BEFORE

DR. A. DALE ALLEN, JR.

IMPARTIAL ARBITRATOR

In the Matter of Arbitration between:	)
	)
Southwest Airlines Company	) [redacted] Grievance
Dallas, Texas	)Regarding Absence Point
	)
	)
and	)
	)
	)
Local 555	)
Transport Workers Union	)

OPINION AND AWARD OF THE ARBITRATOR

December 2, 1999

ARBITRATION AWARD

In the Matter of:

Local 555
Transport Workers Union

and

Southwest Airlines Company
Dallas, Texas

FOR THE COMPANY:	Ruth S. Landau Company Attorney
FOR THE UNION:	Charles Cerf Local Vice President
IMPARTIAL ARBITRATOR:	Dr. A. Dale Allen, Jr. Hankamer School of Business Baylor University—Box 8006 Waco, Texas 76798-8006

By the terms of the agreement between Southwest Airlines Company, hereinafter referred to as the "Company," and TWU Local 555, hereinafter referred to as the "Union," Dr. A. Dale Allen, Jr., Baylor University, Waco, Texas, was selected by the parties to serve as impartial arbitrator. A hearing was held at the Embassy Suites Hotel of Dallas, Texas, on August 26, 1999. Full opportunity was afforded the parties for the introduction of evidence, examination and cross-examination of witnesses, and oral arguments. Upon receipt of post-hearing briefs from both parties, these proceedings were declared closed on October 1, 1999.

ISSUE

When a disciplinary action is not issued in a timely manner under the Collective Bargaining Agreement Attendance Program, and the progressive disciplinary letter is, as a consequence, removed from the Grievant's file, must the recorded occurrence and corresponding attendance point(s) be removed from the Grievant's attendance record?

STATEMENT OF GRIEVANCE

Employee Statement of Grievance: Attendance discipline letter "4 point Warning Letter" was inaccurate and out of specified time frames. Letter was issued 38 days after incident.

Remedy or Settlement Sought: Correct point status to 3 points and appropriate "Letter of Notification."

PROVISIONS OF THE LABOR AGREEMENT

Article 20 Grievance/System Board/Arbitration

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

E. Time Frames. It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent. Furthermore, if the time frames set forth are violated by the Association, the grievance shall be considered withdrawn. Determination of time frame violation issues shall take precedence over consideration of any other issue, and, if upheld, no further determination shall be appropriate.

Article 23 Attendance

Section II – Control Procedures

A. Recorded Occurrences. Absences and tardiness on scheduled workdays, overtime, training, trades, or holidays shall be recorded in the following manner:

No Show (Unreported Absence)	2
Reported Personal Absence (Personal Business)	1
Reported Illness (One (1) statement per three (3) months)	0
Reported Illness (No doctor's statement or after utilizing one (1) doctor's statement per three (3) months)	1
Unreported Tardy	1
Reported Tardy	½

B. Chargeable Occurrence. An employee receiving a chargeable occurrence for absenteeism/tardiness shall receive the following disciplinary action as the occurrences accumulate:

Less than 1 point	No action taken
1 – 1 ½	Verbal Counseling
2 – 3 ½	Letter of Notification
4 – 5	Warning Letter
5 ½ - 6 ½	Final Warning
7 or more	Termination

D. Record Improvement. For each non-cumulative three (3) consecutive month period during which an Employee works without any chargeable occurrence, two (2) points shall be deleted from the Employee's accumulation until the total reaches a maximum of minus five (-5). At the end of February of each year, the record of any Employee who has a positive total of three (3) or fewer points shall be reduced to zero (0). Further, effective upon the date this Agreement is ratified by the members of the Association, each Employee's point accumulation as of such date shall automatically be reduced by three (3) points; provided, however, that the

maximum negative total accumulation shall be negative five (-5) points.

Article 24 Discharge and Discipline

C. Letters of warning or reprimand not involving loss of pay or discharge shall be issued no later than five (5) working days from the time the Company has full knowledge of the incident.

POSITION OF THE COMPANY

The Company notes that the Grievant, [redacted], is a Ramp Agent at the Company's Las Vegas location. As such, he was covered by the parties' negotiated Attendance Program found in Article 23 of the parties' Collective Bargaining Agreement (CBA). The occurrence and discipline at issue are those related to two days of illness on [redacted], 1998. These absences were recorded as 1.0 occurrence points pursuant to Section IIA of Article 23. Because the Grievant had accumulated 4.0 points under the Attendance Program, a disciplinary Warning Letter was due to be issued per provisions of Section IIB. Due to administrative error, the Warning Letter was not issued until [redacted], 1999. Grievant [redacted] filed a grievance protesting issuance of the letter because it was given to him well beyond the five-day period allowed by past practice and Article 24C. He further contended that the recorded 1.0 point for the chargeable occurrence be removed. Management agreed that the letter was not timely and that it should be rescinded. However, management refused to delete the 1.0 point chargeable occurrence from his attendance record. It is this latter issue that serves as the substance of the instant arbitration case.

To begin with, the Company contends that CBA language supports is position. Article 23 delineates between the *recording* of attendance occurrences (Section IIA) and the *imposition of discipline* (Section IIB). Section IIA clearly states that absences "shall be recorded." This is to be distinguished from Section IIB which delineates the different types of disciplinary actions to be imposed as the points accumulate. Most importantly, there is no language in the CBA that directs management to remove an occurrence point (which is an actual fact) merely because a disciplinary letter is issued in an untimely fashion. In other words, simply because management mistakenly issues a tardy warning letter does not alter the fact that the absence actually occurred and is required to be retained as a matter of record per Section IIA. Hence, the CBA language clearly supports the Company's position herein.

Additionally, the Company's argument is strengthened by past practice. The Company's only witness was Ruth Ann Chancellor, Senior Director of Employee Resources. She has been managing staff services for at least 18 years during which time she was also involved in contract negotiations. Chancellor has consistently directed all Stations system-wide that if a progressive disciplinary action is not timely given, that disciplinary letter should be removed from the employee's file, but the recorded points are not to be deleted.

To support this past practice, the Company admitted into evidence several documentary examples wherein an employee's recorded points in Section IIA did not correlate with the step of disciplinary action spelled out in Section IIB.

Employees and the Union were well-aware of these instances, but had never raised any issue regarding these circumstances. The Company also admitted into evidence two prior arbitration decisions—the [redacted] and [redacted] opinions—wherein the arbitrators directed that management could not "leapfrog" a step of the progressive disciplinary system merely because an employee amassed several points in a short period of time. Neither arbitration decision directed that any of the employee's attendance points be removed, although the last progressive disciplinary letter had to be deleted from the employee's file. Thus, neither of these arbitrators believed it necessary to correlate points with disciplinary steps. Overall, it is obvious that the parties' past history supports the Company's position in this dispute.

In summary, the Union's position is unsupported. It is falsely premised on the notion that the record of occurrence points is discipline. CBA language specifies otherwise. The Union's position is also falsely based upon the argument that there must be an absolute correspondence between the point level on the attendance record and the level of discipline at which an employee stands. The very structure of the Attendance Program rejects this argument. In short, the Union's argument is not supported by contract language, contract intent, negotiation history, past practice, prior arbitration decisions, or common sense. Consequently, this grievance should be rejected.

POSITION OF THE UNION

To begin with, the Union notes that, contrary to what management contends, there are several places in the parties' CBA that provide for the removal of attendance points from an employee's record. The best example is found in the "Record Improvement" provision of Article 23D. Hence, there is nothing "sacred" about removing points from an employee's attendance record. The Union has also shown through evidence and testimony that when there is a reduction in points due to Record Improvement, the letters are adjusted to correspond to the point level.

In response to the Company's past practice argument, the Union counters that it is not informed by management when it creates a "policy" such as Ruth Ann Chancellor's directive whereby she has directed Station Managers that if a progressive disciplinary action is not timely given, the disciplinary letter is to be removed, but the recorded points are not to be deleted. That involves an internal management procedure of which the Union is not aware. Additionally, in the few cases when members have brought examples to the Union's attention regarding discrepancies between attendance points and the level of disciplinary actions, these instances unfortunately have been noted beyond the time frames allowed in the CBA within which to file a timely grievance. Usually a discrepancy has occurred early in the attendance disciplinary process, and the member does not notice it until more serious action is contemplated by the Company. By then, it is too late to file a timely complaint. The Union further notes that the dispute at issue in this case has never been the subject of contract negotiations.

The [redacted] and [redacted] arbitration decisions were both discharge cases. These cases did not involve the question of whether or not attendance points correlate with disciplinary actions—they both focused on the problem of "leapfrogging" a step in the progressive disciplinary procedure. Thus, there is little application to the instant dispute. In contrast, the Union submits into evidence the [redacted] arbitration decision. The Arbitrator in that case, [redacted], realized the importance of points correlating with the appropriate level of disciplinary action as evidence by his final decision to issue a Final Warning letter (overturning termination), and reducing the point total to correspond to that level of disciplinary action. That is precisely what should be done with [redacted] case.

The language and outline of Article 23, Section IIB, clearly demonstrates that if Agent X' Warning Letter was not timely, and was subsequently rescinded by the Company, then to arrive at the appropriate point total per Section IIB, it is necessary to remove the 1.0 point as well. In other words, if an employee (Agent X) is at the Letter of Notification level of disciplinary action, contractually that person cannot be housed in the "4 – 5" points range, which calls for a Warning Letter level of discipline. Indeed, the Company's position does not make "common sense." In brief, the point total and the level of disciplinary action should correlate. That has not happened in [redacted] case, and it should be corrected. His attendance record should be adjusted in accordance with his grievance so that the attendance points correspond to the appropriate level of disciplinary action.

OPINION OF THE ARBITRATOR

This has been a rather interesting and unusual dispute. Both parties presented quality cases and offered fine briefs. Between the two parties, they submitted into evidence three prior arbitration opinions involving this Union and Company. These opinions are to be briefly examined below. However, none of the Awards in these three arbitration cases hinged on the question of untimely notification of a disciplinary action, as is present in the instant dispute. In the final analysis, the undersigned has arrived at conclusions that neither party directly argued in their respective positions. That is rather unusual, but it seems to be the appropriate decision.

Firstly, let us briefly examine the three prior arbitration opinions in chronological order. Keep in mind, none of these arbitrators addressed the issue in question in the instant dispute. Moreover, the applicable and relevant portions of these three opinions vary in their solutions. Consider, initially, the May 1992 decision regarding Grievant [redacted]. Arbitrator John White concluded that the Company had improperly "leapfrogged" a level of the progressive disciplinary action procedure in getting to the termination step. Arbitrator White did not touch on the "points" or "level of disciplinary action" issues directly in his Award. However, in ordering reinstatement without backpay, White noted that Grievant [redacted] "may be later terminated in the event he has one more chargeable attendance occurrence." One could logically interpret this to mean that [redacted] was to be reinstated at the disciplinary step immediately preceding termination (Final Warning) and be reduced from 9 ½ to 8 points whereby one

more point in the future could result in termination (9 points). The undersigned does not know, in fact, what was done regarding [redacted] reinstatement attendance status.

Let us turn our attention to the arbitration decision involving Grievant [redacted] initially rendered in December 1993, and later clarified in February 1994. Basically, Arbitrator David Acheson declared that the Company had once again improperly "leapfrogged" a step of the attendance progressive disciplinary system in arriving at termination. In his initial Award, Arbitrator Acheson states, "In the interest of consistency in the arbitration, I am in agreement with Arbitrator White in his ruling on the remedy in the [redacted] case shall apply in the [redacted] case." While one may question Arbitrator Acheson's sentence structure, he clearly is indicating that [redacted] is to be treated in the same manner as was [redacted] regarding reinstatement status. However, at the request of the parties, Acheson offered a clarification of his Award in February 1994. Therein, he indicates that [redacted] is to given a Final Warning and left at 9 ½ points. Hence, Acheson ultimately rendered an Award that was "non-correlative" as regards points and the corresponding level of disciplinary action.

Finally, let us examine the arbitration decision regarding Grievant [redacted] rendered in July 1996. Briefly, Arbitrator John Barnard ruled that Grievant [redacted] was unjustly terminated because he had not been made aware of where he was located in the disciplinary action "ladder" after the Attendance Program had been revised. [redacted] had accumulated 7 ¼ points, which brought him to the termination stage under provisions of the revised program. Arbitrator

Barnard, in his Award, ordered that [redacted] be reinstated without backpay; in addition, his "point total will be placed at 5 ½ points, and he is to be issued a Final Warning under the terms of the Attendance Program." Hence, Arbitrator Barnard determined that it was necessary to reduce [redacted] point total to correspond with the "Final Warning" level of disciplinary action and, thereby, make them "correlate."

In summary, we have here three different arbitration opinions with varying approaches to the question of "correlation" of points and levels of disciplinary action. Arbitrator White said nothing about points or level of disciplinary action in his Award. Arbitrator Acheson determined to move the grievant back to the Final Warning stage of discipline, but elected to leave him with 9 ½ points, which does not correlate. In contrast, Arbitrator Barnard evidently felt it was necessary to maintain correlation when he determined to reduce the grievant's points to reflect where he was to be placed in the progressive disciplinary chain. Hence, there is no clear and consistent precedent provided by these three opinions as regards the "correlation" issue. However, this is not particularly important to the settlement of the grievance at bar, because none of these prior arbitration Awards were based upon the fact that the Company had to remove a disciplinary letter that was not issued in a timely manner—"leapfrogging" seemed to be the primary focus. Consequently, that makes the instant case a unique "horse of a different color."

The undersigned has concluded that, indeed, the absence point at issue in this dispute should be removed from Grievant [redacted] attendance record, but

not because of lack of "correlation." There may be other circumstances wherein "non-correlation" may be a reasonable outcome, such as "leapfrogging." Company "past practice" evidence seems to indicate that there has been, at least, some history of "non-correlation." Thus, this neutral is not stating in this decision that lack of correlation between points and the level of disciplinary action is always improper. Certainly, if the parties want to assure of a consistent practice in the future regarding "correlation" of these two items, they can negotiate such an agreement.

The undersigned's disagreement with the Company's refusal to remove the absence point has to do with the rescinding of an untimely disciplinary action. The generally and normally accepted labor relations view of such matters is that the entire untimely action must be removed, not just a portion of it. This seems to be the thrust of comments by Elkouri and Elkouri in *How Arbitration Works*, fourth edition, page 674, wherein one reads:

> Many agreements specify procedural requirements for discharge or discipline. In many cases arbitrators have refused to uphold management's action in discharging or disciplining an employee where management failed to fulfill some procedural requirement specified by the agreement, such as a required statement of charges against the employee, or a notice or investigation requirement, or a requirement for a hearing or joint discussion prior to the assessment of punishment. (emphasis added)

This view is found even more specifically described in the parties' own CBA in Article 20E, Time Frames. Therein is found:

> It is expressly understood and agreed that, if any of the time frames set forth in this Article are violated by the Company, the Employee shall be awarded the desired settlement without precedent. . . . Determination of time frame violation issues shall take precedence over consideration of

> any other issue, and, if upheld, no further determination shall be appropriate." (emphasis added)

Obviously, the language of Article 20E is referring to time frames associated with the grievance procedure; there is no direct contractual language regarding what happens to absence points in the event management issues an untimely disciplinary action letter under the Attendance Program. However, there was mutual agreement in the arbitration hearing that the practice has been to apply the "five working days" guideline found in Article 24C. In keeping with the overall "spirit" of the parties' CBA, one could reasonably conclude that the expressed guidelines and limitations regarding the remedies for management's untimely action under Article 20E should logically be applied to untimely absence letters.

Thus, if an untimely management response in the grievance procedure requires that "the Employee shall be awarded the desired settlement," logically the same remedy should be applied in the case of issuance of an untimely management warning letter under the Attendance Program. In this instance, [redacted] grievance seeks a remedy to "correct point status to 3 points and appropriate Letter of Notification."

In short, it seems to make "common sense" that if a disciplinary step is missed due to an untimely action, then it is not reasonable to withdraw only a portion of the disciplinary action. The entire action should be rescinded as if the disciplinary event never happened. Another analogous situation is "lack of arbitrability" disputes. If management disciplines or discharges an employee, and it is subsequently found to lack arbitrability based on untimeliness or some

other reason, normally the entire action that led to the grievance is dismissed, not just a part of it. Thus, based upon all of the foregoing reasoning, the undersigned is compelled to conclude that the absence point at issue in this dispute should have been deleted from the Grievant's attendance record.

AWARD

The Union's position is upheld for the most part. Thus, the absence point that was associated with the untimely warning letter is to be removed from Grievant [redacted] attendance record. However, that does not necessarily mean that there should always be a "correlation" between absence points and the levels of disciplinary action spelled out in Article 23, Section IIB, as explained in the Opinion section *supra*. Since the Union's entire position was not upheld, in recognition of the language found in Article 20C, the Company is hereby ordered to pay 75% and the Union 25% of the Arbitrator's costs. Any unresolved differences regarding interpretation or implementation of this Award will be settled by the undersigned upon written request of the parties.

A. Dale Allen, Jr.

Dr. A. Dale Allen, Jr.
Impartial Arbitrator

December 2, 1999