

Southwest Airlines/TWU Arbitration Panel

In the Matter of Arbitration §

between §

§ Grievant: XXXXXXXXXXXXXXXXXXXX (Holiday Overtime)

Transport Workers Union of America,

AFL-CIO Local 555 §

§

and §

§ Case No.: OAK-R-2262/11

Southwest Airlines Co. §

Before: Kathy Fragnoli, J.D.

Appearances:

For the Company: Christina Bennett, Senior Attorney

For the Union: Jerry McCrummen, Vice President

Place of Hearing Dallas, TX

Date of Hearing: April 10, 2011

Close of Record May 15, 2012

Date of Award: June 7, 2012

Type of Grievance: Overtime Bypass/Overtime Scheduling

Award Summary

The Company violated the 1991 Arbitration/Implementation Agreement when it failed to notify employees of an accurate schedule for the 2011 Thanksgiving holiday. It further violated the CBA when it went directly to bargaining unit members to correct its mistake without first notifying and involving the Union. The Company is to cease and desist circumventing the Union after it publishes an erroneous holiday schedule.

The Company is correct that there is insufficient evidence of a binding past practice of paying *holiday overtime* bypasses. However, employees were denied the negotiated right to have over 10 days' notice in order to make their holiday plans. The remedy for affected employees is that employees who did not benefit from the Company's schedule alteration by having the opportunity to work more hours than they would have if the original schedule had been published

correctly shall be awarded four hours of paid straight time off. This remedy is not punitive but is recognition of the inconvenience that the employees sustained as a result of the Company's error.

The grievance is sustained in part. The Arbitrator will retain jurisdiction for the sole purpose of answering questions and resolving issues regarding the remedy.

Kathy Fragnoli, J.D.

Arbitrator

Issue

The issue to be decided in this case is whether management violated the Collective Bargaining Agreement when it scheduled and then rescheduled bargaining unit employees to work the 2011 Thanksgiving holiday and, if so, what is the appropriate remedy?

Background

The Company and the Union are parties to a Collective Bargaining Agreement ("CBA"). The Company recognizes two days per year as holiday—Thanksgiving Day and Christmas Day.

Article 22 of the CBA governs how employees are to be paid for holidays:

C. **Holidays.** The following holidays shall be observed: Thanksgiving Day (November) and Christmas Day (December). These holidays shall be that day generally recognized as that holiday. All Employees shall receive a holiday bonus in an amount equal to their regular compensation rate, including premium and differentials, if applicable, for eight (8) hours. If the Company requires an Employee to work on a holiday, he shall be paid time and one-half according to his regular compensation rate for the first eight (8) hours, in addition to his regular holiday bonus rate, and triple time thereafter. An Employee scheduled to work on a holiday who does not report for work shall lose all pay for such holiday unless the absence is due to sickness or is excused.

The Union filed a grievance over the Company's handling of holiday staffing in 1990. That grievance was resolved at arbitration [FMCS Case No. 91-11680 (Goodstein, 1991)]. The arbitration award became binding precedent. Arbitrator Goodstein held that holiday scheduling must be done in accordance with the CBA, particularly Article 7, which governs how the Company may schedule overtime work.

After Arbitrator Goodstein issued his award, the parties negotiated an Implementation Agreement

with guidelines for scheduling holiday work. Those guidelines stated:

1. No employee in the bargaining unit is "scheduled" to work on Thanksgiving or Christmas; they are "off-days" and are paid holidays.
2. The Company can require an employee to work on either or both of these holidays. The Company will offer LWOP, if operation requirements allow and the employee may choose whether to take LWOP.
3. The Company is also allowed to assign less than a full shift for overtime work on these two days; shifts can be from four to eight hours. The overtime call book shall be utilized.
4. The overtime call book may be signed by all those willing to work overtime, despite their regularly-assigned shift. All will be considered on first day off status and assignments from the overtime call book will be awarded by seniority.
5. The call book for Thanksgiving Day and Christmas Day will be closed out two weeks prior to the holiday. [Making of the] assignments will begin immediately and will be completed within 72 hours of closeout.
6. Mandatory assignments will begin immediately following completion of voluntary assignments.
7. Employees may continue to sign up for voluntary overtime for these two days after the call book is closed by signing "below the line." Assignments may continue to be made to those volunteering, even though mandatory assignments have begun; however, those who sign under the line have no grievance rights in accordance with Article 7, paragraph K.
8. Once assignments are completed, employees may trade shifts in accordance with Article 6. Shift trades will be paid at the straight time rate.

The parties agreed that for many years they have operated under a practice regarding Overtime Bypass. An Overtime Bypass occurs when an employee signs the call book for overtime work but is not scheduled a shift due to error by the Company. Such errors frequently involve a junior employee being assigned a shift that should have gone to someone more senior or an employee scheduled an overtime shift not receiving timely notification of his assignment. The acknowledged practice between the parties has been that when an Overtime Bypass occurs, the Company pays the affected employee as if he or she worked the overtime assignment rather than

correcting the error and requiring the employee to actually perform the work.

In November 2011, employees at the Company's Oakland facility ("OAK") signed the call book for Thanksgiving holiday overtime. The call book "closed" at noon on November 10, fourteen days before the holiday. Manager Christopher Cattin was responsible for formulating the Thanksgiving schedule based on the requests in the call book. A schedule was prepared, and employees were notified of their assignments on November 13.

The initial schedule only staffed half as many agents as were actually necessary for the OAK operations due to a Company mistake. The result was that many agents who wanted a shift did not have one, many agents who wanted more than one shift were only assigned one shift, and some employees were assigned a shift but not at the preferential time their seniority would have afforded them. Mr. Cattin did not realize this mistake until the agents had already been informed of their assignments.

The Company deemed this mistake to be correctable because there were still several days remaining before the holiday. In arriving at this determination, it relied in part upon the 2010 award of Arbitrator Diane Dunham Massey, who held because that the CBA imposes upon the parties duties to operate in good faith and to mitigate, the Company was within its rights to correct a mistake in formulating shift bid results where the correction could be made about a month before the schedules went into effect [Case No. BDL-R-1222/09 (2010)].

In that case, the Union took the position that the parties' past practice regarding Overtime Bypass should be applied in all situations where scheduling errors are discovered after the contractual deadline for posting those schedules has passed. Arbitrator Massey disagreed, stating:

Scheduling errors must be examined on a case-by-case basis. If the errors are discovered too late or if the errors are too complicated and would be impossible to correct without actual harm to an employee, then perhaps overtime pay is the appropriate remedy. Nevertheless, a scheduling error does not give the Union the unfettered opportunity to demand overtime pay.

The Company did not contact the Union about the Thanksgiving scheduling mistake. Instead, it approached affected employees individually and asked them to sign Thanksgiving Overtime Award Correction forms. The forms were all dated November 17, 2011 but were signed by the agents starting on November 18. Some were not signed by the employees until as late as November 23, the day before the holiday. The Company provided all affected employees with the choice whether to accept the shift(s) they had originally been assigned, or the shift or shifts they should have been assigned absent the error. Specifically:

- Employees who were assigned at least one full shift but would have been assigned additional hours (the opportunity to work earn triple time) were provided the option to work their original assignment or to work all hours they should have been assigned;
- Employees who would only have been assigned one shift but were not assigned the shift during the time of their preference were given the option to work the shift they were assigned, the shift they should have been assigned, or both; thus, these employees were provided the opportunity to earn triple time where they would not have been able to had the mistake not occurred.
- Employees who should have been assigned one shift but were not scheduled at all were given the option to remain off the schedule or to accept the shift they should have been awarded.

Every single employee chose to work as many hours as their options permitted. The result was that the Company had more people scheduled work on Thanksgiving 2011 (particularly on the p.m. shift) than it actually needed. In order to accommodate the employees for its error, the

Company paid significantly more overtime than it needed to but it required all employees to actually show up at work to earn their overtime rather than paying a bypass. (Many employees had little to do at work for obvious reasons.)

In addition to the schedule modifications, the Company permitted two agents to switch shifts verbally despite the contractual requirement that shift trades be in writing. The Company also paid overtime bypass to four junior agents who were mistakenly told by a supervisor to put the wrong status in the Thanksgiving call book.

Position of the Union

The Union contends that Management violated the CBA, the 1991 Goodstein Award, the 1991 Implementation Agreement, and binding past practice when it modified schedules for the Thanksgiving 2010 holiday after the 72-hour cutoff and failed to pay overtime bypass to employees who were affected by its scheduling error.

First, the Union argues that the shift assignments should have been completed 72 hours after the call book was closed—by noon on November 13. Instead, the assignments were not posted until late in the afternoon on the 13th. The Union claims that posting the assignments was also a violation because they should have been announced via a voice mail recorder, which is the way the Company normally notifies employees of their overtime assignments. Furthermore, the Union insists that the Company did not actually complete the assignments until November 23, the last date any agent signed a Thanksgiving Overtime Award Correction.

The Union takes the position that the holiday scheduling should have been considered completed on November 13 when the assignments were posted. Once the schedule was completed, it argues, the Company cannot unilaterally alter the schedule. Its failure to inform the Union of the mistake before going directly to the bargaining unit members was a blatant violation of its obligations under the CBA.

Moreover, the Union maintains that the parties have a binding past practice wherein, if the Company realizes it made a mistake in overtime scheduling after the deadline for notifying employees of their assignments, the Company is required to pay overtime bypass to employees who were not properly scheduled.

The Union insists that overtime bypass applies to holiday scheduling pursuant to Arbitrator Goodstein's binding 1991 award, which held that holiday scheduling must be done according to the CBA overtime provisions. The Goodstein award has become part of the CBA. The Company, the Union argues, is trying to alter the effect of the Goodstein award without negotiating for changes.

On the other hand, the Union contends that Arbitrator Massey's award is not applicable to the facts of this case. Her award, it claims, is limited to the context of shift bidding and does not apply when there is an existing practice against permitting the Company to correct its scheduling

errors after the scheduling deadline. Here, the Union alleges a binding past practice that the Company must pay overtime bypass monetarily without requiring employees to work for their bypass once the Company has realized its error.

The Union argues that it is not seeking a punitive remedy but merely enforcement of the longstanding past practice between the parties. It concedes that the Company does not need to compensate the affected employees monetarily but can award them paid time off instead.

Position of the Company

The Company admits that its original posted schedule for Thanksgiving 2011 was erroneous. It claims that the mistake was a matter of human error and was not intentional. Once the Company recognized the mistake, it corrected the problem “promptly and effectively.” They point out that all of the affected employees got the very schedules they would have been assigned, but not for the error, and some even had the opportunity to work a second shift and earn triple time, which they would not have had absent the Company’s mistake.

While it insists that it acted purely in good faith, the Company accuses the Union of neglecting its contractual obligation to cooperate with management and attempt to mitigate the effects of the scheduling error. Instead, it claims, the Union is seeking a windfall by way of a punitive remedy where there was no harm to employees and no grounds for a punitive result.

The Company relies on Arbitrator Massey’s award, particularly the following language:

Generally speaking, both Parties have the obligation to mitigate damages where appropriate. Arbitrators do not support either party knowingly “laying in the weeds” until the actual damage has occurred to facilitate the opportunity to secure a monetary damage or to render discipline. If an error has been made but can be addressed and corrected without damage to either Party, then it is appropriate to do so and absent a practice to the contrary, it is in conflict with the basic tenets operating behind the CBA not to do so.

The “tenets operating behind the CBA,” Arbitrator Massey noted, are:

- a. Duty of good faith;
- b. Duty to respect seniority, if applicable;
- c. Duty to make whole, albeit not necessarily monetarily;
- d. Punitive damages are rarely granted, and generally only in cases of flagrant and intentional violation of a CBA;
- e. A CBA is not to be interpreted to render a ludicrous result; and
- f. Duty to mitigate, if feasible.

According to the Company, the Union’s argument and requested remedy flies in the face of Arbitrator Massey’s directive that the parties should work together to give effect to the CBA and to mitigate damages whenever feasible.

Furthermore, the Company argues, the Union has not established a binding past practice of paying employees a *holiday* overtime bypass. To the extent there is a practice of paying overtime

bypass for regularly-scheduled overtime (which some of the Company’s witnesses denied at the hearing); the situation at issue here is distinguishable. This situation, the Company claims, is more similar to the shift bidding error at issue in the Massey award than to a regular overtime bypass because the parties had ample time to correct the Company’s error, unlike regular overtime scheduling where employees are given very little advance notice.

Here, the Company argues, the problem was correctable due to the advance notice requirement for holiday overtime scheduling and it was, in fact, corrected without harm to the employees. The Company insists it was acting within its Article 2.D rights to manage and direct the work force and its inherent right to run its business by having adequate staffing. The Company asks the Arbitrator to deny the Union's requested remedy, which it characterizes as "harsh, absurd and nonsensical."

Discussion

Did the Company violate the CBA?

There is no dispute that the Company violated the 1991 Arbitration/Implementation Agreement when it failed to timely notify employees of an accurate schedule for the 2011 Thanksgiving holiday. The Company corrected the schedule and was able to obtain the cooperation of all affected employees. However, the Company's insistence that the problem was corrected without harm to the employees is incorrect in one regard.

The employees are entitled to significant notice of their holiday schedules. This is an arbitrator-imposed and a subsequently negotiated benefit, and the purpose of the advance notice is for the employees to have time to plan their holidays, not to give the Company time to correct a scheduling mistake. The Company did not complete its correction until as late as November 23, the day before the holiday, meaning that some employees were deprived of the entire benefit of advance notice.

The Company's decision to attempt to correct the problem by going directly to affected employees without notifying or involving the Union was a violation of the spirit and purpose of the CBA. The Union is correct in maintaining that it should have been notified of the problem before the Company went about trying to correct it. The Company's purported justification—that Mr. XXXXXXXX, the primary Union representative, was in Dallas at a System Board and therefore unavailable—is not persuasive. Managers who were in Dallas for the same System Board were aware of the issue and chose not to discuss it with Mr. XXXXXXXX. This was not in keeping with the Company's obligation to act in good faith.

The conduct of manager Thaddeus Brown, who admitted that he refused to give a copy of the correction form (that management was asking affected employees to sign) to alternate Union Rep. XXXXXXXXXXXX until XXXXXX signed his own correction form, is puzzling and can be categorized as acting in bad faith.

Finally, the Union demonstrated that the two agents traded shifts verbally, which was in violation of the requirement in Article 6 that shift trades be requested in writing.

What is the appropriate remedy?

The Union argues that because holidays are staffed as overtime, the remedy for the Company's 2011 Thanksgiving scheduling error is to adhere to the parties' past practice of paying overtime bypass when the Company schedules overtime correctly. The Company counters that any remedy would be purely punitive because the employees did not suffer any harm.

Despite the attempt of some of the Company's witnesses to suggest that the Company does not always pay overtime bypass when it makes a scheduling error, the record shows that the parties have previously stipulated that there is a past practice of paying overtime bypass rather than requiring employees to work the bypass. To the extent the Company has deviated from that practice, it has done so without notifying or involving the Union.

However, past practice must be construed narrowly. The record does not show that the parties have a past practice of paying bypass for holiday overtime. The record does not show that there is a practice for dealing with erroneous holiday scheduling at all. The memorandum that the

Union provided that purports to summarize arbitrator awards for grievances over 1990 holiday scheduling demonstrates that results were somewhat mixed, although more of the grievances were decided in the Union's favor than the Company's.

Furthermore, from the brief descriptions contained in that memo, it does not appear that any of the grievances at issue were related to a typical "bypass" situation. A "bypass" is when an employee is not assigned or properly notified of overtime to which he or she is entitled based on seniority and staffing needs. The 1991 memorandum shows that employees were scheduled but later told not to come in or told to leave before the ends of their scheduled shifts. This is not the same as the kind of "bypass" the Union is complaining about in this case.

Accordingly, requiring the Company to pay overtime bypass to all affected employees is not mandated by past practice. However, employees are entitled to some compensation for the inconvenience of being deprived of the 10+ days of advance notice to which they were entitled with respect to their holiday schedules.

Some employees were already "compensated" by the Company's unilateral solution. Those are the agents whose seniority only entitled them to work one shift but whom the Company permitted to work more than one shift due to the scheduling error, thus enabling them to earn triple time, which is a significant benefit. There is no need to compensate those agents any further.

Agents who should have been scheduled more than one shift but were originally only assigned one shift did not receive any extra benefit through the Company's correction. Similarly, employees who should have been assigned a single shift but who were left off the original schedule entirely, were ultimately only permitted to work the number of hours they should have been assigned in the first place. These employees deserve additional compensation for the inconvenience of having their holiday schedules modified after the Company's deadline. The remedy for these employees is that they are to be awarded four hours of paid straight time off. This is not a punitive remedy—it is compensation for the employees' inconvenience that resulted from the Company's violation of the Implementation Agreement.

The Union is also entitled to a cease-and-desist order. The Union should have been notified and involved as soon as the Company realized it had assigned holiday schedules erroneously. The resolution should have been negotiated between the Company and the Union, not between the Company and the bargaining unit members. The Company's circumvention of the Union was in bad faith and is intolerable.

There is no remedy for the verbal shift trade between XXXXXXXX and XXXXXX. While it might have been a technical CBA violation, the Union did not show that there was any harm to either of those employees.

Award

The Company violated the 1991 Arbitration/Implementation Agreement when it failed to timely notify employees of an accurate schedule for the 2011 Thanksgiving holiday. It further violated the CBA when it went directly to bargaining unit members to correct its mistake without first notifying and involving the Union. The Company is to cease and desist circumventing the Union after it publishes an erroneous holiday schedule.

The Company is correct that there is insufficient evidence of a binding past practice of paying *holiday* overtime bypasses. However, there was harm in that employees were denied the negotiated right to have over 10 days' notice in order to make their holiday plans. The remedy for affected employees is that employees who did not benefit from the Company's schedule alteration by having the opportunity to work more hours than they would have if the original schedule had been published correctly shall be awarded four hours of paid straight time off. This remedy is not punitive but is recognition of the inconvenience that the employees sustained as a result of the Company's error.

The grievance is sustained. The Arbitrator will retain jurisdiction for the sole purpose of answering questions and resolving issues regarding the remedy.