GRIEVANCE ARBITRATION DECISION
TRANSPORT WORKERS UNION, LOCAL #555
&
SOUTHWEST AIRLINES, INC.
JUNE 3, 2022

In the matter of:	}
	}
Transport Workers Union, Local #555	}
	}
&	} Grievance No. DEN-R-1874/21
	}
Southwest Airlines, Inc.	}

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ISSUE

Did the Company violate the contract when they designated travel days to previously scheduled off days, and if so, what shall the remedy be?

DATES

GRIEVANCE: August 16, 2021; **ARBITRATION HEARING**: February 3, 2022; **BRIEFS**: March 21, 2022; **ARBITRATION AWARD**: June 3, 2022.

REPRESENTATION

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Arbitrator

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I. ISSUE

Did the Company violate the contract when they designated travel days to previously scheduled off days, and if so, what shall the remedy be?[1]

II. FACTS

A. *Overview*

[redacted] is the Grievant. Southwest Airlines (Company) employs her as a Ramp Agent. She began her career with the Company in Hartford, Connecticut (BDL), and then transferred to Denver, Colorado (DEN).[2] She requested a voluntary transfer from Denver (DEN) to Tampa (TPA), with work beginning in Tampa on September 1, 2021 (Wednesday).[3] The Company granted her travel leave, defined as unpaid days to relocate to a new station. In this case, the Company granted Ms. [redacted] five travel days.

Transport Workers Local Union No. 555 is the Union. They represent Ms. [redacted] and other Ramp Agents. The Union claims that the Company should have awarded Ms. [redacted] seven days of leave under CBA— her five contractual travel days plus her regularly occurring weekend days off.

Ms. [redacted] filed a grievance due to the travel leave for her transfer.[4] The grievance requested that the Company apply the Union Method to Ms. [redacted] s DEN-TPA transfer and award her two paid days off as a remedy.[5]

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1 The Arbitrator adopts the Union's statement of the issue. Un. Br. at 2.

2 T. 25.

3 Under Art. 21.B, Agents may request a voluntary transfer. The process begins by the Agent submitting an electronic bid for work in the desired city. T. 98. When a station in the desired city has an opening, the Company consults the voluntary transfer list and selects the most senior bidder. *Id*.

4 Jt. Ex. 2.

5 Jt. Ex. 2, at 10.

At the heart of this disagreement is whether the Company should have considered Ms. [redacted] s previously scheduled days off in DEN when calculating travel leave under Article 11.D. The Union says that the Company took these off-days from Ms. [redacted]'s leave time—these days counted against her travel leave as opposed to counting as days-off.

The Union Method for counting travel days preserves scheduled time-off, and adds this time (when circumstances arise, such as long-distance transfers that overlap with days-off) to the computation of Article 11.D leave days.

The Company contends, to the contrary, that travel leave should be calculated by looking at the first day in the new station, and then allotting travel days by counting backward from that day (the Company Method). As explained below in the Company's evidence, this method follows the Company's longstanding practice, as well as language in the CBA. Even if this travel-leave overlaps with days off that the employee enjoyed at the station from she is departing, these days count against the travel leave allowance.

To visualize these differences, here is the Company Method as applied to Ms. [redacted]'s leave days in 2021 (see below).[6]

[6] Un. Ex. 1 & T. 223.

"Company Method" Applied to Ms. [redacted]'s Allotment of Travel Leave Days						
8/26 Thursday	8/27 Friday	8/28 Saturday	8/29 Sunday	8/30 Monday	8/31 Tuesday	9/1 Wednesday
Last day working in DEN	Travel Day 1	Travel Day 2	Travel Day 3	Travel Day 4	Travel Day 5	First day working in TPA

By comparison, this is a visualization of the Union Method, with the days off highlighted in green.[7]

"Union Method" Applied to Ms. [redacted]'s Allotment of Travel Leave Days								
8/24 Tuesday Last Day Working In DEN	8/25 Wednesday Travel Day 1	8/26 Thursday Travel Day 2	8/27 Friday Travel Day 3	8/28 Saturday Travel Day 4	8/29 Sunday DEN Day Off	8/30 Monday DEN Day Off	8/31 Tuesday Travel Day 5	9/1 Wednesday First Day Working In TPA

The Collective Bargaining Agreement regulates travel days for employees who voluntarily transfer from one station to another in Article 11.D.[8]

> **ARTICLE 11**
>
> **FILLING OF VACANCIES**
>
> D. Travel Leave. An Employee transferring from one city to another shall be allowed, after awarding of the bid, one (1) unpaid day of leave, plus an additional one (1) unpaid day for each five hundred (500) miles, or portion thereof, by the most direct AAA highway mileage between the two cities, to report to his new assignment.[9]

The Company contends that it has never applied Article 11.D in the manner set forth in the grievance. By the Company's view, the CBA treats a day as a day under the

[7] T. 71-T. 72.

[8] Un. Ex. 1 & T. 223.

[9] Jt. Ex. 1, at 35.

CBA. Therefore, a travel day counts against a Saturday and a Sunday, even when an Agent has those days off.

The Company reads Article 11.D to mean that she was entitled to one day of leave, plus an additional day of leave for each 500 miles or portion thereof that an Agent travels. Because Ms. [redacted] was traveling approximately 1,800 miles, the Company added three more days: her travel was between 1,500 miles and 2,000 miles, the range in which three additional days are allocated.

The Union contends that Ms. [redacted] was shortchanged two days—specifically a Saturday and Sunday. By the Union's view, Ms. [redacted] already had those days free from scheduling. So, in effect, the Company took away Ms. [redacted] s free days on the weekend and applied those days against her travel time.

The Union supports its view by offering evidence of numerous times when employees were provided travel days in accordance with the Union's view of the CBA. In addition, to the best of the Union's belief and information, it has never seen a transfer where an employee's weekend days-off counted against her travel days.

Nonetheless, the Company entered an exhibit showing that it handled many transfer-related travel days exactly like Ms. [redacted] s situation. The Company also suggests that the Union knew or should have known about these situations, and therefore should have grieved the matter long ago.

The Union counters with an employee who testified at the arbitration hearing to his experience in bargaining of this contract language more than 28 years ago. By his account, this contract language was bargained to ensure that employees would not exhaust free time while moving to a new station.

This overview summarizes the evidence and contract arguments that the Union and Company presented to the Arbitrator during a Zoom hearing on February 3, 2022. These matters are described below in more detail.

Against this backdrop, the following contractual provisions are part of the evidence:

Article One
Purpose of Agreement

A. The Purpose of this Agreement is, in the mutual interest of the Company, the Union, and the Employees, to provide for the operation of the Company under methods which shall further, the fullest extent possible, the well-being of Southwest Customers, the efficiency of operations, and the continuation of employment under reasonable work conditions. It is recognized to be the duty of the Company, the Union, and the Employees to cooperate fully to attain these purposes.

Article Two
Scope of Agreement

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

Article Six
Section Once
Hours of Service

D. **Work Schedule Bids/Requirements.** Work schedules shall be bid as often as required but shall be bid at least six (6) times per year. Each bid shall be for a minimum period of twenty-eight (28) days and shall, where possible, become effective at 0000:01 Sunday morning. Each bid shall indicate the starting and tentative ending dates of the work schedule. Once an Employee's shift is established, it shall not be changed except in accordance with this provision or Article Seven (Overtime). The ending date of the work schedule may be changed due to an unexpected change in flight activity or because of Employee(s) returning from approved leave(s) of absence. There shall be no re-bid on less than seventy-two (72) hours' notice. Employees shall have seven (7) days to bid on either a shift bid or rebid. Nothing in this Agreement shall prevent the Company from assigning shifts and days off to new hire

probationary Employees. Probationary Employees shall be considered in training, and shall be assigned shifts and days off, but not used as Relief Agents, during the first thirty (30) days worked of their probation. Thereafter, probationary Employees shall bid shifts and days off according to their seniority on the next scheduled bid. An Employee who returns from an approved leave of absence will, by exercising his seniority, select a shift and days off that his seniority would allow him to hold according to the current shift bid. An Employee may file a permanent shift and day off bid. The permanent bid will be distributed to the Company, shop steward, and the Employee. Once on file with the Company, the permanent bid will stand as the Employee's official bid in the event an Employee fails or is unable to file a bid during the location's regular bid process. If an Employee wants to change his permanent bid, he may do so at any time. All bids on file before the bid closes will be considered. Any Employee who does not have a bid on file will be assigned to a shift and days off after bids are awarded. If more than one Employee is to be assigned, the remaining available shifts and days off will be offered in order of seniority.

Article Seven
Overtime

B. **Time and One-half.** Employees shall be paid an hourly rate of time and one-half for:

1. **First 4 Hours.** The first four (4) hours worked either prior to or after an employee's regular shift.
2. **First 8 Hours.** The first 8 (8) hours worked on one of two regularly scheduled days off.

C. **Double-time.** Employees shall be paid an hourly rate of double time for:

1. **Excess of 8 Hours Overtime.** All hours in excess of the first eight (8) hours worked on one of the two regularly scheduled days off each work week.
2. **Second Scheduled Day Off.** For all time worked on the second regularly scheduled day off in a work week. If a minimum of four (4) hours of overtime on the first day was also worked.
3. **Excess of 12 Hours.** For all time worked in excess of twelve (12) hours in any work day.
4. For all time worked due to mandatory overtime assignments.

I. (6)(b). Employees will only be required to work on one (1) of their regularly scheduled days off. However, in the event of an emergency situation and the Employee is mandatoried to work both scheduled days off, the Employee will be paid for the second scheduled day off at the applicable overtime rate plus an additional one half (1/2) time at his regular rate for all hours worked during the overtime assignment.

Article Nine
Training

B. Day off Status. An Employee required by the company to attend classes on the Employee's day or days off shall be paid for the day or days at the applicable overtime rate.

Article Eleven
Filing of Vacancies

D. Travel Leave. An Employee transferring from one city to another shall be allowed, after awarding of the bid, one (1) unpaid day of leave, plus an additional one (1) unpaid day for each five hundred (500) miles, or portion thereof, by the most direct AAA highway mileage between the two cities, to report to his new assignment.

B. *The Union's Evidence*

Prior to Aug 16, 2021, Ms. [redacted] properly submitted a transfer bid for the Tampa Bay (TPA) station as a Ramp Agent. The Company awarded her the position, and notified her of a report date of Wednesday, September 1st. The Company's notification stated that her travel time from DEN to TPA would run from August 26th through August 31st, inclusive of her regularly schedule days off.

Ms. [redacted] testified in the arbitration hearing that the DEN Station Services Office (SSO), through Michele Stewart, confirmed Ms. [redacted]'s allotment of travel time on August 16th.[10] Upon receiving this email, Ms. [redacted] communicated with the DEN Station Representative and proceeded to file a grievance over the matter. She based her grievance on a previous transfer and input from co-workers and her Union Representative.

For the DEN to TPA transfer, the Company failed to consider that Ms. [redacted] was already scheduled for days off in conjunction with her workday in Denver. The Union's method counts Ms. [redacted] s last workday, August 24th, a Tuesday.

[10] Un. Ex. 1.

Her first workday in Tampa was September 1st. The Company should have granted August 25th (Wednesday) as Travel Day 1; August 26th (Thursday) as Travel Day 2; August 27th (Friday) as Travel Day 3; August 28th (Saturday) as Travel Day 4; August 29th (Sunday) as Travel Day 5; August 30th (Monday) as Travel Day 6; and August 31st (Tuesday) as Travel Day 7.[11] The Union Method would treat August 28th (Saturday) and August 29th (Sunday) as travel days because these were Ms. [redacted] s regularly scheduled days off.

Ms. [redacted] testified that she transferred to TPA at the same time as four other Denver Agents. They all noticed that regularly scheduled days off in Denver were not provided in addition to their days of travel leave. [redacted] exchanged emails with a member of the Station Services Office in DEN about this matter and shared those emails with Ms. [redacted] [12]

Ms. [redacted] testified that when she transferred from Hartford (BDL) to Denver (DEN), her "days off and [her] travel days were not joined together," and she received both her allotted travel leave and her previously scheduled days off in BDL.[13]

Steve Prouty was a Union negotiator for the 1994 CBA. He had direct knowledge of the intent of the language that the Parties negotiated.[14] Referring to the Company Method at the arbitration hearing, he testified that "I've never seen it done that way."[15]

The testimony provided by TWU Local 555 District Representative Tyler Cluff, further elaborated on this point, stating that "in all the time I've been working

11 T. 71-T. 72.
12 T. 25-26, & T. 28; Un. Ex. 1.
13 T. 29 & T. 57.
14 T. 126 & 133.
15 T. 130.

grievances… this issue isn't something that has come up"[16] and "every time I've been involved with anything like this, travel days have always been put on a – on a day an employee was originally scheduled to work."[17] In reference to Article 11.D, he stated that "it's pretty clear that it's referring to a day that you would normally be scheduled to work. Otherwise, why would it need to mention unpaid?"[18]

Mr. Cluff provided additional evidence in support of the Union Method for apportioning transfer leave days. Focusing on Article 7.B, 7.C, and I.6.b, and Article 9,[19] he noted that these provisions apply to situations and rates that would be applicable if employees are required to work on scheduled days off.

Frank Pelz (Denver Alternate Union Representative) testified about emails he received from [redacted] and [redacted] These employees also questioned their allotment of travel time. Ms. [redacted] was included in the group emails for those transferring to TPA.[20] Mr. Pelz also stated that he believed that the Denver location had been corrected regarding how the travel time was awarded.[21]

Former Denver station agent [redacted] also testified. He said that when he was awarded a transfer to the Miami station around the time as Ms. [redacted] s TPA transfer, he received an email from DEN Station SSO Steward indicating that he was receiving his scheduled days as well as an FHL (Floating Holiday Leave) for August 25, 2021.[22]

C. *The Company's Evidence*

16 T. 101.
17 *Id*.
18 T. 98.
19 T. 71-T.73, referring to Jt. Ex. 1.
20 T. 74-T.74.
21 *Id*.
22 Un. Ex. 2.

Over several years, the Company has processed about 1,000 voluntary transfers for this group of employees.[23] When Ms. [redacted] transferred, the Company calculated the distance between DEN and TPA— approximately 1,800 miles. Under Article 11.D., she was entitled to five unpaid days of travel leave. This calculation included one day for the move plus another day for each 500 miles or portion thereof. The Company provided Ms. [redacted] five days of travel leave in accordance with this policy.[24]

The Company points to the CBA's definition of a "day," which is set forth in Article 4 as a 24-hour period.[25] That part of the CBA does not define a "day" as a "working day," the view put forward by the Union. The Parties negotiated the language in Article 11, Section D in 1990. Since that time, the Company has consistently administered its travel day policy.

Under Article 4.C, a "day" is defined as a "a twenty-four (24) hour period beginning at 0000:01."[26] The Company has relied on this definition by apportioning the number of "twenty-four (24) hour periods" in Article 11.D. The Article makes no mention of extra days that should be provided based on an Agent's schedule in either the departing or the new station.

The CBA has a separate definition of a "working day." In Article 20, which applies to procedures for grievances and system board arbitrations, times for assessing discipline and administering grievances are measured in "working days."[27] Article 28

23 Transfer requests were lower in 2020 due to COVID-19. T. 220.
24 T. 71-T. 72; Un. Ex. 1.
25 Jt. Ex. 1.
26 *Id*.
27 Jt. Ex. 1 (Art. 20.E, Art 20G.2, Art. 20.H, and Art. 20.L).

also sets forth "working days" regarding pay shortages.[28] These provisions show that the meaning of a day under Article 11.D differs from a working day, and therefore, the Company apportioned leave days properly to Ms. [redacted]

The Company calculates leave days by looking at the first day in the new station, and then allotting travel days by counting backward from that day (called the Company Method). Ms. [redacted]'s last workday in Denver was August 26th (Thursday). Her first workday in Tampa was September 1st (Wednesday). The Company granted August 27th (Friday) as a Travel Day 1; August 28th (Saturday) as Travel Day 2; August 29th (Sunday) as Travel Day 3; August 30th (Monday) as Travel Day 4; and August 31 (Tuesday) as Travel Day 5.[29]

The Company Method is used widely today across many stations.[30] Three witnesses testified that they used the Company Method in administering hundreds of transfers in the following stations and time frames, without any challenge from the Union. These transfers originated from stations in Phoenix (2007-2014),[31] Washington/Dulles (2014-2015),[32] San Diego (from 2015-2017),[33] Minneapolis (from

28 Jt. Ex. 1.

29 T. 177-180.

30 *See* Co. Ex. 5, showing transfers using the Company Method among 30 stations in 2017-21. *Also see* T. 223-24.

31 T. 233; Un. Ex. 1.

32 T. 180-T. 181.

33 T. 182-T. 183 & T. 189.

2017-2022),[34] Denver (from 2018-19),[35] Milwaukee (2019-2022),[36] Salt Lake City (2007-08),[37] and Philadelphia (2008-2009).[38]

Moreover, the Company Method was consistently used both times that Ms. [redacted] transferred stations. Records show that when Ms. [redacted] transferred from BDL to DEN, she was awarded five days of unpaid time off on August 16th, 17th, 18th, 19th, and 20th in 2019, Article 11.D. provides.[39]

III. ARGUMENT

The Arbitrator summarizes arguments from the Employer's and Union's briefs.

A. *Union*

1. The Union Method of Allocating Travel Days Reflects the Parties' Bargaining Intent in Article 11.D. Negotiator Steve Prouty, a member of the 1994 ROPA negotiating team, credibly and specifically testified about the rationale behind this agreed-upon contract language.[40] He credibly testified that he had never seen the Company Method used until this grievance arose, stating: "I've never seen it done that way."[41] TWU Local 555 District Representative Tyler Cluff similarly testified that "in all the time I've been working grievances… this issue isn't something that has come up,"

34 T. 182.
35 T. 207-T. 208.
36 T. 196.
37 T. 233; Un. Ex. 1.
38 T. 202-T. 203.
39 Co. Ex. 6 and Co. Ex. 7; T. 56 & T.60-T. 62. Ms. [redacted] had days off prior to her travel leave, on August 10-14, but they were a combination of her regular days off and voluntary leave days that she initiated and requested. *Id*.
40 T. 126 & T. 133.
41 T. 130.

and "every time I've been involved with anything like this, travel days have always been put on a – on a day an employee was originally scheduled to work."[42]

2. The Company's Inconsistent Practice in Allocating Travel Days Indicates that Managers Recognize the Union Method. The Union highlighted the experience of [redacted] in this regard. The Company scheduled his travel days around his days off.[43] The evidence appears in his timecard for the period November 1, 2019 through November 30, 2019.[44]

Denver Alternate Union Representative Frank Pelz spoke of his concerns about the allotment of travel days to [redacted] and [redacted] and upon review, the DEN station corrected their allowance of days.

3. The Union Grieved the Company Practice at the First Instance of Learning that the Company Violated Article 11.D. The Union does not dispute that an adverse practice has taken root at some stations, but at many others the Union Method is routinely and consistently used. The Union advanced Ms. [redacted]'s grievance to arbitration because it is the first instance of gaining knowledge of a violation.

4. The Union Is Not Seeking a Benefit at Arbitration that It Failed to Bargain in the CBA. There is no evidence that the Union bargained the issue after 1994. That is because the issue was settled at that time, 27 years ago before this grievance was filed.

The Union therefore asks the Arbitrator to sustain the grievance in its entirety.

B. *Company*

42 T. 101.
43 T. 102.
44 T. 202-T. 203.

A. The Union Did Not Meet Its Burden of Proof. A party who asserts a contract violation in labor arbitration bears the burden of proof by a preponderance of evidence. The Union's proof did not meet this threshold.

B. The CBA Does Not Mean What the Union Purports. The Union overlooks the CBA's distinction between a "day," which is set forth in Article 4 as a 24-hour period,[45] and a "working day," which is defined more specifically for certain circumstances that do not apply to the grievance.

The Parties negotiated the language in Article 11.D in 1990. Since that time, the Company has consistently administered its travel day policy.

C. The Arbitrator's Powers Are Limited by Article 20.L.5. The Arbitrator cannot interpret the meaning of "day" in any way other than the Parties have defined it themselves. The Arbitrator's powers are circumscribed under Article 20.L.5, where the CBA states: "The functions and jurisdiction of the Arbitrator shall be fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms."[46]

By applying the plain language of the CBA, the Arbitrator should conclude that a transferring employee "shall be allowed, after awarding of the bid, one (1) unpaid day of leave, plus an additional one (1) unpaid day for each five hundred (500) miles, or portion thereof, by the most direct AAA highway mileage between the two cities, to report to his new assignment."[47] A "day" is defined by Article 4(C) as a "a twenty-four (24) hour

45 Jt. Ex. 1.
46 *Id*.
47 *Id*.

period beginning at 0000:01."[48] When transferring, an employee is entitled to the apportioned number of "twenty-four (24) hour periods" that Article 11.D. provides.

D. A "Day" Is Not the Same as a "Working Day" in the CBA. In Article 20, which applies to the grievance process and system board procedures, timeframes for assessing discipline and administering grievances are measured in "working days."[49] Article 28 also uses "working days" for pay shortages.[50] The Arbitrator should not alter the Parties' choice not to use "working days" in Article 11.D.

E. The Company Method Has Been Used Without Challenge from the Union for Many Years. Company Exhibit 5 is a compilation of transfers in which the Company Method of allocation travel leave has been used without a grievance filed by the Union.

F. The Union's View of Bargaining History is Not Relevant to this Grievance. Mr. Prouty bargained on behalf of the Union when the language was drafted.[51] He testified that its purpose was to create a consistent travel leave allotment, based on distance traveled, instead of the prior Agreement's "one size fits all" ten-day travel leave provision. Mr. Prouty said that the Parties' intent was to "put a frame on it, of mileage, and how long it took and that kind of thing."[52] Article 11.D. reflects this "frame" – Agents are awarded travel leave based on mileage between the cities.

The Union Method turns this purpose on its head, resulting again in awarding of leave time that is untethered from the distance traveled.

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48 *Id*.
49 *Id*.
50 *Id*.
51 T. 122.
52 T. 120.

G. Once Ms. [redacted] Left DEN, She Forfeited Her DEN Days Off. Ms. [redacted] was not even able to be physically present to work in DEN anymore. On their last day of work at a station, employees must turn in their SIDA badge and be escorted in secure areas, and then obtain a new SIDA badge at the new station, in accordance with federal regulations.[53]

IV. ANALYSIS

The grievance involves the application—and possibly the interpretation— of Article 11.D. The applicable text states:

> **ARTICLE 11**
>
> **FILLING OF VACANCIES**
>
> D. Travel Leave. An Employee transferring from one city to another shall be allowed, after awarding of the bid, one (1) unpaid day of leave, plus an additional one (1) unpaid day for each five hundred (500) miles, or portion thereof, by the most direct AAA highway mileage between the two cities, to report to his new assignment.[54]

The CBA does not expressly state whether an "unpaid day of leave" in Article 11.D should include a transferring employee's day off in a normal workweek schedule or count that day against the allotment of mileage-based days.

A contract is to be construed by its express terms.[55] Where terms are vague or omitted, the parties' intent must be construed by examining the contract as a whole.[56] The leading treatise on labor arbitration instructs that "the contract should be construed, not narrowly and technically, but broadly and so as to accomplish its evident aims."[57]

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53 T. 80.
54 Jt. Ex. 1, at 35.
55 ELKOURI & ELKOURI, HOW ARBITRATION WORKS 348 (4th ed. 1985).
56 *Id*.
57 *Id*.

This points the Arbitrator to the Company's arguments for comparing other provisions in the CBA that differentiate between a "day" and a "working day." The CBA defines a "day" in Article 4 as a 24-hour period.[58] Under Article 4.C, a "day" is defined as a "a twenty-four (24) hour period beginning at 0000:01."[59] The CBA has a separate definition of a "working day." In Article 20, which governs grievance and system board procedures, the timeframe for assessing discipline and administering grievances are measured in "working days."[60] Article 28 also sets forth "working days" regarding pay shortages.[61]

While it is true that these provisions show that the meaning of a "day" under Article 11.D differs from a "working day," the Arbitrator is not convinced by the Company's theory. There is no evidence that any manager referenced this contract language in administering the Company Method. Rather, this seems to be a post-hoc argument that fits the facts without a basis in evidence.

As Justice Oliver Wendell Holmes observed more than a century ago, a "word is not crystal, transparent and unchanged. Rather, it is the skin of living thought and may vary greatly in color and content *according to the circumstances and the time in which it is used* (emphasis added)."[62]

This wisdom applies to the definition of a "day" and a "working day" in the CBA. The Company's view is plausible. Then again, it is plausible that the Parties defined "day" and "working day" at different times in their collective bargaining relationship to

58 Jt. Ex. 1.
59 *Id*.
60 Jt. Ex. 1 (Art. 20.E, Art 20G.2, Art. 20.H, and Art. 20.L).
61 Jt. Ex. 1.
62 Towne v. Eisner, 245 U.S. 418, 425 (1918).

meet different circumstances but meant the same thing. A "working day" could have been bargained by the Parties without their conscious thought they had already defined a "day" differently elsewhere in the CBA.

To this point, the Company places too much reliance on Article 4, Section C's definition of a day as "a twenty-four (24) hour period beginning at 0000:01."[63] In Article 4.C of the 1986-1989 CBA, this term started out more like the Union's generalized definition of a day. The 1986-1989 CBA defined a day as "a twenty-four (24) hour period beginning at midnight."[64] Article 4, Section B said, "A week shall consist of seven consecutive days commencing at 0001 Sunday morning."[65]

Obviously, the Parties felt a mutual need to modify this language from 1989 to the present CBA, though the record does not disclose why this language changed. The changes in contract language from 32 years ago to the circumstances of Ms. [redacted]'s grievance are subtle, perhaps insignificant—but this begs the question, why would negotiators open the 1986-1989 contract to these modifications if not for a concrete circumstance?

The two-fold problem with the Company's strict literalism is that is inflexible and unresponsive to the evolution of the meaning of a "day" under the CBA over this lengthy period.

Thus, the Arbitrator cannot expressly *apply* the definition of a "day" in the Company's theory of its case. He must *interpret* its meaning.

63 *Id*.
64 *Id*.
65 Co Ex. 1.

This conclusion points the Arbitrator to Mr. Prouty, a member of the Union's negotiating team in 1994. He was a highly credible and relevant witness at the arbitration hearing. But just as the Company's literal arguments suffer from timebound limits of relevance, Mr. Prouty's testimony speaks to a time long ago that since changed.

His testimony referred to a time when the Company was expanding west from its limited base of operations in Texas and bordering states. In 1994, transfers involved shorter moves than Ms. [redacted]'s 1,800-mile transfer from DEN to TPA. His testimony was captured in this cross examination:

> **Q**: Okay, but as far as the days, what if any consideration [during bargaining over Article 11.D.] was given to the application of these reference to days off schedules?
>
> **A**: Well, we never even – basically we thought, at that time, it takes five days, two days off, you basically move in nine days. That's what the notes always said. *And when we talked about this, and especially if you're moving from – at that time, we were more worried about people living in Texas and going into the West Coast because that's what we opened up*.
>
> We opened up most of the cities in – in that time frame. So, we were trying to get people to go. So, they'd have their first two days off, and then five days, and then the two days off, so you'd really get, like, nine days to do it. And that's – the notes that we used and the stuff we came back to, was that— whatever the days where you were transferring to, you'd have that much time (emphasis added).[66]

The Arbitrator uses two different ways to emphasize Mr. Prouty's testimony. The italics refer to his account of shorter moves from Texas to newly opened West Coast stations. These transfers were shorter than Ms. [redacted]'s transfer; and therefore, they could be accomplished in fewer days. Thus, fewer transfers would overlap with scheduled time-off compared to Ms. [redacted]'s transfer. The point is that the Company

[66] T. 120.

might have had a different thought about transfer leave days in 1994 if it was bargaining language for an operation that extends from Washington to Florida, and California to Maine.

The underlined portion of Mr. Prouty's testimony shows that he was speaking about a situation where the Company was *looking for volunteers to transfer*. But again, Ms. [redacted] voluntarily bid to make this move. Thus, Mr. Prouty's bargaining history testimony does not address the facts presented in Ms. [redacted]'s grievance.

In sum, the Union's primary theory of bargaining history— like the Company's primary theory of plain meaning of a "day"— lacks strong support in the record.

The contract principle that applies best to the evidence is "custom and practice." How Arbitration Works states this idea forcefully and succinctly: "The custom or practice of the parties is the most widely used standard to interpret vague or unclear contract language."[67]

Company Exhibit 5 is a summary of voluntary transfers that are direct evidence of the Company Method as applied to 31 different employee transfers from 2014 through 2021.[68] In every case, the transferring employee was not awarded his or her days off as part of an additional increment of transfer leave days. Those days-off counted against the Article 11.D total allowance of travel days.

The transfer of Abilio Villaverde adds weight to this evidence. Just like Ms. [redacted] he transferred from DEN to TPA.[69] Mr. Villaverde's first day at TPA was

67 HOW ARBITRATION WORKS 12-20 (Kenneth May, ed. 7th ed. 1997).
68 Co Ex. 5.
69 *Id*. at 1, line 1.

March 16, 2017.[70] His move overlapped with his two days-off, but the records show that these days were included in his travel day allowance.[71]

The Union counters this evidence by stating that it filed a grievance at the first instance of learning of a contract violation. While this argument has a high degree of credibility, it has low persuasive value. To the Union's point, its employees work in a highly decentralized work setting, where contract administration and enforcement depends heavily on employees initiating contact with Union Representatives to voice concerns about adherence to the CBA. Monitoring Article 11.D is an especially daunting challenge for the Union because when its members uproot to a new station they are likely preoccupied with planning and moving. The name and contact of the nearest Union Representative could be lost in this shuffle.

Added to this contract enforcement challenge, the applicable CBA is 103 pages.[72] The Arbitrator takes judicial notice that employees could be familiar with basic contract matters such as their seniority rights, wage rates, overtime pay, call-in obligations and similar— but they might not even realize that the CBA regulates transfer days. They would tend to accept the Company Method at face value.

In short, the Arbitrator comprehends the Union's theory of first-awareness enforcement. However, the Arbitrator would undermine the common law of labor arbitration principle of practice and custom as an aid to interpreting unclear contract language if he ruled that 31 other voluntary transfers from 2014 through 2021 meant nothing of contractual significance.

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70 *Id*.

71 *Id*.

72 Jt. Ex. 1.

In sum, the record shows that the Company Method and the Union Method have been used simultaneously at different stations without either the Company or Union realizing that a mixed practice had arisen.

As the Company Brief aptly stated, the burden of proof in a contract interpretation case rests with the moving party—here, the Union.[73] The Union's evidence has counted for something of significance in this arbitration but not enough to meet the standard of preponderance of evidence.

For this reason, the grievance is denied.

[73] Co. Br. at 7.

V. AWARD

1. The grievance is denied.

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Arbitrator Michael H. LeRoy

This Ruling Entered Into
This **3rd *Day of June 2022***.