GRIEVANCE ARBITRATION DECISION
TRANSPORT WORKERS UNION, LOCAL #555
&
SOUTHWEST AIRLINES, INC.
SEPTEMBER 9, 2022

In the matter of:	**}**
	}
Transport Workers Union, Local #555	**}**
	} Grievance No. ISP-R-0369/22
&	**}**
	}
Southwest Airlines, Inc.	**}**

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ISSUE

Did Ramp Supervisor Chris Acosta violate the terms of the Work Rule Interpretations (WRI) and the Collective Bargaining Agreement (CBA) when he scanned and loaded bags on Baltimore (BWI) Flight #1199, and if so, what is the remedy?

DATES

GRIEVANCE: February 15, 2022; **ARBITRATION HEARING**: June 7, 2022; **BRIEFS**: July 29, 2022; **ARBITRATION AWARD**: September 9, 2022.

REPRESENTATION

For the Union

Ryan Wittmuss, Grievance Specialist
Transport Workers Union, Local 555
1341 W. Mockingbird Lane Suite 1050
Dallas, TX 75247

For the Employer

Adria Jetton, Labor/Employment Attorney
Southwest Airlines
2702 Love Field Drive
P.O. Box 36611, HDQ-4GC
Dallas, TX 75235-1611

Arbitrator

Michael H. LeRoy

I. ISSUE

Did Ramp Supervisor Chris Acosta violate the terms of the Work Rule Interpretations (WRI) and the Collective Bargaining Agreement (CBA) when he scanned and loaded bags on Baltimore (BWI) Flight #1199, and if so, what is the remedy?[1]

II. FACTS

All dates refer to 2022 unless stated otherwise.

A. Overview

Ramp Agents [redacted] and [redacted] were working on February 6th at the ISP (Islip) station for Southwest Airlines. Supervisor Chris Acosta worked at the same location and time.[2] All three employees worked on Flight #1199. Mr. Acosta scanned fifty-seven bags onto the aircraft.[3]

This led Mr. [redacted] a Ramp Agent, to file Grievance ISP-R-0369/22 on February 15th.[4] The matter proceeded to a System Board of Adjustment on April 12th, where a deadlock occurred.

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[1] The Arbitrator adopts the Union's statement of the issue. Un. Br. at 3. The Company framed a similar issue: "Whether the Company violated the contract when Supervisor Chris Acosta scanned and loaded bags onto flight 1199 on February 6, 2022, during his on-the-job training." Co. Br. at 1.

[2] Mr. Acosta testified that he worked as a Duty Supervisor on the day in question. *See* T. 68.

[3] *See* Jt. Ex. 4. The substance of the grievance is confirmed in Co. Ex. 1, Supervisor Acosta's OJT checklist. It states:

> The Ramp OJT hands-on training should take place over an 8–10 daytime span, finishing just prior to the employee attending Ramp Initial Training in Dallas."

The Union points to the fact that Supervisor performed bargaining unit work on Feb. 6th but suggests without proving that Mr. Acosta started training two weeks before February 6th and continued in a training role through March 15th.

[4] Jt. Ex. 2. Mr. [redacted] role with the Union was not established at the hearing; however, he testified that he had "been with Southwest Airlines since January of '07, so just over 15 years. I've served as a ramp agent, primarily in Islip MacArthur Airport, with a short stint, less than a year, in Fort Lauderdale." T. 27.

This gist of the grievance is that a newly designated Duty Supervisor worked Flight #1199 while performing bargaining unit work more than the CBA allows. The Company does not dispute the Union's version of the facts. However, it states that the work lasted a short time, deprived no Covered Employees of work, and did not violate the CBA. The Company also asserts that the CBA allows Covered Employees to train Supervisors on their job duties.[5] This improves Supervisors and makes them better operations leaders. This type of training can only occur in the Air Operations Area (AOA), not a classroom. Moreover, the Company asserts this practice has existed for many years.[6]

This Arbitrator was assigned to hear this dispute. A hearing occurred on June 7th via Zoom. The Union and Company were afforded an opportunity to make opening statements, present evidence, challenge each other's evidence, and provide the Arbitrator with contractual arguments and proposed rulings.

B. Flight #1199 (February 6, 2022)

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[5] Co. Br. at 1 succinctly states this position:

> Allowing Southwest to continue training its new supervisors on the job for a short time does not circumvent or undermine the parties' Agreement. Simply, Supervisors must learn and experience the job duties they oversee when carrying out their leadership duties.
>
> The Air Operations Area (AOA) is not an environment that can be recreated in a classroom setting, and so for decades, Southwest Supervisors have performed covered work in their on-the-job training.
>
> Here, consistent with past practice, a new Duty Supervisor received on the job training from a Ramp Agent at the Long Island MacArthur Airport. In line with the CBA, this Duty Supervisor's training did not replace or harm any covered Employee or cover a scheduled line.

[6] *See* T. 87 (Testimony of Phillip Stachowski, a current Manager and 15-year employee of the Company who started his career as a Ramp Agent):

> Q. To your knowledge, how long have supervisors and managers been receiving on-the-job training at Southwest?
>
> A. So from my personal knowledge, it's been since I got hired in 2007. Whether it's an agent or a leader, if they're new to the position, they receive the on-the-job training.

On Flight #1199, a Ramp Agent at ISP named [redacted] was assisting a new Duty Supervisor with on-the-job training. Chris Acosta, the new Duty Supervisor, transferred in January to the Long Island MacArthur Airport (Islip). As a Duty Supervisor, he was assigned to oversee all three departments at the airport—ramp, operations, and customer service. Immediately before transferring to Islip, Mr. Acosta had been an Above the Wing Supervisor, overseeing operations and customer service. He spent most of his career in above the wing operations. However, Mr. Acosta had not been a ramp agent in over twenty years. This necessitated his training.

In the pertinent sequence of events, Mr. [redacted] and Mr. Acosta approached the bag cart to scan and load the bags onto the flight. From the terminal, Mr. [redacted] saw the two men have a brief conversation at the bottom of the belt-loader before Mr. [redacted] climbed into the bin to assist the other Ramp Agent in stacking bags.

Mr. Acosta scanned fifty-seven commodities for Flight #1199,[7] and placed items onto the belt loader while Mr. [redacted] was in the bin.

C. The Collective Bargaining Agreement

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

ARTICLE TWO
SCOPE OF AGREEMENT

> **A. Recognition.** The Union is recognized by the Company as the sole and exclusive bargaining agent for the Employees of the Company based in the United States, its territories and possessions, who comprise the class and craft of Ramp, Operations, Provisioning, and Freight Agents. The Union reserves the right to defend and protect any covered Employee.

[7] *See* Jt. Ex. 4.

B. Covered Employees. This Agreement extends to and covers all Employees in the classifications described in Article Five who normally and regularly spend a majority of their work time in the performance of duties described in Article Five. 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 perform the work of that covered Employee for the entire shift.

3. When a supervisor is working for an agent, they will be the first Employee to be involuntarily extended if the need arises on that shift.

4. All supervisors who have entered into a shift trade with a covered employee will provide a copy (may be electronic) of that shift trade to the local union representative upon approval.

C. Reasonable Work Rules. Employees covered by this Agreement shall be governed by all reasonable Company rules and regulations previously or hereafter issued 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 Office prior to becoming effective.

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

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.

L. **Interpretation/Application of Agreement.** In the event of a grievance arising over the interpretation of, or application of, this Agreement ("Contractual Grievances"), or in the event of a grievance involving disciplinary action other than discharge ("Disciplinary Grievances"), the following steps shall apply. However, in the event of a grievance involving discharge or a Union grievance concerning a change in Work Rules ("Discharge/Work Rule Grievances"), 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. If a termination is grieved, insurance benefits will continue until all grievance procedures have been exhausted and a final decision has been rendered. Employees are required to continue to pay the premiums when they are due; failure to do so will result in termination of insurance benefits.

15. **Arbitration/Function and Jurisdiction.** The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. 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.

D. The Memorandum of November 19, 2019

The following Memorandum was entered into evidence:

MEMORANDUUM

November 19, 2019

To: All Ground Operations and Cargo Leadership All TWU Ground Operations and Cargo Representatives

From: Charles Cerf and Michelle Jordan

Subject: TWU Work Rules Interpretations

The attached is a complete version of the new work rules. Please read the entire document since there are some new interpretations and clarification to existing interpretations indicated below:

Article Two Question Number 2 -Supervisors perform covered work alone

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?

— Working at the bottom of the belt loader
— Working in the bin
— Wing walking
— Marshalling in aircraft
— Pushing back aircraft

Wing Walking: Wing walking duties are those of assisting, and not a violation of 2.B.
Supervisors may perform wing walking work.
A Supervisor may be one of the two wing walkers.

Marshalling in aircraft: A supervisor marshalling would be in violation of 2.B. and may not perform marshalling 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.

2. Can Supervisors perform the following covered work alone?

Upload - Yes, but no more than 30 items
Download - Yes, but no more than 30 items

> Note: This work alone can be done either in the bin or at the bottom of the belt.[8]

III. ARGUMENT

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

A. *Union*

1. The Union Has Met Its Burden of Proof

The Union has the burden of proof and persuasion by a preponderance of the evidence in a contract language case. The Union believes it has met this burden.

2. The Plain Meaning of the CBA Supports the Union's Case

The CBA has language that applies specifically to loading and scanning of bags onto aircraft. Nowhere in the CBA is there any mention that Supervisors are granted a right to perform bargaining unit work while they are training.[9]

The Union relies on a standard contract interpretation principle: the plain meaning of contractual language is a sound method for resolving grievances.[10]

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[8] Jt. Ex. 3 (TWU Work Rule Interpretations).

[9] Un. Br. at 4, stating:

> Southwest did not produce any contractual language that supports their theory why this grievance should be rejected. Rather the Company agreed with the Union that the intent of language regarding supervisor training in Article 2 para. B. means supervisors provide training to rank and file members, not that they (supervisors) themselves gain the benefit of training under the scope of the CBA (citing T. 95).

[10] *See* Un. Ex. 4, the position letter drafted by Jerry McCrummen on Nov. 23, 2020. Mr. McCrummen stated:

> They are hiding behind the language of the contract and stating that they are training the ELDP managers when they are clearly performing covered work. The aforementioned training is intended for an agent to gain training. The language was not intended to provide an opportunity for management to replace agents under the auspices of "training". Management training is not provided for in our Contract, therefore, there is no loophole for managers to benefit from performing our protected and covered work. Training your management is responsibility of the Company and is not license or a free pass to perform our covered work. Simply put, carving out services that must be

In support of this theory, the Union relies on the Work Rule Interpretations (also called WRI). The WRI specifically refers to the "30/30 parameters," a strict limit on a Supervisor's uploading and downloading thirty items.[11] This rule applies whether the work is performed in the bin or at the bottom of the belt.

This activity includes scanning of bags, which is inseparable from loading aircraft.

Also, the CBA and WRI do not mention that Covered Employees train Supervisors. The latter are excluded under the CBA. Supervisors are not permitted to do the work negotiated for ramp agents in the CBA.[12]

3. The [redacted] Arbitration Decision Supports the Union's Case

[redacted] filed a grievance after a Supervisor scanned 85-90 bags (Grievance MCI-R-3818/19). Prior to Arbitrator Barnard's ruling on this grievance ("[redacted] Decision," August 27, 2020), the Work Rule Interpretations did not mention anything regarding scanning for Supervisors. However, the Union and Company reached an agreement in the WRI for the 30/30 parameters. The [redacted] arbitration established that loading and scanning were inseparable functions. It also led to the 30/30 limitation on

performed by agents under the contract and replacing the performance of the covered work with an excuse of training is circumventing the contract. I am reaching out to you in an effort to have this practice must cease immediately.

11 Jt. Ex. 3.

12 Un. Br. at 11, quoting How Arbitration Works (Alan Miles Ruben, ed., 6th ed., ch. 9.2, at 434, "if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." The Union contends that the WRI has no qualifier for "Supervisors." The Union also notes that Company Witness Phil Stachowski admitted that the WRI language does not specify this limitation. *See* T. 97.

Supervisor work.[13] Just as there was no mention of scanning in the WRI, there is no mention of "training" as an exception to covered work in the CBA.

4. There is No Bargaining History for the Company's Position

The Parties have had no talks for an amendment to the 30/30 parameters in WRI that would allow the Company to have Covered Employees train Supervisors.

5. Gap-Filling Is Not an Appropriate for this Grievance

Occasionally, contract interpretation requires gap filling. When these cases arise, an arbitrator looks to how the parties acted with reference to the gap. The Parties' history in bargaining and adjusting covered-work grievances do not support use of the gap-filling principle.[14]

6. The Arbitrator Has No Authority to Adopt the Company's Interpretation

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[13] Un. Br. at 10, citing and quoting the [redacted] arbitration decision, rendered by Arbitrator Barnard. An employee named [redacted] filed a grievance after a supervisor scanned 85-90 bags. Arbitrator Barnard reasoned:

> Further here, based upon the testimony and evidence as presented in the arbitration, it is clear that scanning is inseparable from loading or unloading. It is one function. If a supervisor cannot scan, he cannot work alone at the bottom of the beltloader. Applying then such to the work rules as published by the parties' memo on November 19, 2019, it is established that supervisors can scan and load or unload up to thirty (30) items on the upload and thirty (30) items on the download if working alone.

Un. Br. at 10, quoting Arbitrator Barnard at 21. Arbitrator Barnard sustained the grievance stating:

> The undisputed facts adduced in this case show that a supervisor held the scanner and actually scanned eighty-five to ninety-five bags on Flight 1161. This is a clear violation of the Contract.

Id.

[14] *See* Un. Br. at 14, "Gap-Filling and Common Law of the Workplace" in How Arbitration Works (Alan Miles Ruben, 6th ed., ch. 9.2.D). The Union notes that the Company presented two previous grievances at arbitration ([redacted] filed two grievances in 2015, BWI-R-1241/15 and BWI-R-1242/15). *See* Co. Ex. 2. The Union withdrew both grievances. In the instant case, the Company insinuates that because these grievances were withdrawn, the Union agreed there was no contract violation. The mischaracterizes the evidence. The Union's Mike Martinez said he was going to do more research before pursuing the matter further. *See* Co. Ex. 2, at 2. No reason was given for the eventual withdrawal of either grievance.

The CBA states that the arbitrator shall have no power to "change, add to, or delete" terms of the contract.[15]

In sum: The facts, CBA, and WRI prove by a preponderance of evidence that the Company violated the CBA and work rules when Supervisor Acosta worked beyond the limits of handling baggage on February 6th. The Union concludes: "For these reasons and all others stated supra, [redacted] ISP-R-0369/22, should be awarded in full for the Union and Southwest shall bear the cost of arbitration as stated in Article 20 paragraph C."[16]

B. *Company*

1. The Union Bears the Burden of Proof

The Union must prove its case by a preponderance of evidence.[17] The Union failed to meet its burden.

2. The Arbitrator Must Find Specific Proof of a Violation

A finding of a contract violation requires specific proof.[18] The Union's case alleged nothing more than the existence of an accepted, general practice of Supervisors doing *de minimis* bargaining unit work.

3. Supervisors May Perform Covered Work

15 Un. Br. at 17, quoting Jt. Ex. 1, Article 20, Section One, Paragraph L., #15.

16 Un. Br. at 22.

17 Co. Br. at 5, citing [redacted]e, DAL-O-2502/14 at p.17 (Hill 2015), Appx. 1.

18 *Id*:

> Each grievance that is advanced to arbitration is fact specific. As such, it is important to outline with specificity what is exactly before (the Arbitrator).

Article Five of the CBA allows Supervisors to perform covered work.[19] This is set forth in the following express terms in Article Five, B:

> B. Covered Employees. This Agreement extends to and covers all Employees in the classifications described in Article Five who normally and regularly spend a majority of their work time in the performance of duties described in Article Five. *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

[19] Co. Br. at 6, quoting Jt. Ex. 1, Art 5:

> The Work of Ramp, and Provisioning Agents includes the functions which have been historically performed by such agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract. Agents required to perform such duties must be current and qualified within that classification. . . .
>
> C. Loads and unloads the cargo compartment of the aircraft with cargo (such as Customers' baggage, air freight, air mail, ballast, and Company materials) according to a pre-determined plan received either electronically or manually from an Operations Agent. Submits, either electronically or manually, a Cargo Bin Loading Slip (CBLS) to an Operations Agent. . . .
>
> F. Receives and records (either manually or by means of an electronic scanner, worn or held by a Ramp Agent) Customer baggage, air freight, air mail, and comat as required. Restickers misconnect bags.

> assignment if covered Employees are available for voluntary overtime assignments . . . . (emphasis by the Company).[20]

4. Arbitral Precedents Permit Supervisors to Perform Article Five Work

Under the CBA and arbitral precedent, supervisors are permitted to perform the job duties listed in Article Five. The CBA does not explicitly address supervisor training. While the Union repeatedly pointed out that there was no exception for supervisor training in any of the parties' agreements, there is also no exception to covered work in the CBA for "all hands-on deck" situations. Testimony from the Daily Operations Labor Administration Manager, Phil Stachowski, showed that this exception routinely applies to covered work grievances.[21]

Moreover, the Union mistakenly attempts to apply the Work Rule Interpretations to the February 6th flight. Specifically, the Union contends that supervisors cannot scan and load more than 30 bags during on-the-job training. But because they are not working alone or unassisted or replacing an agent, supervisors who are training on the job are permitted to load or unload an unlimited number of bags.

5. The [redacted] Arbitration Does Not Resolve This Grievance

The [redacted] arbitration does not apply here; this not a case where the doctrine of *res judicata* applies. The issue in that case was whether supervisors could use a scanner. The [redacted] arbitration did not rule on job training for supervisors.

6. Past Practice Establishes that Covered Employees Train Supervisors

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20 *Id*.

21 Co. Br. at 7.

The undisputed testimony establishes that supervisors have performed covered work during on-the-job training for as long as anyone can remember.[22]

7. The Union Has Not Proved Any Injury

The Union failed to show that Supervisor Acosta's work on Flight #1199 caused harm to any Ramp Agent.

In conclusion, the Union has failed to carry its burden of proof. Accordingly, the Company respectfully requests that this grievance be denied.

IV. ANALYSIS

This case involves a small grievance with significant implications for the Parties. Therefore, the Arbitrator begins by acknowledging that his powers are limited by Article 20.L.5: "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."[23]

Typically, an arbitrator resolves factual discrepancies before analyzing a grievance for an alleged contract violation. This is not such a case: the Parties mostly agree on the facts.[24] The essential fact is that a supervisor being trained by an employee scanned fifty-seven bags onto the aircraft for Flight #1199.[25]

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22 Co. Br. at 8.

23 Jt. Ex. 1.

24 The Parties stipulated two facts:
WITTMUSS: "Supervisor Chris Acosta scanned all commodities that were loaded onto Baltimore Flight No. 1199 on February 6, 2022." T. 9.
JETTON: "Duty Supervisor Chris Acosta was receiving on-the-job training for ramp agent duties on February 6, 2022." T. 10.

25 Supervisor Acosta's OJT checklist states: "The Ramp OJT hands-on training should take place over an 8–10 day-time span, finishing just prior to the employee attending Ramp Initial Training in Dallas." Co. Ex. 1.

In its brief, the Union suggests that the Supervisor performed bargaining unit work on February 6th, but he started training two weeks before this activity and he continued through March 15th.

The Arbitrator finds this assertion believable. However, he cannot assume facts that are not in evidence. Again, the submission is limited to whether a Supervisor in training scanned fifty-seven bags onto the aircraft for Flight #1199 on February 6th.[26] Also, the grievance requested eight hours of pay to an eligible employee.[27] This clearly indicates that the submission is limited to a single shift.

Turning to analysis of the CBA, the grievance relates to the Union's work jurisdiction. Article Two, Section B ("Covered Employees") states:

> 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.[28]

The plain text of this sentence establishes its meaning. This language does not allow an exception for a Covered Employee to train a Supervisor. To understand the indented sentence, one must use the "subject-object" rule of English grammar. This means: "In grammar, we use the word 'subject' to talk about the pronoun, noun or noun phrase that does the action of verb. In English, the subject is usually before the verb."[29] In short, the subject is the "doer" word. Here, the "doer" is a group called "Supervisors."

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26 Jt. Ex. 2.

27 *Id*.

28 Jt. Ex. 1.

29 Subjects and Objects, Perfect English Grammar, https://www.perfect-english-grammar.com/subjects-and-objects.html.

Next: "In grammar, we use the word 'object' to talk about the thing or person that the verb is done to, or who receives the verb."[30] Clearly, the "receiver" noun—actually, the noun phrase— is "agent performance."[31] That focuses attention on the verb that connects the subject and object, which in this passage is a series of "doing" words. In this case, the germane action word is "train."

Applying the plain meaning of this indented sentence, the CBA has no exception for "Covered Employees" to "train" a "Supervisor." That would contort the meaning of this sentence by placing the "doing" noun (Supervisors) in the position of being the "receiving" noun phrase ("agent performance"). Again, the sentence allows Supervisors to perform bargaining unit work to train Covered Employees; however, it does not allow Covered Employees to train Supervisors.

The analysis would end here if this were a case of first impression; but it is not. Arbitrator Barnard was recently presented with an issue that also involved Article Two, Section B. In his decision, the grievance did not deal with Supervisor *training* activities—rather, it dealt with a *scanning* items in the context of *assisting* an employee. Arbitrator Barnard summed up the matter by stating the case involved a "grievance filed by [redacted] in reference to Supervisor Ray scanning 85 to 90 bags for Flight 1161 going from MCI to BWI on September 6, 2019."[32]

Arbitrator Barnard did not use the "subject-object" grammar rule; but he focused on the plain meaning of "assist" and a related verb, "scanning," in Article Five, Section

30 *Id*.
31 *Id*.
32 Jt. Ex. 6, at 23.

One (F).[33] The undersigned Arbitrator's "subject-object" grammar application of Article Two, Section B (Covered Employees) is like Arbitrator Barnard's textual, "plain meaning" rationale, which Arbitrator Barnard stated in these terms:

> The term assist as contained in Article Two cannot be described in this instance as such term is not specific here, as the CBA clearly holds that such scanning is assigned to Ramp Agents and Provisioning Agents in Article Five, Section One (F), as agreed to by the parties. Again, as mentioned previously, if Ray would have not scanned in this instance and would have assigned such scanning to one of the Ramp Agents working that flight, such would not have been a violation of the CBA, and there would not have been a grievance filed.[34]

Once again, that does not end the analysis. Both Arbitrator Barnard and this Arbitrator received into evidence a body of rules titled "TWU Work Rules Interpretations."[35] While this lengthy document modestly refers to itself as an interpretive document, it has the characteristics of a formal Memorandum of Understanding. The first page is also a signature page. The Company's General Counsel (Michelle Jordan) and the Union's President (Charles Cerf) were signatories. Under their signatures, a 39-page document was issued on November 19, 2019, to "All Ground Operations and Cargo Leadership," and to "All TWU Ground Operations and Cargo Representatives."

On this cover page, the document continued:

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33 *Id*.

34 *Id*. at 22.

35 Jt. Ex. 3 (Nov. 19, 2019).

> The attached is a complete version of the new work rules. Please read the entire document since there are some new interpretations and clarification to existing interpretations indicated below:
>
> Article Two Question Number 2 – Supervisors perform covered work alone.[36]

The document continued by stating:

> 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….[37]

Near the bottom of the page, the interpretation of rules related to Article Two stated:

> 2. Can Supervisors perform the following covered work alone?
>
> Upload – Yes, but no more than 30 items
>
> Download – Yes, but no more than 30 items

[36] *Id*.
[37] *Id*.

> Note: This work alone can be done either in the bin or at the bottom of the belt.[38]

Thus, the TWU Work Rules Interpretations created a new meaning for Article Two, Section B ("Covered Employees").

First, it clarified the very broad definition of work performed by "Covered Employees" by allowing Supervisors a contractual right to upload thirty items and download thirty items. By not specifying anything more than a discrete item-count (thirty items) and a work-function (uploading thirty items and downloading thirty items), this interpretation eviscerated Article Two, Section B's subject-object distinction, *but only to a fractional degree*.

In other words, to a very limited extent it allows Covered Employees to train Supervisors on specified work, including training, within the 30/30 parameters. The Union concedes this point when it argues that Supervisor Acosta was trained beyond the thirty-item limit.[39] Important to note, however, Article Two, Section B remains in effect for any training that varies from these specific limits.

As applied to this grievance, this analysis demonstrates that Supervisor Acosta was permitted under the TWU Work Rules Interpretations to upload thirty items on Flight #1199. The evidence shows that he did more than TWU Work Rules

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38 *Id*.

39 Un. Br. at 3, stating:

> Relevant contractual and arbitral language is clear and unambiguous.
> a. WRI state that a supervisor can load and unload up to 30 items which was expanded to include scanning through; [redacted] (MCI-R-3818/19) decision states that a supervisor that scans above the 30-item threshold is in clear violation of the contract.

Interpretations allow: He scanned fifty-seven items and placed them on the conveyor belt for Flight #1199.

The grievance is therefore sustained.

The Arbitrator has considered the Union's and Company's respectful requests for dispositions and remedies.

The Company contends that there was no actual harm to the Union. To this end, its brief appends Arbitrator Hill's decision that outlined the *de minimis* doctrine.[40]

The Arbitrator respectfully declines to apply that decision to this grievance. Proof of a minor contract violation does not negate the existence of the violation. Moreover, the Union's interest in strictly enforcing a work jurisdiction rule would seem comparable to the Company's interest in strictly enforcing a work safety rule: An actual injury would not have to occur to justify enforcement of the Union's work-jurisdiction right or the Company's safety rule. The point of enforcement is to *prevent* injury, not just to remedy its actual effects.

The Union asks that an employee "be awarded in full for the Union and Southwest shall bear the cost of arbitration as stated in Article 20 paragraph C."[41] A more specific guide for a remedy is stated by Mr. [redacted] in his grievance:

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[40] Arbitrator Hill—a leading and widely published authority on labor arbitration—thoughtfully summarized his research on the common law of arbitration remedies, stating:

> By far the most common application of the de minimis rule is where supervisors have performed bargaining unit work. The reported decisions, however, do not lend themselves to the formulation of any set guidelines as to when the de minimis doctrine will defeat a grievance.

Co. Br. at Appx. [redacted] DAL-O-2502/14, (Hill 2015), at 15. The undersigned Arbitrator's point in quoting this passage is that Arbitrator Hill recognized that there is no uniformity in how labor arbitrators view the *de minimis* doctrine.

[41] In Mr. [redacted] grievance (Jt. Ex. 2), the Union requested an eight-hour pay remedy to an eligible employee, not necessarily payable to this Grievant.

> Request 8 hours overtime to the Agent next in line to receive overtime for this violation. Moving forward, we request MGMT adhere to the CBA.[42]

This remedy is specific. It is modestly consequential while being proportionate. It also conforms to remedies that the Parties have administered for some covered-work grievances.[43] For these reasons, the Arbitrator adopts the Grievant's proposed remedy.

The Union's request about the loser-pay provision has merit but is denied. This Arbitrator, without knowledge of the loser-pay provision, divided his fee equally between the Parties in a previous arbitration case. Both Parties paid half of the Arbitrator's invoice. Neither Party addressed the loser-pay provision. In the interest of equitable treatment of the Parties, the Arbitrator will invoice each Party for half of his fee for this arbitration, while specifying that this part of the Award will not set precedent.

In view of the Parties' history of having arbitrators reserve jurisdiction in related grievances, the Arbitrator reserves jurisdiction for thirty calendar days.[44]

In sum: For the foregoing reasons, the grievance is sustained. An Award shall be entered on this ruling.

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42 Jt. Ex. 2, at 1.

43 See *infra* note 44.

44 The Parties' advocates stated their views on the Arbitrator's remedy powers:

MR. WITTMUSS: Hopefully, if there is— again, depending on— on how the decision comes out, if there was an award for the Union and we had to figure out who gets paid, if there's a dispute over that, I've seen— and I think this is normally how things would probably work— where you would keep jurisdiction for a period of 30, 60, 90 days from the date of your decision in case we have an issue on who might get paid, and then we can come back to you, and since you have— would have the breadth of knowledge at that point, decide anything that we can't figure out from that point.

THE ARBITRATOR: Is that consistent with your understanding of how things work, Adria?

MS. JETTON: I'm fine if you want to reserve jurisdiction. To my knowledge, we've never had that issue or had to come back to an arbitrator on a covered work violation….

T. 12-T. 13.

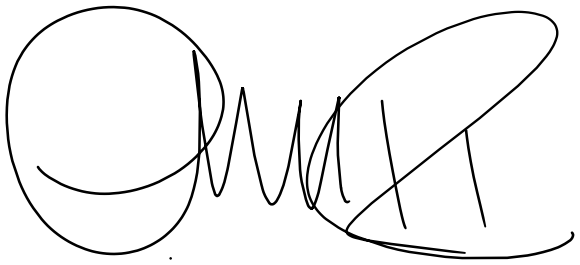
V. AWARD

1. The grievance is sustained. The Company shall cease and desist from exceeding the "30/30" upload and download limits set forth in the TWU Work Rules Interpretations.

2. The Company shall pay eight hours overtime to the Ramp Agent next in line to receive overtime for this violation as of February 6, 2022.

3. The Parties shall bear costs of this arbitration equally, without setting a precedent.

4. The Arbitrator reserves jurisdiction for thirty calendar days from issuance of this Award.



Arbitrator Michael H. LeRoy

This Ruling Entered Into
This **9th *Day of September 2022***.