way to verify their authenticity. Further, the station cannot be identified and ten (10) of the letters were issued on the day of or after the instant group grievance was filed. The Union contends that this is a thinly-veiled attempt to establish that they take this seriously.

During negotiations Company representatives vowed that they were going to put a stop to violating the award, but Company memos without support or enforcement have no teeth. It is as if the Company is putting out the direction to the supervisors with a wink-wink, nod-nod attitude. The Company is encouraging the violations by their condoning and lack of discipline issued for proven violations. The Company's interpretation and application of the word "portion" is at the root of the problem and causing the massive violations of the Barnard decision.

The Union contends that the reason for the large number of covered work grievances is chronic under staffing of stations due to the ever increasing pressure from headquarters to do more with less in an attempt to become even more productive. The Company has trained their supervisors that it is okay to perform covered work as long as it is less than half of the flight. The proper way to apply the definition of "portion" is that the agent and the supervisor are working together and they get down to a number where they can accurately count them, the agent leave to fill out his bin slip and the supervisor can continue to load the remaining bags.

The Union contends that hard fought gains at the negotiating table are now being

threatened by the actions of the Company. If the Company wanted to maintain the status quo or culture they should not have agreed to the new language at the bargaining table. The number of daily flights has no bearing or consequence on Arbitrator Barnard's decision, which makes no reference to staffing levels, absenteeism, weather related issues and other external factors. These are just excuses contrived to circumvent the clear and unambiguous language of the CBA and Arbitrator Barnard's decision.

The Union contends that these egregious violations of the CBA harmed not only the agents represented by TWU Local 555 but the Union itself. This issue has caused irreparable harm to the relationship between the parties and is impacting the pace and tone of the current negotiations. The agents have been harmed by being prevented from providing the customer service that SWA is known for. There has been a loss of confidence in the Union's ability to enforce the negotiated agreement between the parties. And, the payment of overtime bypasses comes off the bottom line, our profits. Every Employee at SWA is a shareholder.

The Company alluded that there was an agreement that the Union would seek only the minimum amount of overtime needed to cover the violation. The Company produced no written agreement or side letter to that effect. There only was testimony that this is what normally happens. In any event, the Company's egregious behavior has effectively nullified any commitment or normal cooperation. Whether the remedy is 4.0 hours of overtime, 8.0 hours of overtime, or more, if the Company adheres to Arbitrator Barnard's 2009 decision and ceases having supervisors perform covered work there will be no cost to the Company.

The Union rejects the Company's attempt to make this about punitive damages. Paying the contractually required minimum call out of 4 hours of VOT or MOT, whichever is applicable for each violation, would not be punitive. It would be a disincentive to violate the arbitration decision. The parties have not expressly and unambiguously precluded an award of punitive damages in their arbitration clause. Therefore, the arbitrator is able to award punitive damages due to the egregious and willful violations of the final and binding arbitration decision. In the majority of cases, punitive awards or punitive sanctions may not be appropriate, but there are exceptions to this generally applied rule.

The Union further contends that punitive or exemplary damages are already a part of the fabric of Southwest Airlines in three instances. The CBA explicitly provides for the payment of punitive damages at SWA in the area of no lunches. The two other instances of a past practice involve improper mandatory overtime (compensatory time off with pay or additional regular pay, equal to the amount of time they were improperly mandatoried) and payroll shortages equaling more than half a day's pay (3 hours of regular pay for each business day after the allowable 3 business days). The Company has been paying "punitive damages" with regard to "no lunches" since 2003, with regard to "improper mandatory" since 1999, and "payroll shortages" since 2005.

The Union has shown that the Company violated the Collective Bargaining Agreement, the Railway Labor Act, the parties' final and binding 2009 Barnard arbitration decision and

subsequent implementation discussions over covered work. The Union now asks that the grievance be awarded, including a suitable remedy for those grievances pending and filed in the future through payment of the minimum call out of 4.0 hours of VOT or MOT, whichever is appropriate. The Union also asks that the Company bear the cost of the Arbitration as required in Article 20 (C) of the CBA.

The Company's Contentions

The Company contends that the Union's demand for a punitive penalty of at least four hours of overtime to be paid for each instance in which a Supervisor improperly performs covered work, regardless of the amount of work performed or whether any covered Employee was actually harmed by the violation, is excessive and should not be granted. Citing arbitration decisions in various industries, the Company notes that arbitrators almost universally refuse to award punitive damages and many state that arbitrators do not have the authority to award punitive damages. Rather, a remedy must be determined on the basis of equity and fairness, with no damages in the absence of proof of injury to covered employees.

The Company contends that the rare occasions when arbitrators do award punitive damages have been found to be justified where there is evidence of bad faith that shocks the conscience. The four commonly accepted criteria for determining whether punitive damages are called for include: (1) the award must correspond to actual losses suffered; (2) damages must not be *de minimis*; (3) there must be a consistent practice of violations, knowingly repeated; and (4) the violations are willful and flagrant. The Company argues that none of these criteria are met in this case.

The Company contends that the parties have a long-standing, agreed-upon remedy for covered work violations that is more than fair – providing for a payment equal to the least amount of overtime that would have been required for an additional covered employee to have performed the work at issue. This compensatory remedy is consistent with the remedies generally awarded by arbitrators for covered work violations. In fact, because the Company has not always required the Union to prove actual harm resulting from the violation, i.e., that it would have been necessary for an additional covered employee to be on duty to complete the work, the Company has been more generous than necessary. Such a remedy provides no motivation for the Company to encourage or support covered work violations and is distinguishable from cases where employers consciously chose not to call in covered employees for a few minutes work out of a financial motivation.

The Company contends that in most instances the amount of covered work is so small there in no actual harm to the employee. In the majority of situations the work could be performed by the employees on duty, without calling in an additional employee on overtime, or by a minimum shift extension of 45 minutes. Most arbitrators decline to award damages at all in such circumstances.

The Company further contends that it has made a good faith effort to change its longstanding culture of teamwork. Through written memoranda and bulletins, conference calls, in-person meetings and training sessions the Company has consistently spread the message about the narrower scope of permissible supervisor work. The Company has disciplined Leaders for permitting or performing impermissible covered work.

The Company contends that a large number of grievances filed does not prove a large number of violations. Supervisors are still permitted to perform some covered work, sometimes the amount of work is de minimis, and sometimes no harm results to an employee. The existence of a large number of grievances does not prove that violations are consistent, knowing, willful and flagrant.

The Company contends that the CBA does not provide for punitive damages for covered work violations. The Arbitrator's jurisdiction is limited by Article 20 and a remedy must draw its essence from the CBA. The only punitive remedy in the CBA relates to missed meal period and that was collectively bargained by the parties. As with the overtime bypass remedy, the parties have agreed to pay the employee, who would have been the next to be assigned, what that employee would have received.

For the above reasons and taking into consideration the contract language, past practice, and arbitral authority, the Company requests a decision affirming the parties' previously agreed-upon remedy for covered work violations, and requiring actual harm to a covered employee for any monetary penalty to result.

STIPULATED ISSUE

When there is a covered work violation, what is the appropriate remedy?

FINDINGS

Although there are numerous covered work grievances pending in the grievance procedure, the parties stipulated that the only issue now before the undersigned arbitrator involves the appropriate remedy for when a covered work violation exists.

The Union contends that the remedy the parties have been applying in covered work cases has proven insufficient to deter violations, that egregious violations have continued, and that, therefore, a stronger remedy is required. The remedy being sought, payment of the minimum call out of 4.0 hours of VOT or MOT, is unrelated to the duration of the violation and would, in many cases, go beyond making the harmed employee whole for actual damages. Both parties recognize that arbitrators only award remedies exceeding actual damages in extraordinary circumstances, unless the CBA specifically authorizes such an award. Whether such extraordinary circumstances exist is a fact question and the Union bears the burden of proof.

The parties' current CBA contains no provision for remedies exceeding actual damages for covered work violations. It does contain such a provision for missed meal periods. Pursuant to Article Six, Section One-B, an employee who is not granted a meal period break is paid .5 hours overtime and two hours straight time, in additional to their regular pay. The existence of that provision demonstrates that the parties know how to write such a provision into the CBA, when they choose to do so. Until receipt of the Barnard decision the parties had no way of knowing how the new "assist" language would be applied. And, the Union had no way of knowing that it might want to obtain new language providing a specific remedy for covered work violation remedies as was done for recurring meal period violations.

The Union presented evidence concerning agreed-to and routinely-applied remedies in overtime bypass, improper mandatory and payroll shortage cases. For each type of case, the remedy applied exceeds the actual damages. The difficulty with relying upon those practices to justify the remedy sought here is that the present covered work remedy already, in many cases, goes beyond actual damages. The record is clear that the Company pays the employee who would have been extended or called out, even if there were sufficient employees at work who could have performed the covered work instead of the supervisor, making the extension or callout unnecessary. Therefore, the treatment of overtime bypass, improper mandatory and payroll shortage violations tends to reinforce the propriety of the parties current method of remedying covered work violations and does not provide justification for extending the remedy in the manner sought.

Further, the remedies in the overtime bypass, improper mandatory and payroll shortage cases were mutually agreed to by the parties. For covered work grievances the parties have agreed to and consistently have been applying a remedy like that used in improper mandatoried cases, i.e., the minimum amount of overtime necessary to extend the next eligible employee.

The Union is correct that the many grievance settlements were on a non-precedent basis. The wording of the November 2, 2009-Implementation Agreement resolving the pending grievances with two hours of overtime and addressing what happens "after that" cannot be ignored. Union witnesses did not dispute the former ER-Director's testimony that the final sentence in the Implementation Agreement was responsive to the Union's concern that the settlement might limit the remedy in future cases to two hours of overtime. That concern was addressed by the assurance that the parties "will handle any covered work grievance as we have in the past." This reflects an agreement by the parties, not merely the non-precedent setting settlement of a list of individual grievances.

The Union argues that in reaching the Implementation Agreement the Company also made a commitment to ensure that covered work violations ceased and, since they failed to do so, the Union should not be limited to the agreed-to remedy. Certainly, the failure to uphold one side of a bargain can bring enforcement of the other side of an agreement into question. Whether that occurred turns on the facts.

Both of the Union's arguments, i.e., that extraordinary circumstances exist sufficient to

warrant the award of remedies exceeding actual damages and that the Company's failure to halt covered work violations means that the Implementation Agreement no longer limits the remedy, would require a finding that the Company has engaged in willful and repeated violations.

The Union's direct evidence regarding alleged covered work violations since the Barnard decision in 2009 consists of the grievance forms, with the Company's answers, and testimony from Union representatives in Nashville, Dallas and Seattle. Surely the Seattle incident involving a supervisor who allegedly switched vests to perform covered work in disguise, if proven, would be an example of a willful violation. That case is, however, still pending and there is no evidence of that sort of willful behavior occurring on a repeated basis.

A review of the 2009-2012 grievances shows that they fall into several categories.

1. Implementation Agreement applied. Several of the 2009 grievances were resolved as a result of the November 2, 2009-settlement of the grievances listed in the grievance arbitrated before Arbitrator Barnard and "those that are still in process regarding this same issue." (UX 1.) See, among others, MCI-R-1772, 1773, 1774-2009. Those grievances, therefore, are not relevant to the issue here.

2. Withdrawn by the Union, no violation. The Union withdrew, without prejudice, some grievances in which the Company maintained that no violation had occurred, such as when the OT book had been exhausted (AUS-R-0634/10). See also, among others, SNA-R-0233/10, STL-R-0370/10, LBB-O-0614-/10, and BUF-R-0476/10. This indicates that on some occasions the supervisor's judgment that the work involved "assisting" was recognized by the Union as having been correct.

3. Withdrawn by the Union, new information. A number of grievances were denied in Step 1 because of insufficient information and the Union subsequently withdrew them. See, among others, SLC-R-0383/10, and HOU-R-0569/10 and -0570/10. In these cases, the Union representative frequently stated that new information had been received but did not explain the nature of the new information. That leaves the implication that the investigation had revealed no violation had occurred, but no basis to reach a firm conclusion.

4. Granted at Step 3, time frames missed. Several grievances were granted by Employee Resources at Step 3 because time frames were missed. See, among others, AUS-R-0635/10. These cases provide no guidance as to whether a violation actually occurred. The Company did not acknowledge a violation, as in other cases.

5. Offered remedy rejected at station level, accepted at Step 3. In some cases a remedy was offered at the station level but rejected by the Union. Subsequently, at Step 3, the very same remedy was offered and accepted. See, DTW-R-0165/10.

6. Denial at station level, remedy granted at Step 3. Employee Resources granted grievances

that had been denied at the station level, and awarded a remedy acceptable to the Union. See, among others, HRL-R-0204/10, BHM-R-0625/10, and TPA-R-. This occurred, for example, when station management had attempted to call out employees but did not complete the mandatory process. See, ABQ-O-0639/10.

7. Settlement offered in lieu of System Board. See, among others, LAX-R-0236/11 and TPA-R-0296/11. These cases do not indicate that the Company agreed a violation occurred.

The grievance forms understandably contain only cryptic descriptions of what occurred. In many cases where a remedy was offered and accepted, it is not possible to tell whether the Company, at the station level or at Step 3, was admitting to a violation or whether they simply were offering a settlement for other, unstated, reasons. In some cases the Union withdrew grievances for reasons that are unclear. Also, it is not always clear why the Union, either at the station level or at Step 3, accepted a specific, offered remedy.

A "bright line" provision, such as the complete prohibition on supervisors performing covered work the Union sought in the current round of bargaining, might be much easier to apply on the ground. The April 2010 work rules interpretations provide substantial guidance but do not address every possible situation that can arise. The Union did not want to get into "bag counting" to draw the line of demarcation. Necessarily, the current "assist" language leaves the supervisors and agents with a gray area requiring judgment calls.

By asserting the right of supervisors to "assist" to the fullest, within Article Two and the Barnard decision, the Company is within its rights under the CBA. The Union may genuinely disagree in many instances and file grievances. The existence of those disputes is not, in and of itself, evidence of willful or repeated violations. It reflects each party's interest in extending or shrinking the gray area that still exists.

The fact that violations, acknowledged by the Company at the station and Step 3 level, are still occurring is problematic. In the Union's view the root problem is the Company's misinterpretation of "portion." As discussed above, what constitutes a "portion" may be the subject of legitimate disagreement between the parties, and not evidence of a willful violation.

The Union argues that the Company's failure to do more to educate station managers and supervisors or to discipline those who improperly perform covered work or permit covered work to be performed indicates the Company is condoning mass violations. Again, the Union has a high bar to cross to prevail on this argument. The evidence would have to show that the Company is willfully permitting its managers and supervisors to repeatedly violate the CBA and Barnard decision.

The Company's evidence that it is disciplining those who fail to adhere to the instructions given in the various memoranda, bulletins, and trainings, etc., is not persuasive that managers and supervisors have been disciplined, specifically for covered work violations as

opposed to other types of leadership expectation failures, beyond a few receiving a letter in the file. That failure of evidence does, however, support the finding sought by the Union. The Company clearly has made efforts to communicate the work rules interpretations. It has required stations to send all covered work grievances to Employee Resources for review. It has reversed station-level decisions in many grievances. A reading of the totality of this evidence falls far short of establishing such bad faith that "shocks the conscience."

The Union's frustration with the continuing incidents of covered work violations is understandable. The record presented here, however, does not support a finding that the Company is engaged in willful and repeated violations that would justify the extraordinary remedy sought. Therefore, the grievance will be denied.

In accordance with Article 20, paragraph C of the CBA, the cost of the arbitration shall be borne by the Union .

AWARD

The grievance is denied.

Elizabeth Neumeier, Arbitrator

September 7, 2012