IN THE MATTER OF ARBITRATION	)	
	)	
	)	
SOUTHWEST AIRLINES CO.	)	
	)	
	)	
and	)	Case No. LAX-R-0603/12
	)	
	)	
TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO, LOCAL 555	)	
	)	

Michelle Morgan, Esq., for the Employer
Jerry McCrummen, for the Union
Before Matthew M. Franckiewicz, Arbitrator

OPINION AND AWARD

This arbitration proceeding involves the discharge of Grievant [redacted].

A hearing was held on August 10, 2012, at Dallas Texas. Both parties called, examined and cross examined witnesses, and offered documentary evidence. Both parties filed briefs. The record closed with the exchange of briefs on September 21, 2012.

Contract Provisions Involved

ARTICLE TWO
SCOPE OF AGREEMENT

D. Management Rights. The right to manage and direct the work force, subject to the provisions of this Agreement, is vested in and retained by the Company.

ARTICLE EIGHTEEN
GENERAL AND MISCELLANEOUS

E. Copy of Agreement. The Company shall provide each Employee covered by this Agreement with a copy of the Agreement, printed and bound in a booklet with reasonable print size, bearing the Union logo. The Company shall also supply the Union Office with fifty (50) extra copies.

J. Bereavement Benefits. Employees shall be granted four (4) days off with pay for death in the immediate family of the following: mother, father, brother, sister, spouse, Committed or Registered Partners or children (including stepchildren and children of a committed or registered partner) and step-parents. Employees shall be given three (3) days off with pay for the death of mother-in-law, father-in-law, parent of a committed or registered partner, grandchildren and grandparents. If additional days are required, the Employee may elect to use accrued vacation. If the Employee has no accrued vacation in his bank, in the event of death of the Employee's spouse, committed or registered partner, child, mother or father, the Employee may use up to four (4) accrued sick days as additional leave. The use of accrued sick leave must be in compliance with Article 13C (first sick day compensation shall not be paid unless the Employee has 12 days or more of accrued sick pay to his credit). If the accrued sick days are utilized for this purpose, it shall not constitute a chargeable occurrence under the Attendance Policy.

ARTICLE TWENTY
GRIEVANCE / SYSTEM BOARD / ARBITRATION
DISCHARGE and DISCIPLINE

SECTION ONE
PROCEDURES

A. Purpose. No Employee who has passed his probationary period shall be disciplined to the extent of loss of pay or discharge without just cause.

B. Representation Requirements. The Union and the Company shall be represented at each location. These representatives shall be empowered to settle all local grievances without setting precedent of any kind. The Local Representatives for the Union shall be selected from members of the Union who qualify under Article Two. The Local Representative for the Company shall be the Manager or his designee. Neither party shall be represented by legal counsel through and including the System Board. Legal representation shall be permitted in the case of Arbitration.

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

G. Fact-Finding Procedures. No covered Employee shall be subject to discipline involving loss of pay or discharge without first having the benefit of a factfinding, with the right to have a Union representative present, in accordance with the following procedures.

* * *

2. Suspension. Notwithstanding the foregoing, the Company may suspend a covered Employee pending a factfinding and/or until such time as the decision of the Company resulting from the factfinding is rendered, subject to the following conditions:

a. The suspension shall be a paid suspension;

b. The basis for the suspension shall be reduced to writing and presented to the Employee and the local representative of the Union within two (2) working days of the suspension;

c. The factfinding shall be held within three (3) working days of the presentation of the written notice of the basis for suspension; and

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

L. Interpretation/Application of Agreement. In the event of a grievance arising over the interpretation of, or application of, this Agreement, or in the event of a disciplinary action other than discharge, the following steps shall apply. However, if the action involves discharge or a Union grievance concerning a change in Work Rules, it shall proceed to sub-paragraph 3, below. Decisions made pursuant to Steps 1 through 3, below, shall not constitute precedent of any kind unless agreed to, in writing, by the Union and the Company.

14. Arbitration/Function and Jurisdiction. The functions and jurisdiction of the Arbitrator shall be as fixed and limited by this Agreement. He shall have no power to change, add to, or delete its terms. He shall have jurisdiction only to determine issues involving the interpretation or application of this Agreement, and any matter coming before the Arbitrator which is not within his jurisdiction shall be returned to the parties without decision or recommendation. In the event any disciplinary action taken by the Company is made the subject of proceedings, the Arbitrator's authority shall, in addition to the limitations set forth herein, be limited to the determination of the question of whether the Employee(s) involved were disciplined for just cause. If the Arbitrator finds that the penalty assessed by the Company was arbitrary or unreasonable, he may modify or remove that penalty.

ARTICLE TWENTY-THREE
ATTENDANCE

A. Purpose. The Company and the Union recognize that habitual absenteeism and tardiness adversely affect operations and morale. The purpose of this program is to control the attendance of Employees in a constructive manner and within the framework of progressive disciplinary procedures. In order to avoid the accumulation of occurrences, it is recommended that, in the event Employees require time off, they should, to the degree possible, secure trades with other Employees, request vacation time, or, where appropriate, request a leave of absence. Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick leave or sick pay shall warrant immediate termination.

1. Reporting Procedure. In all cases of absence or tardiness, the Employee shall call his supervisor. If the Employee is unable to call, he shall cause someone to call in his stead. Answering machines at the stations can also be utilized.

2. Requirements of Reporting. Call-ins must be made at least one-half (½) hour before the start of the Employee's shift on every day that the Employee shall be absent. Failure to report an absence at least one-half (½) hour prior to the start of the Employee's shift shall be treated as unreported. Failure to report a tardy before the beginning of a shift shall be treated as an Unreported Tardy. No tardiness shall be charged until two (2) minutes have passed from the Employee's scheduled starting time. If an unusual condition exists that would make it impossible for the Employee to report an absence or tardy within the required time frames before his shift, a valid reason must be furnished. If no valid reason is furnished, the penalty for an unreported occurrence shall be assigned. If an Employee can provide doctor's verification in advance of a specific duration of absence, the requirement to call in each day shall be waived by the appropriate manager.

SECTION I
ATTENDANCE PROGRAM

DEFINITIONS

A. No Show. (Unreported Absence). Any Employee who is scheduled for regular work, overtime, training, trades, or holidays and does not report his absence as outlined in the "Requirements of Reporting" section of this program shall be charged with a No Show (Unreported Absence). Failure to report an absence, whether or not verified by a doctor's statement, shall be chargeable as a No-Show (Unreported Absence). The Employee shall not be allowed to work.

B. Reported Personal Absence. (Personal Business). Any Employee providing at least one hour prior notice that he shall not report to work for whatever reason, other than his personal illness, shall be charged with a Reported Personal Absence (Personal Business).

C. Reported Illness. (Non Chargeable). Four (4) doctor statements per calendar year shall be allowed for any Employee calling to report that he shall not report to work because of his personal illness/injury. No more than one (1) doctor statement shall be accepted for any Employee during the period from November 1 through and including January 3.

There shall be no charge to an Employee's attendance record in the event such Employee suffers a relapse of the same medical condition for which the Employee utilized a doctor's statement, provided:

i. The verified relapse occurs no later than three (3) days following the Employee's return to work; and

ii. Such absence is verified by the same doctor or medical facility who treated the Employee for the original illness/absence and which documents in the statement that the Employee has suffered a relapse.

The doctor's statement which confirms the relapse must be furnished to the Company on the Employee's first day back to work and will not be charged as one of the Employee's four (4) doctor's statements allowed annually.

1. Doctor Statement. An Employee utilizing a doctor's statement to excuse his absence must furnish it to local management on his first day back to work. Upon receipt of the doctor's statement on the Employee's first day back, if the Employee has not utilized his allowable number of doctor's statements under paragraph C. above, the absence shall be excused.

2. Non Chargeable Occurrence. If an Employee becomes ill and fails to complete his shift after working at least four (4) hours thereof, no charge shall be made to his record; however, he shall be charged for any similar failure within the succeeding six (6) month period.

3. Statement Contents. The doctor's statement for verification of an illness/injury must contain the following information or it shall be deemed unacceptable:

1 - Inclusive date(s) of illness/injury (Must be included unless verified in writing by the doctor's office that the Employee contacted them and they were initially unable to treat due to scheduling)
2 - Date(s) of treatment;
3 - Date Employee can return to full duty; and
4 - Doctor's signature.

D. Reported Illness. (Chargeable). Any Employee calling to report that he shall not report to work because of his personal illness/injury and who does not provide a doctor's statement on his first day back, shall be charged with a Reported Illness (Chargeable). An Employee who has utilized his allowable number of doctor's statements under paragraph C. above shall also be charged with a Reported Illness (Chargeable).

E. Unreported Tardy. Any Employee who reports to work within one-half (½) hour after the start of his shift and did not notify local management that he was going to be late prior to his shift beginning shall be charged with an Unreported Tardy.

1. Within ½ Hour Window. If the Employee did not notify the local management that he was going to be late prior to his shift beginning, but notifies the local management within one-half (½) hour after the beginning of his shift, the Employee shall be allowed to report to work, provided he reports to work within one hour and thirty minutes (1:30) past the beginning of his shift. Otherwise he shall be sent home without pay and charged with a No-Show (Unreported Absence).

2. Outside ½ Hour Window. If the Employee is more than one-half (½) hour late and has given no notice to the local management that he shall report late, the Employee shall be sent home without pay and shall be charged with a No-Show (Unreported Absence).

F. Reported Tardy. Any Employee who calls prior to the start of his shift and reports that he shall be late or any Employee who calls within one-half (½) hour after the start of his shift because of an extreme or unusual circumstance shall be considered tardy. In this instance, the Employee should estimate the time he shall arrive at work. However, in no event shall the Employee be permitted to report more than two (2) hours after the start of his shift.

1. Two (2) Hour Period/Fails to Report. If an Employee calls reporting that he shall be late and fails to report to work within two (2) hours from the start of his shift without further notification to the local management of his intended absence, he shall be charged with a No-Show (Unreported Absence).

2. Two (2) Hour Period/Reports. If however, the Employee provides notification to local management within this two (2) hour period, he shall be charged with a Reported Personal Absence.

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 (Non Chargeable)	0	
Four (4) doctor's statements per calendar year, but no more than one (1) November 1 - January 3		
Reported Illness (Chargeable) (No doctor's statement or after utilizing allowable number of doctor's statements for Non Chargeable Reported Illness	1	on the first day and ½ for the third consecutive day, to a maximum of 1½ per single continuous

	illness
Unreported Tardy	1
Reported Tardy	½

B. Point Accumulation. The Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:

Less than 1 point	No action taken
1-2 ½	Letter of Instruction
3-4 ½	Warning letter
5-6 ½	Final warning
7 or more	Termination

C. Excused Time Off. No points will be recorded for approved absences, i.e., personal leave, medical leave, OJI leave, military leave, bereavement leave, jury duty, Union leave, and shift giveaways.

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).

E. It is noted that nothing contained in this Attendance Program negates Article Eight, Paragraph H, Sub-paragraph 3; Article Twenty, Section One, Paragraph J.2; nor precludes Company action under Article 13, Section 2, Paragraph C, nor Paragraph A of this Article.

F. Earned Award Program. An Employee with -4 or -5 points as of the end of February (beginning February 2002) and who was absent for any reason (other than jury duty or bereavement leave) less than six (6) days during the prior twelve (12) month period shall be awarded two (2) nonchargeable personal days ("Earned Award Days"), which may be utilized during the following twelve (12) months, subject to the following terms:

1. A minimum of one (1) and a maximum of five percent (5%) of shifts shall be available at each bid location per day for use of such Earned Award Days.

2. Earned Award Days cannot be used during the week of Thanksgiving (Monday through Sunday) nor during the period from December 16 through and including January 3.

3. Earned Award Days shall be awarded on a "first come, first served" basis, with at least 24 hours advance request by the Employee.

4. For Employees with -4 or -5 points as of the end of February who were absent from work for any reason (other than jury duty or bereavement leave) less than three (3) days during the twelve (12) month period prior to the award of the Earned Award Days (i.e. the previous March-February period), the Earned Award Days shall be paid. For other Employees awarded Earned Award Days, such Earned Award Days shall be unpaid.

5. If any paid Earned Award Days are not used within twelve (12) months of award (by the end of the following February), the Employee will be paid for the unused Earned Award Day(s).

The Facts

Grievant [redacted] was discharged on April 3, 2012. The discharge notice, issued by Assistant Station Manger, Ramps and Operations Craig McShurley, states:

> As you are aware, Article Twenty-Three of the contract between Southwest Airlines and The Transport Workers Union Local 555 provides in Section II, Paragraph B: It is the responsibility of the Employee to know the status of his point accumulation. However, the Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:
>
> | | |
> |---|---|
> | Less than 3 Points | No action taken |
> | 3 - 5 | Warning Letter |
> | 5 ½ - 6 ½ | Final Warning |
> | 7 or more | Termination |
>
> In accordance with Article Twenty, because of your total point accumulation of seven or more points, you have been given the benefit of a factfinding meeting. Due to your occurrence on 03/28/12, your point accumulation as of this occurrence is 7.0 points. As a result of the factfinding meeting, your employment is hereby terminated.

The schedule listed in the memorandum does not conform to the schedule listed in Article Twenty-Three Section II. (The notice also mischaracterizes the import of Article Twenty-Three Section II, Paragraph B.) Craig McShurley explained that he used an out-of-date template for the discharge memo. McShurley himself was not disciplined for his mistake.

Prior to his discharge, Grievant [redacted] had received a number of memos related to his attendance. These memos all follow the same format:

SUBJECT: [LETTER OF INSTRUCTION, WARNING LETTER, FINAL WARNING] - ARTICLE TWENTY-THREE - ATTENDANCE

As you are aware, Article Twenty-Three of the contract between Southwest Airlines and The Transport Workers Union Local 555 provides in Section II, Paragraph B: It is the responsibility of the Employee to know the status of his point accumulation. However, the Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:

Less than 1 Points	No action taken
1 - 2 ½	Letter of Instruction
3 - 4 ½	Warning Letter
5 - 6 ½	Final Warning
7 or more	Termination

Your current point accumulation is points, and this letter will serve as your [Letter of Instruction, Warning Letter, Final Warning]

The memos carried different dates, point levels, and disciplinary levels as set forth below:

Date	Points Listed	Discipline Level
8/24/09	1.5	Letter of Instruction
9/28/09	3.0	Warning Letter
11/02/09	5.0	Final Warning Letter
02/09/10	4.0	Warning Letter
02/16/10	5.0	Final Warning Letter
05/25/10	4.0	Warning Letter
06/08/10	5.0	Final Warning Letter
11/17/10	5.0	Final Warning Letter
07/06/11	7.0	Final Warning Letter
11/01/11	6.0	Final Warning Letter
03/17/12	5.0	Final Warning Letter

Pomee signed each of these memos. None of them were grieved.

The parties agree that, prior to March 2012, the Grievant's attendance records (Employer Exhibit 2) accurately reflect his absenteeism, and accord with the memos listed in this table.

Grievant [redacted] was employed as a Ramp Agent at Los Angeles (LAX) since October 21, 2008. During the course of his employment he was never issued a performance appraisal. Performance appraisals include a section and rating for attendance.

Craig McShurley made the decision to discharge Grievant [redacted], in consultation with other Management representatives. McShurley acknowledged that he had never heard anything "bad" about [redacted], and that [redacted] was discharged for attendance and not for job performance.

Grievant [redacted] explanation of his attendance issues over his last few weeks was not questioned.

He called off sick on March 15 and 16 based on his own illness. None of his family members were sick on those days. His three year old daughter [redacted] was ill from around March 17 through March 21. On Saturday March 17, a workday, he learned that his grandfather had died in Tonga. He was off on Sunday March 18 through a shift trade. He worked Monday March 19. On March 20 his wife [redacted] became ill, and her illness lasted through Saturday March 24. He called in sick on March 20 and March 21. He was scheduled off for March 22, 23 and 24 (a day off, vacation day, and free day, respectively), and had arranged a shift trade so that he did not have to work on Sunday March 25. His grandfather's wake was on March 23 and his burial on March 24. In Tongan culture, each man has obligations in connection with the passing of a family member, the higher the status of the decedent, the greater the obligation. [redacted] obligation included preparing and cooking food. On March 24 his 11 month old son [redacted] became sick. [redacted] illness lasted through March 27. [redacted] testified that he was emotionally "gone" and stressed because of his grandfather's passing and the illness of his children. (At the arbitration hearing, [redacted] was still wearing black in keeping with Tongan tradition, since he is still in the grieving process for his grandfather.) He worked overtime on March 26.

[redacted] had picked up a double shift on Tuesday March 27, and sometime on March 27 he agreed to work a shift on the following day, Wednesday March 28, starting at 5:30 a.m. Wednesday is a scheduled off day for him, but he usually tries to arrange shift trades so that he does not have to work on Sundays and instead works Wednesdays. Also, since his wife is not employed, he works as much overtime as possible to increase the family income.

During the time he was working on March 27, [redacted] phone records indicate that his wife called him four times. At least some of the calls went to voicemail, since Employees may not use their phones in the ramp area, and he phoned home four times. During their conversations, his wife told him that she could not handle the kids, she needed help with their son [redacted] and she wanted him to come home. But by then he was already in the second half of his double shift, and had already signed up for the March 28 shift.

He finished work on March 27 at 11:30 p.m. The Flyaway bus left the airport at 12:15 a.m., and [redacted] arrived home around 1:00 or 1:15 a.m. He changed his son's diaper, gave him a bath, and got to bed himself around 2:00 a.m. He set the alarm for 4:15 a.m. intending to ride the Flyaway back to LAX. But he slept through the alarm and was a no show for the March 28 shift. As he described it, he had been physically and emotionally drained, and his body gave out. He acknowledged, however, that he was not ill on March 28.

[redacted] did not work on March 28. He did telephone, at 5:41 a.m., according to his phone records, eleven minutes after his shift start time. No one answered, and he did not leave a message. He explained that he panicked when he made the call.

[redacted] could have stayed over at the airport the night of March 27 - 28, but his wife had been calling to have him come home and help care for their son, and he felt he had to go home between shifts.

McShurley conducted a fact finding on April 2, 2012. At the fact finding McShurley reviewed [redacted] attendance records, and no discrepancies were identified. He asked about [redacted] no-show on March 28. According to McShurley, [redacted] said that he had had a rough week, there had been a death in his family and a lot of family members had been over. He explained that part of the Samoan culture is to celebrate the life of one who had died, and that from sun up to sun down, relatives had been bringing food over. He said that it all caught up to him, and he overslept. He did not claim that he or a family member had been ill on March 28.

According to McShurley, [redacted] did not identify which of his relatives had died, and McShurley did not inquire because he regarded it as a private matter and did not want to pry. He stated that he did not learn until the System Board that the one who died had been [redacted] grandfather. Adam Westermaier, who attended the System Board but not the fact finding, testified that at the System Board he asked [redacted] if he had told McShurley that his grandfather had passed, and [redacted] replied no, he had said there was a death in his family but he never specified that it had been his grandfather.

[redacted] stated that he did say at the factfinding that his grandfather had died. Union Representative James Barrett, who attended the fact finding, agreed.

It is undisputed that [redacted] never sought bereavement leave in connection with his grandfather's death, and that he never informed the Company that there had been a death in his family at least prior to the fact finding. Company witnesses stated that bereavement leave has never been granted retroactively. However, corrections to attendance and absenteeism records, such as the application of Family and Medical Act Leave are made retroactively, and no-shows have been converted to personal days. [redacted] had vacation days available as of March 28. McShurley stated that if [redacted] had called after the start of his shift and requested a vacation day on March 28, McShurley would have denied it.

McShurley informed [redacted] of his termination at a "results" meeting on April 3. At that meeting [redacted] provided a written statement quoted below. At the arbitration hearing there was some confusion as to whether [redacted] gave McShurley this letter at the fact finding or at the results meeting, but it seems most likely that he gave McShurley this letter, which is dated April 3, at the April 3 results meeting. The letter states:

> My name is [redacted] (E92107) and I've been working for Southwest Airlines for a little over 3 years. On Wednesday, March 28, 2012, I received a no show. These past few weeks have been extremely stressful for me. Aside from ongoing financial and marital problems, my grandfather's passing, on March 16 has taken a toll on me. In the Tongan culture, our funerals last six days. Throughout those six days, from sun up to sun down, traditional prayers and events take place. I got very little sleep throughout those six days. On the 23rd of March, my kids started to get sick, followed by my wife. That weekend, I was not able to catch up on rest, due to the fact that I was caring for my infant son and

> 3 year old daughter. Most of the night, on the 25th and 26th, I stayed up with my son. On Tuesday, March 27, I worked a double from 7:00 a.m. to 11:30 p.m. I caught the 12:00 a.m. Van Nuys Flyaway bus, so by 1:15 a.m. I finally was home. I set my alarm for 3:30 a.m. so that way I could catch the 4:30 a.m. bus back to LAX. My start time was 5:30 a.m. The lack of sleep over the past two weeks caught up to me, causing me to oversleep and not wake up to my alarm. I know all of this does not justify my no show, nor make it acceptable. I sincerely do apologize for my bad attendance and lack of reliability.

McShurley told [redacted] to send the letter to the Union, the decision had already been made. By then he had the termination notice prepared.

[redacted] acknowledged in a written statement he presented to the System Board that he "was playing the point game." He explained at the arbitration hearing that "when I had a point, I would use it."

[redacted] had a no-show on November 29, 2008, during his probationary period for which he could have been, but was not, discharged without recourse to the grievance procedure. McShurley stated that he did not review the record relating to this prior to terminating [redacted]

According to Senior Manager Employee Resources for Labor Relations Embedded in Ground Operations Lewis Apperson, once an Employee reaches seven points, the Employee is terminated unless there has been an error in the records, and he would so advise any manager who inquired. He acknowledged that Employees have been reinstated with over seven points when there has been an error in the records.

Union Vice President Jerry McCrummen testified that Employees have been reinstated with over seven points, including by System Boards and through arbitration. He explained that in most such reinstatements the Employee remains at the same point level. Most have involved last chance agreements.

Issue

The issue, as agreed to by the parties, is: Did the Company have just cause to terminate [redacted]; if not what is the appropriate remedy.

Position of Management

The Company asserts that attendance is an integral part of each Employee's job responsibilities, and that the Grievant habitually failed to fulfill this obligation. It emphasizes that the Attendance Program and Control Procedures were negotiated between the parties, and specify the point procedures and disciplinary consequences. It submits that Grievant [redacted] was well aware of the rules and the consequences of violating them, and that he "knew where he stood" based on the March 19 final warning letter. It submits that it has a right to expect Employees to report for work and to be on time. It maintains that the Grievant's explanation for his March 28 absence does not absolve him from his no show nor from the "abysmal" attendance record he created.

It contends that Employees are responsible for creating their own attendance record and that the Grievant had received numerous disciplinary letters for attendance, including seven final warning letters. It stresses his own concession that he was "playing the point game." Citing arbitration precedents, it asserts its right to expect reasonable attendance.

It maintains that the parties negotiated a no fault attendance program in order to avoid value judgments about the legitimacy of an excuse for an absence. It urges that the Grievant knew where he stood, having been informed 11 times (including seven final warnings) of the consequences of reaching seven points.

The Employer answers any plea of unusual and mitigating circumstances by positing that the very purpose of a no fault attendance program is to eliminate the need to differentiate between acceptable and unacceptable absences. It regards the Union as asking the arbitrator to modify the attendance program, contrary to Section 20 (L) (14) but it considers the program as plain and unambiguous.

It insists that the Grievant's final points were warranted. It portrays the Grievant as providing contradictory explanations for his final absence. It chides him for working a double shift and then signing up for a shift the very next morning, knowing that he would have only a few hours between for rest. It cites the Grievant's acknowledgment that he left no message when he phoned on March 28, and his admission that he was a no show on that date.

In the Company's view, the Union's argument regarding bereavement leave is a red herring. It deems that an Employee is responsible to notify the Company that there has ben a death in the family in a timely manner, but the first time the Grievant mentioned the passing of his family member was after he had been a no show. It denies that it provides bereavement benefits retroactively.

It sees no basis for mitigation in the Grievant's attendance record.

It distinguishes cases relied upon by the Union: [redacted] as arising under different contractual provisions; [redacted] because he did not oversleep or seek retroactive bereavement; [redacted] as not involving retroactive bereavement; [redacted] as involving a questionable time clock; [redacted] as becoming ill suddenly within 30 minutes of her shift start. It disputes that the Grievant's situation could be considered such an unusual condition. It observes that it has terminated numerous Employees for accumulating seven or more points.

It asks that the grievance be denied.

Position of the Union

The Union contends that the Attendance Control Program does not override the just cause provision of the contract, including consideration of mitigating circumstances.

It counts five occasions when Grievant [redacted] could have been issued a Performance Appraisal, which would have provided opportunities for Management to call attention to deficiencies in attendance, and provided him an opportunity to improve.

The Union notes that the Grievant never took the contractual bereavement benefit over his grandfather's passing. It considers that he provided enough information to trigger an offer of bereavement benefits at the fact finding. In this regard, it asserts that there are no time frames established for taking of bereavement, and that there is no rule prohibiting granting bereavement retroactively. It emphasizes that the critical day was only 11 days after [redacted] learned of his grandfather's death. It reasons that since the Grievant should have been permitted to use his bereavement leave, no points should have been assessed.

It cites the "seven tests" of just cause and contends that the Company's investigation was not fair and objective, with higher Managers making the decision and then reviewing their own decision, a case of prejudging rather than fresh and objective review. It points to the lack of inquiry when the Grievant mentioned the death of a family member. It regards the treatment of Grievant [redacted] as discriminatory since the Company has applied FMLA leave retroactively in attendance cases, and no shows have been changed to personal days.

The Union views termination as excessive, in view of past cases where Employees were reinstated because of extenuating and mitigating factors. It cites a number of cases: [redacted] (42 discharged agents under the former 5 percent rule were eventually reinstated); [redacted] (Arbitrator's opinion that no fault attendance plans do not override just cause and should not lead to "perverse application"); [redacted] (System Board conclusion to reinstate based on family problems); [redacted] (Grievant, who fell ill while on way to work, failed to give 30 minute notice); [redacted] (Employee could not report due to an "unusual condition").

It argues that the final absence in this case constituted an unusual condition. It defines an unusual condition as loss of a grandfather, exhaustion and fatigue from the celebration of life, family strife and illness, coupled with the financial necessity to pick up hours. It considers the Company as seeing nothing beyond the seven points.

The Union submits that the Grievant wants and deserves his job back, and has assumed responsibility and demonstrated remorse. It asks whether it is reasonable to punish him for his lack of knowledge of the availability of bereavement leave. It agrees that attendance is important "but not more important than compassion, fairness, and understanding."

Finally, the Union avers that [redacted] called off sick for March 20, and it therefore stands to reason that he was unable to turn in the trade for March 21 that day, although the trade was approved on March 20. If contends that if the Company approved the trade after he had called in sick, it is unfair to use the shift trade against him.

It asks that the grievance be sustained and that the Grievant be reinstated and made whole.

Analysis and Conclusions

At the conclusion of his direct testimony, Grievant [redacted] offered a plea for retaining his job:

> I am true -- I'm truly sorry for this day. I know if I am given the opportunity to return, I can become, you know, a better Southwest employee. I've learned so much from this. I know that I can change. I have two kids, a wife, a pregnant wife at home that I

know that needs me. These past couple months has been so hard for me. Going home and trying to provide is like the worst man's dream when you can't provide for your family.

So, I know that I can change. I know it. Being able to wake up when I was working was great. Knowing that I can bring home stuff for my family was the best feeling ever. But having to lose my job, what can I say to my kids? I have never shown this much emotions in my life, even when my grandfather's passing. I have everything on the table right now because I know that this company can provide everything that I need. I have so much plans for this -- with this company.

You read my letter. Look at the support that I have. Who wouldn't want this back? Who wouldn't? I have worked countless jobs previously, never like this. Came here and it was different. Came to -- got hired and didn't know anything about the company. It was weird when I got hired, no one knew me. Now if you look at my phone, you will see more contacts from work than my whole family now because of this, because of what the company has provided for me was friends. My wife was beginning to get happy because I kept to myself and I started opening up, trying to hang out with the guys. They would invite me to come.

I know that I can change because seeing the three faces at home would help me. So, I am sorry for what happened. I'm truly sorry. I know that I can change. Just give me -- let me show you that I can. So, thank you.

The Grievant's plea is a very moving one. But this grievance, like every grievance, must be resolved on the basis of what the collective bargaining agreement requires, and whether the Company has satisfied those requirements for the discharge of an Employee.

A fundamental principle in American labor relations is that the parties to a collective bargaining agreement can agree, within the confines of the law, to whatever they choose. The function of an arbitrator is to determine what the parties have agreed to, and to apply that agreement to the facts of the case. The arbitrator must follow the agreement to conclusion, regardless of whether he finds the result satisfying or unsatisfying.

Although the just cause standard for discipline and discharge is adopted in the vast majority of collective bargaining agreements, nothing in the law requires parties to accept this standard. They may, if they so negotiate, forego the traditional just cause standard, or adopt some other standard. And while the just cause standard has been applied over the years to imply a number of subsidiary principles (for example, adequate notice of what is prohibited, consistency in application of discipline, progressive discipline for all but the most serious offenses) the parties to a particular agreement, even if they use the phrase "just cause," can refine or define what just cause means to them.

So the parties to this, or any, contract could agree that discipline and discharge over attendance infractions would be governed by an uncompromising no fault point system, under which a set number of points automatically resulted in discharge, regardless of the circumstances or the reasons for the absences. Such a system could be seen as either replacing just cause with respect to attendance, or as establishing the parties' own understanding of what just cause means with respect to attendance. Either way, if that is what the parties have agreed to, that is what an arbitrator must apply.

Have the parties adopted such an absolutely inflexible no fault attendance system, under which counting the points is all that matters? For several reasons, I conclude that the current agreement does not remove all flexibility in consideration of absenteeism.

First, the literal terms of the collective bargaining agreement, especially in the light of their evolution, do not indicate that the listed discipline is the inevitable, unavoidable consequence of reaching a certain point total. Section II (B) of the Control Procedures states that "The Company shall be responsible for notifying an Employee receiving a chargeable occurrence for absenteeism/tardiness of the following disciplinary action as the occurrences accumulate:" followed by the table of points and disciplinary actions. Conspicuously absent in this paragraph is any statement to the effect that the stated penalty is the "automatic" action for the number of points, or that the specified number of points "shall" or "will" or "must" elicit the stated penalty. The absence of any word indicating that the list of penalties is mandatory is particularly significant when the current provision is compared with corresponding provisions in earlier agreements [emphasis added]:

- Case No. 96-13852 (John B. Barnard, 1996) "B. Chargeable Occurrence An Employee receiving a chargeable occurrence for absenteeism/tardiness *will receive* the following disciplinary action as the occurrences accumulate:"

- Case ONT-R-0237/01 (John B. Barnard, 2002) "B. Chargeable Occurrences An Employee receiving a chargeable occurrence for absenteeism/tardiness *shall receive* the following disciplinary action as the occurrences accumulate."

The present provision, by contrast, lacks any "will receive" or "shall receive" language. It simply sets forth the table of points and disciplines without more. The provisions in the earlier agreements are a much stronger indication that the stated penalties are automatic consequences. The disappearance of the mandatory words suggests that, while the stated penalties are the normal disciplinary consequences, there is room for departure from the penalty matrix in at least some cases.

Even within Article Twenty-Three, when the parties intended that discharge was to be automatic, they said so: "Using sick leave or sick pay for a purpose other than that intended constitutes abuse. Abuse of sick leave or sick pay *shall warrant immediate termination*." [Emphasis added.]

The parties' own history confirms their understanding that termination is not necessarily automatic upon an Employee's seventh point.

In Case DAL-R-0193/02, a System Board returned an Employee to work at a level of 7.5 points. (The Employee's discharge notice indicates that he had actually been assessed 8.5 points. The reason for the System Board decision is not apparent from its brief decision, although there was testimony at the current hearing that some of the absences involved intensely personal family issues. but there is no doubt that the System Board decided that reaching seven points is not necessarily incompatible with retaining one's job.

Similarly in Case MSY-R-0739/01, a System Board reinstated an Employee at a level of 8.5 points, but the decision states that "This decision is to be confidential and will be accepted as a non-referral or non-precedence setting."

In a 2006 case involving [redacted], the contract language in Section II B stated "It is the responsibility of the Employee to know the status of his point accumulation" followed by a matrix of points and penalties (somewhat different from the table in the current contract), but which significantly, and like the current provision, lacked any provision that such penalties "shall" or "will" be imposed upon the Employee reaching the specified point level. The Grievant fell ill while trying to report for work and failed to give a 30 minute notice. Arbitrator A. Dale Allen directed that the Employee be reinstated with limited backpay. He noted the provision in Article Twenty-Three Section A (2) relating to an "unusual condition" that would make it "impossible" for the Employee to report off. The Arbitrator indicated that some discretion was in order in applying Article Twenty-Three "Obviously, management would have to look at those on a 'case by case' basis and do the 'right' thing."

Finally in this regard, Grievant [redacted] himself, according to his attendance record, had previously reached the seven point level in July 2011, without being discharged.

Based on the literal language of the collective bargaining agreement, the deletion the of mandatory words "shall" and "will" that had appeared in earlier agreements, and the parties' own history of retaining at least some Employees who had reached or exceeded the "Termination" point level, I conclude that while the negotiated Attendance Program and Control Procedures constitute a no fault absenteeism program, they do not establish such an inflexible program that termination is the automatic consequence of reaching seven points, no matter what.

At the same time, it is important to appreciate that this is a negotiated program, not one unilaterally promulgated by the Company. The matrix of point levels and associated disciplinary actions cannot be discounted as merely guidelines or recommendations. Rather, the disciplinary actions specified represent the normal and presumptively appropriate response to reaching a given level of points. There is, however, room in the negotiated program for consideration of the unique facts of a given case, and of mitigating circumstances.

Typical mitigating circumstances would include long service and a previously acceptable attendance record. Neither consideration is present here. The Grievant is a relatively short term Employee, and while his job performance apparently was fine, almost from the beginning his attendance record was unacceptable. In his own words, he "was playing the point game," accumulating points whenever he could without reaching the termination level, and gambling that he would be able to avoid that final point that put him over the limit. He had received seven final warnings in less than a year and a half. Although this is not entirely clear, he may already have been afforded a second chance, since in July 2011 he was issued another final warning, rather than terminated, at seven points.

One can certainly sympathize with the Grievant's circumstances during his last week of employment: he had recently lost a close relative (and it appears that he was much closer to his "grandpa" as he called him, than most people are), his energy level was depleted by his own recent illness, he was dealing with family strife in addition to the illness of his wife and both of his children. But he himself knew all of these circumstances when he volunteered to work an extra shift on March 28. He also knew that, after having worked overtime on March 26, he was working 16 hours on March 27, so that he would be working a total of 24 hours in a 36 hour period. He surely knew that he was taking a substantial risk that he would give out and be unable to drag himself to that extra shift, exactly as happened.

I cannot characterize the exhaustion that caused Grievant [redacted] to sleep through his alarm on March 28 as an "unusual condition" that made it "impossible" under Article Twenty-Three (A) (2) for him to report off or tardy. To do so would come close to nullifying the negotiated regimen in cases of oversleeping. Nearly all such instances can be attributed to a legitimate reason.

In this respect, as I calculate the arithmetic, the Grievant could have reported off as a personal absence on March 28, after he decided to go home rather than sleep at the airport on the night of March 27 - 28, which would have resulted in the assessment of one point as a reported personal absence. (Article 23, Section 1, Paragraph B), and would have kept him below seven points. Rather than doing so, he assumed that he would be able to get to work with only a few hours sleep, after working a 16 hour day, and overtime the day before that. This situation is more accurately characterized as an unfortunate miscalculation on the Grievant's part than as an unusual condition that made it impossible to report off.

Sadly, the entire incident might have been avoided if [redacted] had availed himself of his contractual bereavement benefits. If he had used bereavement leave rather than working on some of the shifts after his grandfather's death, he likely would not have been so sapped of energy, so that even if he had been unwise enough to sign for the extra shift on March 28, he might have made it. (His grandfather died on March 16 and was buried on March 25.) But the Grievant's unawareness of his own bereavement benefits is his own responsibility, since presumably he had been provided with a copy of the collective bargaining agreement that describes the benefit. (See Article Eighteen Section E.)

The Union urges that bereavement be applied retroactively to March 28, but there are two problems with this suggestion. First there is just no way to know, in hindsight, which days the Grievant would have taken as bereavement days. But almost certainly, March 28, the day of the no-show, would not have been one of them. It is not plausible that the Grievant would sign for an extra shift, and then apply bereavement leave to that extra shift. Second, although Article Eighteen does not state that bereavement days are to be designated in advance, this seems a fair expectation. When the Company knows in advance that an Employee will be off a given day, it can arrange for a replacement. Unexpected absences are a problem since either the Company must scramble to find a replacement, perhaps at additional cost, or part or all of the shift may be uncovered, so that the remaining Employees must do extra work, or delays may result.

The Union further asserts that just cause was lacking because the Grievant was not issued performance appraisals, which might have alerted him to the need to improve his attendance. This argument is unavailing for two reasons. First, it seems highly unlikely that performance appraisals would achieve what seven final warning letters did not. More importantly, Article 23 itself specifies what is both required and sufficient by way of notice of the need to improve attendance. Under a typical just cause analysis, an Employee could expect to be suspended before being terminated for absenteeism. Here, however, the Parties have agreed that the series of warning letters is the proper mechanism for impressing upon an Employee that his or her job is in jeopardy because of absenteeism. Nothing more was required.

In conclusion, it is clear that circumstances beyond the Grievant's control contributed to his inability to respond to his alarm clock on March 28. But the Grievant was aware of those circumstances when he chose to obligate himself to a shift he had no duty to accept. His inability to report stemmed from his unfortunate but unwise choice in scheduling so many hours within a three day period.

Award

The grievance is denied. Pursuant to Article Twenty Section One (C) of the collective bargaining agreement, the arbitrator's fee and expenses are allocated to the Union.

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