

ARBITRATOR'S OPINION AND AWARD

In the Matter of Arbitration Between:

April 27, 2016

SOUTHWEST AIRLINES COMPANY

and

TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO
Local 555

Grievance: SAN-R-1725/15 (Agent X - Covered Work)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Company: Samantha Martinez, Muskat, Martinez & Mahoney, LLP

The Union: Jerry McCrummen, Vice President, TWU, Local 555

Statement of the Award: The grievance is denied. In accordance with Article 20, Section 1, Paragraph C, the costs of the arbitration shall be borne by the Union.

BACKGROUND

Southwest Airlines Company (Company or Southwest) and the Transport Workers Union Local 555 (Union) are parties to a collective bargaining agreement (CBA) effective July 1, 2008 through June 30, 2011, and continuing through the date of this grievance. In this case the Union protests that on July 13, 2015¹ a Ramp Supervisor performed covered work in violation of Articles Two, Four, Five and Seven of the CBA. The Union contends that the CBA clearly states all power equipment used in the operation is covered work to be performed by covered employees.

After the Company denied the grievance, the System Board deadlocked on September 17. The parties stipulated that the issue is properly before the undersigned arbitrator and there are no arbitrability or procedural issues.

The basic facts giving rise to this grievance are not in dispute. San Diego (SAN) Ramp Supervisor Florencio (Junior) Perez was new in that position as of July 3 or 4, having started working for the Company on June 8. After classroom training, he spent two weeks in Sacramento, working side-by-side with a Supervisor. On July 13 Perez was assigned to zone 1, encompassing five gates: 1-A, 1, and 2, and, around the corner from the covered T-point bag belt, gates 3 and 4. Adjacent to gate 2 is a staging area for T-point where carts are placed. Along the terminal wall, just in front of the nose of aircraft parked at gate 2, is a staging area for gate 4, where carts not in use are parked. Between gates 1-A and 1 is a “boneyard” that serves as a central location for empty carts. After the bags were uploaded in the aft of the aircraft at gate 2, Supervisor Perez walked to T-point, took a tug, went to the aft of that aircraft and, by himself, used the tug to move two empty carts approximately 30 feet beyond the nose of the aircraft and park them along the terminal wall. SAN Ramp Representative Agent X, while working as a Ramp Agent in the area, observed this and filed the instant grievance.

When the parties agreed to the CBA effective July 1, 2008, the language of Article 2-B Covered Employees was changed, in part, from:

Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty.

to:

Supervisors are not covered by this Agreement, but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the workforce.

¹ All dates are 2015 except as otherwise noted.

Subsequently, large number of grievances were filed protesting that supervisors were performing covered work beyond that permitted by the above-quoted language. On October 24, 2009, Arbitrator John B. Barnard issued an arbitration decision in the Agent B case regarding the performance of five specific functions that the Union contended had been impermissibly performed by supervisors. (TWU-ALL-1000/09, Barnard decision or *Agent B*, JX 3.) Arbitrator Barnard expressed his “hope that the parties can now discuss these five functions in an effort to come to some conclusions that they both can agree upon.” He held:

In sum, by the parties agreeing to change the wording in Article 2 (B), foremost of which the addition of the term assist, that changed the meaning of 2.B. by spelling out the supervisor’s role in the performance of covered work, whereas in prior agreements, there was no restriction on a supervisor performing covered work. The term assist was proposed and accepted by the Union on February 26, 2008. As mentioned, unfortunately the trail ended then. When different wording is inserted into a section of the agreement, it is the responsibility of the party proposing the change to fully explain the change and its possible ramifications, and the responsibility of the other party to also understand the meaning of the wording change. It seems obvious that both parties felt a sense of relief with the Company’s proposal to add the term assist, with both parties believing their positions had been validated. Hindsight being what it is, had the parties fully discussed examples as to how the term assist would be implemented, arguably any issues could have been resolved during negotiations. It must be recognized that the supervisors, in prior agreements, had much latitude in performing covered work. The fact that the term assist was proposed and agreed upon by the parties does now change the supervisor’s role in that performing of covered work. [JX 3, pg. 21-22.]

In April 2010 the parties agreed to new Work Rules Interpretations covering a variety of topics, including the change the language contained in Article 2. The relevant Interpretations provisions state:

ARTICLE TWO SCOPE

In a decision dated October 24, 2009, the Arbitrator ruled that the Company and the Union must realize that there was a contractual change, and the word “assist” clearly alters the current contract thus creating a different meaning to that section. Nothing can be considered status quo when the language is changed by the parties. Under the previous contract, the supervisor had free reign to do covered work. See below for clarification regarding the arbitrator’s ruling on these five areas:

1. Can a Supervisor perform the following covered work by themselves:
 - Working at the bottom of the belt loader
 - Working in the bin
 - Wing walking
 - Marshalling in aircraft
 - Pushing back aircraft
 - Working at the bottom of the belt loader. If the supervisor works alone loading or unloading the belt without the assistance of an agent for a good portion of that work, such would be in violation of the agreement. This is referring to the loading or unloading and means that a supervisor should be assisting an agent working at the bottom of the belt loader by working with them and not performing this work alone except for a short portion of the loading or unloading if needed.
 - Working in the bin: A supervisor is not considered assisting if he works alone in the bin. If an agent is also working the majority of the bin work along with the supervisor, the supervisor should be considered assisting. This means that a supervisor should be assisting an agent in the bin by working with them and not performing this work alone except for a short portion of the bin work if needed.
 - Wing Walking: Wing walking duties are those of assisting, and not a violation of 2.B. supervisors may perform wing walking work.
 - Marshalling in aircraft: A supervisor marshalling would be in violation of 2.B. and may not perform marshalling work.
 - Aircraft push back: A supervisor operating the push back tug would be in violation of 2.B and may not perform push back work. [CX 2.]

As discussed in the September 7, 2012 arbitration decision issued by the undersigned Arbitrator in the 2012 Group Grievance case, while the case before Arbitrator Barnard was

pending, the Union filed nearly 200 grievances over covered work. (TWU-ALL-5001/12, Neumeier decision or *2012 Group Grievance*, JX 4.) After receipt of the Barnard decision, the parties met to discuss implementation of that decision and, on November 2, 2009, resolved numerous grievances involving ground operations and provisioning agents. The Neumeier decision dealt with the Union's allegation that the Company "continues to willingly, knowingly, and blatantly disregard the final and binding Arbitrator's decision in TWU-ALL-1000/09." The Union sought as a remedy "that the bypass be paid at the applicable rate (VOT or MOT), and that the minimum amount of overtime 4.0 hours or actual hours (whichever is greater) be assessed for each violation." That request was rejected, as follows:

The Union's frustration with the continuing incidents of covered work violations is understandable. The record presented here, however, does not support a finding that the Company is engaged in willful and repeated violations that would justify the extraordinary remedy sought. Therefore, the grievance will be denied. [JX 4, pg. 19.]

On February 26, 2015, Arbitrator Hill issued a decision in the Agent A case regarding the appropriate remedy in a covered work case, i.e., a Provo Assistant Manager running bags. (BWI-R-1759/14, Hill decision 1, JX 5.) The Company maintained that 1.7 hours of overtime was appropriate, whereas the Union sought the minimum call out for an overtime bypass, i.e., four hours. Arbitrator Hill found that "the traditional make-whole remedy (i.e., the minimum amount of overtime necessary to extend the next person who would have been available to cover the work performed, which would be 1.7 hours in this case)... is more than sufficient to make the employee whole." (Hill decision 1 or *Agent A*, pg. 15.)

On May 13, 2015, Arbitrator Marvin Hill issued a decision in the Agent B case denying a grievance that alleged a Customer Service Supervisor and Customer Service Manager tagged approximately seven bags in the jetway prior to a flight's departure. (DAL-O-2502/14, Hill decision 2 or *Agent B*, JX 6.) He found as follows:

I don't see what happened in this case as an attempt by the Company to undermine the work of an operations agent, especially when the evidence record indicates that traditionally it is a *shared responsibility* often performed by flight attendants, pilots, managers, supervisors, ramp and operations agents. Moreover, and working in favor of the Company's case, the challenged activity lasted approximately *less than three minutes*. The work was "immediate," engendered by a full flight that resulted in bags that had to be checked/tagged at the jetbridge. While it is a shared responsibility, there is no evidence that the conduct at issue was done "repeatedly" *in an effort to undermine or supplant the work of an operations agent*. This case is comparable to the "helping hand" scenarios often litigated in the arbitral forum. Also, there is no evidence that the Grievant was in any way harmed,

economically or otherwise. Absent any willful and flagrant intent to undermine a bargaining-unit position, and given the length of time at issue, along with the practice indicating that the responsibility had been “shared” by numerous job classifications, the following award is issued:... The grievance is denied.....” [JX 6, pg. 22.]

The Union offered testimony from Vice President Jerry McCrummen, Representative Agent X, and DAL Representative Agent C.

The Company offered testimony from SAN Ramp Supervisor Florencio (Junior) Perez, Senior Manager-Labor Relations Dan Kusack, and Labor Relations Manager Phil Stachowski.

Representative Agent X has worked for the Company for four years and, at the time, had been the elected Representative for six months. He testified that previously he has not observed other supervisors doing the work being disputed here. Agent X said that 10% of the members file covered work grievances and not more because they are concerned about retaliation. If a member writes up a supervisor for covered work, the supervisor could write up the member. He used to feel that way himself. As a Union Representative and writer of grievances, he is put on the heavier gates, with 800 aircraft. Thirty covered work grievances were filed in SAN in 2015.

As to this incident, Agent X testified that two people can ride on the tug and there were other agents in the vicinity, at the bottom of the belt loader, who could have moved the carts if directed to do so. He said that, normally, the rover is in charge of taking bags out to the gate and retrieving carts back for agents at T-point. The agent could be disciplined if that work was not done. Agent X said that Supervisor Perez has a reputation as a “go-getter” and the nickname of “Spinner” because he is constantly everywhere, always going. Agent X has not observed him doing this particular violation since this grievance was filed. He said that Supervisor Perez was asked, at System Board if he performed this job any longer and he said no. When asked why, Perez said it was covered work.

On cross examination, Representative Agent X said that, since this grievance was filed, Supervisor Perez pushes the carts outside the “shadow of the aircraft” and just outside the safety zone. The covered work he did before could have been done by any of the Ramp Agents: rover, bag runner, transfer driver or float. Agent X was not aware of any agent being disciplined for failure to move carts.

Vice President McCrummen testified that under Article 5 of the CBA the use of power equipment is restricted to the job classification of Ramp Agent/Provisioning Agent and is not for supervisors. He discussed the four arbitration decisions issued to date concerning covered work. (JX 3, JX 4, JX 5 and JX 6.) He said that, after the Barnard decision was received, the parties got together and worked out Work Rules Interpretations, quoted above. McCrummen also referred to a booklet the Union provides to new employees explaining basic things in the CBA. It provides the Union’s interpretation regarding covered work as follows:

COVERED WORK

As a general rule, supervisors are not to perform covered work by themselves. This is our work, and the company agreed that sups should only assist us with our duties.

Of course, there are exceptions, but those exceptions have to do with covering bathroom breaks and other *small* diversions. Supervisors can not cover lunches, agent shortages, gate overflows or perform covered duties during other long, drawn out substitutions. Per an arbitrator’s binding written judgment...

RAMP SUPS CAN

RAMP SUPS
CANNOT

Wing walk

Pushback A/C

Work bin w/ an agent

marshall A/C

work bottom of belt loader w/ an agent

dump lavs

*work the bin alone

*work the bottom of
belt loader alone

*It is permissible if an agent steps away and lets the sup work by him/herself, but only for a “short portion” of the load.

Every other normal operational duty has already been agreed to as an agent duty. Sups running offloads, transfers, ops coordinating, tpoint, tendering freight, etc. without an agent next to him/her is creating an overtime bypass, even if there are no volunteers in the OT book. See the April 2010 Work Rule Interps or talk to your station rep for more details.

If you see a supervisor violating the contract,[file] a grievance! By allowing Article 2 violations to go uncontested, you undermine your own job security and eliminate opportunities for new agents to be hired and/or transferred in, not to mention the potential overtime of which we are robbed. [UX 3, pg. 3.]

Vice President McCrummen testified that of the 3,549 covered-work grievances quite a few were about driving of equipment. He discussed the following eleven grievances filed between 2009 and 2011. (UX 3.)

1. TBA-R-0225/09 protested a cargo supervisor pulling four full carts from the warehouse and returning with empty carts. At the station level the agent who best fulfills this need was paid for 45 minutes, because this is normally the job of a freight runner.
2. BNA-R-0980/09 protested a supervisor taking late bags to flight #2540 and carts to T-point. At the station level the remedy was 4.0 hours overtime.
3. BNA-R-0981/09 was the same grievance as 0980, but for a different flight number, and with the same resolution.
4. MSY-R-1245/09 protested a supervisor running bags out of T-point and returning empty carts. This was resolved by the then Director–Employee Resources, Jeff Cox, agreeing to pay one hour of double time.
5. TBA-R-1500/09 protested a supervisor driving gate to gate to retrieve carts for T-point. This was resolved by Jeff Cox, who agreed to pay the next eligible agent 4.0 hours of overtime.
6. PDX-R-0058/10 protested a supervisor grabbing open carts for flights due to bag runners being busy. At the station level the resolution was to pay 2.5 hours double-overtime.
7. PDX-R-0840/10 protested RSS loading bags without assistance on forward bin and pulling full carts to aft bin. The offer at the station level was rejected. The District Representative assessment was that the RSS violated arbitrator Barnard’s decision. The grievance was resolved by Jeff Cox, who agreed it was a covered work violation and paid 45 minutes of double time for a mandatory extension.
8. LAX-R-1703/10 protested a supervisor coordinating carts and lining them up at the rear of the cargo facility. At the station level it was acknowledged that the supervisor performed covered work and the grievance was paid.
9. LAX-R-1703/10 was the same grievance as 1703, but for a different day, and with the same resolution.
10. DTW-R-1512/11 protested a supervisor performing covered work by pulling up freight carts to use for offloading on two flights. Senior Manager–Employee Resources Lewis Apperson settled the grievance with the payment of 2.7 hours at the double time rate of pay.
11. SNA-R-0597/13 protested a supervisor driving empty carts from plane to

boneyard. On page 2 of the grievance Vice President McCrummen included the following statement as the District Representative Assessment:

The RSS violated the CBA and Arbitrator Barnard's ruling regarding covered work by performing the driving duties of a Ramp Agent without the assistance of another agent. The RSS replaced and was not assisting another agent. The RSS failed to manage and direct the workforce properly. We are seeking for the station to cease and desist violating the spirit and intent of the decision of Arbitrator Barnard. In a meeting between the parties on 12/7 [2012] it was agreed that a RSS could move carts around while working a flight or assisting an agent but could not transport carts or bags when not in the proximity of the A/C while working it. The station needs to manage, direct and staff the work force properly by the provisions of the CBA...

Senior manager-Labor Relations Cicero Wilkinson settled the grievance "as a result of the supervisor performing covered work" with the payment of one hour at the VOT rate of pay.

Vice President McCrummen testified that since receipt of the Barnard decision the parties have had constant discussions and more covered work grievances than any other type of grievance. He had multiple discussions with Michelle Jordan, Bill Venckus and Mike Ryan. Most recently, Bill Venckus, who at the time was Director of Labor Relations, approached him about the need to put something out to their employees and to Union members defining the parameters of what is allowable and what is not. McCrummen was initially resistant because the Union already had the arbitration decision. After 3 to 5 months of discussion they came up with a guideline telling supervisors what they can and cannot do, and members what they can grieve and should not grieve. Following an exchange of emails containing different drafts, McCrummen, on May 27, 2013, emailed to every station representative in the system with an email address, the "Covered Work Parameters" that had been agreed to. His email notes the following:

This clarification memo was agreed to in a meeting between the parties on 12-7-12. We are hoping that this will clear up some of the questions regarding covered work. We have not agreed to the one bullet point that is bracketed on the attachment. There is also a draft where there was another bullet point that was added that states that Operations Supervisors may "Assist as second person de-icing.", this has not been agreed to. We have agreed that an Operations Supervisor, in a small station, for the purpose of training and signing off may be in the cab with an agent/Supervisor. They cannot be unassisted. Due to the Arbitrator's decision the Company must pay the amount of OT that

is required to cover the coverage time needed, MOT or VOT (OT or DT the proper rate). with the minimum being .7 to 3.9 if there is an extension available. If it cannot be covered by an extension because of the time of the violation then it is a minimum of 4.0 till whatever amount is actually needed, whichever is greater. If you have any questions do not hesitate to call me at (214)... I am still handling all covered work grievances presently but they will be returned to the District Reps in the near future. [UX 4, pg. 8.]

The attached “Covered Work Parameters” agreement reads as follows:

The primary role of a Ground Operations Supervisor is to assist, direct, train, complete Agent performance appraisals, and support the operation by managing and directing the workforce. A Ground Operations Supervisor may not replace an Agent. Below is a list of tasks that can and can't be performed by a Supervisor. Keep in mind that we are still working through what a “good portion of the turn”, means.

Ramp Supervisors can perform the following:

- Provide assistance the Agents
- Chock aircraft
- Perform ground services: (with Agent) air or electric, not both
- Perform part of the gate services: (with Agent) air or electric but not both
- Assist as the second person de-icing
- Assist Agents while working at the bottom of belt loader or in the bins
- Setting up the gate by moving carts, positioning belt loaders with Agent
- May pick up dropped bags (fell off cart) on tarmac and drop at carousel or bring to proper gate
- May help with retrieving items from the jetway slides
- May move carts forward at the end of belt load or
- Wing walk

Operations Supervisors can perform the following:

- Provide assistance to Ops Agent
- Can be at the top or bottom of jet way while Ops Agent is on the opposite end of jet way
- May get things out of the jet way slide and/or run things down to the ramp

- May be at one gate and direct Customers to another gate assisting on a flight where the Agent is at the other gate.
[HAVE NOT AGREED TO]

Cargo Supervisors can:

- Provide assistance to Agents
- Work the counter when assisting a Cargo Agent and working the counter with them
- Work in the warehouse when assisting a Cargo Agent and working the warehouse with them

Ground Operations Supervisors may not perform the tasks listed below:

Ramp Supervisors can't:

- Perform lav service alone
- Perform potable water service by themselves
- Perform driving duties or deliver bags from t-point alone
- Move carts gate to gate
- Perform towing of aircraft alone
- Perform pushback work
- Work in the bin alone, except for a short portion of the download and upload
- Marshall aircraft
- Work alone at the belt loader, except for a short portion of the download and upload
- Set up gate area alone

Operations Supervisor can't:

- Work flights by themselves
- Park or deplane aircraft by themselves
- Take the place of the Ops Coordinator where established (except bathroom breaks)

Cargo Supervisors can't:

- Work the counter alone. (The only exception is in a facility in which there is only one Agent and one Supervisor scheduled. In this case, the Supervisor may work the counter while the Agent is in the warehouse [or] vice versa.

However, the Supervisor may not replace the Freight/Cargo Agent.)

- Work the Cargo warehouse alone. (The only exception is in a facility in which there is only one cargo Agent and one Supervisor scheduled. In this case, the Supervisor may work the warehouse while the Agent is on the counter [or] vice versa. However, the Supervisor may not replace the Freight/Cargo Agent.)
- Relieve Freight/Cargo Agents for breaks or lunches except in a facility in which there is only one agent and a Supervisor scheduled. [UX 4, pgs. 9-10.]

McCrummen testified that the provisions applicable to this grievance are listed under tasks that may not be performed by Ground Operations Supervisors. Specifically, Ramp Supervisors cannot “perform driving duties or deliver bags from T-point alone,” because the bringing of carts is a driving duty of the T-point bag runner, and “moving carts from gate to gate.”

On cross examination, Vice President McCrummen agreed that if a supervisor is moving carts from the front of the aircraft to the back of the aircraft, that is within the shadow of the aircraft and not a violation. Once he leaves the aircraft to take those carts somewhere else, and he is operating a powered tug, it is a violation. This is the concept referenced in Case Number SNA-R-0597/13. He said he might be a little bit lenient on a supervisor hand moving carts outside of the safety zone, to a staging area, and would try to work with the Company on something like that. However, it would be a violation. He emphasized that the “assist” language refers to assisting an agent, not assisting on the turn or assisting in the on-time performance. If a supervisor hooks a cart to a tug and dropped the cart elsewhere, i.e., cleaning up the gate, the supervisor is doing covered work. A supervisor may move carts within the shadow of the aircraft, such as to make room for a fuel truck to come in, even using powered equipment, but may not move carts off the gate. The concept of “shadow of the aircraft” was discussed with Jeff Cox, Bill Venckus and Louis Apperson, but was not put in writing. McCrummen said that he had grievances filed because supervisors were moving carts from the front of the plane to the back of the plane, such as when the loading schedule was changed and loads had to be split. He had an understanding with Labor Relations that he would not file grievances over that type of thing and is not now trying to expand that. Rather, he is trying to maintain the agreements they have.

On cross examination, referring to the Covered Work Parameters, Vice President McCrummen testified that Ramp Supervisors can perform “setting up gate by moving carts” only if working with an agent. The language “with Agent” refers to both moving carts and positioning belt loaders. He said that some cases do not fall into any category and he asks who would be disciplined if the empty carts were not moved. If the agent would be disciplined, it is agents’ work. He acknowledged that neither the Covered Work Parameters nor the Work Rules Interpretations state, under Article 2 or Article 5, that supervisors may not use motorized equipment when they are assisting. However, Article 5-P states that Ramp Agents, as qualified, operate all power and other ground equipment.

Supervisor Perez testified that zone 1 is congested, but the carts were not in the safety zone and could have been left where they were. He was keeping the area tidy and would not have called out an employee on overtime to move the carts. He believed his actions were assisting gate agents who were doing other types of work. This was not the job of a particular agent. He said that, in Sacramento, he saw this done daily and no employees complained or filed grievances. He still keeps the area clean, daily, but moves carts by hand. On cross examination, he said he has been told that the use of tugs is something the Union and Company are dealing with. He agreed that he could have directed an agent to move the carts.

Senior Manager-Labor Relations Kusek, who has worked for the Company for 17 years and has been in Labor Relations for eight years after working in ground operations, testified that he is familiar with the covered work arbitration decisions and the facts of this grievance. He noted that the Barnard decision dealt with five different Ramp Agent duties but was not about tugs, a tool everyone uses. That decision does not prohibit the actions disputed here. Similarly, the Work Rules Interpretations discuss two-party duties, such as working at the bottom of the belt when there is somebody in the bin, and a supervisor can replace one of the two agents for a short portion. Nothing in the Interpretations would prohibit Supervisor Perez from doing what he did on July 13.

Senior Manager Kusek testified that the Barnard decision said that supervisors can do a short portion in the bin or at the bottom of the belt and Arbitrator Hill's Agent B decision referred to a *de minimus* amount of time. Supervisor Perez was assisting agents for a very short period of time, 30 to 60 seconds, with the intent to assist the agents. He said that the volume of grievances exceeded the Labor Relations Department's ability to timely process them. Therefore, some grievances were awarded that might not have been if the actual merits were examined.

Senior Manager Kusek testified that he participated in meetings leading to the Covered Work Parameters, quoted above. He said that it is close to accurately reflecting an agreement between Labor Relations and the Union, but does not give a lot of detail and some assumptions have to be made. He said it is a little bit different than the direction management put out. Kusek emphasized that what Supervisor Perez did was incidental, and allowed for break time for the Ramp Agents, by assisting them in removing a couple of empty carts. That work could have been done at the end of the day or the beginning of the day. He said there is no requirement that a supervisor assisting an agent must be in the same vicinity. Nor is there any prohibition on a supervisor using a tug to perform covered work.

On cross examination Senior Manager Kusek acknowledged that he did not participate in ground ops TWU negotiations or any meetings for the Interpretations. He agreed that Bill Venckus had the authority to enter into an agreement as reflected in the Covered Work Parameters.

Manager of Labor Relations Stachowski, in that position for just over a year, has worked for the Company for eight years, starting as a Ramp Agent in Buffalo. He was Station Manager in San Diego, 2010-2014. He said it was common to see supervisors using a tug to drive carts. He could only recall one grievance, and that was filed over supervisors running full carts of bags

out of T-point. He has written up supervisors who constantly received grievances for covered work. However, as closing supervisor, he did the work protested here on a daily basis when he was a Ramp Supervisor in Orlando. When he was a Ramp Agent in Buffalo, he saw supervisors run full carts, as well as empty, on a daily basis. Moving empty carts is a shared responsibility. He has done it, by hand, and seen provisioning agents do it, by hand, so they can get their trucks in. He has also seen supervisors driving tugs.

On cross examination, Manager Stachowski said, depending on the circumstances, a supervisor cannot use a tug to take carts from gate to gate. An exception would be a shortage of people and an "All hands on deck" situation. He said that responsibility for cleaning up the gate is not defined. The person who is doing the walk around before a flight pushes, normally the gate lead or an assist, needs to make sure that the safety zone is clear. He recently settled a grievance after a ramp supervisor grabbed empty carts to download an aircraft, because they did not have enough bag runners.

Manager Stachowski discussed the following four grievances that were withdrawn by the Union.

- SAN-R-1724/15 protested a supervisor driving carts from one gate to another. (CX 3.)
- FLL-R-0829/15 protested a supervisor moving freight from gate B3 to B1. (CX 4.)
- PIT-R-1606/14 protested a supervisor staging carts at two gates. (CX 5.)
- PIT-R-1603/14 protested a supervisor staging empty carts on two gates. (CX 6.)

He said that SAN-R-1724/15 was vague because it did not specify whether the carts were full or empty. It turned out they were moving empty carts from gate 4 to gate 1-A, using a tug. In FLL-R-0829/15, the carts were empty. In PIT-R-1606/14 the supervisor moved carts that were already staged at the gate to the belt loader. In PIT-R-Eckstein 03/14 the supervisor moved carts that were already staged at the gate to the belt loader, as in the previous case.

On cross examination, Manager Stachowski agreed that the grievances in CX 5 and CX 6 were filed out of time frames. With respect to CX 4, he was not aware that an agent asked the supervisor to cover for him because he had to go to the bathroom. He agreed that grievance was withdrawn without prejudice. As to CX 3, District VI Alternate Representative stated that this "withdrawal is not a capitulation as the Union reserves the right to pursue this type of grievance at a future date." Stachowski said he did not know why these grievances were withdrawn. He agreed that all of the grievances listed in UX 3 were awarded or were settlements that are all non-precedent, but not non-referral.

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT**ARTICLE TWO
SCOPE OF AGREEMENT**

* * *

B. Covered Employees. This Agreement extends to and covers all Employees in the classifications described in Article Five who normally and regularly spend a majority of their work time in the performance of duties described in Article Five. Supervisors are not covered by this Agreement but may continue to perform covered work while on duty, with the understanding that the intent is for a supervisor to assist, direct, train, evaluate agent performance and support the operation by managing and directing the work force. A supervisor may not replace any covered Employee or cover a scheduled line. A supervisor's schedule may not be altered to prevent payment of overtime to a covered Employee, and a supervisor may not accept an overtime assignment if covered Employees are available for voluntary overtime assignments. When, at management's discretion and approval, an agent may give away their shifts to a supervisor, the following will apply:

1. The agent should, when time permits, make the shift trade available to other covered Employees prior to offering it to a supervisor.
2. Supervisors that enter into a shift trade will be required to perform the work of that covered Employee for the entire shift.
3. When a supervisor is working for an agent they will be the first employee to be involuntarily extended if the need arises on that shift.

* * *

**ARTICLE FIVE
CLASSIFICATIONS****SECTION ONE
RAMP AGENT/PROVISIONING AGENT**

The work of Ramp, and Provisioning Agents includes the

functions which have been historically performed by such agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract. Agents required to perform such duties must be current and qualified within that classification.

* * *

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

CONTENTIONS OF THE PARTIES

The Union's Contentions

The Union contends that the operation of powered equipment is the job of a Ramp Agent, as set forth in Article 5-P of the CBA. It has never been a shared responsibility to utilize powered equipment in the performance of SWA's airline operations, as opposed to for transportation or the performance of supervisory duties.

The Union contends that the parties agreed on parameters to provide guidance to agents and management regarding what constitutes a violation in what is allowed. Based upon those parameters, hundreds of grievances were awarded, settled or withdrawn. The protested actions in this case directly violated two of the points of the agreed parameters. The Company did not call former Senior Director of Labor Relations Venckus to contradict the testimony of Vice President McCrummen regarding their agreement. The Company witnesses who testified were not part of any negotiating team for the CBA governing the Ramp, Operations, Cargo and Provisioning Agents, nor did they participate in discussions regarding the parameters memo.

The Union presented 11 grievances, similar in nature to the instant case, that were awarded or settled. The four grievances introduced by the Company were flawed and do not refute the Union's evidence.

The Union contends that the Company is trying to get changes through arbitration decisions that they have been unable to negotiate. Here, the Company is applying flawed logic by using Arbitrator Hill's *de minimus* comments to set a standard. Acceptance of that position would require the arbitrator to legislate and add new language, undermining the negotiation and bargaining process of the parties, by establishing a time wall dividing what is permissible from violations. The CBA restricts the arbitrator's powers to interpreting the agreement. Arbitrator Barnard ruled on the clear language of the Ramp Agent classification when he held that supervisors are allowed to wing walk but prohibited to drive the pushback.

For the above reasons, the Union asks that the grievance be awarded and the Company be directed to pay the appropriate OT bypass to the agent at the proper rate.

The Company's Contentions

The Company contends that it is the Union's burden to prove that the Company violated the CBA, by a preponderance of the evidence. The Union has failed to do so.

The Company contends that the alleged violation consisted of moving two empty carts a few feet with a tug. Grievant Agent X testified that Supervisor Perez moved two empty carts 30 feet from the aft of an aircraft at gate 2 to just past the nose, against the terminal building. He described that area, outside T-point, as a staging area for T-point. However, he also characterized it as basically almost in the same area as the aircraft. Grievant Agent X does not object to Supervisor Perez moving carts outside the safety zone by walking them.

The Company notes that the Union does not assert that a supervisor moving carts, even using a tug, is a violation as long as it is "within the shadow of the aircraft." However, According Vice President McCrummen, moving carts out of the area is cleaning up the gate and a violation. Despite his testimony that the parties had reached an understanding regarding the concept of working in the shadow of the aircraft, he admitted that they did not agree that working outside the shadow of the aircraft was a contractual violation.

The Company contends that moving these carts from the aft of the aircraft to just beyond the nose of the aircraft, covered 30 feet and lasted between 30 and 60 seconds. Towing the carts from the nose of the aircraft to the wall covered only a fraction of that distance in time. Supervisor Perez's purpose was to get them away from the area to keep things tidier, and not to move them to T-point which was nearby.

The Company does not dispute that, given the right set of facts, using a tug to go from gate to gate and collect empty carts for use at T-point may be covered work. However, that is not what occurred here. If Supervisor Perez had performed the same work at gate 1, i.e., moved the carts just outside the nose of the aircraft against the wall, then the Union would have no argument that he transported carts for use at T-point. Further, moving carts out of the way during a turn is an optional task, made necessary in congested conditions. As long as the carts were cleared from the safety zone they could remain clustered around the aircraft. Clearing the area was not an assigned task and Supervisor Perez testified that, had they remained, he would have been unable to single out any one agent for failure to complete the duty of moving them.

The Company contends that clearing carts from the immediate gate area, when needed, is a shared responsibility done by Ramp Agents, Supervisors and Managers, as well as Provisioning Agents who need to move their trucks in to the aircraft. The Union withdrew a FLL grievance after the Company showed that the supervisor merely moved empty carts from one location to another. As in *Agent B*, the Union has not demonstrated that the work of clearing the carts from a gate "has been historically performed by [Ramp] Agents at SWA exclusive to others."

The Company contends that if Supervisor Perez did performed covered work, he did so permissibly by assisting agents. The Union does not dispute that his intention was to get the carts out of the way and keep things tidy, while one or two agents worked at the bottom of the belt loader. Arbitrator Barnard emphasized that a supervisor may assist for short periods, but would not be assisting if “working alone for a *good portion* of the turn.” (Emphasis added.) The Union’s booklet for new agents characterized impermissible work as “long, drawn out substitutions.” Further, Arbitrator Barnard rejected the concept that supervisors could only perform covered work when standing next to agents. And, it is disingenuous to characterize Supervisor Perez’s actions as a “one-person job” such as pushing back an airplane.

The Company contends that the Union has not shown an agent was impermissibly replaced. No agents were sent to the break room. No agent would have been called on overtime to move the carts. Under the *Agent B* principles no covered work violation occurred. The brief cart-moving was designed to facilitate agent work, not undermine it. It occurred once and the Union has not complained of repeated help in clearing carts since. No unit employee lost a work opportunity as a result of this helping hand scenario. And, the Union failed to show any harm, only claiming that the membership potentially would lose faith in its ability to protect their work.

The Company contends that the use of a tug does not transform action into a covered work violation. Nothing in the CBA, Work Rules Interpretations or applicable precedent supports the Union’s argument that the listing in Article 5, Section 1 is work that may only be performed by agents. Article 2-B specifically allows for supervisors to perform covered work. The Union’s withdrawal of a grievance in San Diego that had asserted that supervisors were prohibited from using power equipment at all contradicts the position the Union is trying to take now.

Finally, the Company contends that if a contractual violation occurred, it was *de minimus*. The *Agent B* decision is, again, applicable. The disputed actions here took no more than 30 seconds, the work performed was a shared responsibility, there was no evidence of an intent to undermine or supplant agent work, and the Union showed no evidence of harm to any member. There are no measurable damages to award.

As to the Union’s reliance on the 2013 email negotiations and “Covered Work Parameters,” the Company notes that this was not a signed agreement and that, as the Union admits, the Company has taken the position it does not apply anymore due to intervening arbitration decisions. Although the Union pointed to several bullet points as potentially applicable, it failed to explain how they apply to the carts-moving at issue in this case. Further, the past grievances introduced by the Union do not support its case as none are precedent-setting. The first five were issued prior to the Barnard decision, one was issued prior to the Work Rules Interpretations, and none involved in similar facts. In the most analogous case, SNA-R-0597/13, the supervisor allegedly took empty carts to a boneyard that, unlike the space utilized here, was located ½ mile from the gates.

For the above reasons, the Union failed to prove that Supervisor Perez’s brief cart-moving on July 13, 2015, was a contractual violation. The Company thus requests the grievance

denied.

ISSUE

Company's Statement of Issue: Did the Company violate Article 2 of the Contract when a ramp supervisor assisted agents by moving empty carts from a gate to a staging area?

Union's Statement of Issue: Did the Company violate the CBA, Article 2 (B) and Article 5 (P), when the Ramp Supervisor performed covered work under the Scope of the Agreement when they replaced and did not assist an agent?

FINDINGS

Although the parties frame the issue somewhat differently, the question to be answered in this case is: Did Supervisor Perez impermissibly perform covered work when, on June 13, 2015, he used a tug to move empty carts from the aft of an aircraft at gate 2 to a space along the terminal wall?

Since the new "assist" language was added to Article 2 of the CBA in 2008, the parties have grappled with the practical applications of that change. Their respective positions were tested through the presentation of disputes in the four arbitration decisions discussed in the Background, above. The parties also agreed to new Work Rules Interpretations provisions providing five specific examples. The Union provided guidance to new employees with respect to covered work and encouraged them to file a grievance if they see a supervisor violating the contract. However, that guidance was solely a Union-produced document and had not been agreed to by the Company. Despite these efforts, the volume of covered work grievances remained high, to the extent that it was difficult, if not impossible, for the Company to respond to them in a considered and substantive manner within the time frames set by Article 20. Then-Director of Labor Relations Venckus initiated discussions with Union Vice President McCrummen about defining parameters.

The Venckus-McCrummen discussions were successful to the extent of reaching the Covered Work Parameters distributed by McCrummen on May 27, 2013. Senior Manager-Labor Relations Kusek testified that the Covered Work Parameters is *close* to accurately reflecting an agreement and said it is a bit different than the direction management put out. However, the direction management put out was not introduced as an exhibit and Kusek did not specify what those differences were. Further, McCrummen's May 27, 2013-email, in addition to being sent to every station representative with an email address, was copied to Venckus, Kusek, Apperson and 10 additional members of the Labor Relations staff. There is no indication that any of them raised a question about or objection to McCrummen's statement in the email that "[t]his clarification memo was agreed to in a meeting between the parties on 12-7-12." On this record, therefore, the Union has established that the Covered Work Parameters is an agreement reached between the Union and the Company. The Company argues that this agreement should be given diminished weight because it is not a signed, as are the Work Rules Interpretations, but has

pointed to no requirement in the CBA requiring signatures on such agreements for them to be binding.

There is no indication in this record that the Union has acceded to the Company's position that the Covered Work Parameters no longer apply due to intervening arbitration decisions. As stated in Article 20, Section 1, L-14, the jurisdiction of the Arbitrator is limited and the arbitrator has no power to "change, add to, or delete" terms. Although that provision refers to the terms of the CBA, the principle certainly applies, with equal force, to other agreements reached by the parties. Therefore, until otherwise agreed by the parties, the Covered Work Parameters remains in effect.

However, the Union's reliance upon the Covered Work Parameters in this case is misplaced. Vice President McCrummen referenced four tasks identified in the parameters.

Ramp Supervisors can perform the following:

* * *

- Setting up a gate by moving carts, positioning belt loaders with Agent

The challenged work in this case, however, does not involve setting up a gate. Therefore, that provision is not relevant.

Ramp Supervisors can't:

* * *

- Perform driving duties or deliver bags from t-point alone
- Move carts gate to gate

* * *

- Set up gate area alone

Vice President McCrummen acknowledged that the work performed by Supervisor Perez did not involve setting up a gate. He maintained that Perez did perform driving duties and move carts, tasks that are prohibited covered work.

Performing driving duties is a broad category and, clearly, Supervisors drive on a regular basis. The agreed-upon Parameter regarding driving duties, therefore, must be read in the context of driving in the performance of the work of Ramp Agents. The following bullet point identifies moving carts from gate to gate as work that Ramp Supervisors cannot perform, thus reserving that work to covered employees. Supervisor Perez, however, did not perform driving duties to move carts from gate to gate. Thus, he did not run afoul of the specific items addressed in the

Covered Work Parameters.

It is important to be mindful of what Supervisor Perez did not do. He did not pull full carts from the warehouse and return with empty carts, as in TBA-R-0225/09. He did not take late bags to a flight and carts to T-point, as in BNA-R-0980/09. He did not drive from gate to gate to retrieve carts, as occurred in TBA-R-1500/09. He did not coordinate carts and line them up at the warehouse or any other facility, as occurred in LAX-R-1703/10. He did not collect carts and take them to the boneyard, as in SNA-R-0597/13. In that case, Vice President McCrummen referenced the meeting between the parties on December 7, 2012, at which it was agreed that:

a RSS could move carts around while working a flight or assisting an agent but could not transport carts or bags when not in the proximity of the A/C while working it.

The Senior Manager-Labor Relations settled that grievance “as a result of the supervisor performing covered work” i.e., collecting carts and taking them to the boneyard.

What Supervisor Perez did in this case, while working a flight at gate 2, was to use a tug to move two empty carts a short distance and place them against the wall. He did this for the purpose of tidying up the congested area, not to retrieve and store carts for use at T-point or the boneyard. The “tidying up” of a gate area is not work that is assigned to a particular agent, as is the case with working the bin or belt loader, wing walking, marshalling or operating the push back tug, etc. Although agents can be disciplined for not performing their assigned duties, such as a rover who fails to retrieve carts back for agents at T-point, no evidence was presented of discipline being imposed for failing to move carts to tidy up a gate area, so long as the carts are not left in the safety zone.

The Union’s complaint here comes down to a very fine – too fine for practical application – definition of “proximity of” or “shadow of” the aircraft. Reflecting a reasonable approach, the Union has not protested that Supervisor Perez is performing covered work when he moves carts in this location in order to tidy up the gate by walking them, without using the tug.

The crux of the Union’s complaint in this case is Supervisor Perez’s use of “powered equipment.” Article 5 sets forth the classifications of, in Section 1, Ramp Agent/Provisioning Agent and, in Section 2, Operations Agent/Freight Agent. The introductory paragraph in each of those sections states that their work includes “the functions which have been historically performed by such agents at Southwest Airlines stations and includes, but is not limited to, any or all of the following work covered under this specific labor contract.” Thus, Article 5 differentiates between the classifications, and provides, in Section 3, for their cross utilization under specified circumstances.

The Union argues that the inclusion of paragraph P in Section 1 restricts the use of “all power equipment and other ground equipment (including push back tugs) assigned by the Company to complete its airline operations” to Ramp and Provisioning Agents. Applying that

interpretation to the content of paragraph P would necessarily mean the same interpretation would apply to the other lettered paragraphs. The difficulty with that interpretation is that many of the listed duties are performed by others, under a variety of circumstances.

The Company relies upon Article 2-B to support its contention that Article 5 is not a bar to supervisors performing covered work. That provision states that supervisors “may continue to perform covered work while on duty....”

Article 2 and Article 5 can be read so as to give meaning to each. The limitations on supervisors performing covered work contained in Article 2 are focused on the supervisor assisting, directing, training, evaluating agent performance and supporting the operation by managing and directing the workforce. The language specifies that a supervisor may not replace any covered employee or cover a scheduled line. A supervisor who replaced a covered employee by, for example, using a tug to go from gate to gate collecting carts and taking them to T-point, would be, impermissibly, performing covered work. That would be true, however, not because a tug was used, but because of the work performed. The prohibition on supervisors replacing covered employees is fully consistent with Article 2-A Recognition.

In the *Agent B* case Arbitrator Hill recognized that the disputed work was traditionally a shared responsibility. Although in that case the responsibility was shared by flight attendants, pilots, managers, supervisors, and ramp and operations agents, the disputed work was integral to the Company’s business, i.e., checking and tagging customers’s bags. In this case the disputed work could have been left undone, or could have been performed by any agent in the area. It was not subject to a specific assignment. More importantly, however, as in *Agent B*, there is no evidence that Supervisor Perez was attempting to undermine or supplant the work of an agent, or, in the words of Article 2-B, to replace any covered employee. Certainly no employee would have been called out or held over to perform this work.

For the above reasons, the Union has not established that the Company violated the CBA when Supervisor Perez utilized a tug to move two carts a short distance from the aircraft for the limited purpose of tidying up the gate. Therefore, the grievance will be denied. In accordance with Article 20, Section 1, Paragraph C, the costs of the arbitration shall be borne by the Union.

AWARD

The grievance is denied. In accordance with Article 20, Section 1, Paragraph C, the costs of the arbitration shall be borne by the Union.



Elizabeth Neumeier, Arbitrator

April 27, 2016