IN THE MATTER OF ARBITRATION	)	
	)	**Case MHT-R-1816/15**
BETWEEN	)	**Grievant: Agent A**
	)	**Issue: Covered Work**
SOUTHWEST AIRLINES, INC.	)	
EMPLOYER	)	**Hearing Date: December 2, 2015**
	)	**Dallas, TX**
– and –	)	
	)	**Marvin Hill**
TWU LOCAL 555	)	**Arbitrator**
UNION	)	
	)	

Appearances

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I. BACKGROUND, FACTS AND STATEMENT OF JURISDICTION

Most, but not all, of the essential facts giving rise to this grievance are not in dispute.

In the summer of 2015, SWA's Charters' Department contracted for a charter flight to pick up some National Association for Stock Car Auto Racing (NASCAR) teams from the Manchester Airport (MHT), Manchester, New Hampshire, and then fly to Concord, North Carolina (JQF). SWA executed the contract with ConSeaAir, a third-party charter broker/agency working on behalf of NASCAR. The contract with ConSeaAir required that ground handling be performed by a fixed base operator ("FBO") in Manchester. The reason had to do with needing private screening and needing a private place to wait and also coordinating a number of different people and keeping the teams all together in one place. For that reason, they required not

terminal services but services from a fixed base operator. According to the Employer, this turned out to be one of approximately 30 times in 2015 that a SWA charter flight was serviced by an FBO at an airport in which Southwest Airlines maintains a station, out of approximately 900 total charter flights (*Brief for the Employer* at 3).

According to the Carrier, pursuant to an agreement with the Union and the parties' past practice, a Charter Department representative inquired whether the local Manchester FBO, Signature Flight Support (a contract company that performs ramp, fuel, GSE, and aircraft maintenance services), would allow Southwest Airlines Ramp Agents to work this flight. The answer was "no."

However, two weeks before this flight, SWA Manchester Station Manager Tom Labric met with Grievant Agent A, who is also the local union representative. According to the Carrier, Mr. Labric told Agent A about the charter flight arriving at the FBO so that he could reach out to Union Leadership (*Brief* at 3; R. 59). Agent A did not follow up with Larbic after this conversation (R. 61).

On July 19, 2015, charter flight #8260 arrived at Signature FBO in Manchester. The flight came in empty from Baltimore. A SWA Agent from Baltimore, MD worked this flight at the Signature FBO in Manchester. In the Carrier's view the charters that go in and out of FBOs are not – the agents are not performing work at a Southwest Airlines' station. It is not work that has historically been performed by Southwest agents at a Southwest Airlines' station. "In fact, it's precisely not a Southwest Airlines' station. It's an FBO at an airport where Southwest maintains a station, but it's not a Southwest station. So in this particular instance, the work was performed outside of the Southwest station." (R. 17).

On or about September 28, 2015, Grievant Agent A, through his Union, filed the following grievance (JX 2) asserting that Signature performed the work of SWA ramp agents when it loaded SWA aircraft:

> On 07/19/15 a charter flight departed MHT. The charter flight was worked by Signature, a contracted FBO, instead of local ramp agents. The covered work performed included marshalling, chocking, and loading luggage onto the aircraft (one bin at a time). This goes against the collective bargaining agreement as a covered work violation.
>
> Remedy Sought:
>
> The Company (Southwest Airlines) should stop contracting out covered work as outlined in the collective bargaining agreement; Also seeking to pay out 2 ramp agents 4.0 hours at the applicable rate for the above violation and make whole in every way.

Significantly, after the grievance was filed, the Charter Department solicited a letter from Signature confirming the conversation regarding whether SWA Ramp Agents could work a flight that was services by the Signature facilities (EX 2; R. 57; 83). The "Signature Letter", authored by its Senior Legal Counsel, stated that "no third parties are permitted on the [Signature] leased premises to provide FBO services." In the Company's view, without Signature's authorization, Southwest Airlines' employees are not allowed at the Signature FBO (*Brief* at 4). The Union has

countered by asserting that no airport policy has ever been introduced or given to the Union to show that Southwest Airlines' employees are prohibited from ever being at the FBO.

The grievance was denied that same day (JX 2). The grievance was appealed and again denied by the Company through Manager of Labor Relations Vance Foster (JX 2). On September 9th the Union requested a hearing before the System Board of Adjustment (JX 2), which met on October 22, 2015. The System Board deadlocked. On October 26, 2015, the Union moved the grievance to arbitration (JX 2 at 3). A hearing was held by the undersigned panel arbitrator on December 2, 2015. The parties appeared through their representatives, Ms. Samantha Martinez (for the Company) and Mr. Michael Martinex (for the Union) and entered exhibits and testimony. At the conclusion of the hearing the parties agreed to file briefs, which were received by the undersigned and exchanged. The record was closed on January 29, 2016.

II. ISSUE FOR RESOLUTION

The issue is whether the Company violated the parties' collective bargaining agreement by entering into an agreement for FBO services in Manchester, New Hampshire, on July 19, 2015 and, if so, 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:

A. Background: On July 19, 2015, the Company subcontracted covered work of ramp agents

By way of background, the Union points out that on July 19, 2015, Southwest Airlines subcontracting out covered work to Signature on Charter Flight No. 8260 at the Manchester, New Hampshire (MHT) airport.

Flight #8260 was an SWA flight that utilized a Southwest Airlines' aircraft (WN 731).

The Charter Flight was worked by a Southwest Airlines/TWU operations agent, flown by Southwest Airlines pilots, and serviced by Southwest Airlines flight attendants.

Southwest Airlines began service to MHT on June 7, 1998.

The MHT airport flight activity exceeds more than 12 departures a day which is a restriction that prohibits and restricts subcontracting.

Approximately 40 ramp agents are employed by SWA at MHT Airport (*Brief for the Union* at 1).

B. The Company violated the terms of the parties' collective bargaining agreement when it entered into a charter agreement that allowed ramp-covered work duties to be performed by Signature on July 19, 2015 for Flight #8260 at MHT

The Union initially submits that the Company's reliance on Article Five, Section One (JX 1 at 8)(asserting that the work at issue is not work that has historically been performed by ramp agents at Southwest Airlines) is incorrect. In the Union's view, "Southwest Airlines' charters at MHT airport always have been worked solely by Southwest Airlines Ramp Agents." (*Brief* at 3). According to the Union, "this is the first time, with the Union's knowledge, that Southwest Airlines ramp agents have not worked a Southwest Airlines' charter in MHT." (*Brief* at 4). In the Union's opinion, "the performance of baggage handling for Southwest Airlines aircraft in its "airline operations" is exclusively handled by ramp agents." (*Brief* at 4). To credit the Company's justification for their actions would require the Arbitrator to legislate new language and undermine the negotiation and bargaining process of the parties. In the matter before the Arbitrator the relevant language is clear, consistent, and unequivocal. The parties' collective bargaining agreement (JX 1) clearly speaks for itself, in the Union's view. Article 5 (Classifications), Section 1 (Ramp Agent/Provisional Agent)(JX 1 at 8) is replete with ramp agent duties that the Company used contract workers to perform (*Brief* at 4). The Company knew of the possible ramifications for allowing covered duties to be sub-contracted out as evidenced in an email to MHT Station Manager Tom Labrie: "You are likely to incur some grievances since your rampers will not work this flight." (*Brief* at 4).

C. SWA is trying to get through Arbitration an exception it has not attempted to gain through negotiations

The Union notes that the parties are currently in Section 6 negotiations and any exclusionary language should be bargained for and included in any tentative agreement for ratification by the members. Here the Union asserts the bargaining table is the proper forum for any desired changes to the clean and unambiguous language of the labor agreement (*Brief* at 5). In the Union's words: "The chasing of revenue does not give the Company the right to shirk any negotiated contractual obligations, especially in the light of financial reports that show a profit of over three billion dollars the last two years. This was an abuse of managerial rights by Southwest Airlines." (*Brief* at 5). According to the Union:

> Our position is that if it is our aircraft and we service that station then it is to be worked by our members. The Company had two choices: one, they could have honored the collective bargaining agreement and the historical practice and concept of "our aircraft, our people," or, two, they could violate the collective bargaining agreement, threatening the job security and safety of the other Southwest Airlines employees flying the aircraft by chasing after the $65,900 that was paid by Conseair, LLC [Company Ex. #2]. The erroneous choice or money grab by SWA resulting in the proceedings at hand. (*Brief* at 5).

D. Crew safety was jeopardized when SWA elected to subcontract ramp duties

In the Union's view, the decision to allow an FBO to perform the ramp job duties of loading bags and equipment possibly endangered the flight crew and lone Operations Agent flying the aircraft (*Brief* at 5).

E. Southwest Airlines painted an "unrealistic" picture of what an FBO can offer

The Union asserts that ramp agents performing their duties do not prevent any less stringent security or "comfort" from the general public from taking place by their seclusion. It is unusual for the Company to ferry (empty) a flight in to an airport. Southwest Airlines will generally utilize an inbound portion of a flight and then utilize and turn the outbound portion into a charter. The plane could have been loaded with baggage/equipment at the terminal gates and then either towed or taxied under its own power to the FBO, where it could have been boarded. Both the customer's desires and the collective bargaining agreement could have been followed if Southwest Airlines had chosen to do that. (*Brief* at 6-7).

F. Southwest Airlines alluded/implied that the Union agreed to subcontracting charters to FBOs

Citing the testimony of Mr. Venckus (that he was under the impression that there was an agreement with the Union), the Union refutes the existence of any past practice or agreement regarding the use of FBOs (*Brief* at 7). To this end, the Union submits that the Carrier could not produce any email or letter confirming Venckus' position. The Union points out that Southwest Airlines sells approximately 900 charters/year, with approximately 30 of them going to FBOs. With about 1,300,000 departures last year, a loss of 30 flights is a small price to pay when weighted against the integrity of the negotiated collective bargaining agreement (*Brief* at 7).

G. The problem is not the rules/regulations of the FBO, but the fact that the charter was sold with onerous conditions attached

The Union submits it never received any documentation from the MHT Airport stating that the bargaining unit did not have a business need that prohibited the servicing of SWA aircraft by its own agents (*Brief* at 7). In the view of the Union, Southwest Airlines would not sell a charter if it prohibited pilots from flying the charter. The same considerations should be extended regarding the ramp services (*Brief* at 8). The charters at issue should not be sold with restrictions. The awarding of the grievance will not cause undue hardship or a revenue loss. As such, the awarding of this grievance would not cause an undue hardship on the Company. It will reduce the need for the Company to use their collective bargaining agreement rights to manage and direct the workforce. It will hold the Company accountable to prove any rumor or fictitious belief. The clear and unambiguous language in the collective bargaining agreement restricts the Company from subcontracting the Union's protected an covered work. The financial impact will be minimal (*Brief* at 8).

H. Remedy sought

The Union asks that the grievance be sustained and that due to the productive, capable, and professional abilities of a ramp agent at Southwest Airlines, the Union requests that two agents, an agent at the bottom of the belt loader and an agent in the bin, be awarded an overtime bypass of three (3) hours. More importantly, the Union in seeking that the clear and unambiguous language of the collective bargaining agreement be applied in the selling of charters involving stations that Southwest Airlines flies to and have agents stationed (*Brief* at 9).

IV. POSITION OF THE COMPANY

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

A. The Union bears the burden of proof in showing that the Company violated the parties' collective bargaining agreement

There is no dispute that the Union, as the moving party in a contract interpretation ("rights") case, bears the burden of proof in demonstrating that the Company has violated the collective bargaining agreement (*Brief* at 5-6). The Union has failed to prove, in the first instance, that ground-handling work performed by third parties on Southwest Airlines' aircraft is covered work, falling within the scope of Article Five of the collective bargaining agreement (*Brief* at 7).

B. The work at issue is not covered work because it has not historically been performed by agents at SWA stations

Management asserts that in order to show that the ground handling that occurred at the Signature FBO on July 19, 2015 violated the parties' collective bargaining agreement, the Union must first show that this work comes within the scope of the labor agreement. In Management's eyes, it failed to do so because the plain language of Article Five, Section One limits covered work "which has been historically performed by [Ramp] agents at Southwest Airlines stations . . ." (*Brief* at 6). According to the Employer, only work that has been performed at Southwest Airlines' stations is "covered work." The Company would not dispute that had the July 19th charter flight been serviced at the Southwest Airlines Manchester station, this work would have been "covered work." In the Carrier's words: "But to argue that work done anywhere at the Manchester Airport, and not specifically at the Southwest station, is covered work, is to ignore the qualifying words 'at the Southwest Airlines stations.'" (*Brief* at 7). To this end the Carrier argues: "The contract looks broadly to types of work performed 'at Southwest Airlines stations,' not types of work performed 'at airports where Southwest Airlines also maintains a station.'" (*Brief* at 7).

C. If the July 19th ground handling is covered work, and if no adequate facilities are available, under the parties' collective bargaining agreement the Carrier is permitted to contract with the FBO when no adequate facilities are available to meet the customer's needs

Management contends that if the Arbitrator finds, contrary to the above, that the July 19th ground handling is covered work, then Southwest Airlines argues, in the alternative, that it was permissible third-party contracting because adequate facilities were not available at Manchester (*Brief* at 7). Here the Company points out that under Article 2, Section F of the parties' agreement (JX 1 at 3-4), Southwest Airlines may contract with third parties for covered work provided that certain conditions are met: (1) There shall be no reduction in force or involuntary furlough as a result; (2) the Company shall notify the Union of the contracting; and (3) adequate facilities are not available for the Company's operations, ramp and/or freight needs (*Brief* at 7-8). The Union's case fails because it did not prove that adequate facilities were available for Southwest Airlines' charter flying on July 19, 2015 in Manchester. The Company presented ample evidence, which the Union did not dispute, regarding needed facilities for certain charter customers. Their operational needs cannot be satisfied by Southwest Airlines at its stations. They include: (1) private screening of passengers; (2) a private space to wait for flights, separate from the general public; (3) enhanced security; (4) crowd control for dignitaries or celebrities and (5) different limits on weight and types of baggage (*Brief* at 8-9; R. 13). [1] While the Employer acknowledged that the Southwest Airlines station at Manchester was adequate to meet the ramp needs of the charter flight on July 19th, it also had to meet the operational needs of that flight, as per the parties' agreement. For this reason, argues Management, the Company has met the conditions for third-party contracting out under the collective bargaining agreement (*Brief* at 9).

D. The parties have developed a past practice for managing FBO work, which the Union now seeks to renege

Management points out that July 19th was not the first instance of the use of an FBO for charter flights in airports where Southwest Airlines maintains a station (*Brief* at 9). In the Company's view, it presented sufficient evidence to establish a past practice regarding FBO use at airports where SWA maintains a station – a separate and independent reason for denial of this grievance (*Brief* at 10). Specifically, in Company Counsel's words: "Now, this is not the first time that this can come up. I mean, obviously, as I've said, there have been a few dozen of these – of these charters in 2015. There have been some of these same types of charter flights before where the Company uses an FBO at an airport where there also exists a Southwest station. And the Union and the Company have had a number of different conversations about that, and the

[1] As outlined by Company Counsel in her opening: "So as I discussed, and as we'll have testimony today, there are many, many different reasons why a customer would require or request an FBO. And there – there are things that Southwest can't provide. Southwest cannot provide a private waiting area. Southwest cannot provide private or enhanced screening or enhanced security measures. Southwest has rules about the kinds of – of baggage and freight it takes on its airplanes. So those are some reasons why adequate facilities are not generally available." (R. 13).

Company – and had developed what the Company believed to be an agreement or a past practice regarding that." (R. 14).

The Carrier asserts that Bill Venckus testified that the Company and the Union had an understanding: "If we could provide the union with a letter stating that they [the FOB] were not going to allow us, the ramp agents, to work on their ramp, that we wouldn't incur any grievances or there wouldn't be any issue with us doing that." (R. 92). If the Union did file a grievance, then it would be withdrawn if a letter was produced. (*Brief* at 10). Management submits that Labor Relations Manager Bob Watkins testified to a similar conversation with Union Vice President Jerry McCrummen, in conjunction with an email communication on this topic (*Brief* at 10).

In further support of the Company's position regarding the parties' past practice, it produced a series of letters (discussed *infra*) that were solicited from FBOs and then provided to the Union (*Brief* at 10; CX 3 & 4). All of these letters were presented to the Union, which accepted these as legitimate reasons for staffing by third parties. Significantly, the Union did not grieve any of these instances (*Brief* at 11). Also, the Company points to a grievance filed by the Union, and later withdrawn consistent with the parties' past practice (*Brief* at 11; CX 5).

E. The equities favor Southwest Airlines

Citing equity considerations, Southwest Airlines argues it has conducted itself in good faith in its administration of the parties' collective bargaining agreement with respect to charter flying. Specifically, it has sought to have the TWU members work at each FOB in which Southwest Airlines maintains a station. It flew in an operations agent from another city just to work the flight in Manchester, although certainly a Signature FOB agent could have done the job. The Charter Department prefers to use Southwest Airlines' stations, and does so 97% of the time. And it has engaged in continued discussion with the Union about this matter. Applying a rule of reason test to subcontracting cases, the Company has acted reasonably. In the Carrier's view, it has shown no intent to undermine bargaining-unit work (See, *Brief* at 13-15).

F. The Union seeks a punitive remedy

Citing prior arbitration decisions, the Carrier asserts that there is no room in the parties' collective bargaining agreement for a punitive remedy (*Brief* at 16). It is undisputed that in Manchester on July 19th there were no agents left to call in for overtime (R. 47). The voluntary call list was exhausted (R. 62). Had the charter flight been serviced at the Southwest Airlines' station, there were sufficient agents already on duty there to handle the duties. Thus, there are no agents to which the Company may award a remedy because no bargaining-unit employees were harmed (*Brief* at 16).

Management further argues that it would be improper to order a broad cease and desist order "on this thin record, and in light of the parties' discussions and past practice." (*Brief* at 17).

V. DISCUSSION

A. Focus of an Arbitrator in a Rights Dispute

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.**
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> * * *
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> **§ 2.2 The Prime Directive: Intent of the Parties**
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> **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.**
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> **Comment:**
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> 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 of 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, 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.

B. Relevant Testimony

Ramp Agent (20 years) and District I Representative Richard Hendsbee (PHL) testified he presented the instant case (Agent A) at System Board (R. 17). According to Hendsbee, Tom Labrie stated at System Board that "we were prohibited from going over to the FBO unless we had a business purpose or a business need over there." (R. 18). While Labrie did not mention how many charters have been worked at Manchester, he did acknowledged that military charters were worked at the FBO where SWA ramp agents worked (R. 18). Hendsbee testified that Labrie indicated that military charters were different than the particular charter in question (R. 19), although he noted that the collective bargaining agreement, specifically Article Two, does not make distinctions with respect to the type of charter (R. 20).

Asked, "What kind of documentation has the company provided us from Manchester Airport that shows our employees are prohibited from being over there?", he responded "nothing." (R. 21). Mr. Hendsbee argued there were no restrictions he was aware of that prevented ramp agents from being at the FBO (R. 22). Hendsbee noted that Signature Flight Services ("Signature") loaded the charter on July 19th, contrary to Article Five, Section 1 (A)(R. 23).

During cross examination, Mr. Hendsbee acknowledged that he has heard that Manchester Airport regulations required that an individual have a business need to be around other parts of the airport. He conceded he does not work at Manchester (R. 24), but testified: "What I'm stating is that we know of no restrictions that prevent us from being over there [the FOB]." (R. 25).

> Q. But you are – the Union is aware of restrictions provided by Signature that prohibits Southwest Airlines agents from working at the Signature FOB, correct?
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> A. From – from that – that was entered into evidence in the System Board that – yes.
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> Q. So just to be clear, the Union did receive and reviewed a copy of Company 1 before, correct?
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> A. That's correct, yes.

Q. And Company 1 is telling Mr. – it says Labrie. I believe his name is Labrie. But telling Mr. Labrie, the station manager in Manchester, that Southwest Airlines agents cannot work the signature FBO, right?

A. That's what this – this –

Q. That's what the letter says?

A. Yes, that's correct.

Q. And the Union doesn't have any evidence to contradict what Signature said in this letter, right?

A. No. (R. 25-26).

MTH Ramp Agent Agent A, the Grievant in this matter, testified that he filed a grievance "because I saw that there was another – the FOB was loading and – bags onto the plane, which was our company aircraft, Southwest Airlines' aircraft, which is work that we do." (R. 30). According to Agent A, Signature employees loaded the aircraft. Asked to explain what is the FBO, Agent A responded: "It's a – as far as I know, a general aviation. They have –do our contract maintenance there, our GSE services there. If something breaks and we don't have the equipment to – to do that, then we would call them in, and they would help support the operation if we were unable to do it." (R. 30-31).

According to Agent A, Southwest Airlines ramp agents (two employees and an ops agent) worked just once at the FBO in the past (R. 32). Agent A went on to confirm a conversation with Station Manager Tom Labrie. In Agent A's words:

> I was in his office, I believe, for other business, and he mentioned to me that we had some charters scheduled in a – a couple weeks. This was a couple weeks before they were scheduled. He talked about the fact that there would be an ops agent that we would provide to work then, but the ramp was not going to be providing any ramp work for that charter. It was going to be over at Signature on the Signature ramp.
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> There was a discussion – I had asked him, at that point, about why we weren't working them and things of that nature. I don't recall exactly why he told we weren't going to be working them, but it led into the fact that – you know, he said the labor relations or employee resources. I'm not sure – sometimes he uses both terms – was expecting there to be grievances and that he was directed to send them up to that Department for them to handle.
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> At that time, I – you know, I'm a visual learner, so I like to be able to see something and read it to understand it better than I can in speaking in a conversation with someone. So he provided me a copy – not a copy, but allowed me to view the copy of the e-mail that he had received, that I read over, so I could understand better what he was trying to tell me. (R. 35-36).

Still on cross examination, Agent A acknowledged that the overtime call book was exhausted on July 19th (R. 47).

Company witness Thomas Larbie, Station Manager (eight years) at Manchester, where Southwest Airlines leases space within the terminal and out on the ramp, Gates 11, 12, 14 and 15 (R. 56). This is what he is in charge of, Larbie testified, and not other parts of the airport (R. 56). Mr. Larbie asserted he has no control over any other parts of the Manchester Airport that's not a Southwest station (R. 56).

With respect to Company Ex. 1 – the letter from Signature – Larbie maintained he did not personally ask Signature for the letter (R. 57). He asserted that Southwest Airlines ramp agents would not be allowed at the Signature FOB if Signature did not give them permission to be there, according to his understanding of airport rules (R. 57). In his words: "We wouldn't be allowed on the FOB ramp based on these rules, and we wouldn't have a business need to be on that ramp, in their eyes. So they wouldn't allow us on that ramp." (R. 58).

Discussing a meeting he had with Agent A a couple weeks before July 18th, Mr. Larbie testified that "I just let them know that we had this charter coming in. We normally don't have a charter that goes over to the FBO. And so I just wanted them to know that it was going to be a little different. We weren't going to have ramp over there. And – and basically giving them a heads-up in case there were things that they needed to do going forward." (R. 59).

Q. And when you say "things they needed to do." What do you mean by that?A. If they wanted to talk to Agent A, the district rep, if they wanted to ask about – if this was a covered work thing. I mean, just general conversation like that.

Q. Okay. Let me stop you for a second.
You said this is going to be unlike other charters. Do you actually service charter flights in Manachester that don't go to the FBOs?
A. We do. Military charters that we've had in the past normally come over to our ramp.

Q. And that's something that Southwest ramp agents do?
A. That's correct.

Q. They always do that?
A. They always do that.

Q. If it's at a Southwest station?
A. That's true, yeah. (R. 59).

* * *

Q. After this conversation with Agent A, did Agent A follow up with you and engage with you about it again, about this charter?
A. I – I don't believe so.

Q. Did anyone else from the Union follow up with you about the charter flight on July 19th?

A. No. (R. 61).

Asked about Southwest Airlines having private screening services, or a private waiting area for charter passengers, Mr. Larbie answered in the negative (R. 61). Mr. Larbie also acknowledged that Southwest Airlines cannot make arrangements for charter folks in case some coordination is needed among the travelers (R. 61). Mr. Larbie did concede that there was a Southwest Airlines' ops agent from Baltimore on the flight that took off from FBO on July 19th (R. 62). According to Larbie, if the charter had come to the Southwest Airlines' station rather than going to the FBO, it would not have created any need for additional personnel or overtime: "We could have managed this without adding extra coverage." (R. 63). He acknowledged that everyone that was on the voluntary overtime call list was already exhausted on that day (R. 64). "Everyone that was in the book received an assignment. And we also gave an assignment to someone that was signed up under the line, in the voluntary overtime call book." (R. 64).

Mr. Larbie acknowledged that his SIDA badge is the same color as Agent A's, which gives him access to the FBO when there is a business need (R. 68). On re-direct he asserted there was no business need for any Southwest Airlines' ramp agent to be over at the Signature FBO on July 19, 2015 (R. 73).

Director (eight years) of Southwest Airlines' Charter Department Albert "Bert" Craus testified that the Company is expected to book just north of 900 charters for 2015, half of which will go into airports where Southwest Airlines does not have a station (about half)(R. 75). Of those 900, approximately 30 arrived or departed from an airport FBO where Southwest Airlines maintains a station (R. 76). Mr. Craus acknowledged that Southwest Airlines executed a contract in order for a flight to go in and out of Manachester using an FBO. He conceded the Carrier made a contract with ConSeaAir, a charter broker, in order for a flight to go in and out of Manachester using an FBO on July 18, 2015 (R. 76).

Significantly, Craus testified that he inquired whether Southwest Airlines' ramp agents could work at the Manachester FBO, but the answer was "no." (R. 77-78). Asked why the answer was "no," Craus stated that "I don't specifically, but it's my understanding that it's usually an insurance issue and liability issue." (R. 78). He testified that he would rather use Southwest Airlines facilities rather than an FBO (R. 78). Craus testified that he was aware that the flight at issue carried in from Baltimore a lone ops agent to do the weight and balance (R. 78). In an exchange with Company Counsel, Mr. Craus outlined some of the things than an FBO can give a charter customer that Southwest Airlines cannot:

Q. So what are some of the things that an FBO can give a charter customer that Southwest Airlines cannot?

A. So the FBO facility can provide their own private screening, can provide a private space for them to be kept separate from the general public, if you will. It's a contained environment?

In this particular instance, NASCAR – the NASCAR program provides a rental car process where these guys get off the plane, and they have a car waiting for them and they go. And then on the return, they park the car and get on the plane and go.

So just some examples of – of the FBO facility.

Q. You talked about the fact that it's – the FBO service is more contained. For charter customers who are concerned about security, does that allow for enhanced security as well?

A. Right. I mean, there's – there's – there's not the – the masses that you have at an airport. So most professional teams, this is the kind of preference they want for that – for – that's one reason. (R. 79).

Mr. Craus testified that in 2015 Southwest Airlines had charters fly through an FBO other than NASCAR teams (R. 79). "We had the foreign dignitaries, military dignitaries, that we flew out of Kansas City to Andrews Air Force Base. And they're – and – and it – and the bid came out through GOPAX as FBO requirement." (R. 79-80). He maintained that Southwest Airlines has no method of crowd control if a celebrity comes through and charters a plane (R. 80). Asked if Southwest Airlines has requirements regarding weight limit or types of baggage, he responded in the affirmative, but testified that FBOs do not have the same (R. 80).

Mr. Craus also testified that there is a difference in flexibility in terms of the aircraft taking off and landing in an FBO versus at a Southwest station as there would potentially be an issue with the plane being at a gate longer than it was expected to be (R. 80).

Addressing the issue what the Company requires when it does an FBO at a Southwest Airlines' location, Craus stated that whenever the Company was going to do an FBO at a SWA location, "we ask if our ramp agents can come over there and work it "and if no, we request a letter." (R. 82).

Q. And if a letter is received or some understanding of confirmation is received, what's your understanding about the grievance process that – from labor relations?

A. I understand that that's what we need to – there [will] not be an issue.

Q. When you say there not being an issue –

A. With the grievance. * * * Yeah, if we get a letter, then – then that will suffice. (R. 82-83).

During cross examination Craus conceded that Southwest Airlines has a weight limit on bags (200 pounds), while FBO does not (R. 84). However, he asserted that the Company would place a weight limit on their bags (R. 84). "The contract would – would say that, yes." (R. 84). Significantly, he agreed that if Southwest Airlines lost business at the FBOs, millions would be lost (R. 85).

Director of Labor Relations (for the technical side) Bill Venkus discussed an arrangement he believed the Company had with the Union:

Q. Did you have a working understanding or an agreement regarding how you would manage the situation of a charter flight going in and out of an FBO where Southwest – an airport where Southwest also maintains a station?

A. Yes. I thought we did.

Q. And what was you understanding?

A. My understanding was that if we could provide the Union with a letter stating that they were not going to allow us, the ramp agents, to work on their ramp, that we wouldn't incur any grievances or there wouldn't by any issue with us doing that.

Q. Now, you say that if you provide this letter, no grievances would be incurred. Were there also sometimes grievances filed that then were resolved once you maintained a letter – or once you got a letter?

A. From my recollection, yes. (R. 91-92).

Mr. Venkus went on to document communications he had with the Union regarding who is allowed to service an aircraft at an FBO (R. 93-94; EX 3 & 4). Letters were solicited "because we had conversations with the Union. Specifically, Jerry and I would talk about these things. Initially, you'd start off verbally. We'd advise of the third-party contracting in an FBO. And then it evolved into Jerry wanting to be able to show others within the Union that we, in fact, couldn't have our ramp agents on their ramp." (R. 99). Mr. Venkus testified that the Company needed proof, so letters were obtained via the charter group. "And then, of course, I would forward those on to Jerry." (R. 99). Asked if there were ever a time after he provided the Union with letters that they proceeded with the grievance anyway, he responded "Not that I'm aware of." (R. 100-101).

During cross examination Mr. Venkus described what he thought was the essence of an agreement with the Union. In an exchange with Union Counsel, Mr. Martinez, Counsel was asked what the Union's position is regarding the loading of aircraft when the Charter people reject a request that bargaining-unit employees do the loading:

[By the Arbitrator]: What's the Union's position, may I ask? What's the Union's position in a case like Counsel described, that they go to the Charters – they go to charters – excuse me – and they say, "Can our employees service the aircraft; and if the charter says "no, because of insurance issues or we have no control over those folks," your position is what? When they can't – they can't do the charter?

[Mr. Martinez]: That's one. The other is that our guys can load it over on the ramp side and then it can be towed over to the other side for them to load their passengers and then fly it out.

[By the Arbitrator]: In other words, they can move the airplane to your gate.
[By Mr. Martinez]: Uh-huh.

[By the Arbitrator]: -- load it and then –

[By Mr. Martinez]: Actually they don't have to move it straight – overtime can fly in like this one. This particular flight ferried in. It can go and taxi right into our gate. We load all the bags. We can then tow it over to the other side for them to load all the passengers.

[By the Arbitrator]: And your response to that is?

[By Ms. Martinez]: Well, this is the first we've heard of something like this. I don't think that would satisfy all concerns. Number one, I'm not sure that would be something that the FBO would allow, to be honest, if it's going to come back over there. I don't know – in other words there – it's not just – you have screening requirements, federal screening requirements, that kind of thing.

I don't know if you're allowed, as a Part 121 carrier, to load up a bunch of bags and then bring it over to another FBO and then have it go out from there. You know what I'm saying? Just because of screening requirements. And because this is the first I've heard of it, I'd have to really vet it with the people in charge and who know. (R. 96-97).

Assistant Manager of Ramp at Dallas (currently) Adam Westermajer testified that he handled a grievance involving the same issue that is present in the instant case, where a Southwest Airlines' charter flight flew into an FBO at an airport where there was also a SWA station (R. 108; EX 5). Mr. Westermajer explained that the grievance arose out of Atlanta where SWA was operating a charter at Landmark airfield, which is an FBO. There was an ops agent and provo agents present, "but we didn't have ramp agents working the flight. It was worked by Landmark employees. And that's where we got this grievance." (R. 111). The Union withdrew the grievance. According to Westermajer, the grievance was handed over to Mr. McCrummen, who told him that "all we need is a letter from Landmark Aviation telling us that they don't allow our ramp agents on their field, and then the grievance would be withdrawn." (R. 112). "And so I went and got a letter from Landmark Aviation. They sent it to me. I forwarded it to Jerry. And the grievance was withdrawn right after that." (R. 112).

Q. After you sent it to Jerry, did you have any follow-up conversation with anyone in the Union?

A. I did. So when I forwarded it, I just called to ensure that he had it. He said he did and it would be taken care of. And I got a withdrawal the following day. (R. 113).

During cross examination Westermajer testified that he believed the withdrawal was actually sent over by Mark Waters (R. 114). Mr. Westermajer did not know why the provo agents were allowed at the FBO but ramp employees were excluded (R. 115). Westermajer stated: "it was actually a really easy grievance to resolve. I made one phone call. He said get a letter from Landmark and we would be done. And that's what happened." (R. 115). He acknowledged that Mr. Waters never actually told him why he was withdrawing the grievance (R. 115-116).

SWA Manager of Labor Relations Bob Watkins (22 ½ years) testified that he has been dealing with the Union regarding the issue of charter flights going in and out of FBOs at an airport where Southwest Airlines has a station (R. 117). Discussing the issue, he stated:

> There was a charter coming into Tampa. It was an Atlanta to Tampa back to Atlanta. It had to do with – the Atlanta Falcons staff. I believe it was. And they needed an FBO in Tampa. Tampa was one of my cities at that time. Dave DeMeyer, the station manager, sent me an e-mail and said, Hey, we have this coming into the FBO. Is that going to be a problem?
>
> And I asked him, you know, Can your guys work over there? He said, No, they can't. I said. You need to get a letter from – from the FBO per Bill Venckus's direction to provide to the Union to show that they could not work over there,
>
> Q. And so the reason that you gave that advice we need to get a letter – could you tell us why it was that you did that?
>
> A. I ran it by Bill Venkus – he was my director at the time – and asked him would there be an issue, and he said as long as we had a letter from the FBO, that it would not be an issue.
>
> Q. And what did you do next?
>
> A. I got an email, actually, from the FBO. Dave DeMeyer did, and he forwarded it to myself. And told Bill that I had it. And he said, Give Jerry a heads up – Jerry McCrummen – that we were doing that. (R. 117-118).

Watkins testified that he received an e-mail (EX 6) and then called Mr. McCrummen to give him a "heads-up" that the Company was going to use an FBO out of Tampa and that ramp agents could not use it and that it'd would be followed by an e-mail from the FBO (R. 119). Mr. McCrummen's response was "thanks for the heads-up." (R. 120). There was no grievance (R. 120).

TWU District Representative Jerry McCrummen testified

> There is no past practice agreement. For it to be a past practice, both parties have to realize it's binding on the parties. What Bill and I talked about – if I could have Company Exhibit 4 to look at. There's not one here. * * * This is very easily explained. One, I never saw Mr. Kramer. And I think it's funny that they can't furnish an e-mail that shows that he sent it to me. The conversation on the April 18th letter actually took place. This is a Kansas City operation. And Mr. Venkus said this is a one-off, one-time. And I said, Okay. You get me a letter and – very straightforward – you get me a letter saying it, because I'm not taking your word for it. I trust you. I'm going to play cards, but I'm going to cut the deck. And so that's what I told Bill. I said, you're going to show me something in writing. And so he gave me this letter in response to a first Kansas City agreement. Then I got another one in August. I said, Bill, you said it was one-off. This is not one-off. Come to find out, these are charters going to NASCAR, the problem we're having at the time. And I said, Bill, you are selling these

charters with the understanding you're not pushing the job. **And he said, "Well, what would you have us do? Don't sell the charter." * * * And so Bill – there has never been any implied or show me any – something in writing. I have done it on an individual basis. I had to weigh each case individually. That is the Venckus deal. (R. 124-126).**

Mr. McCrummen went on to assert that "there's no agreement. * * * I would have it in writing if there's agreement." (R. 126-127).

C. Relevant Contractual Language

ARTICLE TWO - SCOPE OF AGREEMENT

* * *

F. Third Party Contracting. The Company and the Union agree that job security and a stable work environment are important objectives to be maintained. Therefore, the Company agrees that contracting with third parties shall be prohibited if it results in a reduction in force or involuntary furlough. **It is the intent of both parties that covered work be done by Southwest Airlines Employees.**

1. Should the Company have a need to contract with third parties for the performance of covered work, the Company shall notify the Union of:

   a. The nature of the contract; and
   b. The anticipated length of time the third party work shall be required.

   The Company and the Union agree to discuss the time frames in an attempt to minimize such third party work and return same to covered Employees. **No such contracting shall occur when and if adequate facilities are available for the Company's operations, ramp, and/or freight needs.**

2. Should the Company have a need to contract with third parties for the performance of covered work at stations where flight activity does not exceed 12 departures per day, the Company shall be entitled to do so. The Company shall notify the Union of:

   a. The nature of the contract; and
   b. The anticipated length of time the third party work shall be required.

   This provision shall not apply to stations in operation as of date of ratification (March 27, 2009).

(JX 1 at 3-4)

ARTICLE FIVE – CLASSIFICATIONS

SECTION ONE
RAMP AGENT/PROVISIONING AGENT

The work of Ramp and Provisional 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 the specific labor contract. Agents required to perform such duties must be current and qualified within that classification.

A. Loads, unloads, services, guides, and directs Company aircraft.

B. Transports cargo to and from aircraft, including form the Company to other carriers.

C. Loads and unloads the cargo component of the aircraft with cargo (such as Customer baggage, air freight, air mail, ballast, and Company materials) according to pre-determination 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.

D. Warehouses, weights, stacks, picks up, and delivers air cargo checks air cargo handled against its accompanying forms to identify any mishandling or discrepancies, and corrects routine errors.

E. Safeguards Customer baggage, air cargo, air mail, and comat from weather, loss, theft, damage, and/or destruction.

F. Receives and records Customer baggage, air freight, air mail, and comat as required. Scans Customer baggage and baggage carts at T-point for airside delivery. Re-stickers misconnect bags.

G. Checks cargo forms for accuracy and corrects forms as necessary.

H. Equips aircraft cabin interiors for flights with equipment and supplies such as blankets, literature, disposal and refuse containers, and commissary items (including ice), in accordance with applicable paperwork.

I. Hand cleans interior of aircraft by such operations as hand sweeping and dusting, empties ash trays, and uses specialized clearing fluids and materials, using mechanized cleaning aids as required, in accordance with applicable paperwork.

J. Removes stains from upholstery; cleans windows; and cleans and services lavatories and galleys and disposal containers, in accordance with applicable paperwork.

K. Transports cabin, commissary, and cleaning equipment between aircraft and storage areas.

L. Wears visual identification required by the Company, prominently displayed for ready recognition.

M. Maintains an inventory of cabin equipment items, commissary items, and cleaning equipment and supplies, including the storage areas for such supplies and notifies local management of possible materials needed.

N. Checks delivery of supplies for shortages and brings discrepancies to the attention of local management.

O. Works according to Company regulations and procedures and instructions from supervisors issued in accordance with this Agreement.

P. As qualified, operates all power and other ground equipment (including push back tugs) assigned by the Company to complete its airline operations.

Q. Has routine contacts with people outside the Company such as delivery agents, shippers, etc.

R. Completes forms and paperwork connected with work assignments according to established procedures and enters such information into the Company's information system as required.

S. Keeps work area in a clean and orderly manner, including storage areas for Company supplies and commissary items and Employees' break room.

T. Provides friendly service to all co-workers and Customers.

(JX 1 at 8-9)

* * *

SECTION THREE - CROSS-UTILIZATION

It is mutually understood and agreed that under normal working conditions, Ramp Agents shall perform Ramp Agent duties; Provisioning Agents shall perform Provisioning Agent duties; and Operations Agents shall perform Operations Agent duties; however, cross utilization shall be allowed when sufficient personnel of a specific job classification are not available. No Employee shall be required to perform duties in another job classification unless that Employee has been adequately trained to perform the required duties and is current and qualified

(JX 1 at 10)

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.

ARTICLE SEVENTEEN - SAFETY AND HEALTH

I. Company Required Physical. The Company may, at its expense, require an Employee to submit to a physical examination at any time by a doctor of the Company's choosing.

(JX 1 at 35)

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

SECTION TWO - MANAGEMENT GRIEVANCE

The Company has the right to file a grievance against the Union. Such grievance shall be proper when filed by the appropriate Vice President with the President of the Union, who shall provide a written answer within ten (10) working days. If the answer is unsatisfactory, the Company may appeal the grievance to the System Board of Adjustment within ten (10) working days following receipt of the Union's answer. In the event of a deadlock or if the System Board of Adjustment fails to render a timely decision, the grievance may be sent to arbitration, at the Company's option.

(JX 1 at 43).

D. Analysis of Evidence Record

In its opening statement Union Counsel asserted that it has never been argued that the Company may not continue doing charters. In the Union's words: "On the contrary, we want our Company to succeed in bringing in additional revenue. Southwest Airlines ramp agents working flights at the FBO does not prevent the Company from doing charter flights at Manchester Airport." (R. 8). The Union goes on to assert: "It has never been argued by the Union that Southwest Airlines ramp agents are the only agents that should be working charters at stations that do not have Southwest Airlines' personnel. What we have argued from the beginning is that any charters brought into the Manchester Station be worked by Southwest Airlines personnel given that our employees are not restricted from working at the FBO or any other part of the Manchester Airport. What we have also argued, from the beginning, is for the company to follow the collective bargaining agreement instead of woefully ignoring it." (R. 9)

In an exchange with the Arbitrator, Agent A discussed what exactly is at issue in this case:

[By the Arbitrator]: Part of that contract [with an agent for NASCAR] was, if they were going to have their own folks – they were going to have a subcontractor load the airplane with the baggage, act as an agent, too, as a ramp agent, was going to look at people getting on the airplane, boarding passes? Do charters have boarding passes – what do agents do – what does a ramp agent do in a charter situation?

[By Ms. Martinez]: I don't know that I know the answer to that. You might have to ask the charter person –

[By the Arbitrator]: Okay.
[By Ms. Martinez]: who's coming.

[By the Arbitrator]: So – and that's the – what in general [are] you grieving? That whatever was done on that airplane at that gate, you folks could have done?

[By Agent A]: The loading of bags is what –

[By the Arbitrator]: Just the loading of bags?
[By Agent A]: That is correct.

[By the Arbitrator]: -- is what is at issue today, nothing else?
[By Agent A]: Yes.

[By the Arbitrator]: If the plane came in empty, obviously, there wouldn't be anything to unload?

[By Ms. Martinez]: Right. That's right. But the – when it came in from Baltimore, there was nothing to unload. (R. 51-52).

Black-letter law in this area is clear. Unless otherwise prohibited by the parties' collective bargaining agreement, management is free to execute contracts in its everyday business operations, including contracts for labor and charter-type agreements. This does not mean that management is free to impose wholesale contracting of bargaining-unit jobs. Implied from the general provisions of the contract is a so-called "rule of reason" where the employer's decision is subject to a rational basis test. See, Hill & Sinicropi, *Management Rights: A Legal and Arbitral Analysis* 449-486 (BNA Books, 1991). Arbitrator and Past President of the NAA Dennis Nolan, in *Uniroyal, Inc.*, 76 LA (BNA) 1049, 1052 (1981), expressed the better view as follows:

> [V]irtually all authorities agree that absent some explicit contractual prohibition management retains broad authority to subcontract work. Common sense tells us as much, else why would so many unions strive so vigorously to impose explicit contractual limitations on subcontracting? Similarly, virtually all authorities agree that even a silent contract imposes some limitations of management's freedom to subcontract. To take an extreme example, no one would seriously contend that immediately after signing a collective bargaining agreement an employer could lay off all employees and

hire a subcontractor to perform all bargaining unit work simply to escape the burdens of the collective agreement.

Arbitrator Marshall Ross, in *Campbell Truck Co.*, 73 LA (BNA) 1036, 1039 (1979), had this to say on the same issue:

> Arbitrators recognize that there is an implied covenant of fair dealing between the contracting parties, and that one of the parties cannot subvert an agreement by conduct seeking to deprive the other party of the bargain that was struck. The published awards dealing with this problem indicate a subcontract that deprives the Union or its employed members of any contractual gains or benefits is suspect and will be denied unless an employer can demonstrate a special business need that outweighs the loss caused the members of the bargaining unit.

Given the above background, SWA and the TWU have not executed a collective bargaining agreement that is silent on the subject of contracting out.

A step-by-step analysis of Article Two (Scope of Agreement), Section F (Third Party Contracting), Subsection 1 clearly prohibits subcontracting "if it results in a reduction in force of involuntary furlough." The contracting out at issue resulted in neither. As such, it is appropriate to "read on" (a term known to all who went through law school and took statutory-based courses).

Having passed the first test, the parties' collective bargaining agreement then provides that "should the Company have a need to contract with third parties for the performance of covered work," management is saddled with the obligation to "notify the Union of (a) "the nature of the contract," and (b) "the anticipated length of time the third party work shall be required." The parties further agree to "discuss the time frames in an attempt to minimize such third-party work and return same to covered employees." There is no serious issue that Management vectored the Union in the decision.

Based on this specific evidence record, I hold that the work at issue involved permissible third-party subcontracting because adequate facilities and specific contractual requirements of the customer were unavailable to Southwest Airlines on July 19, 2015. To this end Management Counsel advances the better case in demonstrating that it could not provide (1) private screening of passengers, (2) a private space to wait for flights, separate from the general public, (3) enhanced security, (4) crowd control, and (5) different limits on weight and types of baggage (See, *Brief for the Employer* at 8-9). As pointed out by the Carrier: "The NASCAR team on July 19th specifically requested non-TSA private screening and close coordination of the travel of all passengers. The FBO offered both, and Southwest's station offered neither. In terms of the request for close coordination, the FBO allowed the passengers to return their rental cars curbside at the FBO. And it offered the ability for the travel coordinators to keep track of their passengers who may arrive at different times, subject to the contingencies of the race. The FBO also allows the plane to wait at a gate indefinitely. Southwest cannot offer this to charter

customers, particularly at a busy station." [2] Management concludes: "It is true that the Southwest station at Manchester was adequate to meet the ramp needs of the charter flight on July 19th. But it also has to meet the operational needs of that flight, per the parties' Agreement. It did not do so." (*Id.* at 9; transcript and exhibit references omitted).

What of the Carrier's past practice argument? Asserting that July 19th was not the first time that Southwest Airlines used an FBO for charter flights in airports where the Company maintains a shelter, Management advanced a past practice argument regarding FBO use, such as the one at issue here, dating to 2011 (*Brief* at 9-10).

A practice is defined as "the understood and accepted way of doing things over an extended period of time." Its elements are clarity, consistency, longevity, repetition, and acceptability. See generally, M. Hill & A.V. Sinicropi, *Management Rights: A Legal and Arbitral Analysis* (BNA Books, 1986). The true dimensions of a practice are determined by the circumstances out of which it arose. The practice is enforceable and becomes the "prescribed way of doing things" if it is supported by "mutual agreement." See, Mittenthal, "The Ever Present Past," in *Arbitration 1994: Controversy and Continuity, Proceedings of the National Academy of Arbitrators,* 184 (BNA Books, 1994).

The National Academy of Arbitrators had this to say on the definition of a past practice:

> § 2.20 Past Practice as an Interpretative Aid
>
> (1) Definition. A "past practice" is a pattern of prior conduct consistently undertaken in recurring situations so as to evolve into an understanding of the parties that the conduct is the appropriate course of action.
>
> * * *
>
> Comment:

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[2] On Monday, June 29, 2015, Bill Zugenbuehler send the following e-mail (UX 6) to Tom Labrie regarding July 16-19 NASCAR Charters:

> This e-mail is to give you a heads up and to fill you in on the details for upcoming charters for NASCAR on July 16-19. Southwest has been doing season long charters from CLT or JQF to the site of NASCAR's weekly races. These are private charters moving the staffs of all the teams and NASCAR itself. In addition to our aircraft Miami Air also operates charters for this group as well.
>
> Our agreement with the customer dictates that we will use a specific Fixed Base Operator in each location, including those where Southwest has their own employees. This is done for a couple of reasons, to allow for non-TSA private charter screening and also to allow for the NASCAR travel people to closely coordinate the travel of all of their people regardless of the Carrier upon which they travel. I will be giving your local TSA notice that we will be doing the private charter screening.
>
> You are likely to receive some grievances since your rampers will not work this flight. The HDQ Labor Relations are aware of what is being done to provide the Customer the service they demanded in order to win this business. In your case I will be arranging for Signature F/S to handle these flights. Your only involvement will be to provide an Ops agent to do the w/b for the departures. You will be copied on Charter Advisories when they are issued.
>
> In addition to this upcoming July weekend, NASCAR will also have a September 27 race for which we will be doing the exact same thing.

a. Definition. Past practices arise as a dynamic of a collective bargaining relationship in response to traditions, customs, and unique circumstances of a workplace. The most authoritative treatment provided by Arbitrator Mittenthal, who analyzed a group of factors that originated in the steel industry and that are now generally applied by arbitrators in determining whether workplace activity qualifies as a "past practice." These factors are:

(1) Clarity and consistency of the pattern of conduct;
(2) Longevity and repetition of the activity;
(3) Acceptability of the pattern, and
(4) Mutual acknowledgment of the pattern by the parties.

Arbitrators recognize that the scope of a past practice is restricted by circumstances under which it arose. The practice may be enlarged over time through the administration of the agreement, but it remains linked to its origin and purpose. A party relying on a past practice to prove a case before an arbitrator must establish the existence of the claimed past practice.

Id. at 89-90, citing (the late) Richard Mittenthal, *Past Practice and the Administration of Collective Bargaining Agreements*, 59 *Mich. L. Rev.* 1017 (1961).

Once a party has demonstrated the existence of a past practice, the issue then arises as to the effect to be given that practice. A review of arbitration awards and court decisions reveals four primary uses or applications of past practices: (1) to clarify ambiguous language in the parties' collective bargaining agreement; (2) to implement general contractual language; (3) to establish an enforceable condition of employment where the contract is silent; or (4) to modify or amend apparently unambiguous language in the agreement. What is at issue here is the third and fourth categories, depending upon whose position is credited.

Applying the above criteria, I am hesitant to find a binding past practice in this case, concluding that (perhaps) longevity and mutuality are absent. Still, the evidence record indicates that SWA was under the impression that no grievances would be forthcoming if Management made a *bona fid e* attempt to secure the work for the ramp agents. To this end I credit the testimony of Mr. Venckus regarding an agreement he thought he had with the Union. In his words: "Well, I thought we had agreed, but now we're in a grievance hearing over this same issue, so – that's what I'm saying, back then, I thought we had an agreement. * * * That is – if we could provide the Union with the letter saying that they were not allowed on the third-party or the FBO's area, that we basically would not get grieved over the – over it and that it would put the issue to rest." (R. 103).

Q. [By Mr. Martinez]: So did you provide us with a letter from – in this case, on July 19th, was the Union provided with a letter to show that we weren't allowed to go over there and work the flight?

A. I think you guys were.

Q. Before the charter?

A. Well, I'm not exactly sure of the date when you would have gotten the letter. There's times that's – like I explained to – to – to the – to the Arbitrator, Mr. Hill, that

sometimes we would get the letter after the fact and send it over and sometimes we'd get it before. (R. 103-104).

Bottom line in this case is this: While I am not concluding that the disputed work is not bargaining-unit work (part of it does, after all, require loading and unloading of baggage which is clearly bargaining-unit work), the Company has carried the day in demonstrating that the contract at issue was permitted by the parties' collective bargaining agreement. Management should not be put in the Draconian position of having to forgo its charter business when the customer (the end-user of the product) insists on using an FBO at a station where Southwest Airlines operates. I agree with the position articulated by Mr. Venkus, and corroborated by Mr. Watkins – specifically, once Management inquires and advocates on behalf of the ramp agents, and its efforts are unsuccessful, it may properly subcontract the work as part of its charter business. A contrary ruling – that Southwest Airlines forgo the charter contract if its ramp agents are not used – would be operationally and economically non-sensical.

In the alternative, even if the Union is correct on all substantive allegations, it is unclear whether a monetary remedy is available, given that no specific agent has been identified as being harmed. As pointed out by Company Counsel: "It is undisputed that in Manchester on July 19, there were no agents left to call in for overtime. The voluntary call list was exhausted. Had the charter flight been serviced at the Southwest station, there were sufficient agents already on duty there to handle the duties. Thus, there are no agents to which the Company may award a remedy, because none were harmed." (*Brief* at 16).

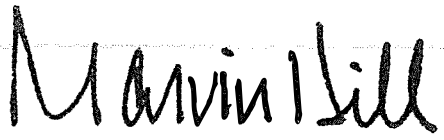
For the above reasons the following award is issued:

VI. AWARD

The grievance is denied. Southwest Airlines did not violate the parties' collective bargaining agreement in using an FBO when required as part of its July 19th charter contract for NASCAR.

Pursuant to Article Twenty (Grievance/System Board/Arbitration, Discipline and Discharge), Section One (Procedures), Paragraph G (Cost of Arbitration) of the parties' collective bargaining agreement (JX 1 at 40), fees and expenses are assessed against the Union.

Dated this 15th day of February, 2016
at DeKalb, Illinois, 60115.



Marvin Hill,
Arbitrator