IN THE MATTER OF ARBITRATION	)	**(Grievant) Agent X**
	)	**Case DCA-R-2393/15 (2016)**
Between	)	
	)	**Hearing Date: May 11, 2016**
SOUTHWEST AIRLINES, INC	)	**Love Field, Dallas, TX**
EMPLOYER (SWA),	)	
	)	**TemporaryAssignment Grievance**
and	)	
	)	**Marvin Hill**
TRANSPORT WORKERS UNION	)	**Arbitrator**
(TWU) LOCAL 555, UNION.	)	
	)	

APPEARANCES

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I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

Many of the essential facts giving rise to this grievance are in dispute.

In a nutshell, this case involves the question whether the Company violated the parties' collective bargaining agreement when it returned the Grievant, a 17-year employee with Southwest Airlines, from a temporary Boston assignment, retaining a junior employee agent in his place, because of the Grievant's alleged union activity.

The Grievant is a SWA Ramp Agent, whose home station is Ronald Reagen Washington National Airport (DCA). Agent X was awarded a temporary assignment in Boston, which was scheduled to last approximately 30 days – from September 10, 2015

through October 10, 2015. According to Southwest Airlines, during Agent X's temporary assignment, a group of bargaining-unit employees/ramp agents complained about him to the Boston Station Manager, David Irving. The gist of the complaint was that they were frustrated with the Grievant because of the way he was treating them. The employees notified Irving that Agent X was screaming at them, disrespecting them, and belittling them. After a follow-up meeting with the Grievant – where Agent X was informed about the employees' complaints – the Grievant neither admitted nor denied that he was yelling at or being disrespectful to his fellow employees. Agent X was, however, informed that he needed to be more respectful or he would be sent home.

While the Grievant admitted that he was told during this meeting that the other employees were complaining about him, still Agent X asserted that Irving was "making it up." As noted by Management, the Grievant cannot remember anything else of significance that was said at the meeting, and the Grievant did not dispute Mr. Irving's testimony of what was said at this meeting.

The record indicates that after a meeting with the Union Representative in Boston, Agent Y, where Agent Y allegedly asked that the Grievant be sent home (according to the Company – Agent Y was not called by the Company to testify), Mr. Irving made the decision to cancel Grievant's temporary assignment and reassigned him back to his home station "based on everything that [he] had" and based on the "morale" of his employees in Boston. Accordingly, on September 29, 2015, the Grievant was notified that his Boston temporary assignment was being cancelled and his last day would be September 30th. The Grievant, however, called in sick to his scheduled shift in Boston on September 30th, and then returned to his home station.

A grievance was filed by the TWU on October 15, 2015 (JX 2 at 9) asserting the absence of just cause for the removal of Agent X from a temporary assignment. That grievance requested a remedy for the agent to receive all overtime missed and "was eligible for and to be paid at the applicable rate." The grievance was denied on November 9, 2015, by Mr. Vance Foster (JX 2 at 7). A System Board was held on March 10, 2016, which deadlocked (JX 2 at 5). Unable to resolve the matter in the lower steps of the parties' grievance procedure, the matter was moved to arbitration. A hearing was held on, May 11, 2016, at the Doubletree Hilton, Love Field, Dallas, TX. The parties appeared through their representatives and entered exhibits and testimony. Post-hearing *Briefs* were filed on or before June 23, 2016, and electronically exchanged through the offices of the undersigned Arbitrator. The record was closed on that date.

II. ISSUE FOR RESOLUTION

Was the removal of Agent X from a temporary assignment in Boston, MA warranted in view of the Grievant's conduct and, if not, what shall be the remedy?

III. POSITION OF THE UNION

The position of the Union, as outlined in its opening statement and post-hearing *Brief*, is summarized as follows:

By way of background, the Union asserts that the Grievant put in for a temporary assignment to Boston when Management indicated it needed two agents to go from DCA to Boston for a temporary assignment for 30 days, from September 10 to October 10th. Agent X, the Grievant, being the senior person, was awarded the temporary assignment, and another agent, Agent Z, junior to the Grievant, was also awarded a temporary assignment. Both employees went to Boston to help out.

During that time in Boston, towards the end of the assignment, Agent X was called into the office and told that he was no longer needed in Boston, approximately seven days early for the temporary assignment, and sent home. The Union points out that Agent X is a Union Representative.

The Union concedes that the Grievant engaged in conduct that Management may have considered disruptive. In the Union's words: "Do I think the Manager felt Agent X was being disruptive? I'm sure he felt that way. But Agent X was not disciplined, and I know Southwest Airlines . . . that they're not shy about handing out discipline." * * * They sent him home early and kept the junior employee on a temporary assignment. (R. 10-11).

Asking "Who can cancel or end a temporary assignment," the Union acknowledged that the Company will usually be the one to make that decision (regarding who can cancel a temporary assignment) based on the needs of that location (R. 11). In the Union's view, there was a need in Boston for at least one temp agent from DCA because Management retained one, in this case the junior agent. The TWU points out that Southwest Airlines did not allow the Grievant to exercise his contractual rights when he was sent home and a junior agent was retained in Boston.

Citing the testimony of Southwest Airlines' Manager, the Union asserts that it is clear that the Grievant was sent home for the "morale" of the station. In his words: "employees who were just tired of the way he was treating them. They were frustrated, and they voiced it. They let me know." (*Brief* at 3). The TWU asserts that nowhere in the parties' collective bargaining agreement does it state that the Company can cancel a temporary assignment for "morale" reasons. To this end the Union points out that the five employees who the Manager asserts came in to complain about the Grievant, none testified at the hearing. No one showed up to verify that these discussions even took place. The Manager's testimony is 100% hearsay (*Brief* at 4).

By their own testimony the Company violated the parties' collective bargaining agreement. In the Union's eyes, the Grievant was only doing what a good Union Representative does: Educate members and make sure equipment is safe to use. Maybe

the Manager's morale was affected, but this is insufficient to terminate a temporary assignment (*Brief* at 6). Management did not allow Agent X to exercise his contractual rights under the collective bargaining agreement and work the overtime that he could have worked on his temporary assignment by sending him home and keeping the junior employee.

As a remedy, the Union requests that the Grievant be awarded the hours that he could have worked in Boston.

IV. POSITION OF THE COMPANY

The position of the Company, as outlined in its opening statement and post-hearing *Brief*, is summarized as follows:

Asserting that this is a very simple case, the Company initially points out that there are numerous undisputed facts relevant to this case, specifically:

1. There is no testimony or evidence from the hearing that Mr. Irving was aware that the Grievant had engaged in any protected union activity. To the contrary, Mr. Irving testified that, at the time he cancelled Grievant's temporary assignment, Mr. Irving was not aware that the Grievant had engaged in any protected union activities.

2. There was no testimony or evidence from the hearing that Mr. Irving told the Grievant , or anyone else, that the Grievant's temporary assignment was ended because of union activities. To this end Courtney Heywood acknowledged that the parties' collective bargaining agreement does not address how and under what circumstances temporary assignments can be cancelled (*Brief* at 6; R. 98).

3. The Work Rule Interpretations, which are agreements between the Company and the Union as to the interpretations of the collective bargaining agreement, provide the Company can cancel a temporary assignment "based on the needs of the location." And the Grievant admitted during cross examination that "the Company gets to determine the need."

4. The Union's Vice-President admitted that morale and maintaining a harmonious work environment are legitimate business needs (*Brief* at 4-5; R. 116-117).

Management submits that as a result Mr. Irving consulted the parties' collective bargaining agreement to verify whether it prevented him from ending the Grievant's temporary assignment and reassigning the Grievant back to his home station. In the Company's eyes, "Mr. Irving found nothing that prevented him from doing so." Management points out that Irving also consulted the Work Rules Interpretations and demanded he could end Grievant's temporary assignment based on the needs of the Boston Station. As a result, Mr. Irving made the decision to cancel the Grievant's temporary assignment and reassign him back to his home station "based on everything

that [he] had" and based on the morale of the employee in Boston (*Brief* at 5).

Other key undisputed facts include:

5. There is no testimony or evidence from the hearing that Mr. Irving was aware that the Grievant had engaged in any protected union activity. To the contrary, Mr. Irving testified that, at the time he cancelled Grievant's temporary assignment, Mr. Irving was not aware that the Grievant had engaged in any protected union activities (*Brief* at 5; R. 124-125).

6. There was no testimony or evidence from the hearing that Mr. Irving told the Grievant, or anyone else, that the Grievant's temporary assignment was ended because of union activities. To the contrary, Mr. Irving testified he never said that (*Brief* at 6; R. 124).

7. Nowhere in the parties' collective bargaining agreement does it limit the Company's ability to cancel or end a temporary assignment early, which the Union admits (*Brief* at 6; R. 98).

8. The Work Rule Interpretations, which are agreements between the Grievant and the Union as to the interpretations of the collective bargaining agreement, provide the Company can cancel a temporary assignment "based on the needs of the location." And, the Grievant admitted during cross examination that "the Company gets to determine the need." (Brief at 6; R. 33).

9. The Union's Vice-President admitted that morale and maintaining a harmonious work environment are legitimate business needs (Brief at 6-7; R. 100-101).

10. While the collective bargaining agreement states that temporary assignments will be awarded based on seniority, nowhere in the parties' collective bargaining agreement or the Work Rules Interpretations does it refer to seniority as a consideration for cancelling a temporary assignment. Moreover, the Vice-President of the Union acknowledged there is an obvious difference between "awarding" and "cancelling" a temporary assignment. While the Company and the Union found it necessary to use the word "seniority" in relation to awarding temporary assignments. They did not use the word "seniority" when talking above cancelling temporary assignments (*Brief* at 7; R. 98).

11. The Union was aware, prior to the hearing and throughout the grievance process, that the Grievant's temporary assignments was ended based on complaints from and conversations with bargaining-unit employees and the Union representative. However, the Union did not call Mr. Agent Y or any other employees from Boston to testify at the hearing (*Brief* at 7).

12. The Grievant cannot identify any provision of the collective bargaining agreement that has been violated (*Brief* at 7).

In addition to the above points, the Company asserts the following arguments in support of its position that Southwest Airlines did not violate the parties' collective bargaining agreement with respect to the Grievant:

13. *The Grievant's temporary assignment was not ended because of Union activity.* Management asserts the Grievant was sent home because of his union activity at the BOS station. Nowhere in the grievance does it refer to any other specific provision of the collective bargaining agreement that was allegedly violated other than Article One, and nowhere in the grievance is there any mention of seniority rights being at issue. As a result, the issue before the Arbitrator should simply be whether the temporary assignment was ended early because of alleged union activity and/or in violation of Article One (B) – and the answer is a resounding "no." (*Brief* at 9).

It is undisputed that Mr. Irving made the decision to end the Grievant's temporary assignment early. It is also undisputed that Mr. Irving was not aware of any alleged protected activity that the Grievant had engaged in. There was no evidence introduced that Mr. Irving knew of any alleged union activity, and Mr. Irving testified he did not know the Grievant had engaged in any union activity. There was also no evidence introduced at the hearing that Mr. Irving said the Grievant's temporary assignment was being ended because of union activities, and Mr. Irving denied ever making any such statement (*Brief* at 9).

As a result, the grievance should be denied because there is no evidence to support that the Grievant's temporary assignment was ended because of alleged union activity (*Brief* at 9).

14. *The Union has not identified any contractual limitation which prohibited the Company from acting as it did* (*Brief* at 10). The Carrier argues that even if the Arbitrator were to consider a broader issue for resolution – that is, whether the Company violated the collective bargaining agreement when the Grievant's temporary assignment was ended early – the grievance still fails because the Union failed to identify any contractual limitation which prohibited the Company from acting as it did (*Brief* at 10). Not only was it the Union's burden to establish that the Company breached some provision of the collective bargaining agreement, the evidence supports just the opposite – the Company acted in accordance with the Work Rules Interpretation. Citing *Southwest Airlines & TWU 555, Case TUS-O-0689/11* (Hill, 2012), Management asserts that it is not the Company's burden to prove that the collective bargaining agreement permitted its action but, rather, that its action was prohibited by the collective bargaining agreement (*Brief* at 10). There is no evidence that any provision of the parties' collective bargaining agreement was breached or that any other contractual limitation exists prohibiting Mr. Irving from cancelling the Grievant's temporary assignment. To be sure, the parties' agreed-upon language in the Work Rules Interpretations undeniably differentiates "cancelling" a temporary assignment from "awarding" one, and it expressly provides the Company with broad discretion to cancel a temporary assignment "based on the needs of the station." (*Brief* at 10-11). Significantly, the parties did not use the term

"seniority" when talking about cancelling a temporary assignment (*Brief* at 11, R. 98-99). **Thus, in the Carrier's eyes, the Union's argument that cancelling a temporary assignment must be done by seniority fails because neither the parties' collective bargaining agreement nor the Work Rules Interpretations expressly grant employees that right/protection, and the Union cannot ask the Arbitrator to write into the collective bargaining agreement additional obligations in this regard (Brief at 12).**

15. *The Company ended the temporary assignment based on the needs of the Station.* Management submits that although it need not prove it acted with authority of, or in accordance with, the collective bargaining agreement when it ended the Grievant's temporary assignment, the evidence overwhelmingly establishes just that (*Brief* at 13). Management points out that the Work Rules Interpretations clearly state the Company can cancel a temporary assignment based on the "needs of the station," and the Grievant admits it is the Company who gets to make that determination (*Brief* at 13). Southwest Airlines maintains a group of bargaining-unit employees came to Mr. Irving's office complaining that Agent X was yelling at them, disrespecting them, and belittling them, and Union Representative Agent Y requested that Agent X be sent home early. In the Company's eyes, it is axiomatic that morale and maintaining a harmonious work environment are legitimate business goals/needs, and the Union's Vice-President admitted as much (*Brief* at 14).

To this end the Company notes that the Union failed to call any employees from the Boston Station or its very own Union Representative, Agent Y, to rebut Mr. Irving's testimony. This, says the Company, is telling because the Union admitted that it was well aware, prior to the hearing and during the grievance process, that Mr. Irving has always maintained that he ended the Grievant's temporary assignment early based on complaints and statements from bargaining-unit employees and the Union Representative.

Finally, inasmuch as the Union attempts to rely upon Arbitrator Hill's decision in *SWA & TWU 555, Case TWU-ALL-5004/14* (Hill, 2015), it is distinguishable. Here, the Grievant's assignment was not ended for engaging in protected activities under the collective bargaining agreement or the RLA, nor could it have been, as it is undisputed that Mr. Irving had no knowledge of any protected union activities under the collective bargaining agreement (*Brief* at 15). Instead, Mr. Irving ended the temporary assignment early based on employee morale, complaints from bargaining-unit employees that the Grievant was yelling and being disrespectful towards them, and a request from the Boston Union Representative that the Grievant would be sent home. Mr. Irving's reasons for cancelling the Grievant's temporary assignment do not implicate any protected rights under either the collective bargaining agreement or the law, and therefore the Hill award in Case TWU-ALL-5004/14 does not help the Union's case (*Brief* at 15).

For the above reasons, the Company requests that the Union's grievance be denied in its entirety.

V. RELEVANT CONTRACT PROVISIONS

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 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.

(JX 1 at 3)

ARTICLE SIXTEEN
TEMPORARY ASSIGNMENTS

A. Utilization. Covered employees may be utilized for the purpose of temporarily filling positions caused by shortages or circumstances beyond the Company's control.

B. Assignments. If more than the required number of employees volunteer, the most senior employee(s) shall be awarded the assignment.

* * *

(JX 1 at 34)

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.

* * * *

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

(JX 1 at 40).

G. **Fact-Finding Procedures.** No covered employee shall be subject to discipline involving loss of pay or discharge without having the benefit of a fact-finding, with the right to have a union representative present, in accordance with the following procedures:

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

* * *

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

(JX 1 at 40-41).

VI. DISCUSSION

A. Decision and Analysis of Evidence Record

The National Academy of Arbitrators, in their recent text *The Common Law of the Workplace* 69 (BNA, 2005)(2d edition), had this to say regarding rules of contract interpretation:

> Labor arbitration is a matter of contract. It is the role of parties to a collective bargaining agreement to determine the value of their exchange and, then, the role of arbitrators to interpret the labor contract consistent with the parties negotiated preference. Arbitrators generally refrain from evaluating the prudence of a particular contractual term or inquiring into bargaining power imbalances and issues of justice. It is the role of arbitrators to use standards of contract interpretation to understand the meaning of the parties' contractual goals and to render a decision in keeping with the parties' intent.
>
> * * *
>
> § 2.2 The Prime Directive: Intent of the Parties

> Standards of contract interpretation used by arbitrators are designed to determine the intent of parties in adopting certain language to express their rights and obligations.

Comment:

> Parties rarely hold precisely the same understanding of a contractual term. As a consequence, standards of contract interpretation have arisen and are designed to discern the parties' mutual intent as nearly as reasonably possible. Arbitrators also often confront circumstances not contemplated by the parties at the time of contract formation. Arbitrators customarily rely on three sources of principles as guides to determine contractual intent. They are (1) standards of contract interpretation, (2) the concept of past practice, and (3) the principle of reasonableness. Such interpretative guidelines are frequently used in conjunction with each other.

Id. at 71.

As articulated by the National Academy of Arbitrators, and as I have noted in prior cases, there is no question that the primary goal of the labor arbitrator is to effect the intent of the parties. Arbitrator Jules Justin, in the often-quoted (albeit dated) *Phelps Dodge Copper Products Corp.* decision, 16 LA (BNA) 229, 233 (1951), stated that the parties' intent is to be ascertained from the words used in their agreement. In the words of Arbitrator Justin:

> Plain and ambiguous words are undisputed facts . . . An Arbitrator's function is not to rewrite the parties' contract. His function is limited to finding out what the parties intended under a particular clause. The intent of the parties is to be found in the words which they, themselves, employed to express their intent. When the language used is clear and explicit, the Arbitrator is constrained to give effect to the thought expressed by the words used.

Arbitrator Louis Solomon stated the rule regarding clear and unambiguous language in the often-quoted *Ohio Chemical & Surgical Equipment Co.*, decision, 49 LA (BNA) 377, 380-81 (1987), as follows:

> It is a basic and fundamental concept in the arbitration process that an Arbitrator's function in interpreting and applying contract language is to first ascertain and then enforce the intention of the parties as reflected by the language of the pertinent provisions involved. As a necessary and essential corollary is the principle that if the language being construed is clear and unambiguous, such language is in itself the best evidence of the intention of the parties. And when language so selected by the parties leaves no doubt as to the intention, this should end the arbitrator's inquiry.

Arbitrator Charles LaCugna, in *Hecla Mining Co.*, 81 LA (BNA) 193, 194 (1983), likewise declared:

> It is axiomatic in labor arbitration that clear and unambiguous language, decidedly superior to bargaining history, to past practice, to probative intent, and to putative intent, always governs.

Also, as stated by Arbitrator Wyman in *Clinton County, Iowa*, 113 LA (BNA) 757, 762 (Wyman, 2000):

> The issue, then, is not whether the labor agreement permits a management action that has given rise to a grievance, but, rather, whether the action taken is prohibited by the labor agreement (or prevailing laws and other regulations). The union must prove that the contract (or law) prohibits a management action. . . . The arbitrator is confined to determining the "rights" of the disputants: What does their agreement provide for? That what may be "fair" or "desirable" – even "reasonable" – in a collective bargaining agreement, or in a union-management relationship, may be – and often is – an emotional matter. But it must remain an emotional matter unless or until it is incorporated into the written language of the agreement in objective and unambiguous terms. . . . It is the responsibility of the crafters of contract clauses to draft language that does not leave the matter in doubt. If it was the Union's intent to have [a particular provision included in the contract], then this intent should have been included in the language [of the contract]. The arbitrator, properly, is precluded from putting it there. (Emphasis in original).

With respect to determining whether contract language is ambiguous, Arbitrator Robert Mueller, in *Community Mental Health Center of Linn County*, 78 LA (BNA) 1236, 1238 (1981), suggested the following test:

> To test whether or not particular provisions of a contract are clear and unambiguous or are in fact ambiguous, one must take a particular provision and examine the manner of its application throughout the contract to determine whether or not it has been afforded a consistent application.

Similarly, Professor Dennis Nolan had this to say about determining ambiguity:

> How does the arbitrator know whether certain language is "clear and ambiguous"? An ambiguity is not created simply because the parties disagree over the meaning of the phrase, for that would only encourage them to argue over the clearest provisions in the hope of a favorable arbitration award. See, Nolan, Labor Arbitration Law and Practice (West Publishing, 1979) at 136. According to Nolan, the test most often cited is that "there is no ambiguity if the contract is so clear on the issue that the intentions of the parties can be determined using no other guide than the contract itself."

Perhaps the best summary of the thinking of arbitrators in this matter is provided by Prasow & Peters in their1983 text:

> An unambiguous provision, in lawyers' language, is one that "can be nailed down on all four corners." The degree of clarity in language can range from the exactitude of the proverbial four corners to the relative imprecision of merely pointing in a direction, so that arbitrators enunciate as a criterion, "If the language points in one direction and the practice points in another, go with the language." There may be exceptions to this rule, but in the vast majority of cases it is applicable."

See, Prasow & Peters, *Arbitration and Collective Bargaining* 92 (Hill, 1983).

* * *

In its opening statement Counsel for the Company outlined his view on what happened in this case:

> And based upon numerous complaints Mr. Irving had received, based on the fact that a Union Representative asked Mr. Irving to send Agent X home, Mr. Irving made the determination that the needs of the station required that Agent X be sent home. Okay? Needs of the station is not just manpower. Very legitimate needs of the station is morale, is maintaining a harmonious work environment. There are legitimate ends for Management to see to, okay?
>
> And I'll also say this: This is how the management-labor relationship is supposed to work, okay, union leadership and union representation and management getting together, identifying a problem, addressing it, management listening to what the bargaining unit representatives have to say, listening to what representatives have to say, listening to what the union representatives has to say and taking action because of it. I'll let them tell you how this then turned into a grievance filed back in DCA when the Grievant ended back at his home station (R. 15-16).

There is no question in my mind that it has always been the Company's position that the Grievant was sent home early from Boston "because Agent Y and other union members said that Agent X was causing a ruckus. That's why they sent him home." (Agent A: R. 144). According to Southwest Airlines, it was merely responding to the needs of the location, which it is permitted to do. Any other decision would be non-sensical. An exchange with Company Counsel makes the Company's point:

> Q. – and let's start with here in arbitration – that Mr. Irving sent Agent X home because Mr. Agent Y came to him and asked him to send him home? You understand we're – we're arguing that here today, right?
>
> A. [By Agent A]: Correct, you guys are.

Q. You understand we're arguing that Mr. Irving heard from other bargaining-unit employees complaining about Agent X? You understand that?
A. Correct.

Q. You understand that he's been open about the bargaining-unit employees that complained about Agent X? You understand that, right?
A. Correct.

Q. He's used Mr. Agent Y's name repeatedly from day one, right?
A. Irving has?

Q. Yes.
A. Yes, he has.

Q. That's out position here today, right? Our position, right?
A. Right.

Q. That was our position during the system board proceeding, right?
A. Right.

Q. That was our position throughout the grievance process, right?
A. Right.

Q. Why didn't you bring Mr. Agent Y here to testify?
A. Why didn't you guys bring him here?

Q. It's not my burden of proof, sir. And I get to ask you the questions. Why didn't you bring Mr. Agent Y here to testify?
A. Because he and I spoke yesterday, and speaking to other union members, specifically Agent X, they never had any differences.

Q. Why didn't you bring any of the bargaining-unit members that Mr. Irving said complained to him about Agent X?
A. Because they never wrote grievances up to write SOPIs up about Agent X causing these alleged complaints that they went to Mr. Irving with (R. 145-147).

The problem for the Company is this: In support of its argument that Mr. Irving was acting as to what was in the best interest of the location/department, what explains its decision not to call Mr. Agent Y to testify? As an employee of Southwest Airlines, Mr. Agent Y is under the Company's control. If, in fact, Agent Y went to Management and said "send the Grievant home," the issue is over. Mr. Agent Y consented to a resolution of a potential grievance, and he is empowered to act as the Company said he did. His resolution would preclude the Union from advancing a case, at least as I read the law. End of case for Agent X.

Further troubling in this case is no employee who allegedly was the object of the Grievant's offending conduct was called to testify at the hearing. I am empowered to take and credit hearsay evidence. The problem here is the Company's case is really 100% hearsay, and when a party's case is 100% hearsay, rarely will its position be sustained. [1] Counsel asserts that Management was responding to the complaints of what turned out to be "absent accusers." Not one employee who was the object of the Grievant's scorn or derision or yelling was called to testify, even though these employees are under the Company's control. Not even an affidavit was submitted from any employee who had a problem with the Grievant. **Citing the "needs of the location," when Management responds to the Union's grievance with an affirmative defense – that the Grievant bullied bargaining-unit employees and, significantly, his Union Representative asked Management to send the Grievant home, thus acting according to the needs of the location/department – it was up to the Company to plead and prove up its defense.** The Company came up short in demonstrating, by a preponderance of the evidence, that its decision was in response to complaints of bargaining-unit employees [2] and cleared by Mr. Agent Y, the Union's Representative.

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1 As argued by Hill & Westoff:

> Although the rules of evidence are not strictly followed, the arbitrator is nevertheless charged with providing a fair and adequate hearing. Thus, when confronted with hearsay, the arbitrator can generally be expected to follow the suggestion of the West Coast Tripartite Committee:
>
> > Unless corroborated by truth-telling circumstances in the environment it was uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered. If a witness can testify at the hearing and does not, his statements outside the hearing should be given no weight, indeed, should even be excluded if there appears to be no therapeutic, non-evidentiary reason to admit it.

Marvin Hill & Tammy Westoff, "I'll take it for What it is Worth" – The Use of hearsay Evidence by Labor Arbitrators: A Primer and Modest Proposal, Journal of Dispute Resolution, V. 1998, No. 1 (1998)(attached).

The authors conclude: "The lesson from the reported decisions is clear: If the advocate's case in chief is based only on hearsay evidence, he is almost certainly to lose." *Id.* at 10.

2 It's obvious to me, but to make the point I offer this: Suppose the employees who allegedly complained to Irving were upset because the Grievant accused them of loading an aircraft wrong, violating safety standards. Alternatively, suppose the Grievant got on employees for not properly displaying an AOA badge, an activity that can result in a fine to the Company. Or maybe the Grievant saw employees dozing off. The non-appearing employees may be telling a story that actually favors the Grievant's intervention. Getting rid of the Grievant would be in their interest.

Another example: We have in the evidence record two contrary stories (both hearsay), as recounted by witnesses, as to what Union Representative Agent Y said to Irving, one in favor of the Company ("He had asked me to send him home at that point." R. 117), the other in direct contrast to what Irving alleged ("He [Agent Y] said, I didn't have any problems with Agent X, were his exact words. He said, Agent X came, temped for a couple of weeks, Agent X was sent home. Agent X and I get along, was his exact words." R. 141). Asserting that Agent Y came to David Irving and told him to send Agent X home, if true, seals the Company's case. **As the proponent of the testimony – that Agent Y came to Irving and asked to have the Grievant sent home – it was incumbent that Agent Y be called**
(subpoenaed if necessary) and testify on the stand and be subject to cross examination.

As recognized by the U.S. Supreme Court in 1992, "Even if one does not completely agree with Wigmore's assertion that cross examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth," one must admit that in the Anglo American legal system cross examination is the principal means of undermining the credibility of a witness whose testimony is false or inaccurate. For that reason, a party has a motive to cross examine any witness who, in her estimation, is giving false or inaccurate testimony about a fact that is material to the legal question at issue in the proceeding." *United States v. Salerno*, 505 U.S. 317 (1992).

Bottom line here: Conceding the problems in calling a Union Representative as an adverse witness, Mr. Agent Y's absence at the hearing makes it difficult, if not impossible, to adopt the Company's argument that

B. Where does this leave the Grievant?

Agent X received a temporary assignment pursuant to a contractual provision where seniority is the main criterion for awarding the assignment. While I agree with the Company that the *contract* is silent on the criterion for removal of an employee who had been assigned by seniority, the Work Rules Interpretations are not. The "needs of the location" is the test for removal. Management asserted the needs were morale related, plus Agent Y approved (and indeed requested) the transfer. Absent some non-discriminatory basis for removal, the employee, who bid and won the position based on seniority, is presumptively entitled to be retained. [3] Management may have tens of reasons for ending an assignment (one of which is the "needs of the location/department.") What it cannot do is remove a senior employee for discriminatory reasons, such as race, color, religion, sex, national origin, *or union-type activity*. The Union has made out a *prima facie* case that Agent X was sent home early because he elected to play "advocate" in enforcing the collective bargaining agreement and/or safety-related mandates. In the abstract, complaints of co-workers and especially agreement from a Union Representative (dispositive under any circumstances) are good reasons to end an assignment at a location. Unfortunately, the evidence record before me – where no complaining employee testified and the Union Representative who allegedly approved the removal was not called to testify – falls short and does not compel a conclusion that there was a valid and rational-based reason for sending Agent X home early.

So there is no misunderstanding: Agent X is allowed to be "disruptive" (marginally) and a "rabble-rouser" in his capacity as a Union Representative in enforcing the collective bargaining agreement and safety-related mandates. He is not allowed to engage in such conduct where the overall operation suffers because he is bullying or belittling or yelling at co-workers. [4] Where the line of demarcation is can only be determined on a case-by-case basis. Agreement on what is permissible conduct will be

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David Irving reacted to Representative Agent Y's request to send the Grievant home. To assert that Agent Y is a "party opponent" and, therefore, what he allegedly told Irving is an exception to the hearsay rule, misses the point. What Agent Y told David Irving is critical to the Company's case that the Grievant's Union Representative suggested he be sent home. And, again, if true this would be dispositive on the issue of the needs of the location/department. Grievant would have no defense (and this arbitration does not take place) if, in fact, Irving reached an accord with Agent Y.

3 The Union, through the Grievant, documented a prior instance where two employees where sent to Dulles on a temporary assignment, and one (the Grievant) was sent home after one day. Significantly, the Grievant was junior to the employee retained. Apparently, the Grievant has not had problems on other temporary assignments (R. 37-38).

I credit the Union's argument that when everything else is equal, the decision to retain is made on seniority. (R. 37).

4 To be clear: If the Company deems that a person is being disruptive or breaking a rule that Southwest Airlines has in place, Management has the option to discipline that employee (R. 92).

I find it noteworthy that Agent X was not disciplined for anything he did in Boston. Effectively what Management is arguing is an employee can engage in conduct that does not rise to the level of discipline but, nevertheless, is severe enough to warrant sending him home from a temporary assignment and retaining a junior employee.

more difficult as the issue of permissibility moves from the abstract (an employee cannot bully or harass a co-worker) to the specific ("you are loading an airplane all wrong"). Again, no employee came to the hearing and offered first-hand testimony that Agent X engaged in the conduct alleged by Management. All we have is vague conclusions that the Grievant treated employees inappropriately. [5] As such, I have no choice but to sustain the grievance (aside from the remedy) and issue the following award:

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[5] There is more. The Grievant testified that when he was called into Irving's office he was never given any proof of any employees that actually had complained. Nor was he given any names or write-ups:

> Q. So he offered you no proof that anybody had complained?
> A. No offer.
>
> Q. Could that be why you thought that it – it may not be valid?
> A. Yes.
>
> Q. None of the agents came in the room to say, yeah, I said it, he's – nobody came in?
> A. Yeah, nobody came in. (R. 84).

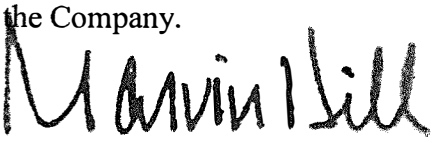
If the facts are what Irving alleges, why would he not mention the agents responsible to the Grievant? (Unless, of course, he feared some retribution by the Grievant on his accusers). At minimum, it would have brought home the point to the Grievant in his first meeting with Irving had Irving disclosed who made the complaints.

VII. AWARD

The grievance is sustained. The Grievant is entitled to non-speculative make-whole relief. The matter of an appropriate remedy is remanded to the parties. [6] Jurisdiction is retained in the event that the parties cannot reach an accord on what, if anything, is owed the Grievant.

Fees and expenses are assessed against the Company.

Dated this 14th day of July, 2016
at DeKalb, Illinois, 60115.



Marvin Hill
Arbitrator

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[6] The remedy requested for the Grievant is problematic.

Q. [By Mr. Smith]: Agent X, now, when they sent you home, did they keep the – the junior employee, Agent Z?

A. [By Agent X]: Yes. They kept Agent Z.

Q. Did you lose out on – on overtime Agent X?
A. Yes, I did (R. 28).

* * *

Q. So you were sent home?
A. Yes.

Q. Could you have been awarded overtime that day?
A. Yes (R. 31).

Given this specific evidence record, it is unclear to me how much overtime, if any, the Grievant would have worked. See, the exchange between Company Counsel and the Grievant, R. 46-48. Simply because there was overtime in Boston *does not mean the Grievant is entitled to it.* Other variables factor in which may preclude an overtime remedy. Relevant inquiries include: Was the Grievant available to work overtime on the days at issue? Did he sign up for the overtime in the call book? (On most days he did not sign the overtime call book). Had he worked overtime in the past? Would he have worked overtime on his days off? What percentage of overtime opportunities did he work in the past while on temporary assignment (R. 41-42).

I have doubts whether the Grievant's claim for overtime for the entire week he was sent home early is warranted, given he was not in the call book most days he claims overtime (R. 46-48). Given the above, the better course is to remand the overtime remedy issue, retaining jurisdiction in the event the parties cannot come to an accord.